In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **SCOTT LEE PETERSON,** **Appellant.**	**CAPITAL CASE** Case No. S132449

San Mateo County Superior Court Case No. SC55500
On Change of Venue From
Stanislaus County Superior Court Case No. 1056770
Honorable Alfred A. Delucchi, Judge

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INTRODUCTION

"I never had a prolonged period of freedom like that from responsibility and, you know, and interesting to me and something you could incorporate into life." Scott Peterson said this to his mistress during the ongoing search for Laci Peterson, his wife who was eight months pregnant at the time and who went missing just days before, on Christmas Eve 2002.

Scott Peterson was raised by a loving family and enjoyed a life of privilege. Given the fortuitous timing of the success of the family's business, Peterson lived in nicer, bigger houses than his older siblings and went on more vacations. His parents provided him with access to a first-rate education. They also bought him a country club membership and gave him money for a down payment on the couple's first house. When Peterson became restless at a particular school or job and wanted to make a change, his parents were there to help him move on to something new.

Yet, despite all that his parents did for him, they could not give their son the one thing he secretly wanted most: to be free from his marriage to Laci and from having to raise Conner, their soon-to-be-born son. In other words, freedom from responsibility. So, fueled by the trifecta of selfishness, arrogance, and wanderlust, Scott Peterson decided to take matters into his own hands by planning and carrying out the murders of his wife and unborn child and then dumping their lifeless bodies into San Francisco Bay. Thankfully, the forces of nature did not oblige Peterson in his attempt to hide the evidence of his crimes. Although he was successful in ridding himself of those perceived irksome responsibilities, all the while portraying himself as the consummate husband and family man, ironically, Peterson forfeited his freedom in the end.

This appeal is about the process by which an experienced and respected jurist ensured that Scott Peterson received the fair trial that was

due him, beginning with the selection of a fair and impartial jury—a jury which Peterson, through his attorney, approved. As the Attorney General demonstrates in the pages that follow, throughout the course of the proceedings, the trial court shielded the legal process from the searing gaze of the public and the media. The trial court's unrelenting dedication to the fairness of the proceedings also enabled the parties' attorneys to perform their respective functions in an effective manner geared toward divining the truth and helping the jurors to reach just verdicts.

The sole question the jury needed to answer during the guilt phase of the trial was the *who* question: *Who* killed Laci and Conner Peterson? The prosecution presented an abundance of evidence that pointed the finger of guilt squarely at Scott Peterson. To be sure, if that were not the case, Peterson, appellant here, would have advanced a claim on appeal that the evidence at trial was insufficient to support the jury's verdicts. Appellant makes no such legal contention. Therefore, any intimation by him to the contrary is "shoveling smoke," to borrow a turn of phrase from Justice Oliver Wendell Holmes, Jr.

Based on the compelling evidence adduced at trial, the jury fairly concluded that appellant, in an unmitigated act of selfishness and arrogance extinguished two beautiful lives—one of which appellant made certain would never see the light of day. The jurors duly considered whether there was anything about appellant's character, background, or actions that merited leniency. Having properly evaluated the penalty phase evidence, the jury determined appellant deserved the penalty of death. Thus, the criminal justice system did not fail Scott Peterson. On the contrary, the process was fair and the verdicts just.

STATEMENT OF THE CASE

By information filed on December 3, 2003, in the Stanislaus County Superior Court, the District Attorney charged appellant with the December

2002 premeditated murders of his wife Laci Denise Peterson and their unborn son Conner. (Pen. Code, § 187, subd. (a).) (9 CT 3284; Supp. CT 4-5.)[1] The information further alleged a multiple-murder special circumstance. (Pen. Code, 190.2, subd. (a)(3).) (9 CT 3284; Supp. CT 4-5.) Appellant pleaded not guilty and denied the special circumstance allegation. (9 CT 3284; 12/3/03 Stanislaus RT 3.)

On December 15, 2003, appellant moved for a change of venue from Stanislaus County. (9 CT 3324-3391.) The People opposed the motion. (10 CT 3408-3427.) Appellant filed a reply. (10 CT 3614-3636.) The People filed a rebuttal. (10 CT 3661-3665.)

On December 22, 2003, appellant filed a motion to set aside the information (Pen. Code, § 995). (9 CT 3394-3407.) The People opposed the motion. (10 CT 3670-3685.)

On January 8, 2004, after an extensive hearing, the trial court granted appellant's motion to change venue. (10 CT 3688; 1/8/04 Stanislaus RT 202.)

On January 14, 2004, the trial court denied appellant's motion to set aside the information. (10 CT 3698; 1/14/04 Stanislaus RT 231-232.)

On January 20, 2004, the court denied the People's motion for reconsideration of the court's ruling on the motion to change venue. (11 CT 3776; 1/20/04 Stanislaus RT 251.) A hearing then commenced pursuant to *McGown v. Superior Court* (1977) 75 Cal.App.3d 648, permitting the parties to address issues concerning the transfer. Of the four

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[1] References to "CT" refer to the 21-volume 6,488-page Clerk's Transcript. "Supp. CT" refers to the one-volume 18-page Supplemental Clerk's Transcript. "Stanislaus RT," with corresponding dates, refers to the Reporter's Transcript covering proceedings in Stanislaus County before venue was changed to San Mateo County. Citations to "RT" refer to the 122-volume 21,882-page Reporter's Transcript covering the San Mateo County trial proceedings.

counties identified by the Administrative Office of the Courts (12 CT 4058-4059), appellant preferred the case be transferred to Orange County (11 CT 3777-3778), nearer to his parents' residence and defense counsel's office (1/20/04 Stanislaus RT 258). The prosecution preferred Santa Clara County. (1/20/04 Stanislaus RT 259.) At the conclusion of the hearing, the trial court ordered the case transferred to San Mateo County. (11 CT 3776; 1/20/04 Stanislaus RT 264-265.)

Jury selection began in San Mateo County on March 4, 2004. (17 CT 5497.)

On May 3, appellant brought a second change of venue motion. (14 CT 4487-4507.) The People opposed the motion. (15 CT 4717-4783.) Appellant tendered a reply. (15 CT 4786-4829.)

On May 11, 2004, at the conclusion of a hearing on the matter, the trial court denied the motion. (17 CT 5598; 36 RT 7095-7099.)

Over a three-month period, the court and parties vetted approximately 1,250 prospective jurors. (36 RT 7096.) Jury selection was completed on May 27, 2004. (18 CT 5621.) Appellant expressed his satisfaction with the jurors and alternate jurors, as selected. (42 RT 8345, 8362.)

The presentation of guilt phase evidence commenced on June 2, 2004. (18 CT 5629; 44 RT 8659.) After the presentation of approximately 174 witnesses, the People rested their case four months later on October 5, 2004. (19 CT 5934; 102 RT 19153.)

On October 18, 2004, appellant moved for a judgment of acquittal. (Pen. Code, § 1118.1.) The trial court denied the motion. (19 CT 5938; 103 RT 19177.) Appellant began his presentation of guilt phase evidence that day (19 CT 5939; 103 RT 19186), and concluded it on October 26, 2004 (19 CT 5960; 108 RT 20061-20062).

With the jurors sequestered, guilt-phase deliberations began on November 3, 2004 (19 CT 5976; 111 RT 20574) and ended on November

12, 2004 (20 CT 6133; 112 RT 20821). During the course of deliberations, two jurors were discharged and replaced. (19 CT 5990-5991; 112 RT 20775-20776, 20805-20806.) The jury found appellant guilty of the first degree murder of Laci Peterson and the second degree murder of Conner Peterson. (20 CT 6133; 112 RT 20822-20824.) The jury also found the multiple-murder special circumstance allegation to be true. (20 CT 6133; 112 RT 20824.)

The presentation of penalty phase evidence began on November 30, 2004 (20 CT 6139; 113 RT 20977), and ended on December 9, 2004 (20 CT 6170; 120 RT 21612). The defense presented 39 witnesses. (120 RT 21619.)

Penalty phase deliberations began on December 9, 2004, with the jury again sequestered. (20 CT 6172; 120 RT 21700.)

On December 13, 2004, the jury fixed the appropriate penalty at death. (20 CT 6233; 120 RT 21758).

On February 25, 2005, appellant filed a motion for a new trial (Pen. Code, § 1181) based on various grounds, some of which have been resurrected in the present appeal. (20 CT 6241-6376.) The prosecution filed an opposition. (20 CT 6379-6440.)

On March 16, 2005, at the conclusion of a hearing on the matter, the trial court denied appellant's motion for a new trial, as well as the automatic motion for modification of the verdict. (21 CT 6462; 121 RT 21793, 21800.) The court then entered judgment and imposed a sentence of death based on the murder convictions, special circumstance finding, and other relevant sentencing considerations. (21 CT 6467-6468; 121 RT 21822-21827.)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Case

1. *Background: Laci and Appellant*

Laci Denise Peterson was born on May 4, 1975. (46 RT 8966.) She grew up in Modesto. (46 RT 8964-8965.) Beginning in 1993, Laci[2] attended college at the California Polytechnic State University, less formally known as "Cal Poly," in San Luis Obispo. (45 RT 8819; 46 RT 8966.)

Shortly after Laci started attending classes at Cal Poly, she met appellant, who lived in San Luis Obispo at the time and worked at a local restaurant. (45 RT 8819; 46 RT 8967.) Their relationship progressed and they married at Avila Beach, near San Luis Obispo, in August 1997. (46 RT 8968.)

For a short while after they were married, Laci and appellant lived apart. Laci was working in Prunedale, while appellant finished college at Cal Poly. (46 RT 8969.) Once appellant graduated, Laci moved back to San Luis Obispo where the couple opened their own restaurant called "The Shack," with proceeds from the sale of appellant's family's business. (46 RT 8969-8970; 47 RT 9165.) They operated the restaurant for about a year and a half. (46 RT 8970.)

In June 2000, Laci and appellant moved to Modesto. (45 RT 8820-8821; 46 RT 8970.) They lived with Laci's mother Sharon Rocha[3] for a

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[2] Respondent refers to family members' first names when they share the same surname to avoid confusion. Respondent intends no disrespect.

[3] Sharon was married to Dennis Rocha, Laci's father. They divorced in 1976 when Laci was one year old. (46 RT 8964.) Subsequently, Sharon (continued...)

short while. In October 2000, the couple bought their own home at 523 Covena Avenue in the La Loma neighborhood of Modesto. (46 RT 8971-8972; 47 RT 9168-9169; 86 RT 16414.) Appellant's parents gave appellant the $30,000 down payment for the house. (86 RT 16425.) At the time, Laci was working as a substitute teacher. (46 RT 8972-8973.) Appellant liked to golf and talked about it frequently. (46 RT 8946, 8978.) His parents bought him a membership at the Del Rio Country Club in Modesto. (61 RT 11827.) The couple enjoyed a comfortable lifestyle. (47 RT 9177-9178.)

Appellant managed a newly incorporated domestic sales venture named TradeCorp U.S.A., which was a fertilizer products company.[4] (59 RT 11627; 73 RT 13987, 14114.) Appellant operated the business out of a leased warehouse in Modesto. (59 RT 11627-11628.)

In mid-2002, about five years after they were married, Laci became pregnant. (45 RT 8830.) She was very happy about being pregnant and becoming a mother. (45 RT 8830; 47 RT 9285.) Her due date was February 10, 2003. (51 RT 10105-10106.) According to Brent Rocha, Laci's brother,[5] appellant appeared excited about having a child (47 RT 9229), and went to most of Laci's prenatal appointments (46 RT 8932-8933). However, in Brent's view, Laci was the one that wanted a family; appellant merely acquiesced to Laci's wishes. (47 RT 9269.)

(...continued)
and Ron Grantski started dating, when Laci was two years old, and had been together ever since. (46 RT 8964.)

[4] TradeCorp was formed in October 2000. (73 RT 14078.) The parent company was based in Spain and called TradeCorp Espana. (73 RT 13987, 14114.) TradeCorp International owned TradeCorp Espana. (73 RT 14114.) A large multi-national conglomerate—SAPEC—owned TradeCorp International. (73 RT 14091, 14115.)

[5] Laci and Brent were full siblings; Sharon and Dennis were their parents. (47 RT 9160.)

Brent's wife Rose recalled one conversation with appellant when she asked him if he was ready to have a child. Appellant remarked, "'I was kind of hoping for infertility.'" (47 RT 9285.) Rose was unsure if appellant was joking; he was not laughing or smiling when he made the comment. (47 RT 9295.)

No one was aware of any problems in Laci and appellant's marriage, including Laci's mother Sharon and her sister Amy Rocha. (46 RT 8912, 8979.) Brent believed that his sister and appellant had a very positive relationship. (47 RT 9229-9230.) Ron Grantski never heard the couple fight or argue. (47 RT 9134.) In fact, appellant remained calm with Laci even when she may have given him reason to be upset. (47 RT 9131.) Laci's friends observed that appellant did many nice things for her and helped with chores around the house. (54 RT 10562-10563.) Laci did not articulate any complaints about their marriage. (46 RT 8912; 54 RT 10523.) Ron Grantski observed that Laci and appellant spent the majority of their time together. (47 RT 9131-9132.)

Yet, despite what appeared to be a loving and well-functioning marriage to Laci's family and friends, unbeknownst to them was the fact that appellant had already cheated on Laci when the couple was living in San Luis Obispo. (46 RT 9065; 47 RT 9122; 54 RT 10522-10523; 99 RT 18661.)

2. *November and December 2002: Appellant's affair with Amber Frey begins*

a. *Appellant meets Frey's friend Shawn Sibley and tells Sibley of his interest in meeting single women*

In October 2002, appellant and his sales associate Eric Olsen attended a pest control trade show and conference in Anaheim. (59 RT 11624, 11631.) While there, appellant and Olsen went out to dinner with David

Fernandez, who Olsen worked with previously, and Shawn Sibley, a female associate of Fernandez's. (59 RT 11632-11633.) Appellant and Sibley had just met each other that evening. (59 RT 11634.) On their way to the restaurant, appellant asked Sibley what he should write on his name tag that would attract women to him that night. (60 RT 11708.)

According to Fernandez, during dinner, appellant moved the discussion away from business to pursue a very personal line of questioning of Sibley about her relationship with her fiancé. (59 RT 11672-11673.) Olsen said that he became very uncomfortable at one point during the dinner when appellant and Sibley started discussing sexual positions. (59 RT 11634.) By Sibley's account, it was appellant that led the discussion in a sexual direction. (60 RT 11710.) Olsen thought the discussion especially inappropriate since appellant was married with a child on the way and Sibley was engaged to be married. (59 RT 11633-11634.) As soon as Olsen finished his dinner, he excused himself and left. (59 RT 11634.) Fernandez did the same. (59 RT 11673.)

After the others departed, appellant and Sibley continued their personal conversation. Sibley confided that her fiancé was her soul mate. (60 RT 11711.) Appellant told Sibley that he once found a woman who he believed to be his soul mate, but he "'lost her.'" (60 RT 11711.) Appellant expressed concern about spending the rest of his life alone. (60 RT 11711.) He told Sibley he was tired of having one-night-stands with "'bimbos with no brains'" and asked Sibley if she had any single friends. (60 RT 11712.)

As the night went on and Sibley and appellant relocated to a bar, Sibley got the impression that appellant was serious about finding a long-term relationship. (60 RT 11713-11714.) So, Sibley told appellant she had a friend who was single. However, because Sibley's friend—Amber Frey (60 RT 11714)—had several bad dating experiences in the past, Sibley wanted to be sure that appellant was serious about a relationship. (60 RT

11713.) After Sibley shared more information about Frey, appellant told Sibley he was interested in meeting Frey. (60 RT 11715.) Appellant and Sibley talked until 3:30 a.m. (60 RT 11735.)

After that evening, Sibley and appellant communicated again. In one e-mail exchange, appellant made a remark about going skiing and meeting some snow bunnies. In response, Sibley said she hoped that he would meet some to ease his frustrations. (60 RT 11717-11718.) Sibley and appellant jokingly referred to appellant by the initials "'H.B.,'" which stood for "'horny bastard.'" (60 RT 11718.) Appellant told Sibley that he was thinking of putting the moniker on his business cards. (60 RT 11718.)

During one of their contacts, Sibley explained to appellant that Frey was looking for someone with whom she could spend the rest of her life. Appellant said that was what he was looking for, as well. (60 RT 11728.)

b. ***Appellant leads Frey to believe that he is single and childless, and assures her that there would be many more corks to come***

In November 2002, appellant telephoned Frey and said he wanted to meet her. (76 RT 14556.) Frey, believing that appellant was single, agreed to a date. (76 RT 14557.)

On November 20, appellant and Frey met at a bar in Fresno. (76 RT 14559.) Before going to dinner, they went to appellant's hotel room and had champagne and strawberries, which appellant had brought with him. (76 RT 14563-14565.) Appellant had also reserved a private room in the restaurant. (76 RT 14566.)

During dinner, appellant told Frey that he operated a business in Modesto, resided in Sacramento, and maintained a condominium in San Diego. (76 RT 14569.) Explaining his schedule over the next couple of months, appellant told Frey that he was going fishing in Alaska for Thanksgiving and to Kennebunkport, Maine, with his parents, for

Christmas. (76 RT 14571.) He was also scheduled to be in Paris over New Year's Eve and traveling in Europe on business for most of January. (76 RT 14638.)

After dinner, appellant and Frey went to a karaoke bar and eventually ended up back at appellant's hotel room where they had sex. (76 RT 14579.) Frey was somewhat self-conscious about sleeping with appellant so soon, but he reassured her that having sex with him was not inappropriate. (76 RT 14580.) Frey spent the night with appellant while Shawn Sibley babysat Frey's daughter, "A.," who was 21 months old at the time.[6] (60 RT 11720; 76 RT 14577, 14579.)

On Monday, December 2, appellant visited Frey and her daughter at their home near Fresno. Appellant previously told Frey that he wanted to meet A. (76 RT 14588.) He brought groceries to make dinner (76 RT 14589-14590) and brought a gift for A. (76 RT 14599). When Frey mentioned that she intended to keep the cork from a bottle of wine she and appellant shared that evening as a memento, appellant told her there would be many more corks to come. (76 RT 14598.) Later, appellant and Frey had sex. He spent the night at Frey's home. (76 RT 14600.)

Appellant told Frey that he had business in the area the following day, December 3, but could visit her in the evening. (76 RT 14601.) Agreeable, Frey asked appellant if he could pick up A. from school. Appellant did so and when Frey arrived home from work, appellant was making them dinner. (76 RT 14603-14604.) Afterward, the three went and picked out a Christmas tree together and brought it back to Frey's home. (76 RT 14607, 14609-14610.) While they were decorating the tree, Frey asked appellant if he had ever been married or had ever been close to being married.

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[6] Since Amber Frey's daughter is a minor, we refer to her by the first initial of her first name to protect her privacy.

Appellant said no. (76 RT 14611.) Frey also asked appellant if he had children or had ever been close to having children. Again, appellant said no. (76 RT 14611.) They slept together that night and, while in bed, had a conversation about the importance of trust in a relationship. (76 RT 14612.) Frey told appellant she preferred to deal with the truth and its ramifications rather than be lied to. Appellant agreed. (76 RT 14612.)

The next day, Wednesday, December 4, appellant told Frey that he had plans to go boating on the Delta for the upcoming weekend. (76 RT 14613.) They continued to communicate by phone. (76 RT 14614.)

c. *December 6: Sibley learns appellant is married, but appellant tells her that he "'lost'" his wife*

On December 6, Shawn Sibley received a call from another friend, Mike Almsari, who said he knew someone by the name of Scott Peterson and, assuming it was the same man, Peterson was married. (60 RT 11721, 11723.) Extremely upset, Sibley called appellant and confronted him. (60 RT 11721.) Appellant repeatedly denied being married. (60 RT 11721.)

At that point, Sibley began having her suspicions about appellant. (60 RT 11728.) She contacted Eric Olsen, appellant's sales associate, but Olsen would not provide any information about appellant, who was Olsen's boss. (60 RT 11722.) So, Sibley conducted research online to determine if there were any marriage certificates in the public record that contained appellant's name. (60 RT 11742.)

Appellant phoned Sibley about an hour after their conversation. Appellant was "sobbing" when he left a message on Sibley's voicemail: "'I'm sorry I lied to you earlier. I had been married. It's just too painful for me to talk about. Call me back.'" (60 RT 11723.) They eventually spoke later that day. Appellant was "sobbing hysterically." (60 RT 11724.) He explained to Sibley:

> "I'm so sorry I lied to you earlier. I had been married. I lost my wife. It's too painful for me to talk about. Please just give me the opportunity to tell Amber in person. I'm going to be in town on Monday. Please don't tell her. This wasn't -- just please let me have the chance to tell her myself."

(60 RT 11724.)

Sibley told appellant that she did not care if he was widowed or divorced. All she cared about was whether he was currently married. (60 RT 11724.) Appellant answered, "'No, absolutely not.'" (60 RT 11724.) Sibley warned appellant that if he did not tell Frey by that coming Monday, December 9, Sibley was going to tell her. (60 RT 11724.)

d. *December 9: Appellant tells Frey that he "'lost'" his wife*

On Monday, December 9, appellant phoned Frey, said he was in the area, and asked if he could visit her. Frey agreed. (76 RT 14614-14615.)

When appellant arrived, Frey noted that his demeanor seemed different. (76 RT 14616.) Cryptically, appellant said he was concerned about having done something terrible to a potentially beautiful relationship. (76 RT 14616.) They sat down at Frey's kitchen table. (76 RT 14617.) Appellant told Frey he had lied to her and that things would be easier if she never wanted to see him again. (76 RT 14618.) Crying, appellant said he lied about being married and that it was less painful for him to let people think that he was never married rather than to tell them the truth: that he had "'lost'" his wife. (76 RT 14619-14620.) Appellant explained that the upcoming holidays would be the first without his wife. (76 RT 14621.) Frey thanked appellant for sharing the information with her since it was clearly so difficult for him to talk about. (76 RT 14622.) Appellant told Frey that she was "'amazing.'" (76 RT 14622.) Given his emotional state, Frey asked appellant if he was sure he was ready for a relationship with her. Appellant said, "'[A]bsolutely.'" (76 RT 14623.) They made plans to see

each other two days later. (76 RT 14626.) Appellant gave Frey a different cell phone number to reach him. (76 RT 14708-14709; 77 RT 14755.)

Later, appellant phoned Sibley and told her that he spoke to Frey and that Frey "knew everything." (60 RT 11725.) However, appellant asked Sibley not to tell Frey that Sibley had found out first. (60 RT 11725.) Sibley responded that since Frey was her best friend and if she asked, Sibley would not lie to her. (60 RT 11725.)

e. ***December 11: Appellant escorts Frey and her daughter to a birthday party***

On December 11, appellant accompanied Frey and her daughter to a birthday party. (76 RT 14628; People's Exh. No. 95.) Appellant was very personable in his interactions with Frey's friends. (76 RT 14629.) Frey explained that the positive manner in which appellant interacted with her daughter her friends fostered Frey's trust in her relationship with appellant. (76 RT 14631.)

They made plans to attend a formal holiday party hosted by a few days later. (76 RT 14632.) Frey accompanied appellant to be fitted for a tuxedo for the party. (76 RT 14632-14633.)

f. ***December 14: Appellant accompanies Frey to a holiday party while Laci goes to a holiday party alone***

On December 14, appellant arrived at Frey's home and greeted her with a dozen red roses. (76 RT 14639.) He said that he hoped she had more vases and then he pulled out two dozen pink roses. (76 RT 14639.) He kept one rose and asked Frey if she had a candle and some scissors. Appellant cut the stem off the rose and with the candle lit and the lights dimmed, appellant rubbed the rose on Frey's face and kissed her. (76 RT 14641.)

After the romantic interlude, Frey and appellant dressed for the party. While they were getting dressed, Frey brought up the fact that appellant shared the information about the wife he had "'lost'" before sharing that information with Frey.[7] (76 RT 14635.) Appellant told Frey that he had planned to tell Frey when he returned from his January business trip to Europe. However, he realized he was wrong for not telling Frey sooner. (76 RT 14636.) Frey asked appellant if she could trust him with her heart. He responded that she already had the answer to the question. (76 RT 14677.) Frey asked the question again. Appellant's response was the same: Frey knew the answer already. (76 RT 14677.)

After they were dressed, Frey and appellant had a brief discussion about how to introduce appellant and their relationship to Frey's friends. (76 RT 14668.) Appellant suggested the term, "'lover.'" (76 RT 14668.) However, Frey thought it sounded inappropriate. (76 RT 14668.) Appellant's response prompted Frey to ask him if he was seeing anyone else. Appellant said no and assured her that he was monogamous. (76 RT 14668-14669.)

Appellant and Frey left to pick up a female friend of Frey's and then went to the party. (76 RT 14644-14645.) At the party, appellant was very affectionate toward Frey and referred to her as his girlfriend. (76 RT 14669-14670, 14672; People's Exhs. Nos. 191A-G; 192A-C; 193A-K) After dropping off Frey's friend, they returned to Frey's home and had unprotected sex. (76 RT 14672-14673.)

Appellant apologized to Frey for not taking precautions during sex. A discussion ensued about birth control and children. (76 RT 14673.) Frey

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[7] Frey had a conversation with Sibley sometime between December 11 and December 14, during which Sibley recounted her discussion with appellant about him losing his wife. (76 RT 14634-14635.)

told appellant that she wanted to have more children. (76 RT 14674.) Appellant said that he did not need to have a biological child; Frey's daughter was enough for him. He said he would help to raise A. as his own child. (76 RT 14674.) Appellant mentioned that he was considering getting a vasectomy. (76 RT 14674.) Frey thought that too permanent a birth control method given appellant's relatively young age. (76 RT 14674-14675.) Appellant made no mention of being an expectant father. (76 RT 14675.)

Back in Modesto, Laci also went to a holiday party that day, but she went alone. (54 RT 10510; People's Exh. No. 14.) Appellant told her that his boss called at the last minute and that he had to go to San Francisco for a meeting and could not accompany her. (46 RT 9025; 86 RT 16422.)

The next morning, December 15, appellant told Frey that he had some business to take care of before he headed off on his extended trip to Europe. (76 RT 14675.) He said he would be back at the end of January and in the interim they would stay in contact by phone. (76 RT 14676.)

g. *December 19-24: Phone contact between appellant and Frey*

On December 19, appellant spoke to Frey on the phone. She was under the impression that he was in New Mexico or Arizona at the time. (76 RT 14686-14687.)

On December 22, appellant told Frey that he was at his home in Sacramento and preparing to depart for Maine to meet his parents for the holidays. (76 RT 14687-14688.) He said he would be in Maine until December 28 and then heading to Paris. (76 RT 14688.)

On December 23, appellant told Frey he was on a guided duck hunt with his father. (76 RT 14689.) Frey asked appellant where she should send things for him while he was away. (76 RT 14690-14691; 80 RT 15258.) He told Frey that he would get back to her. (80 RT 15258.)

Eventually, appellant gave her a post office box address in Modesto. (76 RT 14690-14691.)

During the conversation, appellant and Frey discussed birth control again. (76 RT 14693.) Appellant reiterated his intention to have a vasectomy and suggested they go together to meet with a doctor. (76 RT 14693.) The conversation upset Frey because she wanted more children. (76 RT 14693.)

On December 24, Frey did not hear from appellant. (76 RT 14694.)

3. *Other circumstances leading up to Laci's disappearance*

a. *The Peterson's home laptop is used to research bay tides and currents*

On December 7, 2002—one day after Shawn Sibley confronted appellant about whether he was married (60 RT 11721)—the Peterson's home laptop was used to search classified advertisements for boats.[8] (75 RT 14356-14357.)

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[8] Authorities seized five computers during execution of search warrants at appellant's home and business in late December 2002 and February 2003. (73 RT 14146.) The searches were located during the forensic examination of the home and work computers. From the Covena residence, police took one Compaq laptop computer, one Dell laptop, and one Sotec notebook computer. (73 RT 14121, 14144, 14155.) An I.B.M. laptop computer and a Dell desktop computer were seized from the warehouse. (73 RT 14144-14145.) Former Modesto Police Department computer forensics technician Kirk Stockham examined the hard drives of the various computers. (74 RT 14166.) Detective Lydell Wall of the Stanislaus County Sheriff's Office testified as an expert in computer forensics. (74 RT 14327.) Wall examined the computers' hard drives with respect to internet usage. (74 RT 14328-14329.) Email exchanges between appellant and Sibley from November and December 2002 were located on the couple's home laptop and appellant's work desktop computer that had been deleted, but which still resided on the hard drive. (75 RT 14381-14385.) There was also an email sent to "slpete1@msn.com" confirming

(continued...)

The following morning, on December 8, an internet search was made on the home laptop with the terms "boat + ramp + pacific" (75 RT 14364), "boat + ramps + Watsonville + Pacific" (75 RT 14367), and "San Francisco Bay + boat + ramp" (75 RT 14371). Web sites were accessed relating to the Berkeley Marina, Central San Francisco Bay, and Suisun Bay and related nautical charts. (75 RT 14371-14375.)

On the night of December 8, someone used the home laptop to access web sites for the San Francisco Port, the United States Geological Survey's velocity maps for currents in Central San Francisco Bay, and other sites with navigation and nautical charts. (75 RT 14397, 14400-14401, 14405-14407; People's Exh. No. 183B [U.S.G.S. site showing "Near Real Time Current Velocity Maps"].) A couple of image files were also viewed, which were linked to web pages on Bay currents. The image files showed an enhanced map view of the tip of Brooks Island and surrounding area. (75 RT 14454-14456; People's Exhs. Nos. 189A-B.) The nautical charts pertained to California and Mexico waterways. (75 RT 14401-14402.) There were also numerous visits to fishing-related web sites and the use of fishing-related search terms, some of which related to striped bass and sturgeon fishing. (75 RT 14399-14400, 14402-14404.)

b. *Appellant buys a boat, but no one knows*

On December 7, the same day as the home laptop was used to search the classifieds for boats, appellant called Bruce Peterson,[9] who had placed an ad in the Modesto Bee regarding a 14-foot aluminum boat he had for sale. (62 RT 12146-12147.)

(...continued)
delivery of a package to Amber Frey. The email had been deleted, but was still otherwise accessible on the hard drive. (75 RT 14451-14452.)

[9] Mr. Peterson was not related to appellant. (62 RT 12167.)

Appellant looked at the boat the next day and bought it for $1,400 on December 9—the day on which appellant told Amber Frey he had "'lost his wife.'" (62 RT 12148, 12156; 76 RT 14619-14620.) Bruce Peterson sold the boat to appellant without the two mushroom anchors that came with the boat.[10] (62 RT 12155.)

Numerous witnesses testified that they knew nothing about appellant's new boat. Laci usually told her mother Sharon about major purchases the couple made, such as when they put in a pool at their home, installed an air conditioning system, and when appellant joined the Del Rio Country Club. However, Laci made no mention of appellant acquiring a new boat. (46 RT 8976-8977, 8979-8980, 8990-8991.) Ron Grantski, who was an avid fisherman, did not know about appellant's new boat. (47 RT 9097-9098.) Laci's siblings did not know about appellant's boat. (45 RT 8889-8890; 47 RT 9273.) In fact, appellant and Laci had dinner at Sharon and Ron's on December 15, 2002, and neither appellant nor Laci mentioned anything about appellant having just purchased a boat a few days before. (46 RT 8991-8993.) Appellant's father, who spoke to appellant on a regular basis, did not know about the boat purchase. (88 RT 16862, 16865-16866.) Laci's close friend Stacey Boyers did not know about the boat. (54 RT 10521-10522.) Appellant's good friend Gregory Reed, who routinely discussed hunting and fishing with appellant, did not know about the boat. (75 RT 14425-14426.)

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[10] Mr. Peterson explained that the mushroom anchors he used with the boat each had a center stem with an I-bolt on top for attaching the rope. When the anchors were lowered, they would "mushroom out" and sit on the bottom of the lake. (62 RT 12155.) One anchor weighed 10 pounds and the other 15 pounds. (62 RT 12161.) He never used a cement anchor with the boat. (62 RT 12155-12156.)

c. *Appellant's angst*

Laci's brother Brent recalled an occasion when he and appellant were in the pool at Laci and appellant's house and were talking about life. (47 RT 9175-9176.) Appellant, who seemed "down" and "kind of quiet" at the time, confided in Brent that his job was not going well. (47 RT 9176.) Appellant explained that he was interviewing new sales associates for his business and was hoping he would find someone who had better sales skills than he did. (47 RT 9176.)

In that same conversation, appellant mentioned impending fatherhood and that he was on the verge of turning 30 years old.[11] (47 RT 9175-9176.) Brent sensed that appellant "had a lot going on." (47 RT 9176.)

d. *Appellant's financial situation*

Gary Nienhuis, the internal auditor for the city of Modesto, testified to appellant's personal and business finances during this time period. (73 RT 13960, 13963.)

First, with respect to appellant's personal finances, Nienhuis stated that expenses were high in relation to appellant's cash flow. (73 RT 13974.) In 2002, Nienhuis estimated that nearly 70 percent of appellant's take-home pay was consumed by fixed expenses and credit card debts. (73 RT 13974.) In 2001, the percentage was 58.7. (73 RT 13978.) Although the Peterson's mortgage debt was being paid down (73 RT 14067-10468), there were medical bills that were past due, including for health insurance (73 RT 13981). Nienhaus's analysis did not take into account any potential secondary sources of income, such as Laci's future inheritance or pawning of her personal items (73 RT 14014-14017), discussed below.

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[11] Given that appellant was born on October 24, 1972 (102 RT 19081; People's Exh. No. 149), this discussion presumably took place sometime around October 24, 2002.

As for TradeCorp, since it's incorporation in 2000, the company had not realized a profit. (73 RT 13960.) In fact, the company had a net operating loss of $136,000. (73 RT 13986.) During its first year of incorporation, the company posted a loss of $40,000. The loss increased to $200,000 in the second year. (73 RT 14089.) TradeCorp was not meeting sales goals set by the parent organization and owed its parent company $190,000. (73 RT 13994, 14053.)

With respect to the company's credit card accounts, appellant made minimum payments and carried balances forward. (73 RT 13990-13991.) Nienhuis reviewed two credit card applications completed on behalf of TradeCorp. One application was completed by appellant and the other by Eric Olsen, his employee, but both were signed by appellant since he was responsible for the company's finances. (73 RT 13992, 14079.) In the application that appellant completed, he stated that TradeCorp had a net profit of $150,000, contrary to the company's financial records. (73 RT 13993.) The other application, which appellant signed, stated the business had $500,000 in revenue, also contrary to the company's financial documents. (73 RT 13993.) Also, Nienhuis's review of the financial documents revealed that appellant received a speeding ticket, the fines for which TradeCorp paid. (73 RT 14049.)

Jeffrey Coleman was the Certified Public Accountant hired to handle TradeCorp's incorporation and other financial dealings. (73 RT 14078-14079.) In October 2002, Coleman helped TradeCorp prepare payroll tax returns for the first three quarters of the year because the company received a notice from the Internal Revenue Service that the tax returns were overdue. (73 RT 14082-14083.) Coleman later learned that TradeCorp's fourth quarter payroll taxes were also not paid. (73 RT 14085.) Nor did TradeCorp pay mill taxes owed to the city of Modesto. (73 RT 14113-14114.)

When Coleman reviewed the company's financial documents sometime after appellant's arrest, he determined that TradeCorp had never turned a profit. (73 RT 14090.)

e. *Laci's inheritance*

(1) Jewelry, a pawn shop, and eBay

Laci and Amy inherited jewelry from their grandmother in October or November 2002.[12] (45 RT 8869; 47 RT 9180-9182.) They went through the jewelry and kept what they wanted and returned the rest to Brent. (47 RT 9181-9182.) Laci kept a gold and diamond watch, a pendant, diamond screw-back earrings, and a couple of rings—one diamond and one sapphire. (53 RT 10408-10409, 10423-10424.) Laci liked to wear some of the jewelry, including the watch and diamond pendant. (46 RT 8920; 53 RT 10408, 10416; 54 RT 10527-10528.)

On November 30, 2002, Laci visited Edwards Jewelers in Modesto to have certain items of jewelry appraised. (53 RT 10399-10400, 10419-10420.) She told one of the store employees that it was appellant that was interested in knowing the value of the items. (53 RT 10420.) When Laci learned that the inherited jewelry was worth in excess of $100,000, she said that appellant would be pleased. (53 RT 10420.)

On December 10, 2002, Laci brought some gold chains to a Modesto pawn shop, which she sold for $140. (53 RT 10455, 10459.) She returned four days later, on December 14, with appellant, and sold some rings, chains, and a charm for $110. (53 RT 10458-10459.) Laci explained that she was cleaning out her jewelry box and that some of the items came from her grandmother. (53 RT 10465.) Tory Brooks, who owned the store with her husband, sensed there was a problem between appellant and Laci. (53

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[12] Laci and Amy's father was Dennis Rocha. (45 RT 8817.) The jewelry was passed down from Dennis's mother. (45 RT 8869.)

RT 10471.) Laci seemed agitated and hesitant when appellant was rubbing her stomach in the store. (53 RT 10471.) She pushed his hand away. (53 RT 10471-10472.)

The later forensic examination of the Peterson's computers revealed numerous email exchanges involving the email account "slpete1@msn.com" and the sale of jewelry in December 2002 on eBay.[13] (75 RT 14449-14450.) According to eBay records for appellant's account, there was a listing for an "'Amazing Diamond Bezel Ladies Watch, Croton.'" The watch was listed beginning December 1, 2002 until December 15, 2002. The records did not indicate if the item was sold. (87 RT 16637-16639.) The payment was to be sent to Scott Peterson at the Covena address. (75 RT 14394.)

(2) *Future proceeds from the sale of real estate*

Laci, who was 27 years old at the time, was set to inherit a portion of the proceeds of the sale of her grandfather's house, when she turned 30 years old in 2005. (46 RT 8937-8938, 8966; 47 RT 9220; 73 RT 10461.) The house was held in a separate trust and sold for $485,000 with the proceeds to be split among the grandchildren—Laci, Brent, and Amy. (47 RT 9182.)

Although there was a restriction on the trust, which delayed disbursement of the proceeds to Laci for three more years, Brent, who was the co-trustee of their grandparents' estate (47 RT 9179), never had a conversation with appellant about the restriction (47 RT 9183, 9275). Also, while appellant had no survivorship interest in Laci's portion of the trust

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[13] The forensic computer search also revealed an email exchange involving the private sale of a high-capacity Glock pistol magazine appellant tried to sell on eBay, but which was not permitted. (People's Exh. No. 187A.)

(47 RT 9216, 9218-9219), no evidence was adduced as to whether appellant knew he had no stake in the proceeds.

4. *December 23, 2002: Laci's and appellant's activities*

The Peterson's housekeeper, Margarita Nava, arrived about 8:30 a.m. on December 23. (44 RT 8662.) She left at 2:30 p.m. (44 RT 8666.) Laci was home when Nava arrived (44 RT 8666), but left around 11:00 a.m. and returned with groceries from Trader Joe's. (44 RT 8667, 8687). Nava helped Laci bring the bags into the house. (44 RT 8670.) Appellant came into the house around 10:00 a.m., picked up a package, and left after a few minutes. (44 RT 8667, 8672.)

Sometime that day, appellant rented a private mailbox from a Mailboxes Etc. store in Modesto in the name of TradeCorp for a term of six months.[14] (68 RT 13337-13339; 101 RT 18954-18955; People's Exhs. Nos. 149, 285A.)

In the early afternoon, Laci went to the Sweet Serenity spa in Modesto where she was a regular customer. (45 RT 8692-8693.) Spa employee Tina Reiswig observed that Laci was not herself that day. (45 RT 8695.) Laci, who was about eight months pregnant at the time, also had a prenatal check-up that day. (53 RT 10393-10394; 91 RT 17728, 17234.)

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[14] On January 9, 2003, police recovered correspondence Amber Frey sent to appellant's private mailbox. (68 RT 13340-13341; People's Exh. No. 149.) Defense questioning suggested that appellant rented the private mailbox due to a theft of Laci and appellant's checks from the North Emerald warehouse location. (69 RT 13398-13399.) However, the checks in question were mailed to appellant's warehouse mailbox on January 22, 2003 (69 RT 13401), nearly a month after appellant rented the private mailbox.

Late in the afternoon, around 5:45, Laci and appellant went to Salon Salon where Laci's sister Amy was a hair stylist. Amy cut appellant's hair that evening. (45 RT 8777, 8828-8829.) Amy mentioned to appellant and Laci that she ordered a gift basket from Vella Farms for a family member, which needed to be picked up the following day—Christmas Eve—between noon and 3:00 p.m. (45 RT 8858-8859.) Appellant offered to pick up the gift basket because he said he was going golfing the next day in the same part of Modesto where Vella Farms was located. (45 RT 8859.) Amy made clear to appellant that the basket needed to be picked up before the store closed at 3:00 p.m. (45 RT 8861.)

Appellant invited Amy over to the Covena residence for pizza that evening, but Amy declined because she had plans. (46 RT 8917-8918, 8921, 8960.) The three parted company around 7:00 p.m. (45 RT 8838.) Amy gave Laci a hug good-bye. (45 RT 8852.)

Sharon spoke to Laci on the phone around 8:30 that night. (46 RT 8996.) Laci confirmed that she and appellant would be going to Sharon and Ron's for Christmas Eve dinner the next evening. Laci also updated Sharon on her prenatal check-up and that the doctor advised that the pregnancy was progressing normally. (46 RT 8997.) That was the last time Sharon spoke to her daughter. (46 RT 8997.)

5. *Christmas Eve 2002: Laci is missing*

Karen Servas lived next door to the Petersons on Covena. On the morning of December 24, around 10:18,[15] Servas was backing out of her

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[15] Servas initially told police she left her home around 10:30 a.m., but after checking her store receipts and cell phone records from December 24, she was able to more accurately pinpoint the timeframe. (48 RT 9434-9438; 102 RT 19051, 19121-19122; People's Exh. No. 28.) When she realized that she provided inaccurate information, Servas sent a detailed

(continued...)

driveway when she noticed the Peterson's dog McKenzie standing in the street with his leash on. (48 RT 9412-9423.) This seemed unusual to Servas who, as a next-door neighbor, was very familiar with McKenzie. (48 RT 9428-9429, 9481.) Servas got out of her car and tried the Peterson's front gate, but it was locked. (48 RT 9424.) Laci's car was in the driveway. Appellant's truck was not there. (48 RT 9424-9425.) There was no activity at the house. (48 RT 9428.) Servas found the side gate to the residence open, so she put McKenzie in the backyard and closed the gate. (48 RT 9424, 9428, 9457.)

Neighbors Amie Krigbaum and Terra Venable, who lived across the street from the Peterson's, awoke to the sound of dogs barking. (48 RT 9518-9519, 9528.) Krigbaum recalled that it was 10:38 a.m. (48 RT 9517.) Venable noticed that Laci's car was in the driveway, but not appellant's. (48 RT 9531-9532.) The Peterson's home looked unoccupied and the window blinds were closed. (48 RT 9532-9533.)

Russell Graybill, the Peterson's mail carrier, delivered mail on their street between 10:35 a.m. and 10:50 a.m. that day. (49 RT 9564.) There was nothing out of the ordinary that he noticed. (49 RT 9564.)

Around 3:45 p.m. on Christmas Eve, Amy received a call from Vella Farms advising that no one had come to pick up the gift basket. (45 RT 8874.) Surprised by this, Amy called appellant's cell phone and the couple's home phone, but could not reach appellant. (45 RT 8874-8875.)

When Karen Servas left her home again around 4:05 p.m., she noticed a package in the Peterson's mailbox, which she first noticed at 11:45 that

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(...continued)
letter to Detective Jon Buehler explaining her revised timeline. (48 RT 9477-9478; 102 RT 19144.)

morning.[16] (48 RT 9469-9470.) Appellant's truck was still not there. (48 RT 9481.) Terra Venable saw the Peterson's Christmas lights come on around 4:30 p.m., but appellant's truck was not there at that time. (48 RT 9534, 9538-9539.) Venable noticed appellant's truck parked in the driveway around 5:30 p.m. It had been backed into the driveway. (48 RT 9539.)

Sharon and Ron were expecting Laci and appellant around 6:00 p.m. that evening for dinner. (46 RT 8998.) Sharon forgot to pick up an item from the grocery store that she needed, so she had Ron call Laci that afternoon to see if Laci could stop at the store on the way over. (47 RT 9111.) Ron was unable to reach Laci. (46 RT 8998.)

Around 5:15 p.m., appellant called Sharon at home and asked her if Laci was there. He explained that Laci's car was in the driveway and the dog was in the backyard with its leash on, but Laci was "'missing.'" (46 RT 8999.)[17] Sharon told appellant to call Laci's friends to see if she was with one of them. (46 RT 8999.) After she got off the phone with appellant, Sharon ran down the hallway to tell Ron. (46 RT 8999.)

Appellant eventually called Sharon back to report that none of Laci's friends had seen her. (46 RT 8999.) Sharon suggested that appellant check

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[16] Servas's testimony on this point was a clarification of a time estimate she initially provided at the preliminary hearing. (48 RT 9463-9464.) Mail carrier Graybill could not recall whether he delivered a package to the Peterson's that day, but since it was Christmas Eve, Graybill stated that he tried to deliver as many packages as he could. (49 RT 9574, 9578.)

[17] The defense intimated that Sharon erroneously attributed the use of the word "missing" to appellant at that early juncture. (107 RT 19922-19925.) However, appellant used the term "missing" with others early on. (48 RT 9451 [neighbor Karen Servas]; 54 RT 10555 [Laci's friend Lori Ellsworth].) Additionally, during Ron Grantski's 911 call on December 24, he said, "'we've been told that Laci's missing, our daughter's missing.'" (107 RT 19934.)

with neighbors. (46 RT 8999-9000.) Appellant called Sharon a short while later and said the neighbors had not seen Laci. (46 RT 9000.)

Sensing something was wrong, Sharon told Ron to call the police and local hospitals. (46 RT 9000; 47 RT 9112-9113.) The police advised Ron to have someone remain at his house. (47 RT 9114.) Sharon called her friend Sandy Rickard to come and get her so Sharon could start looking for her daughter, while Ron remained at the house. (46 RT 9001; 47 RT 9300.)

Sharon was hysterical when she called Rickard. (47 RT 9300.) When Rickard arrived at Sharon and Ron's house, Sharon—still highly agitated—told Rickard that Laci was missing. (47 RT 9301.) Once in the car, Sharon called appellant and, given what he had told her about McKenzie having his leash on, told appellant to meet her at the local park near the Covena residence in case Laci may have taken McKenzie for a walk there. (46 RT 9000-9001.)

6. *Christmas Eve: Modesto Police Department response and appellant's unusual behavior*

a. *Appellant gets angry after police ask him about his fishing trip*

On the report of Laci missing, Modesto Police Department personnel first responded to East La Loma Park[18] around 6:00 p.m., where Sharon, appellant, and the others were located. (49 RT 9651-9652; 50 RT 9834.)

Shortly after arriving at the park, Officers Letsinger, Evers, and Spurlock were assigned to respond to the Peterson's residence on Covena. (49 RT 9653; 50 RT 9786-9787.) They arrived around 6:30 p.m. (50 RT 9833.) The officers first did a protective sweep through the house to secure the scene. (50 RT 9836-9837.) No other officers or civilians were

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[18] The park was also referred to as the Dry Creek Park area. (49 RT 9652.) The area is divided into different parks which includes, La Loma, Kewin, Thousand Oaks, and Moose parks. (49 RT 9740-9742, 9749.)

permitted inside. (50 RT 9906.) They found no signs of forced entry or any other indication that a burglary had occurred. (50 RT 9792-9793.) However, the officers noticed a bucket with two mops sitting outside one of the exterior doors with some water near it on the ground.[19] (50 RT 9787.) A rug was bunched up against the door in the living room and some wet rags containing sand and dirt were on top of the washing machine. (50 RT 9788-9789, 9860.) The closet in the spare bedroom was open and duffle bags appeared to have been pulled off the shelf. One was lying upside down on the floor. (50 RT 9790-9791.) In the kitchen, the officers observed an open phone book, a pizza box with several slices missing, and an open bottle of Ranch dressing. (50 RT 9860.) Other than that, everything appeared exceptionally neat. (50 RT 9789.)

Next, the officers checked around the exterior perimeter of the house, including the backyard area, pool, spa, and crawl space under the house. (50 RT 9861-9862, 9905.)

Afterward, the officers did a second walk-through, with appellant this time, to determine if anything was missing. Nothing seemed out of the ordinary in the home. (50 RT 9793.) Laci's purse was inside the master bedroom closet on a hook, which was where it was sometimes kept. (50 RT 9795.) Her wallet, keys, and identification were inside. (50 RT 9865-9866; 51 RT 10011-10012.)

While in the house with appellant, Officer Evers asked him about the events of that day. Appellant said that he and Laci watched Martha Stewart on television in the morning. (51 RT 10004.) Laci planned to walk the dog down in the park and then go grocery shopping because they had a family

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[19] A criminalist later examined the mops and bucket. They smelled of a cleaning agent, but there was no blood on the mops or bucket. (89 RT 17009-17015.)

dinner planned for that evening. (51 RT 10004.) Appellant decided to go fishing at the Berkeley Marina. He left the house around 9:30 a.m. and drove to his shop where his boat was located. (51 RT 10004-10005.) He arrived at the marina around noon and fished, by himself (51 RT 10006), for about two hours and then quit because it was rainy and cold (51 RT 10005). On his way back to Modesto, he tried calling Laci twice on her cell phone and on the home phone, but was unable to reach her. (51 RT 10006.) Appellant dropped off the boat at his shop and arrived home around 4:30 p.m. (51 RT 10007.) Laci was not home and appellant assumed she was out doing errands. He changed clothes and washed the clothes he had been wearing that day on the Bay. (51 RT 10007.) Appellant noticed McKenzie was in the back yard with his leash on. The French doors leading to the patio were unlocked. (51 RT 10007.) After showering, appellant ate a couple slices of pizza, drank some milk, and called Sharon. (51 RT 10007.)

Officer Spurlock asked appellant what time he went fishing, but appellant seemed reticent to provide an answer. (50 RT 9796, 9867.) Spurlock next asked appellant what kind of fish he had been fishing for. (50 RT 9796-9797, 9868.) The officer explained appellant's response:

> And at that point there was a pause. He hesitated in answering me. He—he had this blank look on his face for a second or so, his eyes shifted a little bit and he kind of mumbled some stuff, but again blew off my question, didn't really give me an answer.

(50 RT 9868.)

Spurlock then asked appellant what type of bait or lure he used. As the officer recounted:

> I got the same [] type of response. Kind of the blank stare, shifting of the eye kind of thing. [¶] He just really couldn't give me an answer, again. And then something clicked, and he—he said I was using a silver lure, and he gave me a hand gesture of about seven to eight inches in length.

(50 RT 9868-9869.) Compared to appellant's calm demeanor earlier (50 RT 9946), Spurlock described appellant's demeanor during this line of questioning as "nervous," "a little fidgety," and "more standoffish" (50 RT 9947).

Noticing that appellant was wearing lightweight clothing, Spurlock asked him if he had changed clothes and, if so, whether the clothes he wore earlier that day were in the hamper. (50 RT 9869.) Appellant said no because he had already washed the clothes he wore fishing. (50 RT 9869.)

As the officers walked appellant back to the front door of the house, Spurlock was behind appellant as appellant walked out the front door. (50 RT 9869.) Spurlock heard appellant say "Fuck" and saw appellant throw the flashlight he was holding down onto the ground. (50 RT 9871, 9882.) Officer Letsinger also heard appellant mumble a curse word under his breath and observed appellant throw the flashlight down. (50 RT 9797-9798.) Appellant immediately retrieved it and kept moving. (50 RT 9882.)

Officers contacted the owner of the vacant house next door to the Peterson's residence on the north side and gained access, but nothing was found. (49 RT 9658; 50 RT 9799, 9882-9883.)

Afterward, Letsinger, Spurlock, and Evers conferred with Patrol Sergeant Duerfeldt. Duerfeldt decided to call in a detective. (49 RT 9656.) Detective Allen Brocchini arrived at 523 Covena around 9:30 p.m. (51 RT 10018; 55 RT 10713.) Initially, his role in the investigation was to determine whether appellant could be eliminated as a suspect. (55 RT 10781.) Among other information conveyed to Brocchini upon his arrival, was Officer Spurlock's conversation with appellant about fishing. (51 RT 10013; 55 RT 10713.) Officer Evers did a walk-through with Brocchini pointing out various things, including the duffle bags in the closet in the spare bedroom. (51 RT 10020.) One duffle bag was open on the floor and the other had fallen off the shelf and was sitting on the hangers in the closet.

(55 RT 10735.) Evers also showed Brocchini the wet towels on top of the washer. (51 RT 10020.)

Brocchini introduced himself to appellant and they did a walk-through together, along with Evers. (51 RT 10021; 55 RT 10715, 10729-10731.) Brocchini asked appellant about the duffle bags that were in a state of disarray. Appellant explained that he was a "'slob'" and that was why the duffle bags were displaced. (51 RT 10023.) Yet, when Brocchini inquired about the wet towels on top of the washer, appellant said he took the towels out of the washer so that he could promptly wash the clothes that he had just worn fishing. (51 RT 10024.) Inside the washer were a pair of blue jeans, a blue t-shirt, and green jacket that appellant wore on the Bay. (55 RT 10737-10738.)

Brocchini asked appellant if he could look at appellant's cell and record the phone numbers and times of incoming and outgoing calls. Appellant agreed to the request. (55 RT 10733.)

After taking down the cell phone information, Brocchini asked appellant if he could take a look at Laci's and appellant's vehicles. (51 RT 10026; 55 RT 10738.) Appellant's pick-up truck was backed into the driveway. Laci's green Land Rover was parked facing into the driveway. (51 RT 10026-10027.) In the bed of appellant's truck, Brocchini observed umbrellas wrapped in a blue tarp and another tarp shoved up against a toolbox. (55 RT 10740.)

When the detective opened the passenger door of the truck to look inside, the truck's door bumped up against the side of the Land Rover. (55 RT 10746.) Seeing this, appellant suggested that Brocchini use a leather glove appellant had in his hand to keep the truck door from hitting the

Land Rover.[20] Appellant offered to move his truck. Brocchini apologized and said he would be more careful. (55 RT 10746.)

Inside appellant's truck, Brocchini found a bag from a sporting goods store. Two unused fishing lures—still in the package—were inside the bag. (55 RT 10746.) The receipt was dated December 20, 2002. (55 RT 10746; 62 RT 12176.) Brocchini also located a two-day fishing license and a fishing pole that were purchased from the store at the same time. (55 RT 10746; 62 RT 12176.)

The heavy jacket that appellant said he wore fishing was on the back seat. (55 RT 10747.) Although appellant reported that it was raining on the Bay that day (55 RT 10747), and although he said he had to wash the clothes he wore fishing because they were wet (51 RT 10024; 55 RT 10747), the jacket he wore on the Bay that day was dry (55 RT 10747).[21]

Brocchini discovered a loaded .22-caliber pistol in the glove compartment of appellant's truck. (55 RT 10748, 10770-10771.) Having previously received appellant's permission to look in the house and in appellant's truck for items of evidence, the detective took the gun without telling appellant. (55 RT 10748-10749.) Brocchini also did not want to belie any suspicion on the part of police. (59 RT 11519.)

Appellant retrieved a parking receipt for the Berkeley Marina and gave it to Brocchini. The receipt showed parking was purchased at 12:54 p.m. on December 24 and was valid until 11:59 that night. (51 RT 10029.)

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[20] Appellant sold the Land Rover several weeks later. (86 RT 16429.)

[21] During his interview with Detective Brocchini later that night, appellant told the detective that he was wearing the jacket when it started raining while he was in the boat. (Volume 2, Supplemental Clerk's Exhibits Transcript, page 299.)

After examining the vehicles, Brocchini and Officer Evers accompanied appellant to appellant's warehouse at 1027 North Emerald Avenue in Modesto, where his 14-foot aluminum fishing boat was stored. (51 RT 10036, 10044; 55 RT 10750.) They arrived shortly after 11:00 p.m. (51 RT 10037; 55 RT 10751.) There was no power to the warehouse, so the officers used flashlights and the headlights of Brocchini's vehicle to illuminate the interior. (51 RT 10042-10043; 55 RT 10753.) Brocchini asked appellant a few questions and took photos of the boat and the trailer it was sitting on. (51 RT 10044-10045; 55 RT 10754.) Appellant asked Brocchini not to show appellant's boss any photos of the boat in the warehouse. (55 RT 10768.)

Among other items in the boat, there were a couple of fishing poles, a homemade anchor, a small red rope, a spare tire, a pair of needle-nose pliers, a life-preserver, and a tackle box. (55 RT 10755, 10767.) The anchor was made of rebar-reinforced cement. (55 RT 10768.) There was no long rope in the boat. (55 RT 10768.)

As for computer activity on Christmas Eve, the home laptop was used between 8:40 and 8:45 a.m.[22] (75 RT 14419.) At 8:42, a weather search was conducted for San Jose, as well as a shopping search for a GAP brand fleece scarf and an umbrella stand. (83 RT 15757-15758.) At 8:45, an email document was created bearing appellant's name[23] regarding an eBay transaction involving a golf bag. (75 RT 14420-14421; 83 RT 15758.)

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[22] The computer clock correlated with real time. (83 RT 15776.)

[23] The email address was "slpete1@msn.com." (People's Exh. No. 186.) Emails from Shawn Sibley and appellant's employee Eric Olsen were received at the same email address. (75 RT 14408.) Laci had a separate email account. (75 RT 14408-14409.) Investigators found no evidence to suggest that Laci accessed or otherwise used appellant's email account in December 2002 and not on December 24, in particular. (83 RT 15814.)

There was no further activity on the home laptop computer that day. (75 RT 14421.) However, the work desktop computer was used between 10:30 a.m. until 10:56 a.m. that morning (75 RT 14421), including a search for instructions on assembling a mortiser (83 RT 15761).

b. *Appellant avoids Laci's family*

That evening, around 70 to 80 people—including family, friends, and neighbors— joined police in looking for Laci in and around the park and neighborhood. (46 RT 9009.) Searchers went door to door with photos of Laci. (46 RT 9010; 54 RT 10515, 10555.)

The police department deployed various resources to search the Dry Creek Park area, which included K-9 officers and a police helicopter search crew. (49 RT 9660-9661, 9706.) The helicopter made repeated passes over the Dry Creek Park area at low altitude utilizing a hand-held infrared device, which could detect heat sources. (49 RT 9660, 9699.) The device did not pick up any readings. (49 RT 9707.) Police searched three homeless encampments along the riverbank of the park area. There were about seven to eight people living there. (49 RT 9733-9734.) The local fire department dispatched a water team that searched the deeper areas of the creek adjacent to the park. (49 RT 9753-9754, 9769.)

As for appellant's demeanor at the time, when Sharon and Sandy Rickard saw appellant at the park, Rickard observed that appellant seemed calm. (47 RT 9302-9303.) Sharon recalled asking appellant where he thought Laci might be, but appellant offered no response. (46 RT 9010.) Other people who saw appellant that evening said that he seemed upset and emotional. (48 RT 9510, 9523; 50 RT 9907; 51 RT 10076; 54 RT 10529.) Yet, when Sharon approached appellant to give him a hug and comfort him, appellant maneuvered away from her. It seemed to Sharon that he was also avoiding eye contact with her. (46 RT 9011.) Likewise, Brent noticed that appellant was off by himself and was reluctant to make eye contact. In

fact, appellant and Brent never spoke that night, even though they had a "great" relationship. (47 RT 9186-9187.) Sharon's cousin Gwendolyn Kemple also took note that appellant would not look at her, despite the fact that they had seen each other numerous times at family functions. (47 RT 9333.)

Ron Grantski asked appellant if he had gone golfing that day as appellant had planned. (50 RT 9846, 9887; 51 RT 10016.) Appellant paused and then replied that he decided to go fishing instead. (47 RT 9117; 50 RT 9888; 51 RT 10016.) After appellant told Grantski what time he left to go fishing, Grantski asked appellant what he would be fishing for at that time of day. (50 RT 9846, 9888.) Appellant walked away without responding. (50 RT 9888; 51 RT 10017.)

Although appellant told Grantski and the police that he went fishing, appellant told Sharon's cousin Harvey Kemple that he went golfing that day. (48 RT 9362.) Appellant also told neighbors Amie Krigbaum and Terra Venable that he was golfing all day. (48 RT 9510, 9534.)

Sandy Rickard was standing outside the Covena residence when appellant approached her. He put up his hands and volunteered, "'I wouldn't be surprised if they find blood on my truck because I cut my hands all the time.'" (47 RT 9305-9306.) He explained that it was because he was an outdoorsman, or something to that effect, as Rickard recalled. (47 RT 9305.) Rickard found the interaction perplexing. (47 RT 9306.)

Around 11:00 p.m. that night, police told everyone to go home. (46 RT 9013.) Sharon asked detectives to ride appellant over to her house because she did not want him to be alone. Appellant chose not to spend the night with Sharon and Ron. (46 RT 9013.) Appellant also declined Brent's offer for company. (47 RT 9188.)

c. *Appellant's taped police interview*

Appellant agreed to Detective Brocchini's request for a videotaped interview. (55 RT 10715.) The interview took place at the police station around midnight on December 24. (55 RT 10715-10716.) Brocchini described appellant's demeanor during the interview as "[c]alm, cool, relaxed." (55 RT 10716.) The video was played for the jury. (55 RT 10721; People's Exh. Nos. 68 (DVD) & 68A (transcript).)

In the interview, appellant said that he decided to go fishing that morning. (2 Supp. CT Exhs.[24] 289; People's Exh. No. 68A.) When he left at 9:30,[25] Laci was wearing black pants and a white long-sleeve top. (2 Supp. CT Exhs. 290-291.) Appellant said Laci "was gonna finish cleanin up, like I said she was moppin' the kitchen floor . . . ." (2 Supp. CT Exhs. 289.)[26] After leaving the house, he went to his warehouse, assembled a mortiser,[27] took care of some emails, hooked up the boat and trailer to his truck, and headed out. (2 Supp. CT Exhs. 291.)

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[24] "Supp. CT Exhs." refers to the 15-volume 3,862-page Supplemental Clerk's Exhibits Transcript, which contains the majority of the trial exhibits.

[25] Cell phone records revealed that appellant made a call to his voicemail at 10:08 a.m. on December 24. (79 RT 14992; 81 RT 15383.) This was determined based on data from two cell tower sites in Modesto. (79 RT 14995-14996; 80 RT 15298.) The call originated from the cell site that primarily serves the Covena residence location. (80 RT 15298; 81 RT 15383.) Appellant said that Laci was watching Martha Stewart who was talking about meringue. (2 Supp. CT Exhs. 288.) The show aired at 9:00 a.m. in the Modesto area. The meringue segment occurred about 48 minutes into the show, around 9:48 a.m. (55 RT 10809-10810.) Appellant told Ron Grantski that he left the house around 10 or 10:30 on the morning of December 24. (50 RT 9846.)

[26] Their housekeeper Margarita Nava testified that she was at the house the day before and mopped all of the floors. (44 RT 8664.)

[27] A mortiser is a woodworking tool. (2 Supp. CT Exhs. 291.)

Appellant arrived at the Berkeley Marina around 1:00 p.m. and stayed on the water for about 90 minutes. (2 Supp. CT Exhs. 294.) He went north a couple of miles from the marina to a little island—later identified as Brooks Island—where there was some shallow water. (2 Supp. CT Exhs. 294.) When the detective asked appellant if he trolled for fish, appellant said he did, but the main reason he went "was just to get that boat in the water to see, you know." (2 Supp. CT Exhs. 295.)

Appellant said he called Laci at home as he was leaving the marina and left a message. (2 Supp. CT Exhs. 297.) He said he also called her cell phone twice and left messages on her phone.[28] (2 Supp. CT Exhs. 299.) However, Detective Brocchini pointed out that there was only one message from appellant on Laci's cell phone. (2 Supp. CT Exhs. 299.)

When asked about the umbrellas in the back of the pick-up, appellant said he put them in the bed of the truck that morning with the intention of storing them at the warehouse, but he forgot to unload them. (2 Supp. CT Exhs. 300.) The umbrellas were in the bed of his truck while appellant was at the marina. (2 Supp. CT Exhs. 300.)

Although appellant stopped for gas on the way home (2 Supp. CT Exhs. 298), he did not stop for lunch on the drive up or back from the marina (2 Supp. CT Exhs. 294). Nor did he take a lunch with him. (2 Supp. CT Exhs. 294.)

When he arrived back in Modesto, appellant drove to his shop and dropped off the boat. Then, he went home. (2 Supp. CT Exhs. 298.) Appellant said that when he got home and realized Laci was not there, he

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[28] Appellant had Laci's cell phone during the interview, including her access code. (People's Exh. Nos. 68; 2 Supp. CT 297.) Laci told her prenatal yoga instructor that she never went anywhere without her cell phone. (54 RT 10628.)

assumed she was at Sharon and Ron's house.[29] (2 Supp. CT Exhs. 302.) He found McKenzie in the backyard with his leash on and the French doors in the back were unlocked. (2 Supp. CT Exhs. 300-301.)

With respect to the pistol found in the glove compartment of his truck, appellant said it had been in there for a month. (2 Supp. CT Exhs. 307.) He took it to Lone Mountain on a trip with his father to shoot pheasants, but it did not fire.[30] (2 Supp. CT Exhs. 307-308.) When the detective noted that it was not the type of gun that was used for pheasant hunting, appellant agreed, "No, no."[31] (2 Supp. CT Exhs. 307.)

When asked by Brocchini, appellant agreed to submit to a gunshot residue test, but then appellant asked if exhaust from an outboard motor might show up as gunshot residue. (2 Supp. CT Exhs. 313.) The detective pointed out that since appellant had already showered, it would not. (2 Supp. CT Exhs. 313.)

On the subject of his marriage, appellant assured Detective Brocchini that there were no problems and that everything was good. (2 Supp. CT Exhs. 308.)

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[29] Appellant said he arrived home around 4:30 p.m. (51 RT 10007.) He and Laci were not due at Sharon and Ron's until 6:00 that evening for dinner. (46 RT 8998; 2 Supp. CT Exhs. 303.)

[30] California Department of Justice criminalist Ronald Welsh later test-fired the weapon five times with ammunition similar to that found in the gun. The weapon functioned normally. (59 RT 11597-11599.) Then, Welsh fired the weapon four more times using the ammunition found in the gun. Again, it fired normally. (59 RT 11599-11600.) Welsh also determined that the gun had not been fired recently. (59 RT 11603.)

[31] Appellant's father, Lee Peterson, testified that, although he and appellant would sometimes target shoot with handguns after hunting, he did not see appellant with a handgun when they went pheasant hunting in October or November 2002; they used 20-gauge shotguns. (88 RT 16871-16873.)

The interview ended around 1:30 a.m. (55 RT 10782.) About 45 minutes later, appellant called Brocchini and asked him if he took his gun. (55 RT 10749.) After Brocchini replied affirmatively, appellant said that he wished Brocchini had mentioned to him that he was taking the gun. (55 RT 10749.)

7. *Christmas Day*

a. *Friends and family continue searching*

As Christmas Day dawned, Laci's family and friends, along with police, continued looking for her in the park and along the river that ran by the park. (46 RT 9014-9015.) Searchers put up posters in the area. (54 RT 10516-10517.) About 10 to 15 police officers canvassed the Covena neighborhood, including searching yards and alleyways. (49 RT 9758-9760.) A K-9 team searched the footpath leading into La Loma park and the surrounding brush. (49 RT 9762-9764.)

Laci's friend Stacey Boyers returned to the Covena residence around 8:00 a.m. (54 RT 10531-10532.) Boyers noticed that appellant was vacuuming one particular spot in front of the washer and dryer. (54 RT 10517-10518.) When Boyers asked appellant what he was doing, he said he just could not keep the house clean enough. (54 RT 10518.)

b. *Appellant's second interview: He assures investigators that he is a faithful husband and suggests transients were responsible for Laci's disappearance*

Around 1:30 p.m. on Christmas day, appellant agreed to go to the police station and meet with Detective Craig Grogan, who had taken over as lead investigator in the case. (61 RT 11818, 11829-11830.) Doug Mansfield, an investigator with the California Department of Justice, was also present. (61 RT 11818-11819.) Authorities interviewed appellant first because, as Laci's husband, he was the person closest to her, he was the one

who discovered her missing, and he was the last person to see Laci alive. (93 RT 17647.)

Investigators had several goals for the interview: obtain information about the days leading up to Laci's disappearance, along with background on Laci's family (93 RT 17646); find out if anything occurred shortly before Christmas Eve that would have caused Laci to voluntarily leave on her own (93 RT 17646); and, secure any information that would serve to eliminate appellant as a suspect (93 RT 17647). Grogan was aware of the fact that appellant said he went fishing on Christmas Eve and did not have anyone who could confirm his alibi. (93 RT 17648.)

In discussing his activities on Christmas Eve, appellant said he had no prior experience fishing on San Francisco Bay. (61 RT 11820.) He researched the internet and decided on the Berkeley area. (61 RT 11824.) Appellant said it was too cold to golf. So, he opted to drive about 180 miles round-trip to fish on the Bay, although he was only on the water for an hour. (99 RT 18629-18630.) Appellant said wanted to get the boat in the water to see if it worked. (61 RT 11845, 11865; 99 RT 18629.) He went trolling for fish as he made his way to Brooks Island and back. (93 RT 17656.)

As for Laci's activities, appellant told Grogan and Mansfield that she walked almost every day. He detailed the path she usually took from Covena down into East La Loma Park. (93 RT 17651.) Appellant said that Laci had been wearing some of the jewelry she inherited when he last saw her on Christmas Eve morning. He thought it possible that she wore it when she went walking in the park and a transient robbed her of the jewelry and kidnapped her. (93 RT 17652.)

Mansfield specifically asked appellant if there were any problems in his marriage or if there were any third parties involved. Appellant said that

neither he nor Laci were involved with anyone else outside the marriage. (61 RT 11825; 93 RT 17653.)

c. *Appellant asks about using cadaver dogs within 24 hours of Laci's disappearance*

Later that evening, appellant called Detective Brocchini to check on the investigation. (55 RT 10784.) Brocchini detailed the resources the police department had deployed to assist in the search. (55 RT 10784.) Appellant asked if they were using cadaver dogs. The detective told appellant that since they did not consider Laci dead yet, they had not resorted to the use of cadaver dogs. (55 RT 10785.)

Neighbor Karen Servas went over to the Peterson's later on Christmas Day and had dinner with appellant and his parents, who had arrived at the house. (48 RT 9439-9441.) At dinner, appellant expressed his displeasure with the police because they took his gun and some rags from the washing machine without his knowledge. (48 RT 9443.)

Appellant talked to Amber Frey around 6:00 that evening after Shawn Sibley's uncle called appellant and left a voicemail message chastising appellant for not returning Frey's call from that morning. (76 RT 14694-14695.) Frey believed that appellant was calling her from Maine. (76 RT 14695.) Appellant said he and his family were getting ready to go to bed. (76 RT 14695.)

8. *The search intensifies*

In the days immediately following Laci and Conner's disappearance, police focused their search on the Modesto area. (52 RT 10270.) A police command center was set up in East La Loma Park. (47 RT 9206; 52 RT 10146.)

Searchers continued to scour neighborhoods and parks. (52 RT 10154, 10159.) They checked rivers, canals, and other waterways (52 RT 10153-10154, 10158-10159,), inspected local vineyards (52 RT 10161), went

through bushes and piles of leaves (52 RT 10149), and examined vacant houses (52 RT 10166).

Police made contact with homeless individuals, sex offender registrants, and parolees in the area (52 RT 10147, 10156-10157, 10169; 63 RT 12341), but nothing was generated in the way of tips related to Laci's disappearance (52 RT 10313-10314).

A phone bank was set up at the Modesto Police Department. (52 RT 10155.) Viable tips were redirected to the search command center. (52 RT 10155.) Police followed up on reported sightings of Laci. (52 RT 10314.) In all, authorities received over 10,000 tips. There were purported sightings of Laci all over the world. (59 RT 11474.) There were also numerous reported sightings of appellant and his boat. (59 RT 11474.) Police investigated an errant pair of men's socks found in the park (52 RT 10157), suspicious vehicles (52 RT 10164), unidentified organs that turned out to be animal remains (52 RT 10324-10325, 10328), and a rubber glove (52 RT 10327).

The police department alerted the press. (52 RT 10160.) Media interest increased and a reward for information leading to Laci and Conner's return grew to $500,000.[32] (47 RT 9205; 52 RT 10160-10161.)

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[32] As Detective Grogan explained, it became clear to authorities that since no one had come forward with information, given the sizeable reward, it was less likely authorities were dealing with multiple people involved in Laci's disappearance. (94 RT 17814.) If someone had limited involvement in her abduction, the high dollar amount was a strong incentive to come forward. (94 RT 17814.) In early March 2003, an additional reward of $50,000 was offered for information leading to the recovery of Laci's body. (95 RT 18027.) Otherwise, there would be no incentive for someone who knew Laci was dead or who knew the location of Laci's body to provide that information. (94 RT 17813-17814.) No one ever came forward to provide information and claim either reward. (94 RT 17815.)

A volunteer center was established at the Red Lion Inn in Modesto because the number of volunteers was getting too large for the Covena residence to accommodate. (47 RT 9206; 54 RT 10519.) Telephone lines were set up at the center so that the public could call in tips. (46 RT 9018.)

9. *Appellant's reluctance to have his image or name associated with Laci*

During this time, appellant avoided interacting with the media. He told people that he wanted the focus to be on Laci. (47 RT 9251.) Appellant took down any picture posted in the volunteer center in which he was depicted. (54 RT 10520.) He did not want any wedding photos showing he and Laci together to be posted at the center. (54 RT 10558.) Appellant left a thank-you note for volunteers on the door of the center, which he did not sign with his name:

> VOLUNTEERS
>
> AS I SEE EVERY PERSON COME THROUGH THIS DOOR, OR OUT SEARCHING, I TELL LACI ABOUT THEM, LOOKING FOR HER.
>
> EARLY THIS MORNING I FELT SHE COULD HEAR ME. SHE THANKS YOU.
>
> LACI'S HUSBAND

(86 RT 16420-16421; People's Exh. No. 212.)

10. *Appellant's concern about the dining room table*

On December 26, Captain Christopher Boyer, who was in charge of Contra Costa County's Search and Rescue team, was called in by the Modesto Police Department to assist in the search. (83 RT 15890; 84 RT 15918.) One of the resources utilized by Boyer and his team were K-9 search teams. (83 RT 15890.) At the Covena residence, Boyer and two of the dog handlers collected some of Laci's personal belongings to use as scent articles for the trailing dogs: a hairbrush from the bathroom, a pink

slipper from the bedroom, and a sunglasses case containing Laci's sunglasses which was found in her purse. (84 RT 15920, 15986-15987, 15990.) Boyer explained that the sunglasses, which he collected personally, were an exceptionally good scent article because they were encased and were double-bagged when they were collected. (84 RT 15934, 15990.) Appellant's brown slipper was also taken as a scent article. (84 RT 15991.) After Boyer collected the items, appellant asked Boyer for a receipt for the items. Boyer found this unusual and explained that this was the first time someone had asked for such a receipt. (84 RT 15930-15931.)

Boyer also conducted a brief missing persons interview with appellant intended to assist the K-9 trailing team. (84 RT 15921-15922.) As Boyer and appellant were seated at the dining room table, Boyer put his note pad on the table so that he could take down appellant's answers. However, appellant asked Boyer not to write on the dining room table because appellant did not want it to be damaged.[33] (84 RT 15923-15924.)

Eloise Anderson, a certified dog handler, responded to Covena as part of Captain Boyer's search and rescue team. (84 RT 16072-16073.) Her trailing dog was a Labrador retriever named "Trimble." (84 RT 16029, 16050, 16072.) During her testimony, Anderson provided details of Trimble's training and certification. (84 RT 16050-16069.)

That same day, Amber Frey tried repeatedly to reach appellant to thank him for a gift that he sent her for Christmas. (76 RT 14695; 79 RT 15109.) The billing address was appellant's warehouse. (76 RT 14695.)

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[33] A few weeks later, appellant talked to realtors about selling the couple's Covena home, including the possibility of selling it furnished. (86 RT 16418-16419; People's Exh. No. 207C; 9 Supp. CT Exhs. 1999-2000, 2004-2005.)

11. *Search warrants*

Based on the results of the investigation at that point, Detective Grogan decided that search warrants were necessary. (93 RT 17657.)

a. *December 26 and 27, 2002: Residence*

On the morning of December 26, the Modesto Police Department executed a search warrant for the Peterson's residence. (55 RT 10791; 63 RT 12280.) Before police started searching inside the house, they checked again for signs of forced entry, but found none. (63 RT 12279.) They also checked outside the house for footprints in the soil or broken tree limbs—things that might indicate an intruder. (63 RT 12280-12281.)

The primary purpose of the search on December 26 was to look for forensic evidence, including blood and hair fibers. (63 RT 12326, 12376.) Federal Bureau of Investigation ("FBI") personnel assisted in the forensic search. (63 RT 12383-12384.) Police found two very small spots on the comforter on the bed in the master bedroom that were later confirmed to be appellant's blood. (63 RT 12338; 89 RT 17033; 90 RT 17196.)

Searchers collected two hairbrushes from a drawer of the vanity in the bathroom of the master bedroom. (63 RT 12370-12371.)

A boat cover was located in a shed in the backyard. There was a leaf blower sitting on top of it. (63 RT 12287, 12290.) The boat cover emitted a very strong smell of gasoline. (63 RT 12289-12290.) A criminalist who later examined the cover noted it contained what appeared to be chunks of concrete. (89 RT 17019.) Police also found a blue tarp in a another shed near the grill. (63 RT 12339.)

Police did a cursory search of appellant's truck and Laci's Land Rover. The vehicles were impounded and towed to a secure location for further processing. (63 RT 12318; 64 RT 12490-12492; 68 RT 13315, 13318-13319.) Four areas of suspected blood were found in appellant's truck. (64

RT 12492; 67 RT 12954-12956.) Appellant told Detective Grogan that he cut his hand on the door. (67 RT 12990.) Later analysis confirmed that three of the four stains were, in fact, appellant's blood. (89 RT 17039-17040; 90 RT 17197.) Small chunks of cement were found in the bed of the truck, along with a claw hammer on which there appeared to be cement powder or residue. (64 RT 12504, 12601.) There was also a large storage container in the bed of the truck. (64 RT 12499-12500; People's Exh. No. 116C.)

On December 27, the police continued their search of the residence. This time, they searched for specific items. (63 RT 12376.) In particular, police were looking to see if jewelry that appellant said Laci was wearing on Christmas Eve morning was missing from the home. (93 RT 17676-17677.) The jewelry was there, with the exception of a pair of diamond earrings. (93 RT 17677, 17680.)

That day, police also collected hair samples from appellant. (63 RT 12377.)

b. *December 27, 2002: Warehouse*

On the afternoon of December 27, after searching the residence, officers executed a search warrant at appellant's warehouse. (64 RT 12523, 12526.) Appellant's 14-foot aluminum Game Fisher boat was inside, along with the boat trailer. (64 RT 12537, 12539.) Police searched Department of Motor Vehicle records relating to the boat and discovered there was no registration paperwork for the boat. (93 RT 17683.)

(1) *Pliers with hair*

A pair of needle-nose pliers was located in the boat under the middle seat. (55 RT 10837-10838; 64 RT 12544.) Detective Grogan later viewed the photographs taken during execution of the search warrant and saw what appeared to be hair in the pliers. (94 RT 17837.) Grogan talked to fellow

detective Dodge Hendee and asked Hendee to retrieve the pliers from the police department's evidence room and determine if there was hair attached and, if so, determine if it was suitable for DNA testing. (94 RT 17837-17838.)

Detective Hendee retrieved the pliers and noticed what he thought was a single hair, about five to six inches in length, looped around the pliers and fixed in the clamped portion. (64 RT 12554, 12556-12557; 67 RT 13031.) There was some sort of vegetation stuck to the hair.[34] (64 RT 12556; 67 RT 13034; People's Exhs. Nos. 159A, B.) Hendee inserted the pliers into an evidence envelope, pulled the handles apart, removed the pliers from the envelope, and looked inside the envelope to ensure the hair was inside. (64 RT 12558; 67 RT 12974.) It appeared to be a single hair that was deposited in the envelope.[35] (64 RT 12558.)

Rod Oswalt, the prosecution's forensic criminalist who specialized in hair evidence, later determined the evidence to be two separate hair

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[34] A prosecution expert later identified the material as being consistent with an annual bluegrass found in the Central Valley, which grows during November through April. (69 RT 13482-13483, 13489.)

[35] When Detectives Hendee and Brocchini retrieved the evidence envelope on February 12, 2003, for the purpose of determining whether the hair had a root, they inspected the contents of the envelope and found there were two hairs inside. (64 RT 12563, 12566.) Hendee confirmed that the evidence envelope was sealed and was not tampered with. (64 RT 12566-12567.) He explained that what he initially perceived to be one hair in the pliers may have actually been two that were held together in the clamped portion of the pliers. Alternatively, if it had been a single hair, Hendee suggested the hair may have somehow broken inside the envelope. (64 RT 12567.) In looking at a close-up photo of the hair when it was in the pliers, Hendee pointed out that the entire hair was not visible. (64 RT 12591-12592.) He took extra precautions in repackaging the hairs. (64 RT 12567.)

fragments.[36] (70 RT 13617.) Microscopically comparing the hair fragments to samples of Laci's hair taken from her hairbrushes, Oswalt concluded the hair fragments were microscopically consistent with the samples of Laci's hair. (70 RT 13612-13617, 13644, 13658; 87 RT 16599, 16603; People's Exh No. 164B.) Microscopic analysis also revealed that the fragments were not consistent with samples of appellant's hair. (87 RT 16596.) Oswalt noted there was splaying or flattening out of the hair fragments that could have been caused by pliers. (70 RT 13656.) The fragments could have initially been stuck together due to the clamping action of the pliers, or as a result of hair spray or hair oils. (70 RT 13657.) The fragments were sent to the FBI's lab for mitochondrial DNA testing. (70 RT 13660-13662.)

Noted FBI biologist forensic examiner Doctor Constance Fisher conducted mitochondrial DNA ("mtDNA") testing[37] on a two centimeter segment of one hair fragment. (87 RT 16655.) Dr. Fisher determined that the mtDNA sequence in the fragment from the pliers was the same as the reference sample received from Sharon Rocha. (87 RT 16676-16677.)

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[36] Oswalt explained that if a root was present, it was referred to as a hair. If there was no root present, it was considered a hair fragment. (70 RT 13617-13618.)

[37] Dr. Fisher explained the two types of DNA: nuclear and mitochondrial. Nuclear was inherited from a person's mother and father, while mitochondrial was only inherited from the mother. Nuclear DNA was unique to an individual (except for identical twins) and could, therefore, be used as a tool of inclusion. On the other hand, mitochondrial DNA could not be used to make an individual identification. However, it was a very reliable tool of exclusion for those instances, for example, where there was a hair fragment but no root for nuclear DNA testing. (87 RT 16618-16622.) In mtDNA testing, if there was no access to the subject individual, then an examiner could use a reference sample from the subject's maternal relative to make a comparison to the evidence. (87 RT 16622-16623.)

While mtDNA analysis did not permit the conclusion that the hair fragment was Laci's (87 RT 16696), the mtDNA in the hair fragment was of the same sequence as that found in Sharon's mtDNA (87 RT 16676-16678). In other words, the fragment and reference sample shared the same maternal linkage. (87 RT 16701.) Fisher's further analysis found that the sequence was relatively rare. (87 RT 16701.) Fisher also compared the hair fragment to a sample of appellant's hair, but the sequences did not match. (87 RT 16675-16676.)

As for the pliers, Sarah Yoshida, the state lab's senior criminalist who examined the tool, explained that they were extremely rusted and hard to open. (86 RT 16441, 16471-16474.) She opined that saltwater could increase the corrosiveness of the pliers over time, including during the intervening time since she first examined them in February 2003. (86 RT 16442-16443.) Yoshida concluded that the pliers had not been used recently, meaning since the rust formed. (86 RT 16470, 16477.) She did not observe blood or tissue on the tool. (86 RT 16477.)

Fishing lures were located in a vinyl bag in the front portion of the boat and two fishing poles were found in the rear of the boat. (64 RT 12573-12574.)

(2) *Concrete anchor and cement residue*

A homemade, 8.6-pound, concrete anchor was discovered inside the boat.[38] (64 RT 12545; 91 RT 17292.) It was circular in shape and

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[38] Laci's brother Brent asked appellant about a news article which mentioned that only one homemade anchor was found. Appellant told Brent that he made a boat anchor with cement and then put some in his driveway. (47 RT 9210; People's Exh. No. 207B-2.) However, appellant told Detective Grogan that after making the anchor, he threw away the rest of the cement. (93 RT 17725; 11 Supp. CT Exhs. 2649; People's Exh. No. 266.)

reinforced at the top with a piece of rebar. (64 RT 12545; 91 RT 17311-17312.) Although the object was generally referred to throughout the trial as an anchor, there was no rope attached. (93 RT 17673-17674.)

In the middle of the boat trailer, was a dust pan and a gallon-sized Rubbermaid pitcher. (64 RT 12539.) The pitcher was about one-third full of a grayish-colored water and cement residue. (64 RT 12590.) There was also what appeared to be spilled powder on the trailer. (64 RT 12540.) Detective Hendee described the rings of powder: "Appeared it was void of powder. There was powder around it creating a circular sort of appearance." (64 RT 12591; 67 RT 13061-13062; People's Exhs. Nos. 122A-D.) Hendee pointed out the rings to Detective Grogan. (93 RT 17669.) Grogan observed: "Well, it seemed like a tremendous mess for making one eight-pound anchor." (93 RT 17670.)

There were also two large buckets in the warehouse each of which appeared to contain cement residue. (64 RT 12598, 12606.) A bag of cement and a receipt from Home Depot for cement were collected. (63 RT 12422; 64 RT 12504.)

Appellant's boat was seized and placed in a secure storage facility next to the Modesto Police Department. (64 RT 12445.) There, the boat was vacuumed and debris from the boat was collected. (63 RT 12375.)

Robert O'Neill, a prosecution expert on construction materials and their compositions (referred to as a petrographer), examined 14 different cement or concrete materials recovered from various places during the searches.[39] (91 RT 17275-17280, 17288.)

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[39] O'Neill explained that concrete was typically made by combining Portland cement in powder form with rock and sand ("aggregate"), and water; cement was, therefore, an ingredient and concrete was the end result. (91 RT 17269.)

Given the variation in color and texture of the rebar-reinforced anchor found in the boat, O'Neill concluded that the concrete ingredients were mixed in a container or a mold, but not thoroughly mixed. (91 RT 17295-17296, 17311-17312.) The anchor fit perfectly into a painter's bucket that Detective Grogan had obtained from Home Depot, which matched one appellant had previously purchased. (91 RT 17314-17315; 17335-17337.) O'Neill opined the concrete ingredients were mixed in some sort of a container. (91 RT 17295-17296.) O'Neill also observed that there was quite a bit of debris inside a plastic pitcher, which was found in the warehouse. The debris was similar to that vacuumed from appellant's boat. (91 RT 17318.)

O'Neill determined that the concrete debris collected from the warehouse floor, boat trailer, truck bed, boat cover, and dining room floor were consistent in their composition: Portland cement, fly ash, and aggregate. (91 RT 17318-17328.)

(3) *Paperwork*

Numerous papers were taken from the office area of the warehouse, including a computer printout from a sport fishing web site. (67 RT 13024-13025; People's Exh. No. 179Q.)

12. *December 30: Amber Frey finds out about Laci and calls the police tip line*

On December 27, Amber Frey called appellant on his cell phone and was surprised to reach him. She thought he would be on a plane en route to Paris. (76 RT 14704.) Appellant told Frey that he was in New York and that his departure had been delayed. (76 RT 14704.) Appellant said the airline gave him $100 and he was going to get a meal and a massage and then he would phone her back. (76 RT 14706.) He did so two hours later and said he was getting ready to board his flight. (76 RT 14708.)

Given appellant's use of a post office box and the dubious nature of his travel and whereabouts, Frey had become suspicious of appellant. (76 RT 14707.) During the phone call on December 27, Frey acknowledged she was having trust issues and apologized to appellant for her feelings. (76 RT 14707.) Appellant reassured her that he just needed to be more sensitive to her needs. (76 RT 14707.)

Yet, Frey was nagged by doubts about appellant. (76 RT 14709.) She contacted a friend in law enforcement and discussed her suspicions. (79 RT 15095.) Over the next couple of days, Frey started sharing her concerns with more friends. (76 RT 14709-14710.)

In the early morning hours of December 30, Frey was at a birthday party and received information from her police-officer friend that appellant was connected to the missing woman from Modesto. He advised her to contact the Modesto Police Department tip line. (60 RT 11729; 76 RT 14711; 79 RT 15122.) Frey called the Modesto Police Department and spoke to a female dispatcher. After confirming that appellant was indeed the husband of the missing pregnant woman, Frey explained her connection to appellant. (76 RT 14711-14713.)

Frey called the police department a second time later that morning because she had not yet received a return call. (76 RT 14714.) Detective Brocchini was at the police department monitoring incoming tips. (55 RT 10796.) He watched as the clerk on duty typed up a tip from a woman claiming to be appellant's girlfriend. Brocchini took the phone and spoke to Frey. (55 RT 10796.)

Afterward, Brocchini briefed the other detectives on the case and then Brocchini and Detective Buehler drove to Frey's home in Madera, which was about 100 miles from Modesto, to meet with her. (55 RT 10797-10798; 102 RT 19060.) Investigators also met with Shawn Sibley who had introduced Frey to appellant. (55 RT 10797-10798.) Frey explained her

relationship with appellant and showed the detectives photos of she and appellant together. (76 RT 14715-14716.)

Frey agreed to help investigators. (80 RT 15190, 15268.) She turned over the photos and personal items that concerned her relationship with appellant. (102 RT 19062, 19064, 19072.) The police provided Frey with a recording device for her cell phone so that she could tape her conversations with appellant. (55 RT 10798-10799; 76 RT 14717-14718.) The detectives instructed Frey to play along with appellant's ruse that he was in Europe. (77 RT 14756.) She recorded as many calls as was feasible, taking the recorder with her wherever she went.[40] (76 RT 14719.)

During this time, the search for Laci expanded into San Joaquin and Alameda counties. (52 RT 10271.) Searchers on horseback and quad runners searched the area around the Mapes Ranch 10 miles west of Modesto, including a wildlife reserve. (52 RT 10163.) Divers probed local bodies of water in those areas (52 RT 10168), as well as waterways between Berkeley and Modesto (93 RT 17686).

13. *Cuts on appellant's hands*

Detective Grogan spoke to appellant several times on December 30. (93 RT 17686-17687.) During one of those conversations, appellant again mentioned that there might be blood in his truck because he cut his hands "every day." (11 Supp. CT Exhs. 2632; People's Exh. No. 264C.) Appellant then revised his statement to say that he cut his hand "that day," referring to Christmas Eve. (11 Supp. CT Exhs. 2632.) He said that it happened when he reached inside the side pocket of the door. (11 Supp. CT Exhs. 2632.) Referring to another officer, appellant said: "I mean I

[40] The transcripts of the calls are contained in Volumes 7, 8, and 9 of the Supplemental Clerk's Exhibits Transcript as People's Exhibits Numbers 195A-U. The corresponding recordings of the calls are People's Exhibits Numbers 196A-U.

know Allen looked at my hands and I know he noticed cuts on my hands—so he knows." (11 Supp. CT Exhs. 2632.) Appellant elaborated: "I don't know what it was probably just ah door or the pocket or somethin'—knuckle. Still my hand I—you know—I keep cuttin' it handin' out flyers so—that's the reason I—keep rememberin' it. (11 Supp. CT Exhs. 2632.)

14. *The vigil for Laci and Conner and appellant's phone conversations with Amber Frey purportedly made from Paris and other European cities*

a. *The vigil on New Year's Eve*

On December 31, a vigil was held for Laci beginning at 4:30 p.m. Approximately 1,200 to 1,300 people attended. (46 RT 9019-9020.) Members of the media were also present. (74 RT 14259.) A platform was set up for the Rocha and Peterson families. (46 RT 9020.) Some family members made remarks. (46 RT 9020.) Appellant chose not to sit on the stage with his parents or Laci's family. (46 RT 9020; 47 RT 9200.) He stood in the crowd, near the back. (74 RT 14262.)

Several friends of the Rocha family, who also knew appellant, noticed his demeanor that evening. Seeing appellant in the crowd, one person suggested to him that he go on stage with his family, but appellant said something to the effect of, "'I'd rather be here, be happier here.'" (74 RT 14299.) Another individual observed that appellant showed no emotion at the vigil. (74 RT 14262, 14280.) Still, another said appellant seemed "very relaxed," was "in a very good mood," and was "somewhat jovial." (74 RT 14288.)

A few minutes before the start of the vigil, appellant called Amber Frey and told her that he was calling from Paris. (7 Supp. CT Exhs. 1449-1452; People's Exhs. Nos. 195E-F, 196E-F.) Appellant described the Parisian atmosphere: "It's pretty awesome. Fireworks there at the Eiffel

Tower. A mass of people all playing American pop songs." (7 Supp. CT Exhs. 1450; People's Exhs. No. 195E, 196E.)

b. ***Early January 2003: Appellant's yearning for "a prolonged period of freedom," his death wish for a barking dog, and his curious explanation for an incriminating photo***

As New Year's Eve gave way to New Year's day, appellant and Frey had a long phone conversation. (7 Supp. CT Exhs. 1453-1495; People's Exhs. No. 195G, 196G.) During the conversation, appellant told Frey that he was trying to reschedule his return from Europe for the end of January, but that he needed to travel to Guadalajara, Mexico for a few days at the end of January and beginning of February. (7 Supp. CT Exhs. 1470.)

A little later into the discussion, appellant told Frey about a book he was reading. (7 Supp. CT Exhs. 1480.) Appellant described the book: "[I]t was [] letters he had written [] while hitchhiking across the country. He's the author of [] what's that book? And, I think it was during the late 60's he hitchhiked from New York to San Francisco he wrote that book, it's a famous literature piece." (7 Supp. CT Exhs. 1480.)[41] In explaining his affinity for the book, appellant said:

> Yeah, it was interesting because it's at least a . . . he was not geographically, but mentally interesting to me simply because I never had a prolonged period of freedom like that from responsibility and, you know, and interesting to me and something that you could incorporate into life.

(7 Supp. CT Exhs. 1480.)

Later that night on January 1, 2003, appellant and Frey spoke again. (7 Supp. CT Exhs. 1495-1509; People's Exhs. No. 195H, 196H.) During

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[41] Although the transcription of the call refers to the author in question as "Jack Cadillac," based on the recording as well as appellant's description of the author and his works, appellant was most likely referring to the author Jack Kerouac and his book, "On the Road."

the course of the conversation, appellant told Frey about the French food he had sampled. (7 Supp. CT Exhs. 1499.) Then, appellant complained that there was "a fucking dog" next to his hotel that "just keeps barking." (7 Supp. CT Exhs. 1499.) Appellant continued: "I just want to kill it." (7 Supp. CT Exhs. 1499.)[42] Frey testified to hearing the barking dog on appellant's end of the phone during this call and the previous call. (77 RT 14761-14762.)

When appellant talked to Frey the following night, on January 2, he complained again about the barking dog. He asked Frey, "Can you hear that damn dog?" (7 Supp. CT Exhs. 1513; People's Exhs. No. 195I, 196I.) Appellant went on to mention that his right hip was "very, very dark blue" from falling onto the cobblestones while jogging in Brussels. (7 Supp. CT Exhs. 1517.)

Earlier in the day, when appellant spoke to Detective Grogan, appellant brought up the idea that—as an alternative to his earlier theory about Laci being robbed and kidnapped by transients for her jewelry—perhaps she was kidnapped for the baby.[43] (93 RT 17703.) Appellant asked Grogan: "Do you think when she has the baby I'll get half my family back?" (93 RT 17703.) Tearfully, appellant asked Grogan if he thought Laci was dead. (93 RT 17704.)

On January 3, Grogan met with appellant. During the meeting, Grogan pulled out a faxed photo of appellant with Amber Frey and asked

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[42] Given that appellant was not in a hotel in Paris, the prosecution presumed the dog in question to be the family dog McKenzie and played that portion of the phone call for the jury. (109 RT 20316.) However, the identity of the barking dog was not confirmed.

[43] Authorities sent information to hospitals nationwide about Laci and Conner in the event there were any suspicious circumstances involving newborns brought in by someone other than the birth mother. (94 RT 17826.)

appellant to explain. (93 RT 17708.) Appellant looked at it for a few seconds and then asked, "'Is that supposed to be me?'" (93 RT 17708.) He went on to say that the female in the photo looked like a girl he went to college with, but he did not think it was her. (93 RT 17710.) Grogan told appellant that if he was having an affair, he should come clean about it because having an affair did not necessarily mean that he had harmed Laci. (93 RT 17713-17714.) Appellant assured the detective that the last time he dated anyone other than Laci was before they were married. (93 RT 17714.)

On the subject of the patio umbrellas that had been in the bed of appellant's pick-up truck on Christmas Eve, he explained that he intended to drop them off at the warehouse on Christmas Eve morning, but forgot to do so. (93 RT 17714.) Instead, appellant ended up taking them to the marina where they remained in the bed of the truck while appellant was out on the Bay. He also forgot to drop them off at the warehouse on his way home.[44] (93 RT 17714.)

That evening, appellant had dinner with Sharon, Brent, Amy, and a few other family friends. (46 RT 9021.) Appellant mentioned that he had just come from the police station. (46 RT 9021.) He recounted that while he was at the police station, investigators showed him photos of him with another woman. (46 RT 9021.) Appellant remarked that "they'd done a really good job because the guy really did look a lot like him." (46 RT 9021-9022.)

On January 4, during another phone call with Frey, appellant mused, "Wouldn't it be fun to be able to stay in that mindset of just constant discovery?" (7 Supp. CT Exhs. 1556; People's Exhs. No. 195N, 196N.) On the subject of love and commitment, appellant said, "[L]ove doesn't

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[44] It was the prosecution's theory that appellant used the umbrellas to conceal Laci's tarp-covered body. (109 RT 20201, 20218.)

mean that people can be together forever . . . ." (7 Supp. CT Exhs. 1559.) Appellant also mentioned his bruised hip again. (7 Supp. CT Exhs. 1574.) He told Frey that he was packing up because he was heading to Madrid, Spain. (7 Supp. CT Exhs. 1575.)

15. *Surveillance and tracking of appellant's comings and goings reveals he made five separate trips to the Berkeley Marina in five different vehicles*

a. *Appellant rents numerous vehicles*

During the months of January and February 2003, appellant rented numerous vehicles in Modesto. (83 RT 15824.) He rented a Dodge Neon on January 2 and returned it one day later. (83 RT 15824.) On January 6, appellant rented a Honda Civic and returned it the same day. (83 RT 15824.) On January 8, appellant rented a Chevy S-10 Sonoma pick-up truck. (83 RT 15825.) He returned it on January 10 and exchanged it for a Saturn. (83 RT 15825.) On January 16, appellant returned the Saturn and rented a Lincoln Town Car. (83 RT 15825-15826.) He returned the Town Car on January 23. (83 RT 15826.) Appellant rented a Dodge Dakota pick-up truck on January 27, which he returned two days later. (83 RT 15826.) On February 18, appellant rented a Chevy Tahoe and returned it the next day. (83 RT 15826.)

Detective Grogan asked the California Department of Justice for a surveillance team. (93 RT 17704.) After securing a warrant, authorities also installed Global Positioning System ("GPS") devices on several of the vehicles appellant drove. (83 RT 15835, 16275-16277.) As detailed below, appellant traveled to the Berkeley Marina on five days in January 2003. He drove a different vehicle each time.

b. *Surveillance uncovers appellant's trips to the Marina*

Beginning on January 3, 2003, authorities set up a hidden camera (referred to as a "pole camera") outside the Covena residence to monitor appellant's comings and goings so they could then follow him. Police resorted to this measure because staking out the Covena residence in unmarked cars had proven difficult. (85 RT 16151.)

On the morning of January 5, appellant, joined by a male friend, left in the Land Rover, went to the Volunteer Center at the Red Lion, and then traveled to various churches to put up flyers. (85 RT 16158-16159, 16189-16192.) Appellant returned home by himself later that morning in the Land Rover. About two hours later, he left the house in different clothes and drove off in a silver Subaru, which had been parked at the house. (85 RT 16157, 16160-16161.) Appellant drove to the Berkeley Marina arriving around 2:00 p.m. Once there, he drove to the boat launch area, and then traveled along the seawall on both sides of the marina. (85 RT 16163-16164.) Appellant left the marina after five minutes and headed home. The officers surveilling appellant did not see him stop or talk to anyone during that time. (85 RT 16164-16165, 16265.) About an hour after appellant arrived home at 3:35 p.m., he left in a blue Ford Explorer sport utility vehicle, which had also been parked at the house, and went to the Del Rio Country Club. (85 RT 16157, 16167-16169.)

The next day, January 6, appellant first drove in the Land Rover to his attorney's office and then to the warehouse on North Emerald. (85 RT 16267.) Afterward, appellant went to Enterprise Rent-A-Car and left in a rented red Honda. Appellant drove to the Berkeley Marina where he arrived around noon. (85 RT 16169-16172, 16268.) Officers observed appellant drive in and out of various parking lots. (85 RT 16172, 16268.) Appellant left and parked in a different part of the marina for about another

minute or two. (85 RT 16174.) He was at the marina for 5 to 10 minutes before leaving the area. (85 RT 16175.) Like the preceding day, appellant did not stop to talk to anyone.[45] (85 RT 16177.) Appellant returned the Honda to the rental car location around 5:00 p.m. and left in the Land Rover. (85 RT 16177.)

On January 8, officers observed appellant drive the Land Rover to the Modesto Police Department. He made a complete circle of the various police buildings and then left without getting out of the car.[46] (85 RT 16273-16274.) Appellant went to Enterprise, left the Land Rover, and drove away in his white pick-up truck. (85 RT 16274-16275.) An unidentified female who had been with appellant, drove Laci's Land Rover back to Covena. (85 RT 16232.)

On January 9, appellant left home just after 7:00 a.m. in the white pick-up truck. (85 RT 16280.) He stopped at the warehouse for five minutes and then headed back to the Berkeley Marina where he arrived around 10:40 a.m. (85 RT 16280-16281.) At the marina, appellant proceeded along Spinnaker Way around the traffic circle. He drove around both sides of the marina, including the boat launch parking area, before leaving. (85 RT 16281-16282, 16284, 16286.) As with his other trips to the marina, appellant did not stop to talk to anyone. (85 RT 16282.) On his way home, appellant drove to the Medeiros reservoir area, which was one of the other areas being searched. (85 RT 16286-16287; 86 RT 16329-16330.)

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[45] Insofar as defense questioning of Detective Grogan suggested that appellant may have gone to the marina to look for witnesses, Detective Grogan found it curious that, if that were the case, appellant never got out of the car and attempted to speak to anyone, including the Harbor Master, during any of appellant's trips to the marina. (96 RT 18127.)

[46] The previous day Amber Frey told appellant she was considering going to the police. (93 RT 17722-17723.)

That same day, officers who were surveilling appellant noticed that he was driving in an unusual pattern. (86 RT 16323.) Over a two-hour period, appellant would exit the freeway, drive down a street, make a U-turn, pull into a parking lot, get back on the freeway, exit the freeway again, and proceed into a parking lot. This driving pattern occurred repeatedly on multiple freeways. (86 RT 16323.)

On the morning of January 11, officers who were monitoring the pole camera observed appellant leave the house, walk to the Land Rover in the driveway, crouch down, and inspect different areas of the undercarriage of the vehicle. (86 RT 16352.) Appellant went back into the house, came out a short while later, got into a silver Saturn parked at the house, and left. (86 RT 16352.)

Later that day, authorities followed appellant as he was driving in the Saturn southbound on State Route 99. At one point, appellant pulled to the shoulder of the freeway. (86 RT 16342, 16357.) A female agent, Tera Farris, started to pull in behind appellant, but she was called off so that she would not expose the surveillance. (86 RT 16345, 16356.) Faris drove past appellant on the shoulder and took the first exit off the freeway. (86 RT 16356.) She pulled in behind a business just off the freeway. Faris heard on the radio that appellant had also taken the same exit. (86 RT 16356.) At that point, Faris saw that appellant had pulled in alongside her. (86 RT 16357.) He made eye contact with her and showed her a piece of note paper he was holding. (86 RT 16357.) Faris drove off. Appellant followed her for one or two blocks before leaving her alone. (86 RT 16357.) Based on the events of that day, authorities concluded appellant was aware that he was being surveilled. Authorities shut down the camera surveillance. (86 RT 16324.)

Tracking data supplied by manufacturers of the GPS systems also disclosed that hat appellant also drove to the marina on January 26 and 27.

(89 RT 16906-16907, 16913-16915, 16956, 16959). On January 26, he took the Land Rover, while on January 27, he drove in the Dodge Dakota he rented that day. (89 RT 16970-16971.)

c. *First wiretap confirms appellant is visiting the Berkeley Marina and lying about his whereabouts to family and friends*

Investigator Steve Jacobson of the Stanislaus County District Attorney's Office was the supervisor for the court-authorized wiretaps of appellant's cell phones. (80 RT 15365, 15368; 81 RT 15372.) The first wiretap took place beginning January 10, 2003 until February 4, 2003. (80 RT 15367.)

On the morning of January 11, searchers on San Francisco Bay were trying to determine if a recent sonar hit was a body. (81 RT 15395.) This search activity was reported by the media. (81 RT 15395.) Appellant's cell phone activity revealed that he was in the area of the Berkeley Marina that morning. (81 RT 15396-15397.) At 10:48 a.m., appellant received an incoming call from his mother while he was in the area of the marina. (81 RT 15397.) Yet, appellant told his mother he was in west Fresno. (81 RT 15397-15398; People's Exhs. Nos. 207A (compact disc recording),[47] 207A2 (transcript), 207A3 (visual depiction of call area); 9 Supp. CT Exhs. 1965-1967.)

That afternoon, appellant received a voicemail message from Sharon Rocha in which she, with obvious relief, told appellant that the sonar hit turned out to be an anchor and not Laci. (52 RT 10212-10213; People's Exhs. Nos. 207A, 207A5; 9 Supp. CT Exhs. 1969.) The wiretap recorded appellant listening to the voicemail message. Immediately after Sharon

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[47] There are eight audio tracks on the disc admitted as People's Exhibit number 207A. Appellant's conversation with Jackie Peterson is contained on the first track.

said that it was not Laci and that she just wanted appellant to know, appellant could be heard to let out a sound, which could reasonably have been characterized as a whistle. (People's Exh. No. 207A (second audio track).)

Also that afternoon, appellant had numerous phone conversations during which he said he was in one place, but he was actually in another: appellant told several people, including Sharon and his father, that he was in Bakersfield, but he was actually in Gilroy (People's Exhs. Nos. 207A7-11; 9 Supp. CT Exhs. 1970, 1975, 1979); appellant told his friends Mike and Heather Richardson that he was in Button Willow, while he was calling from Hollister (People's Exhs. Nos. 207A13-14; 9 Supp. CT Exhs. 1985-1988); and, appellant told another friend that he was in Button Willow when he was actually in San Jose (People's Exh. No. 207A15; 9 Supp. CT Exhs. 1989-1991).

16. *Searches on the Bay and in neighboring counties*

a. *Bay search with dive teams and helicopter*

Beginning on December 28, 2002, professional dive teams from various law enforcement agencies, used side-scan sonar equipment[48] to search San Francisco Bay from the Berkeley Marina north toward Point Richmond and the Richmond Marina. (52 RT 10205-10206.) This included the area between the Berkeley Marina and Brooks Island where

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[48] The sonar can profile the bottom of a body of water in a search for missing objects. A computer reconstructs images taken by a small torpedo-shaped device being towed by the boat (known as a "fish"). The fish sends out a sound beam and reflections are reconstructed on the computer screen. (86 RT 16489.) The sonar provides a 95 degree view of a body of water and 100 feet on either side of the fish. There is a narrow blind spot because the sound beam is in the shape of a "V." (86 RT 16492.)

appellant said he had been fishing.[49] (62 RT 12221; 2 Supp. CT Exhs. 294.) The Bay search operation was conducted over 15 days or so from late December 2002 until May 2003. (86 RT 16497-16498.)

The search conditions on the Bay were consistently difficult for the dive teams. (64 RT 12636-12637; 86 RT 16502.) First, the wind and wave action on the Bay made it nearly impossible for the search boat captain to maintain a straight track on the water in carrying out the planned search pattern. (86 RT 16494, 16051.) Second, due to extreme currents and flood tides at times, divers could not see more than a foot in front of them. (52 RT 10208.) The currents and tides also made it difficult for divers to dive down directly on a target; divers had to be dropped a certain distance from the target and then float with the current until they reached the target. (52 RT 10206-10207.) When the side-scan sonar registered an object the team wanted to investigate further, they fixed coordinates to aid the dive team in locating the object. (64 RT 12638.) However, when the boat made a second pass over the area immediately after, the object could not be located at the fixed coordinates. (64 RT 12638.)

Dive teams from the FBI assisted in the Bay search. These teams employed magnetometers and conducted a very methodical hand search on the floor of the Bay. (64 RT 12641.) Additionally, the East Bay Regional Parks District and the California Highway Patrol participated in a helicopter search of the shoreline area along San Francisco Bay. (52 RT 10214.)

Yet, despite these extensive search efforts, nothing of evidentiary value was located. (52 RT 10298, 10305-10307.) That was not surprising to Geoffrey Baehr, the head diver for San Mateo County's Sheriff's Office

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[49] Although Brooks Island was part of the search perimeter, authorities did not necessarily assume that the immediate area around Brooks Island was where appellant disposed of Laci's body. (65 RT 12734-12735.)

Marine Dive Cliff Rescue Unit, who participated in the search. He explained that the conditions on the Bay made looking for a body or a small weight difficult using the side-scan sonar, especially if either had become buried in or covered with mud. (86 RT 16485, 16509-16510, 16518-16519.)

b. *Shoreline search with K-9 teams discovers Laci's scent at the Marina*

On December 28, 2002, in addition to the Bay search that day, searchers combed the Berkeley Marina shoreline on foot. (52 RT 10205; 84 RT 15933.) Directed by Captain Boyer, K-9 search teams checked the entry and exit points of the boat launch area of the marina for Laci's scent. (52 RT 10205; 84 RT 15997.) Dog handler Eloise Anderson and her dog Trimble used Laci's sunglasses that were collected by Captain Boyer as a scent article. (84 RT 15933-15934, 16077-16078.) After scenting Trimble with Laci's sunglasses, Anderson had Trimble check two possible entry areas ("choke points") into the marina. (84 RT 16079.) Trimble detected no scent in the vegetation surrounding the first area searched. (84 RT 16079-10680.) Nor did Trimble indicate a scent trail near the bathroom area. (84 RT 16084.) Anderson presented the scent article to Trimble again and directed the dog to the other entry area to the marina. (84 RT 16080.) This time, Trimble alerted to Laci's scent by pulling steadily on her line and maintaining a level head position all the way out to a pylon at the edge of the water. Once there, Trimble gave Anderson the indication that it was the end of the trail. (84 RT 16080-16081, 16085.)

Another K-9 trailing team checked the east area of the marina near the bathrooms using Laci's pink slipper as a scent item. (84 RT 15997, 16000-16001.) Dog handler Ronald Seitz reported to Boyer that his dog did not pick up Laci's scent in that area. (84 RT 16005.)

c. *Search of the Modesto foothills and Tracy area*

On January 6, 2003, Modesto Police Department personnel searched the Modesto foothills, including mineshafts in the area, using an all-terrain vehicle. (49 RT 9756-9757.)

On January 10, Modesto police personnel traveled 40 miles to the Tracy area and investigated an anonymous tip that Laci was being held in a storage container behind two small white houses. (52 RT 10329-10330; 53 RT 10338-10343; 86 RT 16392.) In addition to officers from the Modesto Police Department, personnel from the San Joaquin and Alameda Counties Sheriff's Departments searched the area specified in the tip over a four-day period, including various residences, but neither Laci nor anything related to her disappearance was discovered. (52 RT 10330; 86 RT 16393-16394, 16406.)

17. *February 18, 2003 search warrant*

A second search warrant was served on the Covena residence on February 18, 2003. (55 RT 10845.) Before police began the search, appellant asked to retrieve some bags he had packed. (94 RT 17843.) Before turning the bags over to appellant, police searched them and found $2,081 in cash, clothing, a watch, appellant's wedding ring, and a bottle of wine. (94 RT 17845-17849; People's Exhs. Nos. 274A-I.)

During the search, Detective David Hawn retrieved what appeared to be a very small piece of concrete on the dining room on the floor. (69 RT 13422, 13426.) Investigators also noticed one of the bed pillows at the house was missing a pillow case. (99 RT 18682.)

Authorities asked Amy Rocha to assist them in determining if the clothes Laci was wearing on December 23, when Amy last saw Laci, were

in the house. (95 RT 18017.) Amy identified a blouse, a scarf, and black shoes.[50] (45 RT 8866-8867; 95 RT 18017.)

Police also searched appellant's storage facility in Modesto. (68 RT 13346.) Inside, they found some items that had been in appellant's warehouse. (68 RT 13354.) Among the items in the storage unit was a photo album from appellant and Laci's wedding. (68 RT 13351.) The album was stored inside a waste basket. (68 RT 13351, 13353.)

18. *Appellant's actions following Laci's disappearance draw increasing attention from authorities*

a. *Appellant's subscription to pornography channels*

Donald Toy of the DISH Network Satellite Company testified that when Laci opened an account in March 2001, the subscription was for the top 100 channels in the greater Sacramento area and for Home Box Office. (74 RT 14239.)

On January 8, 2003, about two weeks after Laci disappeared, there was a change to the Peterson's DISH Network programming: the Playboy Channel was added. (74 RT 14240.) Five days later, records showed that the Playboy Channel was dropped and the Ecstasy Channels were added. (74 RT 14240, 14243-14244, 14254.) Ecstasy was comprised of two different channels of "[v]ery explicit" sexual content—the most sexually explicit of the DISH Network's adult programming. (74 RT 14240-14241,

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[50] Amy stated that when she last saw Laci on the evening of December 23, Laci was wearing cream-colored Capri slacks, a black blouse with cream-colored polka dots or flowers, a black jacket, a cream-colored scarf, and black shoes. (45 RT 8847.) Shown a photo of cream-colored maternity pants sold by the brand name "Motherhood Maternity," Amy said the pants were similar to those Laci had been wearing on the evening of December 23. (45 RT 8892-8893; 46 RT 8940-8941; People's Exh. No. 11.)

14254.) The subscription was on a monthly basis, but permitted unlimited use. (74 RT 14240-14241.)

The above information came to light because while officers were searching the Peterson's home on February 18, Officer Kipp Loving noticed that the television, which he had turned on, suddenly went dark. (73 RT 14121-14122.) Loving, who knew Toy from previous investigations, called Toy a short while later and asked him to check the Peterson's DISH network account to see if there was any activity on the account. (74 RT 14241-14242.) Toy learned that the account was terminated two hours before Loving's call. (74 RT 14242.) Toy explained that service could not have been disconnected without authorization by the account holder. (74 RT 14243-14244.) According to the company's representative who processed the February 18 termination of service, the customer had called and said they were moving overseas. (74 RT 14244-14245.)

b. *Appellant closes down his warehouse*

On January 13, 2003, appellant alerted the property management company that maintained the warehouse on North Emerald that he intended to vacate the premises in 30 days. (87 RT 16575.) The lease was not due to expire until October 2003. (87 RT 16575.)

c. *Appellant's inquiry into selling the couple's home furnished*

While at the volunteer center in January 2003, appellant asked Terri Western, a real estate agent and the mother of Laci's close friend Stacey Boyer, about selling the Covena residence. (86 RT 16418-16419.) Western told appellant that she did not feel it was the time or place to be discussing the sale of the home. (86 RT 16419.)

Later that month, appellant initiated a series of discussions with Brian Argain, another realtor, about selling the Covena home. On January 22,

appellant told Argain, "I'd like to put it on the market right now." (People's Exh. No. 207C [recorded conversation], 207C2 [transcript]; 9 Supp. CT Exhs. 1999.) Appellant asked Argain if he could sell it furnished. (9 Supp. CT Exhs. 2000.) Appellant repeatedly asked Argain to keep quiet about the matter. (9 Supp. CT Exhs. 1999-2000.)

In a conversation on January 29, Argain told appellant that appellant would likely have to consult an attorney on whether he could sell the house with Laci's name still on the title. (People's Exh. No. 207C, 207C5; 9 Supp. CT Exhs. 2004.) After a brief conversation about possible legal ramifications involving a sale, appellant explored the idea of renting the house instead. (9 Supp. CT Exhs. 2005.)

d. *Appellant sells Laci's Land Rover*

On January 29, appellant traded in the Land Rover for a Dodge Dakota pick-up truck. (86 RT 16429; People's Exh. No. 213.) The Land Rover was the car that Laci typically drove and which was widely viewed as her car, including by appellant. (51 RT 10027.)

e. *Appellant stops mail delivery to the Covena residence*

On January 30, appellant completed and signed forms requesting that all mail addressed to him, Laci, or both, at 523 Covena be immediately forwarded to the Mailboxes Etc. post office box appellant set up the day before Laci went missing. (101 RT 18952-18953; People's Exh. No. 285B.)

f. *Appellant's use of the nursery for storage*

Detective Warren Ruskamp participated in the searches at 523 Covena in December 2002 and February 2003. He was specifically assigned to search the nursery. (68 RT 13247.) Ruskamp explained that when police returned to the residence in February, the nursery had been converted to a storage room of sorts. The nursery now contained office chairs and

bedding, which made accessing the room difficult. (68 RT 13248-13249; People's Exh. No. 145A.)

g. *Appellant's seeming disinterest in a possible sighting of Laci in Longview, Washington*

On January 30, 2003, appellant received a phone call at 9:09 p.m. from Rita Cosby at FOX News. (People's Exhs. Nos. 207D [recorded conversation],[51] 207D2 [transcript]; 9 Supp. CT Exhs. 2010.) During the call, Cosby asked appellant if he had heard about a possible sighting of Laci in Longview, Washington that was reportedly captured on videotape. (9 Supp. CT Exhs. 2010.) Appellant said he had "definitely" heard about the tip. However, he relied on Cosby to provide him with the details. (9 Supp. CT Exhs. 2010.)

About 10 minutes later, appellant received a phone call from his friends Heidi and Aaron Fritz. (People's Exhs. Nos. 207D, 207D-3; 9 Supp. CT Exhs. 2012.) Heidi mentioned the possible sighting. (9 Supp. CT Exhs. 2012.) Appellant told Heidi that he had called the Longview Police and talked to "this guy" who was pulling the tapes together and that appellant was going to "keep checking with him." (9 Supp. CT Exhs. 2012.) Yet, Investigator Steve Jacobson, who was monitoring appellant's phone calls during this time, testified that appellant made no such call to Longview police before speaking to the Fritz's. (81 RT 15422.) The investigator confirmed this with authorities in the Longview Police Department. (83 RT 15878.)

The next morning, January 31, appellant received more phone calls about the possibility that Laci was in Longview, including from his mother Jackie, which was captured by the wiretap. (People's Exhs. Nos. 207D,

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[51] There are 19 audio tracks on the compact disc admitted as People's Exhibit number 207D.

207D5; 9 Supp. CT Exhs. 2020.) In the voicemail message she left for appellant, Jackie suggested that appellant get on a plane to Washington as soon as possible and that he could stay with "Rachel"—presumably a family friend or relative—who attended school in Washington. Jackie also mentioned that Rachel was putting up posters about Laci in Washington. (9 Supp. CT Exhs. 2020.) At the end of Jackie's message, appellant can be heard making a sound that might reasonably have been interpreted as chuckling. (People's Exh. No. 207D5.)[52]

Appellant eventually spoke to his mother at 9:29 a.m. that same day. (People's Exhs. Nos. 207D, 207D6; 9 Supp. CT Exhs. 2022.) In discussing the Washington tip, Jackie said to appellant, "Why don't you hop on a plane?" (9 Supp. CT Exhs. 2022.) Appellant replied, "I'll definitely . . . you know, I called up there and talked to one of 'em." (9 Supp. CT Exhs. 2022.)

After two days of repeated conversations with members of the media, friends, and family asking appellant about the possible sighting of Laci in Washington, at 10:02 a.m. on January 31, appellant called directory assistance for the phone number for the Longview Police Department. However, the wiretap monitoring of the call was disconnected by an incoming call on appellant's phone. (81 RT 15425-15426; People's Exhs. Nos. 207D, 207D7; 9 Supp. CT Exhs. 2025.)

At 11:23 that morning, appellant checked his voicemail messages again. One message was left by Rita Cosby from FOX News. While appellant listened to Cosby's message, he said, "Fuck you, Rita." (People's Exhs. Nos. 207D, 207D9; 9 Supp. CT Exhs. 2031.)

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[52]The trial court left it to the jury's determination if the sound at the end of the message was laughter, notwithstanding the "Ha...Ha...Ha" attributed to appellant in the transcript of the call. (81 RT 15424.)

A few minutes later, appellant spoke to his sales associate, Eric Olsen, at 11:25 a.m. (People's Exhs. Nos. 207D, 207D-9; 9 Supp. CT Exhs. 2031.) Appellant told Olsen that he was "hanging out by the airport" in case he needed to go up to Washington "real quick." (9 Supp. CT Exhs. 2033.) Information from appellant's cell phone records disclosed that appellant was in Atwater. (People's Exh. No. 207D1; 9 Supp. CT Exhs. 2009.)

On February 1, appellant called his sister-in-law's phone number and was put through to her voicemail. While Janey Peterson's prerecorded message can be heard in the background, appellant said aloud, "Unbelievable . . . $100 tax to go to Mexico?" He then whistled. (People's Exhs. Nos. 207D, 207D16; 9 Supp. CT Exhs. 2041.)

On February 3, while listening to a message Rita Cosby from FOX News left on his voicemail, appellant said aloud: "It's tough to come back now." (People's Exhs. Nos. 207D, 207D18; 9 Supp. CT Exhs. 2045.) As Cosby was leaving her message, appellant could be heard to say, in a mocking tone, "Rita Cosby I'm a real nice lady." He erased Cosby's message before she finished speaking. (People's Exhs. Nos. 207D, 207D18; 9 Supp. CT Exhs. 2045.)

That same day, appellant left a message for a female friend and told her that he had not returned her calls because "[f]or the past, ah four days or so, I went to ah, grief counseling um, it was out in the hills, no phones."[53] (People's Exhs. Nos. 207D, 207D19; 9 Supp. CT Exhs. 2046.)

Appellant also called the Longview Police Department and spoke to a detective. Appellant introduced himself and said, "I've called a few times, but um . . . I'm glad to finally get to speak to you." (People's Exhs. Nos.

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[53] The timeline showing appellant's calls and his whereabouts during the relevant time period would seem to contradict his assertion that he had been out in the hills with no phone service. (People's Exh. No. 207D1; 9 Supp. CT Exhs. 2009.)

207D, 207D20; 9 Supp. CT Exhs. 2047.) After speaking to the detective, appellant phoned the Modesto Police Department and informed Lieutenant Aja that he wanted to view the videotape purportedly showing Laci. (83 RT 15865.)

On February 4, investigators shut down the first wiretap operation of appellant's phones because, during a recent conversation, appellant told his sister-in-law Janey Peterson that his phones were tapped. Appellant was careful not to reveal his location during that call. (81 RT 15523-15524.)

19. *Appellant's affair is revealed*

a. *Early January 2003: Frey confronts appellant about being married, but appellant tells Frey that Laci is "fine" with the affair*

On January 6, investigators decided that it was time for Frey to confront appellant about being married to the missing woman. (93 RT 17718; 102 RT 19068.)

So, at the instruction of investigators, Frey left a message for appellant intimating that she had received troubling information from a friend who knew something and had become concerned for Frey's well-being. (77 RT 14768-14769.) Doing damage control, appellant phoned Frey and told her the wife that he said he "'lost'" was, in fact, missing. (7 Supp. CT Exhs. 1602-1603; People's Exhs. No. 195R, 196R.) Appellant denied having anything to do with his wife's disappearance, but he told Frey that although she deserved an explanation, he could not discuss the matter. (7 Supp. CT Exhs. 1604.) Appellant did not discourage Frey when she said she might consider contacting authorities. (80 RT 15187-15189.)

In a later conversation with Frey on January 6, appellant said:

> Our hope, and it's a sad hope, is that . . . well, I mean we need a tip, that's why we have such a big reward. And we just hope that someone is holding her for *her* child and that we can, you know, get her back with a tip.

(7 Supp. CT Exhs. 1634; People's Exhs. No. 195S, 196S1, emphasis added.) He went on to say, "I think we will find her well and with *her* child . . . ." (7 Supp. CT Exhs. 1647, emphasis added.)

When appellant spoke to Frey the next day, he told Frey that he still hoped for a future with her. (7 Supp. CT Exhs. 1688; People's Exhs. No. 195T, 196T1.) A little later in the conversation, the following exchange took place:

> FREY: But I'm saying now was Laci aware of the situation about me?
>
> [APPELLANT]: Yes.
>
> FREY: She was?
>
> [APPELLANT]: Yeah.
>
> FREY: Really? How did she respond about it?
>
> [APPELLANT]: *Fine.*
>
> FREY: Fine?
>
> [APPELLANT]: *Yeah.*

(7 Supp. CT Exhs. 1705; People's Exhs. No. 195T, 196T2, emphasis added.)

In fact, during a conversation on January 8, appellant told Frey that he shared news of the affair with Laci after appellant's first date with Frey in November. (8 Supp. CT Exhs. 1748; People's Exhs. No. 195U, 196U.) Later in the call, this exchange took place:

> FREY: So did you love Laci and your baby?
>
> [APPELLANT]: I love Laci. I loved Laci, no question. And she doesn't . . .
>
> FREY: Yeah, but . . . go ahead.
>
> [APPELLANT]: She doesn't deserve to be missing.

(8 Supp. CT Exhs. 1761.)

b. *Police confront appellant about the affair that has become public*

On January 15, authorities decided to tell the Rocha and Peterson families about appellant's affair with Frey because a media publication was going to break the news. (94 RT 17775.) Detectives Buehler and Brocchini advised the Rocha's, while Detective Grogan flew to San Diego to meet with appellant's parents. (94 RT 17776-17777.) The Rocha's agreed to begin taping their conversations with appellant. (94 RT 17777-17778.)

Laci's family's relationship with appellant became strained after they learned of appellant's affair with Frey. They no longer supported him. (47 RT 9144.) Terri Western, whose daughter Stacey was close friends with Laci, decided to close down the volunteer center after she learned of the affair. (86 RT 16417.)

c. *Appellant lies repeatedly to Diane Sawyer during a nationally televised interview and maintains that Laci knew about his affair*

Appellant hid his affair from everyone. Neither Laci's family nor her close friends were aware of appellant's affair with Frey. (45 RT 8890; 46 RT 8979; 47 RT 9121-9122; 54 RT 10521.) Nor did appellant's father did know about the affair until police revealed its existence during a private conversation. (88 RT 16867-16868.) Appellant's close friends Gregory Reed, Mike Richardson, and Aaron Fritz did not know about the affair with Frey. (75 RT 14441; 101 RT 19005, 19009.)

Appellant lied when confronted about the affair. He told Detective Brocchini that he was not having an affair. (2 Supp. CT Exhs. 308.) Appellant told the same lie to Detective Grogan when Grogan asked about an affair. (93 RT 17708, 17713-17714.) Appellant lied to Ron Grantski when Ron questioned him. (47 RT 9121.) Appellant lied to Brent Rocha

about an affair. (47 RT 9270-9271.) As stated, appellant went so far as to suggest that a photo which depicted him with Amber Frey was doctored in some fashion to include him. (46 RT 8955, 9021.)

Yet, appellant maintained to Amber Frey and ABC's Diane Sawyer that Laci knew about the affair. (7 Supp. CT Exhs. 1705; People's Exhs. No. 195T, 196T-2 [Frey]; 11 Supp. CT Exhs. 2657 [Sawyer].)

In his interview with Sawyer for "Good Morning America," which aired in late January 2003, appellant lied and said that he told police "immediately" "the first night" about his affair with Frey. (94 RT 17799, 17818; People's Exhs. Nos. 131A [tape], 270 [transcript]; 11 Supp. CT Exhs. 2656-2657).

Appellant also told Sawyer that he revealed the affair to Laci in early December. (11 Supp. CT Exhs. 2657.) Hearing appellant's explanation about Laci's purported reaction, Sawyer asked appellant, in a somewhat incredulous tone: "Do you really expect people to believe that an eight and a half month pregnant woman learns her husband has had an affair and is saintly and casual about it, accommodating, makes a peace with it?" (People's Exh. No. 131A; 11 Supp. CT Exhs. 2657.) Appellant replied: "Well, yeah, you don't know—no one knows our relationship but us." (11 Supp. CT Exhs. 2657.) Appellant told Sawyer that he told Laci because it was the right thing to do. (11 Supp. CT Exhs. 2657.) Yet, appellant confirmed that he continued his relationship with Frey even after purportedly telling Laci. (11 Supp. CT Exhs. 2657-2658.)

In the second segment of the Sawyer interview that aired on January 29, appellant described his marriage to Laci as "glorious." (People's Exhs. Nos. 131B (tape), 270 (transcript); 11 Supp. CT Exhs. 2659). Sawyer then pointed out that appellant had not mentioned his unborn son. Seconds

passed and then appellant, devoid of emotion, said, "Hmm. . .that was—it's so hard." With regard to the nursery, appellant said, "Can't go in there."[54] (People's Exh. No. 131B; 11 Supp. CT Exhs. 2659). When Sawyer asked appellant about whether he loaded something large into his vehicle on Christmas Eve morning, he said he did, but they were large market umbrellas. (11 Supp. CT Exhs. 2660.) Appellant explained: "Because it was raining, put in warehouse." (11 Supp. CT Exhs. 2660.)[55]

After watching the broadcast of the interview, Detective Grogan phoned appellant. During their conversation, appellant admitted that he lied when he told Sawyer that he had disclosed the affair to authorities. (94 RT 17808; People's Exh. No. 271A; 11 Supp. CT Exhs. 2669 ["they caught me answerin' a question about that I told you about a girlfriend ah—is not true. We both know that."].)

Other portions of Sawyer's interview with appellant aired on ABC's "Prime Time" on August 4, 2003, after appellant had been arrested. (People's Exhs. Nos. 131C [tape], 270 [transcript].) Again, appellant lied to Sawyer and stated that, two days after Laci went missing, he told Amber Frey that he was married.[56] (People's Exhs. Nos. 131C (tape), 270 (transcript); 11 Supp. CT Exhs. 2663.)

The video segments were played for the jury. (94 RT 17805-17806.)

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[54] Appellant apparently did go into the nursery to store numerous items. (94 RT 17851-17852.)

[55] This would appear to conflict with appellant's separate statements to Detectives Grogan and Brocchini that he twice forgot to put the umbrellas in the warehouse on Christmas Eve and that they stayed in his truck to and from the Berkeley Marina. (93 RT 17714 [Grogan]; 2 Supp. CT Exhs. 300 [Brocchini].)

[56] As stated previously, Frey found out about appellant's true marital status, and his connection to the missing Modesto woman, from friends at a party on December 30, 2002. (60 RT 11729; 76 RT 14711; 79 RT 15122.)

d. *Appellant continues his relationship with Frey until authorities instruct her to discontinue contact*

As January and February wore on, Frey continued taping her conversations with appellant. (See People's Exhs. Nos. 198, 199A-H.) During their conversation on January 28, Frey brought up appellant's recent statement during the television interview that he was not in love with Frey. (8 Supp. CT Exhs. 1886; People's Exhs. No. 198, 199H.) Appellant responded, "Yeah. I thought that might bother you." (8 Supp. CT Exhs. 1886.) Appellant told Frey that he was coached to reply that way and that he actually said more positive things after that, but the positive statements about Frey were edited out. (8 Supp. CT Exhs. 1886.)

On February 7, appellant suggested that he and Frey get away to his friend's lake house in Southern California. (8 Supp. CT Exhs. 1900-1902; People's Exhs. No. 200, 201B.)

On February 10—Frey's birthday—appellant told her to go to a certain location because he had left a package for her there. (78 RT 14863.) Inside, among other items, was a necklace. (78 RT 14866.)

On the morning of February 19, at the direction of investigators (102 RT 19071), Frey told appellant that they should stop talking to each other. Appellant agreed. (8 Supp. CT Exhs. 1945; People's Exhs. No. 200K, 201K.)

20. *Appellant's Christmas Eve trip to the Bay*

a. *A slow day at the Marina with few boaters*

According to Berkeley Marina employees who worked on December 24 2002, it was a cold, cloudy, windy, and somewhat rainy day on the Bay. (62 RT 12065, 12088, 12111.) There were very few people at the marina. (62 RT 12066, 12083, 12099.) Christmas Eve was typically a slow day, with few, if any, boaters. (62 RT 12066, 12086-12087, 12095-12096,

12133.) There were no bookings for fishing trips out of the marina that day (62 RT 12100) and only

three boat launch fees were collected from December 23 through December 27 (62 RT 12108).

b. *Appellant's fishing gear contradicted his claim that he went fishing*

As mentioned earlier, on December 8, 2002, the Peterson's home computer was used to search fishing-related web sites, some of which pertained to striped bass and sturgeon fishing. (75 RT 14399-14400, 14402-14404.) Yet, on December 24, when Officer Letsinger asked appellant what type of fish he had been hoping to catch on the Bay that morning, appellant could not answer the question. (50 RT 9796-9797.) And, when appellant had dinner with Sharon and Ron on January 14, 2003, appellant did not answer Ron's question about the type of bait appellant used when he went sturgeon fishing on the Bay. (46 RT 9034.)

Based on appellant's assertion that he was on the Bay to fish, the prosecution called expert angler Angelo Cuanang to testify about fishing in San Francisco Bay. (71 RT 13739.) Cuanang had been fishing for about 40 of his 48 years. (71 RT 13738.) He and his brother co-authored several books on fishing in the Bay: one on fishing for striped bass and two on sturgeon fishing. (71 RT 13738-13739.) Cuanang also had numerous articles published in fishing magazines and was a presenter at the International Sportsmen's Exposition. (71 RT 13739-13740.)

Cuanang was very familiar with sturgeon fishing on the Bay having caught thousands of the fish. (71 RT 13740.) In Cuanang's opinion, the area around the Berkeley Marina was not good for sturgeon fishing. (71 RT 13753.) He explained that in December most of the sturgeon were

running in the northern part of San Francisco Bay known as San Pablo Bay.[57] (71 RT 13745-13746.)

Cuanang pointed out numerous problems with appellant's fishing equipment as it related to fishing for sturgeon: 1) the one functional fishing rod had a line weight of 18 to 20 pounds which was too light for fishing for sturgeon[58] (71 RT 13757); 2) the lure was appropriate for fresh water black bass, but not for sturgeon because it was not heavy enough to be used in the Bay where currents moved swiftly (71 RT 13756-13757); 3) live bait was preferred to fishing lures (71 RT 13746-13747); 4) typically sturgeon fishing required a landing net or some type of snare system (71 RT 13750-13751); and, 5) the homemade cement weight was insufficient to anchor appellant's boat because there was nothing on the weight that could grab on to the bottom of the Bay to keep the boat from drifting (71 RT 13754, 13757; People's Exh. No. 72).

Additionally, although appellant told Detective Brocchini that he had been trolling for fish on the Bay (2 Supp. CT Exhs. 295), Cuanang explained that it was illegal to troll for sturgeon. (71 RT 13747.)

As for striped bass, Cuanang stated that the best time to fish was spring through early fall in San Pablo Bay. (71 RT 13755.) The same fishing equipment that was used for catching sturgeon could be used to fish for striped bass since both types of fish fed on the bottom of the Bay during winter months. (71 RT 13755.) Therefore, according to Cuanang, appellant's equipment was also not suitable for catching striped bass.

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[57] People's exhibits numbers 171 A through C show the location of San Pablo Bay relative to where appellant said he went fishing near the Berkeley Marina.

[58] With respect to other fishing rods, one was new with the tag still on it and no fishing line. Another had no handle and was not functional. (71 RT 13758.)

Although one of appellant's lures could be used for striped bass, live bait was used in winter months since striped bass fed at the bottom of the Bay in the winter. (71 RT 13762; People's Exh. No. 74.) The other problem with appellant's lure was that it could only sink five to eight feet into the water—not deep enough to reach striped bass feeding at much lower depths at the bottom of the Bay. (71 RT 13763-13764). Appellant's other lures were used for rock fishing or fishing near deep reefs in the ocean, not on the Bay. (71 RT 13762.)

c. *Appellant never mentions that he went fishing*

Appellant spoke briefly to his good friend Gregory Reed around 2:30 p.m. on December 24, but appellant did not mention that he had just been fishing on the Bay. (75 RT 14425, 14436-14437.) Afterward, appellant then spoke to his father twice by phone that afternoon at 2:40 and 2:45. (88 RT 16835-16836.) They discussed appellant's plans for that evening, but appellant never mentioned that he had just been fishing at the marina. (88 RT 16865.)

d. *Appellant had other more convenient options for fishing*

Stanislaus County District Attorney's Office investigator Kevin Bertalotto researched fishing locales near Modesto. He identified at least 11 freshwater fishing areas within a range of 9 to 60 miles from appellant's residence. (86 RT 16561-16564; 88 RT 16796; People's Exh. No. 217.)

According to Ron Grantski, there were plenty of good fishing spots in and around Modesto. (47 RT 9099-9101.) He had asked appellant to go fishing on numerous occasions, but appellant only accepted the offer once. (47 RT 9103-9104.) After that trip, appellant told Grantski to keep appellant's expensive fishing pole at Ron's house. (47 RT 9106-9107.) And, although Grantski went fishing on Christmas Eve, he was an avid fisherman and fished often. (47 RT 9110; 100 RT 18789.)

21. *A-boy-called-Sue sort of thing*

On April 11, 2003, while he was in the San Diego area, appellant looked into purchasing a 1990 Saab convertible from Mario Ruvalcalba. (101 RT 18963.) After arriving at a verbal agreement with appellant about the purchase price and transfer, Ruvalcalba completed his portion of the requisite paperwork. (101 RT 18964.) In completing the buyer's portions of the documentation, appellant wrote down his mother's name. (101 RT 18966, 18969-18970; People's Exh. No. 286 [sealed].) Appellant also signed the documents in his mother's name. (101 RT 18968.) Ruvalcalba did not ask appellant about this at the time because Ruvalcalba did not look at the paperwork until after appellant had left. (101 RT 18970.) Ruvalcalba ultimately sold the car to another individual who had previously expressed interest. (101 RT 18965.)

The next day, April 12, appellant negotiated the purchase of a Mercedes from Michael Griffin. (101 RT 18976.) Again, appellant wrote "Jacqueline Peterson" as the buyer on the DMV documents. (101 RT 18977; People's Exh. No. 277.) Griffin asked appellant if he was buying the car for his wife. (101 RT 18977.) Appellant replied, "'No, that's my name.'" (101 RT 18977.) Griffin then asked appellant if that was a "French thing" like "Jacques." (101 RT 18978.) Appellant responded, "'No, it's kind of a boy-named-Sue type thing. That's what my parents hung me with. I go by Jack.'" (101 RT 18978.) Griffin asked appellant if he had a driver's license. (101 RT 18978.) Appellant gave Griffin a driver's license number and said it was from Florida, which Griffin wrote down on a piece of paper, including the expiration date appellant provided. (101 RT 18978-18979; People's Exh. No. 288.) Appellant paid for the car with thirty-six $100 bills. (101 RT 18980.)

22. *Laci's and Conner's bodies wash ashore*

a. *April 13, 2003: Conner*

On April 13, Michael Looby and his wife were walking their dog along the shoreline area of Bayside Court in the city of Richmond. They were looking for a place where their dog could swim. (61 RT 11871.) It was low tide and as they walked along the beach and over a rocky area toward the marsh, they saw a small baby's body on the beach. (61 RT 11873-11874, 11880.) It was apparent the baby was dead. (61 RT 11881.) The body was later identified as that of Conner Peterson. (70 RT 13599.) Conner's left arm was attached, but his right was partially severed. (61 RT 11931-11932.) Conner's head was intact. (61 RT 11932.) There was a twine-like substance around his neck (61 RT 11933-11934)[59] and what appeared to be vegetation stuck to the body (62 RT 12038-12039). Conner's body was badly decomposed. (62 RT 12017.)

Looby recalled that the day before there had been a strong storm in the area. (61 RT 11884.) A fair amount of debris was around Conner's body. (61 RT 11884-11885.) Looby was surprised by how far the debris field extended up from the shore. (61 RT 11885.)

Neither Looby nor his wife had a cell phone, so they had workers in the area call 911. (61 RT 11882.) The Richmond Fire Department received the alert at 4:49 p.m. (61 RT 11905.) When the fire department arrived a few minutes later, Looby took them to the body. (61 RT 11882.) Richmond Fire Department Captain Erik Newman put in a call to the

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[59] A senior criminalist at the state Department of Justice crime laboratory later analyzed the material and opined that it was most consistent with polyethylene—a man-made plastic material typically used in packaging materials. (86 RT 16451-16452.)

Richmond Police Department and then with other fire department personnel preserved the scene until police arrived. (61 RT 11901-11903.)

Police sealed off the area, contacted witnesses, and searched for evidence. (61 RT 11905.) Officer Tod Opdyke, the first responding police officer, observed that Conner's body was located within the high tide water line, as was the debris that surrounded his body. (61 RT 11922, 11942.) Opdyke opined that Conner's body was likely submerged at high tide. (61 RT 11922.)

Fellow officer Brian Gard recalled a large storm in the area the night before. (61 RT 11976.) As a result, the tides rose higher than what was typical. (61 RT 11986.) Gard explained that when debris came in on the tide, it became trapped along the beach and breakers as the water moved back out. (61 RT 11977, 11986.) The tidal area where Conner's body was found was connected to San Francisco Bay. (61 RT 11987.)

The first low tide in the area on April 13 occurred at 4:04 a.m. and the second was at 4:23 p.m. (61 RT 11979.) When the Richmond Fire Department received the emergency call on the report of a baby down at 4:49 p.m. (61 RT 11905), it was less than 30 minutes after the afternoon low tide.

b. ***April 14, 2003: Laci***

The following morning, around 11:15 a.m., Alena Gonzalez was at the dog park at Point Isabel with her family and their dogs. (61 RT 11990; 62 RT 12004.) Point Isabel was situated along the San Francisco Bay shoreline in the city of Richmond—part of the East Bay Regional Parks District. (93 RT 17553-17554.) After the dogs were let off their leashes, they ran ahead. Gonzalez and her family followed behind. (61 RT 11992.)

On the beach, near the water, Gonzalez observed another dog that appeared to be focused on something. (61 RT 11993.) Gonzalez realized it was a human body. (61 RT 11993.) The body, which was partially clothed

(65 RT 12724), was later identified as that of Laci Peterson. (70 RT 13598.) Gonzalez had her father and sister stay with the body while Gonzalez went to call for police. (61 RT 11994.) When the fire and police departments responded, Gonzalez led them to Laci's body, which was partially submerged in the water. (61 RT 11995, 11998.)

The area around Laci's body was littered with debris. (62 RT 12053; 93 RT 17563.) A bag with a Target[60] logo was found in the area, but it was not near Laci's body. (62 RT 12053-12054, 12060.) An officer with the East Bay Regional Park District Police Department observed that the bag smelled like it had been in the water for a long period of time (93 RT 17572, 17576)—like seaweed and algae (93 RT 17582)—and typical of smells on the shoreline (93 RT 17582). Nonetheless, police collected the bag because it had duct tape on it, as did Laci's body. (93 RT 17583.)

Contra Costa County Coroner investigator Deputy Leo Martin, along with other officers, transferred Laci's body onto a sheet and then placed it in a vinyl bag. (62 RT 12045.) Deputy Martin transported the body to the Coroner's Office. (62 RT 12045.)

The area along the Bay shoreline where Laci's body was recovered was less than a mile from where Conner's body was found. (64 RT 12625-12626; People's Exh. No. 280 [aerial view showing proximity].) The distance from Brooks Island, where appellant said he went fishing, to where

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[60] The company manufactured cementitious products for use in the construction industry. The company had no affiliation with the well-known retailer of the same name. (91 RT 17241.) A company representative identified the bag as one used to cover pallets of its product ("poly cap bags"). (91 RT 17244.) The company had supplied 5000 pallets for the seismic retrofit of the Richmond-San Rafael Bridge. The materials were shipped directly to the job site. (91 RT 17245-17246.) The contractor maintained the pallets in a holding yard and barges transported the pallets on San Francisco Bay to the bridge. (91 RT 17248.) After the poly cap bags were removed, they were considered garbage. (91 RT 17246-17247.)

Laci's remains were located was about one and one-quarter miles. It was the same distance from Brooks Island to Conner's body. (64 RT 12625; People's Exh. No. 280.)

Although the bodies had yet to be identified, after the female body was discovered on April 14, Detective Jeff Soler from the Richmond Police Department surmised that the Modesto Police Department should be notified. (93 RT 17617.)

Detective Grogan was informed about the bodies. (96 RT 18051.) The police department had a plan in place in the event Laci's and Conner's bodies were found. (96 RT 18052.) Other detectives were dispatched to attend the autopsies, while Grogan secured authorization for a second wiretap on appellant's phones to try and identify his location. (96 RT 18055.) Grogan wanted to find appellant before the DNA test results were completed on the bodies. (96 RT 18056-18057.)

c. *Appellant never returns Sharon Rocha's call about discovery of the bodies or calls Detective Grogan to ask about the developments*

On April 14, after Sharon Rocha learned about the recovery of the bodies, she called appellant on his cell and asked him to call her right away. He never did. (46 RT 9035-9036.)

Although media coverage was intensifying after the bodies washed ashore, appellant never phoned Detective Grogan to inquire about those developments. (96 RT 18066.)

23. *Condition of Laci's and Conner's bodies*

What remained of Laci's body was clothed with a bra, underpants, and portions of what appeared to originally have been tan-colored slacks,

which had deteriorated to the extent that they resembled shorts.[61] (69 RT 13498.) However, there still remained "some decayed fabric clumps" that were adhered to the lower portion of the right leg. (69 RT 13498.) The clothing was in the normal position of wear. (69 RT 13499.) A criminalist who later examined Laci's clothing found barnacles on what remained of Laci's slacks. (90 RT 17066.) Laci's clothing contained no rips or tears. (90 RT 17065-17066.) Nor was there any blood or other biological fluids on the clothing. (90 RT 17081.)

As for extraneous material, there were four stray hairs on various parts of the body, a couple of pieces of plant material, and a piece of red plastic. (69 RT 13501.) Additionally, there was a piece of gray duct tape that was adhered to the slacks in the waistband area and which draped down across the right thigh. (69 RT 13501.) The duct tape was approximately 15 inches long. (69 RT 13501-13502.) Decomposing tissue and barnacles were adhered to the tape. (90 RT 17068-17072.)

The plastic bag with the Target logo that was recovered from Point Isabel was also inventoried. It had duct tape on it, but the tape did not contain barnacles. (69 RT 13523; 90 RT 17074-17077.) There was also a clump of loosely tangled duct tape that was separate from the plastic bag, which was likewise inventoried. (69 RT 13523.) According to the criminalist who examined the materials, there was no decomposing tissue

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[61] "Motherhood Maternity" was the brand of slacks Laci was wearing when her body was discovered. (91 RT 17400; People's Exh. No. 51 [sealed].) A company employee identified the style, size, and color from the style number on the clothing label. (50 RT 9955-9956.) They were cropped pants. (50 RT 9956.) Laci purchased the cropped slacks on August 30, 2002. (50 RT 9972-9973; 52 RT 10139-10140.) According to the stock-keeping unit ("SKU") identifier on the receipt, the color of the cropped slacks was "stone." (50 RT 9984.) Laci's sister Amy described the color of the slacks that Laci had been wearing on the evening of December 23 as cream-colored, Capri slacks. (45 RT 8847.)

on the bag or the duct tape associated with bag. (90 RT 17077.) The bag did not smell of decomposing tissue. (90 RT 17078, 17168.) Nor did the thread counts in the duct tape match that of the tape found on Laci's body. (90 RT 17077.)

There were a total of 12 hairs or hair fragments found on Laci's body. (70 RT 13667.) Only two were human: one brown pubic hair with a root was one of the four loose hairs collected from Laci's body and the other was a brown pubic hair fragment found on the duct tape. The rest were animal hairs. (70 RT 13667.) Using microscopic analysis, a criminalist compared the pubic hair and hair fragment to reference samples taken from Laci and determined the pubic hair and hair fragment were consistent with the reference samples. (70 RT 13619, 13667, 13694-13696, 13704.)

With respect to the twine-like material found around Conner's neck, the criminalist who examined it noted there was a bow knot at one end. (90 RT 17084-17085.) There were no barnacles on the twine. (90 RT 17090.)

Debris found with Conner's body included purple gloves, food packaging materials, and caution tape. (90 RT 17092-17093.) The twine-like material found around Conner's neck was similar in composition to plastic material found in the debris pile associated with Conner's body. (90 RT 17094-17095, 17149.)

24. *Autopsy results*

Forensic pathologist Doctor Brian Peterson conducted the autopsies on Laci and Conner on April 14, 2003, for the Contra Costa County Coroner's Office. (91 RT 17394-17395.) At the time of trial, Dr. Peterson had performed approximately 5,500 autopsies in his career. (91 RT 17391.) He was board-certified in the areas of anatomic and clinical pathology and forensic pathology. (91 RT 17391.) Dr. Peterson had testified as an expert in forensic pathology between 100 and 200 times. (91 RT 17391-17392.)

In each of those cases, he was called upon to provide a cause of death. (91 RT 17392.)

a. *Dr. Peterson's conclusion that Laci died while still pregnant*

At the time of the autopsy, Dr. Peterson did not know the body was that of Laci Peterson. (91 RT 17395-17396.) There were a number of body parts missing: head, neck, forearms, and the left lower leg. (91 RT 17396.) Much of the soft tissue and internal organs were also absent from the body. (91 RT 17396-17397.) The only internal organ still in the body was the uterus. (91 RT 17397.) Peterson attributed the postmortem changes to a number of possible causes including the effects of the water, being acted on by bacteria, and feeding on the body by marine life. (91 RT 17397.)

During the first portion of the examination, Peterson reviewed the x-rays of Laci's body. He looked specifically for any foreign material such as bullets or fragments of a knife. (91 RT 17398-17399.) The x-rays disclosed no significant findings. (91 RT 17399.)

As for the clothing that remained on Laci's body, her bra was in the normal position of wear and remained secured by two hook and loop fasteners. (91 RT 17399.) What was left of the light-colored slacks was also in the normal position of wear. (91 RT 17399-17400.) The button closure and zipper on the slacks was still in place, as was the drawstring cord in the waistband. (91 RT 17400.) The crotch of the slacks was shredded and stony mineral deposits were mixed in with fibers that remained. (91 RT 17400.) As stated, there was duct tape on the front of the body, which adhered to the waistband of the slacks and around one leg, and which extended up to the zipper area of the slacks. (91 RT 17400, 17417.) Underpants were on the body beneath the slacks, but the portion of the underwear covering the buttocks was missing. (91 RT 17400.) The

front portion was intact and part of the elastic band was in place around each leg. (91 RT 17400.)

During the course of his external examination of Laci's body, Dr. Peterson observed that the only skin remaining was a small amount on the left thigh. (91 RT 17401.) Skeletal muscle was exposed in some places; in other places there was still some fat beneath the skin. (91 RT 17401.) From the waist up, there was very little soft tissue remaining, exposing bones, including ribs, vertebrae, and shoulder blades. (91 RT 17404.) Body fat had undergone postmortem changes and was now adipocere. (91 RT 17404.) Dr. Peterson explained that adipocere resulted when body fat body was exposed to a cold, moist environment. The fat turned into a "crumbly white material" and appeared soapy. (91 RT 17404, 17415.) A marine environment could cause this change, developing over a period of weeks to months. (91 RT 17405.) Aside from changes related to decomposition, there was no evidence of injury to Laci's external genitalia. (102 RT 19029-19030.) The presence of adipocere, mineralization, barnacles on the thigh bone, and stony deposits on her clothing, confirmed that the body had been in a marine environment. (91 RT 17408-17409.)

Dr. Peterson did not observe any tool marks on Laci's joints, which indicated to him that tools were not used to dismember parts of the body. (91 RT 17406; 92 RT 17433.) However, tidal action and marine animal feeding could explain removal of the extremities. (92 RT 17406.) Dr. Peterson explained that gravity would have caused the body to have been floating face down with the arms and legs hanging down. (91 RT 17407.) As the body sank to the bottom or near bottom of the Bay, the tides and currents could have dragged the body along the bottom such that the extremities were susceptible to coming into contact with things at the like rocks and debris. (91 RT 17407.) The combination of decomposition and

tidal action, even without animal feeding, could have dislodged the limbs, head, or neck from the body. (91 RT 17407-17408.)

Internally, Laci's uterus—the only organ remaining—was substantially enlarged corroborating the fact of her pregnant state. (91 RT 17410, 17424.) Dr. Peterson explained that the uterus remained intact because it was relatively protected down in the pelvic area and, therefore, resistant to degradation. (91 RT 17424.) The top portion of the uterus was abraded and open. (91 RT 17411.) For the upper portion of the uterus to have become abraded, portions of the abdominal wall would have to have been missing, including the peritoneum. (92 RT 17431.) Dr. Peterson also noted the uterine wall was very thin. (91 RT 17411.) The condition of the uterus caused him to conclude that the uterus had contained a baby. (91 RT 17411.)

Dr. Peterson determined that Laci died while pregnant. (92 RT 17432.) He explained that after birth, the uterus shrinks back down to the size of an orange or apple. (92 RT 17431-17432.) The fact that Laci's uterus did not reduce in size indicated that the baby was still inside when she died. (92 RT 17432.)

Dr. Peterson also concluded that the baby did not pass through the birth canal because the cervix and lower uterus—the birth canal—were closed. (91 RT 17411-17412.) Also, there was no incision near the pubic bone or in the uterus, or other tool marks, that would indicate a Caesarian-section birth. (91 RT 17412, 17423; 92 RT 17516.) Since the fundus was open at the top, Dr. Peterson concluded the baby exited through the top of the uterus. (91 RT 17412, 17423.)

The doctor reviewed the autopsy photos and described what each depicted, highlighting what he had previously explained about his observations and conclusions. (91 RT 17413-17423.) In several photos, Dr. Peterson pointed out that two upper ribs were fractured and another was

frayed at the point where there would have been cartilage. (91 RT 17418-17422.) He could not determine if the fraying occurred before or after death. (91 RT 17420, 17428.)

Dr. Peterson removed the right tibia and some of the remaining skeletal muscle, which were sent to the California Department of Justice's DNA lab for analysis. (92 RT 17434.) Normally, fingerprints, teeth, blood, urine, or fluids in the eye would be used for identification purposes, but that was not an option in this case. (92 RT 17435.)

b. *Dr. Peterson's conclusion that Conner could have lived had he been permitted the chance*

Dr. Peterson conducted Conner's autopsy first. He did not know the identity of "Baby Doe" at the time of the autopsy. (92 RT 17438-17439, 17461.)

Conner's body was decomposed and had undergone a great deal of postmortem change. (92 RT 17439.) Autolysis and maceration had occurred.[62] (92 RT 17438.) Although Conner's organs were inside his body, "they were remarkably liquefied." (92 RT 17441.) However, there were no body parts missing. (92 RT 17440.)

As for observations about the external portion of the examination, Dr. Peterson noted postmortem tearing that involved one shoulder and which extended across the baby's chest to his abdomen.[63] The body was soft and highly pliable. (92 RT 17442.) Dr. Peterson opined that the tearing could

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[62] Autolysis occurs when chemicals in the body (i.e., acid in the stomach or enzymes in the pancreas) facilitate organs digesting themselves. (91 RT 17425.) Maceration is the process of decomposition by which the body becomes liquefied as a result of being immersed in fluid over a period of time. (92 RT 17441.)

[63] There was no bleeding associated with the tearing, which indicated that the injury occurred after Conner's death. (92 RT 17443-17444.)

have been caused by forces acting on the body when it was washed ashore. (92 RT 17442.) There was no clothing on the body. (92 RT 17442.) About one-quarter of an inch of umbilical cord was still attached to Conner's body. (92 RT 17457.) The end of the cord was soft, friable (crumbly), and falling apart. There was no evidence of a knot tied in the cord or that it had been cut. (92 RT 17457.)

There was a piece of plastic tape around Conner's neck. One end near Conner's left shoulder had a knot in it. There were about two centimeters between the tape and Conner's neck. (92 RT 17444.) The skin underneath the tape was not damaged, nor were the organs. (92 RT 17445.) Because there were no external or internal injuries associated with the tape, Dr. Peterson concluded that the tape was debris that had become associated with the body. (92 RT 17445.) Had the tape been a ligature purposefully placed around the neck, there would have been evidence of injuries associated with such use. (92 RT 17445-17446.)

Conner's colon contained meconium. As Dr. Peterson observed, it "was a clue to me that likely he had died before the birthing process, before he had a chance to get rid of [the meconium]." (92 RT 17460.) Peterson explained:

> In the colon there was a material call meconium. It's a dark green, kind of thick, it's a pasty fluid. And typically when newborns have their first bowel movement, that's what you see is meconium. [¶] Sometimes when babies are in distress in the uterus they can actually dump that in the uterus, which can cause lung problems later. But in Conner's case the meconium was still where it belonged, in the colon.

(92 RT 17459.)

Based on his examination, including the fact that there was nothing anatomically wrong with Conner's body, Dr. Peterson concluded that Conner would have survived outside the womb. (92 RT 17446-17447.) Given the condition of Conner's body, Dr. Peterson could not determine a

cause of death. (92 RT 17457, 17460-17461.) However, the manner of death was ruled a homicide. (92 RT 17463.)

As he did in the case of Laci's autopsy, Dr. Peterson explained the photos associated with Conner's autopsy. (92 RT 17448-17451.)

Conner was positively identified later in the week with DNA testing of skeletal muscle and marrow from his thigh bone. (92 RT 17461.) DNA analysis confirmed that Conner was appellant's son. (70 RT 13598-13602.)

c. *Comparison of the bodies and Dr. Peterson's conclusion that Laci's death caused Conner's death*

Compared to Laci's body, Conner's body was in much better condition. (92 RT 17452.) Although Conner's body exhibited decomposition associated with soaking in fluid, in Dr. Peterson's view, it did not suffer the effects of exposure to animal feeding and tidal effects that Laci's did. (92 RT 17453.) He opined that as small and as soft as Conner's body was, if he had spent substantial time unprotected in the water, he would have been eaten. (92 RT 17453.)

Comparing his examination of both bodies, including the condition of Laci's uterus relative to the rest of her body, Dr. Peterson concluded that Conner was protected by Laci's uterus. (92 RT 17453.) Over time, the uterus was abraded open and Conner's body was released into the Bay, and eventually washed ashore. (92 RT 17453-17354.) Dr. Peterson further opined that it took some time for Laci's abdominal wall to wear away to reach the point where the uterus was exposed and even more time to wear away the top of the uterus permitting Conner to be released from Laci's body. (92 RT 17454.)

Although the exact time of Laci's death could not be determined, Dr. Peterson estimated that "it was months." (92 RT 17471.)

> [T]ruly, I believe that whatever – for whatever reason that Laci met her demise, it was her death that caused Conner's death; that

> he was still in the uterus. And I base that, again, on the difference in the bodies in terms of presence and absence, feeding, no feeding, protection, no protection.

(92 RT 17461.)

Although Dr. Peterson could not definitively rule out the chance that Conner was born alive and protected by something else in the marine environment (92 RT 17474, 17493), the doctor stated: "My opinion is that when Laci was deposited in the marina environment, Conner was still within Laci. And ultimately, because of the effects of environment, animal feeding and decomposition, Laci's front degraded sufficiently to allow access of the uterus to the outside world, and ultimately Conner." (92 RT 17469.)

On the subject of the possible weighting of Laci's body prior to being released into the Bay, Dr. Peterson opined that Laci's remains were consistent with disarticulation caused by a marine environment and, likewise, consistent with her limbs having been anchored. (92 RT 17470.)

d. *The condition of Laci's body precluded identifying the cause of her death*

The considerable postmortem changes to Laci's body precluded isolating a cause of death. (91 RT 17396-17398; 92 RT 17438.) The doctor explained:

> My challenge with Laci is that so much was missing. Could there have been damage before she died to the head, to the neck, to organs in the chest? There most certainly could have, but I simply found no evidence that I could point at and say [t]his must correlate to antemortem injury. [¶] No bullets, no cut marks, just nothing that I could make into lethal damage. [¶] The toxicology was also not productive. We found some decomposition chemical and some caffeine. We probably all have caffeine. [¶] So at that point I was left with undetermined. Nothing positive there that I could make cause death.

(92 RT 17464.)

When queried about the possibility that Laci was strangled to death, Dr. Peterson stated:

> Well, the challenge there is that -- one principle of forensic pathology is that parts of the body that are injured tend to decompose quicker, for a number of reasons. Could there have been damage to her neck or to her face? Sure. But the problem was her neck and her face were missing, so I simply couldn't say that in a positive way.

(92 RT 17465.)

With respect to possible manifestations of death by suffocation, Dr. Peterson explained:

> Asphyxial-type death in general can be associated with more fluid inside the lungs, which is a reaction to asphyxia. And somebody who is going through that process can certainly have bloody foam coming out of their nose and mouth. But not always. [¶] In terms of – there's not really a nice way to put this, but in terms of ways of killing people that aren't going to leave that kind of material outside the body, certainly smothering is one of those ways that's more likely not to produce blood and fluid outside the body.

(92 RT 17466.) Dr. Peterson also pointed out that strangulation with a ligature and poisoning were other modalities of inflicting death that could leave little, if any, evidence of death external to the body. (92 RT 17466.) In some cases, however, even this manner of death might result in postmortem urination, defecation, or purging of stomach contents.[64] (92 RT 17497-17498.)

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[64] Dr. Peterson expounded, however, that purging typically occurred after a matter of days. (92 RT 17507.)

25. *Examination of the bodies by a forensic anthropologist confirms that Laci was in the water for a minimum of three months*

After the autopsies were completed, Dr. Allison Galloway, a forensic anthropologist, was brought in by the Contra Costa County Coroner's Office to try and determine two things: how long Laci had been in the water and Conner's age. (92 RT 17509-17510, 17520-17521.)

After examining Laci's remains, in addition to corroborating many of the findings made by Dr. Peterson, Dr. Galloway noted that the rib fractures were perimortem defects. (92 RT 17525.) This meant that the two rib fractures, which Dr. Galloway described as "clean fractures" and which she distinguished from the "very frayed" portion of what remained of a third rib, could have occurred from the time period prior to Laci's death before healing began, until the time postmortem when the bones lost their resiliency. (92 RT 17525-17526.)

Based on an examination of Laci's bones, the nature and extent of the decay of remaining tissue on the body, the presence of adipocere in large amounts, and the amount of hemoglobin in the muscle tissue, Dr. Galloway determined that Laci had been in the water for a minimum of three months and as long as six months. (92 RT 17528.)

26. *Conner's age, viability, and estimated date of death*

Laci's first prenatal appointment with the medical staff at the Hera Medical Group was on July 11, 2002. (51 RT 10104-10105.) Based on the date of Laci's last menstrual period, along with findings from her first-trimester ultrasound, Laci's due date was initially estimated to be February 10, 2003. (51 RT 10105-10106, 10111; 91 RT 17235-17236.) After her second ultrasound at 20 weeks, the estimate was revised to February 16. (91 RT 17228, 17236.) However, as Doctor Esther Towder, Laci's gynecologist, explained: if the results of the second ultrasound put the due

date within seven days of the original due date, as was the case here, the first date was still considered the projected delivery date. In Laci's case, the six-day differential was within a "very normal range," according to Dr. Towder. (91 RT 17239.)

Laci had a routine prenatal check-up with Dr. Towder mid-afternoon on December 23, 2002. (91 RT 17728, 17234.) The pregnancy was progressing normally and Laci reported that Conner was very active. (51 RT 10125-10126; 91 RT 17230.) He was positioned head down. (91 RT 17230.) Based on ultrasounds, Conner's age on December 23 was 32 weeks. (51 RT 10117; 53 RT 10394-10395.) However, if the date of Laci's last menstrual cycle and her fundal height were incorporated into the calculation, Conner's gestational age on that day was 32 weeks 6 days. (53 RT 10393-10394.)

In the opinion of Dr. Towder, the baby would have been viable had he been born on December 23. (91 RT 17230.) As stated above, Dr. Peterson also shared this view. (92 RT 17446-17447.)

Utilizing post-autopsy anthropological measurements of the growth of Conner's limb bones, Dr. Galloway, the forensic anthropologist, estimated Conner's age to be within a range of 33 to 38 gestational weeks.[65] (92 RT 17529-17530.) She arrived at this estimate using studies that correlated age with bone measurements.[66] (92 RT 17529.)

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[65] Dr. Galloway's estimate utilized the mother's last menstrual cycle. (92 RT 17532.) Although Dr. Peterson initially thought the baby was full-term at nine months (92 RT 17472-17474), his estimation was based on crude measurements (92 RT 17479-17480).

[66] Dr. Galloway noted that the tables she used for her calculations were generated by studies involving children of Eastern European descent and that the tables needed to be adjusted for American babies. (92 RT 17510-17511, 17532.) According to Dr. Galloway, the baby's environment—including the mother's health—could affect the accuracy of

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Doctor Greggory Russell DeVore, a specialist in high-risk obstetrics and maternal-fetal medicine, was asked by the prosecution and the Modesto Police Department to assist in determining Conner's gestational age and the approximate date that Conner died. (95 RT 17861.) Dr. DeVore saw about 6,000 pregnant patients each year, who were referred to him by approximately 700 different OB/GYN doctors in the greater Los Angeles area. (95 RT 17858.) He estimated that he had conducted 75,000 ultrasound examinations of pregnant women in his career. (95 RT 17859, 17933.)

Dr. DeVore reviewed Laci's obstetric medical records, along with Dr. Galloway's report and conclusions. (95 RT 17861, 17872.) Dr. DeVore explained the importance of the first-trimester ultrasound in determining the baby's age and the estimate of the time of conception. (95 RT 17877-17880.) In his opinion, the first ultrasound measurements were the "gold standard" to use as reference points and ensured greater accuracy in determining the age of the fetus. (95 RT 17864, 17946-17947.) The question to be answered was how much did Conner grow since the first-trimester ultrasound and what that growth meant in terms of Conner's age at the time of his death. (95 RT 17955.)

Dr. DeVore took three separate measurements of Conner's femur bone using a method that was very similar to the first-trimester ultrasound.

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the age calculation. (92 RT 17533.) If the mother was in an adverse environment with poor nutritional levels and disease, the baby was typically shorter, which caused for some variation from the studies. (92 RT 17533.) Dr. Galloway accounted for this variation by providing an age range. (92 RT 17534.) Although Dr. Galloway's measurements initially indicated an age closer to 35 or 36 weeks, she explained that she used a standard interval of two weeks on either side of the estimated age so as to include 95 percent of children in the range. (92 RT 17545-17546.)

(95 RT 17868-17870, 17888-17889.) Dr. DeVore's measurements resulted in a "very, very good" correlation with the ultrasound measurements. (95 RT 17869.)

He also compared his measurement results to Dr. Galloway's and the difference was quite small. In Dr. DeVore's opinion, it was a "very precise correlation" despite the fact that he and Dr. Galloway used different approaches. (95 RT 17871-17872, 17916.) Dr. DeVore explained that the study upon which Dr. Galloway based her interpretation of her measurements involved babies who had died due to some pathology, which would have affected growth rates. (95 RT 17914.)

Dr. DeVore estimated the date of Conner's death as December 23, 2002. (95 RT 17881.) Using the femur bone measurement from the first ultrasound as a reference point,[67] as well as the three measurements DeVore obtained himself, the doctor initially determined three estimated dates of death that were within a three-day range: December 21, 2002, based on a measurement of 64 millimeters and a gestational age of 32 weeks, 8 days; December 23, based on a measurement of 64.7 millimeters and a gestational age of 32 weeks, 6 days; and December 24, based on a measurement of 65 millimeters and a gestational age of 33 weeks, 2 days.[68]

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[67] Dr. Devore explained at length that, in his view, using the crown-rump measurement from the first ultrasound was the most reliable reference point in determining a baby's gestational age; not the femur length from the second ultrasound. (95 RT 17933-17942.) If Dr. Devore had used the femur length measurement from Laci's second ultrasound, four days would be added to Conner's estimated date of death. (95 RT 17942-17943.)

[68] With respect to the fact that the evidence established that Conner was alive at least until the late afternoon or early evening of December 23, which meant that one or perhaps two of Dr. Devore's measurements were incorrect, he explained that the focus was on a timeframe within a couple of days of when Conner most likely died. The timeframe suggested by Dr.

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Dr. DeVore averaged these measurements to arrive at a date of December 23, based on 64.5 millimeters and a gestational age of 33 weeks, 1 day. (95 RT 17880-17883, 17960.)

27. *Movement of bodies in the Bay*

Doctor Ralph Cheng, a senior research hydrologist for the U.S. Geological Survey, testified as an expert in hydrology and fluid dynamics as it concerned the processes underlying the movement of water in San Francisco Bay, including the ways in which the tides and currents affected objects in the Bay. (100 RT 18858, 18866.)

Dr. Cheng explained that on April 12, 2003, the day before Conner's body washed ashore and two days prior to Laci's body coming ashore, there was a major wind event that created a great deal of energy in the water in the Bay. (101 RT 18897.) Dr. Cheng also explained that in the spring, the low tides around the Bay shoreline were exceedingly low. (101 RT 18895.) In fact, a very low tide occurred right after noon on April 12 in the area where Laci's and Conner's bodies were recovered. (101 RT 18896.) The water level in that area was very shallow and would rise to no more than about two to five feet. (101 RT 18902-18903.) In Dr. Cheng's view, the energy generated in the water by the strong winds on April 12 had sufficient force to move bodies from shallower areas of the Bay, if they were not weighted down. (101 RT 18904-18905.)

The Modesto Police Department asked Dr. Cheng if he would be able to work backward from where Laci's and Conner's bodies were recovered to help determine where in the Bay Laci's body had been deposited. (101 RT 18900-18901.) Using equations derived from the U.S. Army Corps of

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Devore's measurements was consistent with other information concerning when Conner died. (95 RT 17904-17905.)

Engineers Coastal Engineering Handbook, and calculations of hour by hour movement of the Bay waters based on wind drift, Dr. Cheng concluded that the location where Laci's body was likely deposited was within a quarter-mile square area that lay between the Berkeley Marina and Brooks Island. (101 RT 18912-18915; People's Exh. No. 284.) Dr. Cheng pointed out that his calculations were based on the highest probabilities and were not conclusive determinations. (101 RT 18914, 18930-18931.) Dr. Cheng also noted that if Laci's body had been placed in deeper water, it would have washed out to the ocean or, perhaps, behind Angel Island. (101 RT 18916-18917.)

Dr. Cheng was able to estimate a trajectory for the movement of Conner's body to shore, but not Laci's. (101 RT 18925.) This was because of the difference in size of the bodies, as well as the possibility that Laci's body may have been weighted down initially, which would have caused her body to behave differently in the water. (101 RT 18913, 18942-18943.)

28. *Appellant changes his appearance, huddles with his family in Southern California, and plays cat-and-mouse with law enforcement*

Detective Grogan had been working on an arrest warrant. (96 RT 18061.) In addition to what the investigation had uncovered at that point, Grogan explained that his decision to seek a warrant was based on the fact that Laci's and Conner's bodies were found in the same general location where appellant said he was during the time Laci disappeared; the clothing on Laci's body did not match what appellant said she was wearing when he left; the autopsy results suggested Conner was in utero until shortly before the bodies were recovered and there was no indication from the autopsy that Laci had given birth; and the extent of decomposition of Laci's body correlated with her having been in the Bay for months. (96 RT 18062-18063.)

As Grogan pursued authorization for the arrest warrant to issue, it was decided to continue surveillance of appellant so that he did not flee the area before he could be arrested. (96 RT 18063.) Special Agent Alex Quick of the California Department of Justice was one of the agents assigned to surveil appellant while he was in the San Diego area in mid-April 2003. (95 RT 17968.) Agents located appellant on April 16. (95 RT 18003.) Appellant was driving two different cars, neither of which were previously associated with him: a Mercedes and a Lexus. (95 RT 17974.) Appellant's brother was driving appellant's truck. (95 RT 17972-17973.)

Compared to Quick's earlier observations of appellant in late January and February, appellant had grown a thick goatee and mustache and his hair, including his eyebrows, was now an orange-blonde color.[69] (95 RT 17968-17970, 17972; People's Exhs. Nos. 276A-E.)

On the morning of April 16, Deputy Ronald Schweitzer of the San Diego County Sheriff's Office was also assisting in the surveillance of appellant. (99 RT 18619-18620.) Schweitzer was in an unmarked car. (99 RT 18620.) At one point during the surveillance, appellant pulled up alongside Schweitzer's car and asked the deputy what agency he was with and whether it was state or local. Schweitzer responded that he did not know what appellant was talking about. (99 RT 18620-18621.) Appellant shook his head and said, "Right." (99 RT 18621.) Appellant drove forward

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[69] According to Amy Rocha, who had frequently cut appellant's hair in the past, while appellant may have grown a goatee before, he had never dyed his hair a different color. (45 RT 8838-8840.) Appellant told his good friend Mike Richardson that his hair changed color after swimming in Aaron Fritz's pool. (101 RT 18990-18991.) Aaron Fritz, who had been good friends with appellant since high school, was not aware of any time that appellant had been in his pool. (101 RT 19008-19009.) In any event, Amy explained that appellant's hair color would not change that drastically from mere exposure to chlorine in a swimming pool. (46 RT 8952-8953, 8959-8960; People's Exh. No. 16.)

a bit and then appeared to write down the license plate number of the deputy's vehicle. (99 RT 18621.) Appellant told the deputy that he saw the deputy following him all morning. (99 RT 18621.)

A few minutes later, appellant walked up to Special Agent Kevin Kolbe as Kolbe was sitting in his unmarked vehicle. (100 RT 18800.) While standing at the driver's side window, appellant said something to the effect of: "'That was a real nice block-off maneuver that that guy in the green van did.'" (100 RT 18801.) Kolbe told appellant that he did not know what appellant was talking about, although Kolbe was aware that the person in the green van was an undercover officer also surveilling appellant. (100 RT 18801.) Appellant then recited the license plate number of the van and Kolbe repeated again said that he did not know what appellant was talking about. (100 RT 18801.) Appellant asked Kolbe what agency Kolbe worked for—state or local. (100 RT 18801.) When Kolbe reiterated that he did not know what appellant was talking about, appellant said, "'Yeah, whatever,'" in a disgusted tone and walked off. (100 RT 18801.)

Special Agent Sonia Ramos was also part of the team surveilling appellant on April 16. (100 RT 18833.) Ramos suspected appellant knew they were surveilling him. On one occasion, when appellant was on foot and Ramos was following him, appellant doubled back and ducked down an alley. (100 RT 18834.) Ramos paralleled appellant's path, walking along a different street. When the agent arrived at the corner, appellant was standing there waiting and smiling. (100 RT 18834.)

Another time, while appellant was driving a white Honda Accord, Ramos tried to follow him in her vehicle, but appellant managed to get behind Ramos. As Ramos came to a stop sign, appellant, who was still behind her, honked his horn. (100 RT 18835.)

On the morning of April 18, Agent Quick rejoined the surveillance team at 7:00. (95 RT 17975.) Appellant was driving through a gated

community in Escondido, north of San Diego. He was in his recently purchased Mercedes. (95 RT 17976.) Appellant proceeded south on Interstate 15 to the Ocean Beach area. Quick surmised that appellant knew he was being followed because right as Quick caught up to appellant on the freeway, appellant exited the freeway and then immediately got back on. (95 RT 17977.) Seeing Quick, appellant extended his middle finger. (95 RT 17978.) Quick continued to follow appellant through a residential area. During that time, appellant engaged in odd driving maneuvers such as stopping on the side of the freeway, U-turns, three-point turns, and alternating between fast and slow driving speed. (95 RT 17978.)

Appellant left the residential area around 7:45 a.m. and over the next hour headed north on Interstate 5 to Orange County. (95 RT 17980; People's Exh. No. 277 [showing route taken].) Appellant and the surveillance team passed through a border checkpoint near San Clemente. (95 RT 17981.) Over the police radio, Agent Quick heard that appellant exited the freeway and was now traveling north on State Route 57. (95 RT 17982.) While on route 57, appellant jumped from lane to lane, which signaled to Quick that appellant was trying to determine if he was being followed. At that point, there were 9 or 10 unmarked cars trailing appellant. (95 RT 17982, 17990-17991.) Special Agent Claude Jubran saw appellant clapping his hands up by his right shoulder as appellant went from the first lane, traveled across all the other lanes to the shoulder of the freeway, and then re-entered the freeway. (100 RT 18824-18825.) In Jubran's opinion, appellant was applauding the agents for keeping up with him. (100 RT 18828.)

Appellant next took State Route 91 east toward Riverside County. From there, appellant entered Interstate 15 and headed south. It was 10:00 a.m. (95 RT 17983.) Appellant stopped to buy gas in Temecula. (95 RT 17984.) Afterward, he got on the freeway and made his way back to San

Diego County from where he had started. (95 RT 17984-17985.) The 160-mile excursion ended when authorities stopped appellant on his way into the Torrey Pines Golf Course in La Jolla. (95 RT 17986, 17999; 100 RT 18846.) The decision had been made to arrest appellant for murder. (95 RT 17986.)

Detective Grogan explained the decision to arrest appellant at that point was based on appellant's change of appearance, appellant's conduct toward the agents, which suggested he was aware that he was being surveilled, and a report that someone matching appellant's description had previously eluded the surveillance units when they attempted to follow. (96 RT 18058-18060.) Grogan and other detectives arrived in San Diego early in the morning on April 18—the morning of appellant's arrest. (96 RT 18063.)

29. *April 18, 2003: Appellant is arrested with $15,000 in cash, outdoor equipment, and foreign currency*

After appellant was handcuffed, he asked, "'Have they found my wife and son?'" (95 RT 18005-18006.) Detective Grogan noticed that appellant was not wearing his wedding ring at the time. (96 RT 18066.)

Among the items police found in the Mercedes were the following:[70] nearly $15,000 in cash (102 RT 19106); foreign currency[71] (102 RT 19100-19101); a ticket stub for a Mexican exhibit at a local museum from the preceding day (102 RT 19102-19103); two driver's licenses—one belonging to appellant and the other to his brother John (102 RT 19095); a credit card belonging to another family member (102 RT 19096); a check

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[70] The contents of the Mercedes were documented in photographic exhibits. (See People's Exhs. Nos. 293-1 through 293-46, found in Volume 12 of the Supplemental Clerk's Exhibits Transcript.)

[71] Judging from the photo, it would appear to be Mexican currency. (People's Exh. No. 293-29.)

written out to appellant by a family member dated April 12, 2003 (102 RT 19101); a backpack containing folding knives, scissors, razor blades, a water purifier, cooking utensils, pots and pans, binoculars, a hammock, a camp ax, and an unopened package with a snorkel and mask (102 RT 19097-19099); four cell phones (102 RT 19101); a shovel (102 RT 19099); a considerable amount of clothing including a snowboarding jacket, shoes, pants, sweatshirt, shirts, shorts, sweaters, ties, belt, and socks (102 RT 19099-19100); a fishing rod and reel (102 RT 19099); a photo of appellant and Laci (102 RT 10987), and a MapQuest printout dated April 16, 2003, which corresponded to Amber Frey's place of employment (102 RT 19085-19087).

30. *Further searches in the Bay for remains and other evidence*

In May 2003, searchers returned to the Bay with sonar equipment to try and locate additional remains or other evidence. (62 RT 12206.) Twelve law enforcement agencies and three civilian side-scan sonar operators participated in the search. (62 RT 12227-12228; 64 RT 12627.)

Teams searched from May 16 to May 23 under very poor conditions—including strong undercurrents and near-zero visibility for divers—but found nothing related to the investigation. (62 RT 12207, 12211-12112, 12265; 63 RT 12268, 12271; 64 RT 12627.) There was also a great deal of garbage underneath the Bay, some of which was encountered during the search. (63 RT 12247, 12260-12265.)

In June 2003, the search management team plotted a targeted area with a perimeter of one and one-quarter miles in length and one and three-

quarters mile down.[72] (64 RT 12629; 65 RT 12729.) This area was then broken down into one-quarter mile grids. (64 RT 12630.) Global positioning system coordinates were used to pinpoint search targets. (64 RT 12632-12633.) To aid in the searches, authorities rented a Remote Environmental Unit ("REMUS"), which was a self-propelled sonar unit. (64 RT 12644.) The advantage to using REMUS was that it could proceed in a straight line, unlike the side-scan sonar towed by the boats. (54 RT 12645.)

Searchers returned to the Bay in July, September, and October 2003, but did not find anything of evidentiary value pertaining to the case. (62 RT 12206; 65 RT 12709-12710; 66 RT 12844.)

All told, the Bay search teams covered approximately 75 to 80 percent of the targeted area: one and one-eighth mile east to west and one and one-half miles north to south. (64 RT 12710.)

31. *The prosecution's evidence refuted appellant's suggestion that Laci was kidnapped while walking in the park, as well as the defense theory that authorities rushed to judgment*

Throughout the prosecution's case-in-chief, defense cross-examination attempted to bolster appellant's suggestion to authorities that Laci walked McKenzie on Christmas Eve morning and was abducted by transients, or several men in a van who may have also been responsible for a burglary that occurred in the neighborhood a couple of days after Laci disappeared, or individuals associated with a later burglary of the Peterson residence. And, relatedly, the defense attempted to portray the

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[72] As Bay search coordinator Detective Hendee explained, the targeted area was the equivalent of 21 football fields across and 39 football fields down, end zone to end zone. (64 RT 12629, 12631.)

investigation's focus on appellant as a misguided rush to judgment.[73] The prosecution's evidence addressed these theories.

a. *The investigation initially focused on those closest to Laci, including appellant*

Initially, police followed up on tips and investigated Laci's family members. As lead detective Craig Grogan explained, oftentimes the suspect was someone who knew the victim. (93 RT 17644-17645.) Detective Grogan asked Amy Rocha to verify her whereabouts at the time in question. (46 RT 8953-8954; 93 RT 17715.) Amy supplied authorities with her employment records. (94 RT 17808.) Investigators also inquired into Brent Rocha's whereabouts and talked to Brent's employer to ascertain whether he had an alibi. (47 RT 9211-9212; 93 RT 17715.) Authorities also talked with Brent's wife Rose about his comings and goings during the time in question, as well as her own. (47 RT 9297.) Investigators also asked Rose about appellant and Laci's marriage. (47 RT 9297.)

With respect to Laci's family members, Detective Grogan investigated whether it was possible that the inheritance played a role in

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[73] Throughout the course of the prosecution's case-in-chief, the trial court permitted defense counsel, during cross-examination of prosecution witnesses, to elicit a large number of hearsay statements. (See, e.g., 98 RT 18476-18511 [hearsay statements from several individuals concerning purported sightings of Laci where none of the individuals testified].) The prosecution repeatedly expressed its concerns to the trial court. (See, e.g., 58 RT 11371-11379; 59 RT 11523-11529) The court permitted the questioning since the stated objective was to enable the jury to assess the reasonableness of the police investigation. (58 RT 11371-79; 59 RT 11523-11529.) The trial court provided the jury with occasional reminders that, aside from one instance, the evidence could not be considered for its truth. (58 RT 11379-11380; 98 RT 18561.) The court also permitted the prosecution to present evidence that the hearsay declarants were alive and, thus, available to testify. (59 RT 11537.) After the defense guilt-phase argument, the prosecutor reminded the jury of the judge's admonitions concerning the hearsay testimony. (111 RT 20524.)

Laci's disappearance. (46 RT 8954; 93 RT 17716.) However, by mid-January, Grogan had ruled out a financial motive based on financial documentation and other information. (94 RT 17771.)

Before December 24, 2002, it was difficult for Laci's family to envision appellant hurting her. (46 RT 9063-9064; 47 RT 9144, 9262.) However, that changed after December 24. Laci's mother Sharon explained that while she had been quite fond of appellant (46 RT 9063), after Laci disappeared, appellant's demeanor was troubling to her. (47 RT 9154.) In Sharon's view, appellant did not show the level of concern one might expect from a husband and expectant father. (46 RT 9073.) He also avoided being alone with Sharon. And, when Sharon and appellant were at the volunteer center together, he would never elaborate on his comings and goings. (46 RT 9073.) Sandy Rickard also noticed that when Sharon tried to talk to appellant, he would say that he had to leave. (47 RT 9308.)

Early on, authorities considered whether appellant may have been responsible for Laci's disappearance. (75 RT 14428.) As Detective Grogan explained, one the of the goals of the investigation at the outset was to eliminate appellant as a suspect, if possible. However, evidence gathered over time pointed increasingly toward appellant's involvement. (99 RT 18650-18651.) Grogan observed that the nature of his contact with appellant changed over time. As the investigation wore on, appellant asked mostly about the return of certain items of property. (99 RT 18628.) At best, he asked about the status of the investigation on a monthly basis. (99 RT 18628-18629.)

By January 21, 2003, Grogan, compiling all of the information they knew at the time, theorized that Laci's body was in the Bay. (94 RT 17781-17782.) He detailed for the jury how and why authorities came to that conclusion. (94 RT 17782-17788.) So, Grogan decided that the search for Laci needed to be limited San Francisco Bay. (94 RT 17788-17789.)

However, if tips came in with information about a specific location, authorities followed up on it. (94 RT 17789.)

b. *Laci's compromised physical condition in the latter stages of her pregnancy*

Laci stopped teaching in November 2002 because she had become very uncomfortable later in her pregnancy. (46 RT 8973.) Indeed, the Peterson's housekeeper noticed that, during the latter part of 2002, Laci seemed tired and sometimes sat with her feet up. (44 RT 8669.)

Although Laci enjoyed taking McKenzie for walks early in her pregnancy, in late October or early November of 2002, Laci told her mother and sister that she had become dizzy and vomited during a walk. (45 RT 8832; 46 RT 8946-8949, 8982, 8985.)

During a prenatal check-up on November 6, Laci reported to her obstetrician, Dr. Endraki, that she was experiencing symptoms of dizziness and lightheadedness when she walked. (53 RT 10376.) It happened twice that very day and once during the prior week. (53 RT 10376.) Endraki recommended that Laci stay hydrated and refrain from exercise. However, if she did exercise, she should do it later in the day. (53 RT 10376.)

On November 8, Laci called the doctor's office to report that she was experiencing shortness of breath while walking. (53 RT 10378.) Her mother Sharon sensed that after this incident, Laci took her doctor's advice more seriously. (46 RT 9053.) During this same time period, Laci complained to Sharon about her feet swelling, having back pain, and feeling tired frequently. (46 RT 8985.)

At a party on November 14, Laci told friends that she had to stop walking because she was getting nauseous and tired. (54 RT 10508-10509, 10552.)

On November 25, during another prenatal check-up, Laci complained of swelling in her extremities. (53 RT 10379.)

Over Thanksgiving, Laci accompanied appellant to Southern California for a baby shower for one of appellant's family members. (46 RT 8985, 8990.) While they were there, the couple went to Disneyland even though Laci was not feeling well and did not want to go. Due to her physical condition, Laci needed a wheelchair to get around in the park. (46 RT 8985-8986; 95 RT 18026.)

Although Laci did prenatal yoga during her pregnancy (46 RT 8935-8936; 54 RT 10585-10586), her yoga instructor Debra Wolski noted that as the pregnancy progressed, Laci was very uncomfortable (54 RT 10587). Wolski said that Laci was concerned that McKenzie might think Laci was upset with him because she never walked him anymore. (54 RT 10589.) Laci explained to Wolski that the last few times she walked McKenzie, she became dizzy and lightheaded. So much so that she had to cut her walks short. (54 RT 10589.)

A few weeks before she disappeared, Laci went to the movies with her mother and Sharon's good friend Sandy Rickard. (47 RT 9307.) Rickard recalled that Laci mentioned getting light-headed when she took her dog for a walk. (47 RT 9307.) Laci also complained about feeling tired and heavy. (47 RT 9307.)

On December 14, when Laci arrived at Stacey Boyer's house for a Christmas party, Boyer observed that Laci was exhausted. (54 RT 10511.) At the party, Laci told her childhood friend Lori Ellsworth that she was very tired. (54 RT 10554.) Laci also told Terri Western, Boyer's mother, that she was tired a lot and that it was hard for her to walk. (86 RT 16423.)

On December 20, Laci had a phone conversation with her good friend Rene Tomlinson and told her that she was feeling tired and ready for the baby to arrive. (54 RT 10576.) Laci went to her prenatal yoga class that day and, although she was able to negotiate the stairs that led up to the yoga studio on the second floor, Laci told her instructor that she was in pain

because she thought the baby had turned. (54 RT 10587; 97 RT 18233.) Laci's feet were very swollen. (54 RT 10588.)

Laci and appellant's neighbor Karen Servas last spoke to Laci on December 22. (48 RT 9416.) Laci told Servas that she felt tired and had almost fallen into the pool a couple of weeks prior because she was off-balance. (48 RT 9416.)

Individuals who saw Laci on December 23 observed that she seemed tired or complained of being tired. (44 RT 8668 [housekeeper]; 45 RT 8694-8695, 8708 [spa employees]; 45 RT 8832 [Amy Rocha]). Indeed, the Peterson's housekeeper Margarita Nava observed that on that day Laci was moving slowly. (44 RT 8668.) Also, at her spa appointment, Laci told owner Michelle Bauer that she was uncomfortable and having trouble sleeping. (45 RT 8710.) Spa employee Tina Reiswig noted that Laci did not seem herself that day. (45 RT 8695.)

Stacey Boyers talked to Laci for the last time around 4:45 p.m. on December 23. (54 RT 10512.) Laci said she was somewhat despondent about not being able to throw her traditional Christmas party. (54 RT 10512.) Laci told Boyers that she was tired all the time and every time she tried to do something, she had to stop and rest. (54 RT 10512.)

Inasmuch as appellant specifically suggested Laci went walking in La Loma park, the dirt trail leading from the park to Covena was steep (47 RT 9115-9116), and "[v]ery, very rough" (48 RT 9357-9358). One woman from the neighborhood explained that she could not negotiate the trail when she was pregnant because it was steep and uneven. (87 RT 16751-16752.)

c. *Purported sightings of Laci across the United States and overseas*

With regard to defense-elicited hearsay statements of purported sightings of Laci walking McKenzie on Christmas Eve morning in the park (see, e.g., 98 RT 18476-18511), the prosecution called numerous witnesses

in its case-in-chief to demonstrate that there may have been pregnant women—some with dark hair like Laci's[74]—walking alone or with their dogs in the area of La Loma park that morning, or who usually walked in the area, none of whom was Laci Peterson. (87 RT 16705-16714 [witness C. Van Sandt], 16732-16736, 16740-16741 [M. Dempewolf], 16743-16749 [J. Visola-Prescott], 16753-16755 [E. Guptill], 16760-16763 [J. Lear]; 88 RT 16802-16807 [K. Westphal], 16815-16818 [P. Mewhinney], 16830-16832 [J. Lee], 16835-16837 [D. Merenda], 16843-16845 [M. Martinez]).

In fact, a couple of these prosecution witnesses reported nothing out of the ordinary on Covena on Christmas Eve morning. Brian Lee left his home around 10:00 a.m. to go for a run reaching Covena around 10:15. (88 RT 16824.) He "didn't see a soul." (88 RT 16825.) Kim Westphal was walking with a neighbor that morning. Westphal estimated they reached Covena around 10:50 and walked past the Peterson residence. There was no activity on the street at the time. (88 RT 16807.)

There were at least 74 reported sightings of Laci, including sightings of her on San Francisco Bay on December 24. (94 RT 17761; People's Exhs. Nos. 267 [map showing Modesto area sightings], 268A [California sightings].) Also, there were numerous purported sightings of her in 26 states and overseas. (96 RT 18077; People's Exh. No. 268B [including Canada, Italy, France, and the Virgin Islands].) Only a few of the reported sightings fit the timeframe[75] and location, as authorities could best

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[74] See, for example, the different women depicted in People's exhibits numbered 223, 224, 229A.

[75] Based on appellant's statements, the physical evidence, and appellant's phone records from December 24, authorities narrowed the time frame that Laci would have gone for a walk—as appellant claimed she intended that day—to between 10:08 a.m. and 10:18 a.m. (96 RT 18075.)

(continued...)

determine. Most were not viable and none were corroborated. (94 RT 17661-17666.)

d. *The burglary at the Medina's residence*

Susan and Rodolfo Medina resided at 516 Covena, on other side of street from the Peterson's. (49 RT 9582-9583, 9585, 9617.) The Medina's left town on Christmas Eve 2002. When they returned home on December 26, they discovered their home had been burglarized while they were gone. (49 RT 9602-9608.) The burglars forced entry into the home. (49 RT 9721.) The master bedroom was somewhat ransacked and items were stolen, including a large safe. (49 RT 9712, 9716.) According to the investigating patrol officer, it was a typical grab-and-go robbery. (49 RT 9716.) Police were looking for an older light brown or tan van that might be associated with the burglary. (52 RT 10238-10240.) Two individuals were eventually arrested and most of the Medina's property was recovered. (53 RT 10335-10337.) During the burglary investigation, officers found nothing that connected the burglary to Laci's disappearance. (53 RT 10360-10361.)

e. *Homeless or transients in the area*

Susan Medina said she would occasionally see homeless individuals walk on Covena early in the morning coming from the Gospel Mission, which was about a mile away, and then head back later in the afternoon. (49 RT 9644-9645; 53 RT 10366.) However, Medina did not see any homeless individuals on the street before she and her husband left their

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(...continued)
Therefore, Laci would have needed to change out of the black slacks appellant said she was wearing when he left (given that tan slacks were found on her body), put on shoes and socks (appellant said she was barefoot when he left), put the leash on the dog, and have taken her walk by 10:18 a.m. when Karen Servas found McKenzie in the street. (96 RT 18076.)

house around 10:30 a.m. on Christmas Eve morning. (49 RT 9593, 9645-9646.) La Loma area neighbor Jill Lear explained that she walked her dog regularly around the Dry Creek Park area. During her walks she would see people who were homeless, but they never bothered her. (87 RT 16760-16763.)

f. *A van in the neighborhood on December 24*

During defense questioning of prosecution witness Detective Allen Brocchini, a hearsay statement was elicited that Kristin Reed—a neighbor and friend of Laci and appellant (58 RT 11397)—said during an interview in September 2003 (59 RT 11530), that although she was not sure, she may have seen a blue or brown van on Covena in the morning on December 24, around 9:39 when Reed left to go to the gym. (58 RT 11399-11402.)[76] However, Reed made no mention of a van on the street when she was first interviewed shortly after Laci's disappearance. (58 RT 11402.) In fact, Reed explained that her recollection could just as easily have been due to the power of suggestion generated by something she had read in the media.[77] (58 RT 11402-11403; 59 RT 11530; 99 RT 18680.)

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[76] Defense counsel elicited the same hearsay testimony during questioning of Detective Craig Grogan. (99 RT 18569-18570.) The trial court cautioned the jurors that the statement could not be considered for the truth of the matter. (99 RT 18569.)

[77] Neighbor Diane Jackson had given a statement to police on December 27, 2002, wherein she claimed to have seen a white van and three dark-skinned individuals on Covena at 11:40 a.m. on December 24 (99 RT 18682; 108 RT 20060-20061.) Consequently, information about a mystery van had been heavily reported in the media by the time of Kristin Reed's subsequent September 2003 interview with Detective Brocchini. (59 RT 11530-11531.)

g. *Burglary of the Peterson's home on January 19, 2003*

During his cross-examination of Detective Brocchini, defense counsel also elicited hearsay statements that in the early morning hours of January 19, 2003, Covena neighbor Amie Krigbaum called police after seeing a woman coming out of the Peterson's home carrying a bundle, which the woman put into the trunk of a white Honda Civic. (58 RT 11304-11306.) Krigbaum reported that it was the same woman who Krigbaum had seen walking the Peterson's dog. (58 RT 11307.) When police responded to the residence, they found a window broken, Christmas presents unwrapped, and the house rifled through. (58 RT 11304-11309.) The perpetrator was identified as Kim McGregor—a woman who had worked herself into a position of trust with the Peterson-Rocha families by helping out after Laci was first reported missing. McGregor sometimes took McKenzie for walks. (58 RT 11318-11319.) During McGregor's interview with police, she confessed to the burglary. (58 RT 11313.)

B. Defense Case

1. *The Medina residence burglary*

Officer Michael Hicks of the Modesto Police Department assisted in the investigation of the Medina residence burglary. (108 RT 20049.) A confidential informant provided information to a department detective, which led police to the arrest of suspects Todd and Pearce.[78] (108 RT 20055.) Hicks spoke to Steven Wayne Todd.[79] (107 RT 20015.) When police initiated questioning, the first thing Todd said was that the burglary

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[78] Mr. Pearce's name was also spelled "Pierce" in the Reporter's Transcript.

[79] The trial court admonished the jury that Todd's statements were not being offered for the truth of the matter. (107 RT 20015-20016.)

had no connection to the missing woman with the baby. (107 RT 20016.) Although Todd was initially confused about the date he and his associate Pearce committed the Medina burglary, the investigation confirmed that it occurred on the morning of December 26, 2002. (107 RT 20017-20018.) Officer Hicks related what Todd told him about the Medina burglary, including that Todd targeted the Medina residence because one car was missing from the driveway and there was mail in their mailbox. (107 RT 20018-20023; 108 RT 20057.) Hicks observed that both suspects were "very willing" to share information about the burglary. (108 RT 20053.)

2. *Appellant's use of concrete*

In January 2004, defense investigator Carl Jensen retrieved concrete samples from the driveway area at 523 Covena for further testing. (103 RT 19191-19198.) Jensen returned to the driveway with concrete expert Steven Gebler in September 2004 and observed Gebler remove additional samples of concrete from the same area of the driveway. (103 RT 19198-19200.) Neither Jensen nor Gebler took samples of the concrete used in conjunction with fence posts near the front yard area. (103 RT 19200, 19228.)

The defense employed Gebler to determine whether samples from the anchor, debris found in the bed of appellant's pick-up truck, and debris from the boat cover were consistent with samples taken from side of the driveway at 523 Covena. (103 RT 19247.) Gebler determined there was no difference in the composition of the samples taken from the driveway area relative to the anchor or the debris found in the truck or on the boat cover.[80] (103 RT 19263.) He disagreed with the conclusion of Mr. O'Neill, the

[80] The defense supposition was that appellant—after making one anchor—used the remaining concrete for improvements alongside the driveway and not for other anchors used to weigh down Laci's body. (110 RT 20409-20412.)

prosecution's expert, that the cement sample taken from the driveway by police on December 27, 2002, was not of the same composition as the anchor and debris. (103 RT 19286, 19296-19297.)

Nonetheless, Gebler conceded that changes could have occurred to the cement found in the driveway area between late December 2002, when police retrieved a sample, and January 2004, when Gebler obtained his samples (103 RT 19308).

Although Gebler was not a petrographer and did not conduct a petrographic examination of the concrete samples, Gebler explained that he did consult with a petrographer by the name of Dave Vollmer who did the testing and wrote a report. (103 RT 19276-19280.) Mr. Vollmer did not testify.

The parties stipulated that Vladimir Rodriquez—the Peterson's new next door neighbor on Covena—purchased several bags of concrete and placed them in the Peterson's driveway. (108 RT 20087.) Rodriguez intended to use the concrete to replace a fence post that supported the gate by the driveway. However, when the contractor removed the fence post, they found it was not in concrete. (108 RT 20087.) Rodriguez identified the bag of concrete in the photos labeled People's exhibit numbers, 295A through F, as belonging to him. (108 RT 20087.) The bag remained in the driveway for several weeks. Rodriguez does not know what happened to the bag of concrete, but assumed the contractor used it for something else. (108 RT 20087-20088.) Rodriguez did not have any concrete work done on the Peterson's property. (108 RT 20088.)

During direct examination, appellant's father, Lee Peterson, explained that he took photos of fishing boats at a lake near San Diego. (107 RT 19996; Defense Exhs. Nos. D9B1-D9B3.) Each boat had one cement anchor. (107 RT 19996; Defense Exhs. Nos. D9B1, D9B3.) However, on cross-examination, Lee acknowledged the boats were rowboats, the lake

was an inland lake—much smaller than San Francisco Bay—with no ocean access, and there were long ropes attached to each anchor.[81] (107 RT 20005-20007.)

3. *Appellant's motivation for getting a post office box*

James Cavallero worked for a fertilizer company and met appellant through a business transaction. (103 RT 19329.) Cavallero recalled that appellant contacted him shortly after November 7, 2002, about a check that Cavallero's company had written to appellant's company, which was stolen earlier in the month. (103 RT 19330.) Cavallero concluded that appellant's mailbox at the warehouse location—shared with other tenants—was not secure. (103 RT 19334.) So, Cavallero suggested to appellant that he get a post office box. (103 RT 19335.)

Cavallero was unaware that appellant did not get a post office box until nearly six weeks later. (103 RT 19337.) Cavallero was likewise unaware if appellant ever provided the post office box number to Cavallero's company. (103 RT 19337-19338.)

4. *Appellant's financial position*

Certified Public Accountant Martin Laffer reviewed financial documents pertaining to TradeCorp. (103 RT 19343-19344.) Laffer explained that appellant had no financial exposure relative to the losses that TradeCorp sustained. (103 RT 19348.) However, Laffer acknowledged that if TradeCorp failed, appellant would have become unemployed and that would have been compounded by the fact that Laci was not working during the latter stages of her pregnancy. (104 RT 19440-19441.) In any event, Laffer opined that TradeCorp was not having unexpected financial problems. On the contrary, it was a well-capitalized start-up. (103 RT

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[81] There was no long rope attached to the cement weight (also referred to as an "anchor") found in appellant's boat. (55 RT 10768.)

19350-19351.) Yet, Laffer conceded that TradeCorp documents disclosed that appellant was 50 percent short of his revised business plan projection for October 2002. (104 RT 19442-19443.)

When the prosecutor pointed out that appellant approved his own expenses on behalf of TradeCorp for reimbursement to himself, Laffer remarked that "[i]t's not uncommon." (104 RT 19436-19437.) Laffer acknowledged that appellant would sometimes charge personal expenses on TradeCorp's credit card. (104 RT 19457-19458.)

Laffer also reviewed documents pertaining to appellant's personal financial health and concluded that Laci and appellant were spending less than they were making. (103 RT 19355.) There was no indication the couple was living beyond their means. (103 RT 19361.) However, Laffer acknowledged that appellant's car insurance payments, which were not accounted for in the documentation, could affect the balance sheet. (104 RT 19437-19438.)

Although Laffer initially stated that appellant's credit card payments were timely (103 RT 19352), he conceded appellant had received notices from creditors about overdue payments (104 RT 19456). Laffer said that, as a forensic accountant, it would not necessarily cause him concern, but it was of sufficient interest that he made a note of it after reviewing appellant's financial information. (104 RT 19456.)

Regarding Laci's inheritance, Laffer concluded that appellant had nothing to gain if Laci or Conner were dead and could, therefore, discern no financial motive for killing them. (103 RT 19356-19357.) In fact, Laffer explained, appellant would have stood more to gain financially if Laci were

alive since her inheritance would have vested when she turned 30 years old.[82] (103 RT 19359.)

Appellant's mother Jackie testified that she received what was apparently a tax document from TradeCorp, mailed to her address, that showed appellant was paid $41,000 in the first four months of 2003. (107 RT 19977-19978; Defense Exh. No. D9A [sealed].)

5. *Laci's physical condition during pregnancy and her walking habits*

Jackie testified that during the December 2002 trip to Carmel, she and Laci walked "all over town" because the men took the car and went golfing. (107 RT 19974.) Although Laci and Jackie had another vehicle at their disposal, according to Jackie, neither she nor Laci could drive it because it was two feet off the ground and neither could fit behind the steering wheel. (107 RT 19983-19984.)

Jackie and Laci's walks around Carmel included going "up the hill" three blocks to shop in town. (107 RT 19975.) On December 18, they walked for a couple of hours in the morning during their shopping trip and then walked back to the hotel. (107 RT 19976.) Laci was able to walk, although "[s]he was slower." (107 RT 19976.) They also walked to the beach. (107 RT 19993.)

Defense investigator Carl Jensen testified that the distance to the beginning of the beach area from the hotel in Carmel where Laci and the Peterson family stayed was 1,419 feet and another 150 yards down to the water. (103 RT 19189.) Jensen stated that it was a steep 15 to 20 minute walk from the edge of the parking lot, where the sandy area began, to the waterfront and back. (103 RT 19189-19190.) The walking distance

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[82] As stated earlier, there was no evidence adduced as to whether appellant was aware of issues related to any survivorship interest he may or may not have had with respect to Laci's inheritance.

between Sachs department store and the hotel was about three-quarters of a mile. (103 RT 19191.)

Jackie acknowledged that parking was available at the shopping areas around Carmel, at the beach, and at the hotel. (107 RT 19985.) Jackie also acknowledged that, at the time, her lung function was compromised such that she required the assistance of supplemental oxygen. (107 RT 19985.)

District Attorney Investigator Kevin Bertalotto interviewed an individual named Chris Clark on April 23, 2004.[83] (105 RT 19667.) Clark called the District Attorney's Office after reading a story in a local paper that prosecutors intended to present evidence that Laci had not walked her dog for the two months prior to her disappearance. (105 RT 19668.) Clark told Bertalotto that, beginning on October 15, 2002, he saw Laci walk her dog eastbound on Encina, near Covena, five times between 8:00 and 8:30 a.m. (105 RT 19670-19672.) Clark described the dog as a Golden Retriever mix. (105 RT 19672.) He also thought he saw Laci walking the dog in the park by the creek. (105 RT 19672.) On three occasions, Clark saw Laci walking by herself. (105 RT 19672.) The last time he saw Laci out walking was two weeks before she went missing. (105 RT 19673.) Clark was certain it was Laci, as he saw her photos in the news. (105 RT 19674-19675.)

In talking with Clark, Bertalotto learned that Clark had a substance abuse problem and had been arrested three times for driving under the influence. (106 RT 19736.) Clark related that he had been in and out of residential treatment programs, his last ending on September 30, and was

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[83] The hearsay statements of Chris Clark elicited through Investigator Bertalotto were not offered for the truth of the matter, but to shed light on the reasonableness of the police investigation. (105 RT 19668.)

wearing an ankle bracelet because he was then under house arrest stemming from his most recent drunk driving offense. (106 RT 19736-19737.)

6. *The smell of the Target bag*

After Laci's body was discovered along Point Isabel, Officer Timothy Phillips of the East Bay Regional Park District Police Department was assigned the task of walking the area to look for items that might have evidentiary value. (105 RT 19572.) The standing order for the police department for a long period of time was to collect anything in the area where the remains were found and book any such item into evidence. (105 RT 19573-19574).

Phillips collected the Target bag, which was located on the other side of Hoffman Channel about 800 to 1,000 feet north of where Laci's body was recovered. (105 RT 19549-19551, 19558.) Phillips thought the bag important because a citizen had brought it to his attention. (105 RT 19553, 19557.) The bag was wedged in the rocks and concrete adjacent to the shoreline. Phillips had to dislodge it from the rocks. (105 RT 19577.) There was a piece of duct tape on the bag (105 RT 19552) and a heavy piece of metal entangled with the duct tape (105 RT 19555-19556). The metal piece contained barnacles and was very brittle. (105 RT 19578.) There were no barnacles on the duct tape. (105 RT 19578.)

In Phillips's view, the bag had an odor that was similar to Laci's remains. (105 RT 19554.) Phillips mentioned this observation to his sergeant and then to officers from the Modesto Police Department while at the coroner's office. (105 RT 19558-19559). However, Phillips did not record this observation in his report.[84] (99 RT 18663-18664; 105 RT

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[84] The prosecution initially subpoenaed Phillips. (105 RT 19599.) However, when representatives from the District Attorney's office interviewed him, Phillips mentioned that he had omitted something from

(continued...)

19581.) He explained that since the bag was found far from Laci's body, he did not want to overstate its significance. (105 RT 19582.) Phillips turned the bag over to a criminalist at the scene for testing. (105 RT 19582-19583.) Phillips acknowledged that he had been in the area of the remains for about seven hours. The smell was quite strong and was one that stayed with him for some time. (105 RT 19579.)

A professional dog handler that was on scene brought her cadaver dog over to the bag. (105 RT 19558, 19574-19575.) Phillips was not present when this occurred. (105 RT 19575.) The prosecution was permitted to elicit that Phillips was told the dog did not alert on the bag. (105 RT 19575-19576.) The information was not being offered for the truth of the matter, but was relevant to the reasonableness of the police investigation. (105 RT 19575.) Phillips did, however, record in his report that the cadaver dog did not hit on the bag. (99 RT 18664.)

7. *Scent trailing at the Marina*

Ronald Seitz and his certified trailing dog "T.J." were called out to the Berkeley Marina on December 28, 2002, as part of a mutual aid request. (105 RT 19603-19604.) Captain Boyer, who was overseeing the search and rescue teams at the marina, instructed Seitz to have T.J. work from a scent article associated with Laci to see if T.J. picked up a scent trail. (105 RT 19607.) Seitz elected to use a pink slipper after asking some preliminary questions. (105 RT 19608.) Seitz was told the glasses case was a spare and so Seitz thought the slipper would offer a better scent. (105 RT 19613.)

(...continued)
his report. (105 RT 19600.) The prosecution team told Phillips there would be further proceedings on the issue. (105 RT 19592.) The next day, the prosecution facilitated a meeting with Phillips and defense counsel so that Phillips could explain what he had left out of his report. (105 RT 19600.) Phillips spent most of the time at the meeting answering questions from defense counsel. (105 RT 19601.)

With regard to scent articles, Seitz said that, generally speaking, he was concerned about cross-contamination in any situation where a scent article was touched by anyone other than the dog handler. (105 RT 19624.) However, with reference to the particular scent articles used at the marina, Seitz offered that he did not have any specific information that suggested the articles were cross-contaminated with another person's scent besides Laci's. (105 RT 19625.) Seitz opted for the pink slipper because he thought it was the item least likely to have been contaminated. (105 RT 19626.) Seitz opined that even if appellant had handled Laci's sunglasses, the predominant or strongest scent on the glasses would still be Laci's. (105 RT 19657.) If there was contamination on the article and the source of the contamination was present (i.e., appellant), Seitz would expect the dog to follow the trail of the source of the contamination. (105 RT 19657.) However, since Seitz had no information suggesting there was cross-contamination on the sunglasses or the case, he could not speculate on whether his dog would have followed appellant's trail out of the marina. (105 RT 19658.)

At the marina, Seitz took T.J. to the boat ramp area because he believed that it was the area least likely to be intruded upon by vehicles, which could potentially degrade any scent that was present. (105 RT 19610.) Nonetheless, Seitz agreed that a viable alternative search strategy would have been to work the choke points of the parking lot area at the marina adjacent to the boat launch area. (105 RT 19661.) Seitz worked T.J. for about 90 seconds along the mouth of the boat ramp area on both sides. (105 RT 19615, 19651.) T.J. did not alert in that area. (105 RT 19611.)

Eloise Anderson and her trailing dog Trimble arrived near the end of Seitz's participation in the search at the marina. (105 RT 19615.) Seitz was not privy to where Anderson and Trimble began their search. He only

saw them come in from the west side of the marina, go down to the dock, and then end near the mouth of the boat ramp. (105 RT 19655.)

Seitz was aware that Anderson worked Trimble in the same area using a different scent item and Trimble had alerted. Seitz had previously opined that either dog could have been accurate on that particular day. (105 RT 19662.) He explained that dogs have different abilities and those abilities can vary from day to day. (105 RT 19663.) Seitz estimated that T.J.—like most trailing dogs—was accurate about 70 to 80 percent of the time. (105 RT 19640.) In any event, Seitz was clear that the efficacy of the dog's efforts was directly related to the competence of the handler's interpretation of the dog's behavior. (105 RT 19629.)

With respect to scent theory, Seitz explained that while trailing dogs could certainly pick up the scent of a live person days after the person had passed through a given area, he had not seen anything in the scientific literature, including any studies that had been conducted, concerning the particular theory that someone who is deceased can still give off live residual scent that could be picked up by a trailing dog. (105 RT 19619-10620.) Yet, Seitz acknowledged that "[t]here probably is residual scent" that comes from the body. (105 RT 19646.) Also, clothing on a dead body might contain residual scent. (105 RT 19635.) Seitz further agreed that, under certain conditions, it was possible for a dog to trail an individual that was traveling in a vehicle. (105 RT 19641.) If the individual were in a truck or on a boat, it was possible the person's scent might leave a trail. (105 RT 19645.)

8. *A stranger in the neighborhood on December 23 and unclaimed shoes*

Judge Ricardo Cordova was a Stanislaus County Superior Court judge who lived near the Peterson's in December 2002. (106 RT 19745-19746.) At the time, Judge Cordova was a public defender. (106 RT 19746-19747.)

Judge Cordova recounted that on the night of December 23, 2002, a stranger came to his door asking for money for his girlfriend who the man said was stranded somewhere. (106 RT 19746, 19755.) The man explained that he had been to other houses in the neighborhood asking for money and other people were not home. (106 RT 19747.) He told Judge Cordova that he was staying at a house in the neighborhood, which was at the corner of Edgebrook and Encina. There was a white station wagon parked at that house. (106 RT 19747-19748.)

In his experience as a public defender, Judge Cordova was acquainted with scams involving pleas for money, which occurred with some frequency because there existed a large number of people who were kind-hearted and actually gave money. (106 RT 19755.) In the judge's view, it was more than likely that these scams occurred in more affluent neighborhoods. (106 RT 19755-19756.) Judge Cordova also stated that he suspected the man may have been casing the neighborhood because the holidays were a ripe time for burglaries. (106 RT 19747.) The judge knew that his former office had represented someone that used a similar modus operandi. (106 RT 19756.)

On Christmas day, Judge Cordova told Detective Sebron Banks of the Modesto Police Department, with whom the judge was previously acquainted, about the visit from the stranger. (106 RT 19747.) Together, they walked toward the house the stranger described, which was around the corner from the Peterson's residence. (106 RT 19748.) In a grassy area on the front lawn of the property, Judge Cordova noticed a pair of women's sandals. (106 RT 19748, 19754.) He described them as "platform flip-flops that were probably an inch and a half, two inch heels with maybe an inch soles on them that were an orange flower pattern." (106 RT 19753.) They were summer-type sandals. (106 RT 19754.) Although Judge

Cordova thought the shoes might be connected to Laci's disappearance, Detective Banks did not retrieve the sandals. (106 RT 19748-19749.)

The following day, Judge Cordova was driving in the neighborhood and encountered a different police officer whom he knew. (106 RT 19749.) Judge Cordova told the officer about the stranger. At the officer's suggestion, Judge Cordova relayed the information to the sergeant in charge of the search for Laci. (106 RT 19749.) The judge was later contacted by a detective. (106 RT 19750.) At some point, Judge Cordova also spoke to one of his neighbors who recounted that a stranger had come by their house, too. (106 RT 19749-19750.)

Investigator Bertalotto interviewed Judge Cordova in June 2003. (106 RT 19752-19754.) Judge Cordova may have told Bertalotto that the shoes did not look like a pair of walking shoes and certainly not a pair of walking shoes for a woman who was late into her pregnancy. (106 RT 19753-19754.) Judge Cordova stated that he had no indication at the time he saw the shoes that they were related to Laci's disappearance. (106 RT 19754.)

Judge Cordova knew appellant and Laci having met them at a community meeting over a proposed housing development. (106 RT 19751.) Judge Cordova spoke to Laci about some of the people that frequented the local park. (106 RT 19751-19752.) He became concerned about appellant and Laci's actions in confronting some of these people. (106 RT 19752, 19755.)

9. *Conner's gestational age*

Doctor Michael March testified was the defense expert on Conner's gestational age at the time of his death.[85] The focus of Dr. March's private

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[85] The defense attempted to cast doubt on the estimated time of Conner's death because if it was possible that Laci was alive after

(continued...)

practice was infertility. (106 RT 19790.) Dr. March was acquainted with the prosecution's expert Dr. DeVore because they previously worked together. (106 RT 19789.) Although March had conducted and reviewed many ultrasounds in his career, not all were of pregnant women. (106 RT 19792-19793.) Dr. March acknowledged that Dr. DeVore had conducted more ultrasounds of pregnant women. (106 RT 19793.)

Having reviewed the relevant reports and testimony, including that of Dr. DeVore (106 RT 19762-19763), Dr. March explained that he did not dispute the measurements Dr. DeVore used to establish Conner's age and estimated date of death (106 RT 19783). Indeed, Dr. March agreed that Dr. DeVore's measurements were nearly identical to those generated by Dr. Galloway the forensic anthropologist. (106 RT 19838-19839.) However, Dr. March disagreed with the fundamental premise relied upon by Dr. DeVore that Conner's gestational age could accurately be projected based on measurements from the first-trimester ultrasound from July 2002. (106 RT 19770.) Yet, when pressed by the prosecutor, Dr. March acknowledged that the first-trimester ultrasound was generally more accurate in determining gestational age than the second-trimester ultrasound, but only if any variation established by the second-trimester ultrasound was also considered. (106 RT 19816-19817, 19844 ["there's no question everyone says the first ultrasound is more accurate . . . ."].)

Dr. March used the findings from the second ultrasound and Dr. Yip's recalculations of Conner's age at that time, which shifted the due date by six days from February 10, 2003, to February 16. (106 RT 19779, 19785.) Dr. March acknowledged that he was aware that the other obstetricians

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(...continued)
December 24, that would support the defense supposition that someone other than appellant deposited her body in the Bay. (110 RT 20475-20478.)

from the medical practice who treated Laci during her pregnancy—Drs. Endraki and Towder—did not abide by Dr. Yip's practice of altering the due date if the results of the second ultrasound established a date within six days of the original due date. (106 RT 19819-19820.) Based on the measurements from the second ultrasound, Dr. March concluded that on December 23, 2002, Conner's gestational age was 32 weeks, 2 days, not 33 weeks, 1 day—six days younger than the timeframe provided by Dr. DeVore. (106 RT 19779.) Dr. March theorized that even if Conner's gestational age was the latter, Conner's date of death at the earliest, would have been December 29, 2002. (106 RT 19779-19780, 19848-19849.)

Dr. March's conclusions were also based on a different date of conception, which was. (106 RT 19796-19800.)[86] That was the day Laci's friend Renee Tomlinson said Laci called to say she was pregnant. Dr. March acknowledged the June 9 date was nowhere in Laci's medical records. (106 RT 19798-19800.) Using June 9 as the date of conception meant that Dr. March's estimate was 10 days later than the generally accepted computation of taking the date of the woman's last menstrual period and adding two weeks.[87] (106 RT 19856.) Dr. March acknowledged his conclusions rested on the assumption that the day Laci called Tomlinson was the same day Laci took the pregnancy test. (106 RT 19801-19802.) He conceded there was no evidence establishing what day Laci actually took the pregnancy test. (106 RT 19804.) However, Dr.

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[86] In his report, Dr. March repeatedly referred to the date of conception as June 11, 2002, which he said was a mistake. (106 RT 19800-19801.)

[87] Dr. DeVore had explained that it was impossible to pinpoint the date of conception unless you were there, which explained why medical practitioners used the date of the women's last menstrual period plus two weeks as the date of conception. (95 RT 17879-17880, 17884, 17886; 106 RT 19856.)

March stated that his assumption was based on information provided to him by the defense.[88] (106 RT 19804.) Dr. March did not know if the information was generated through trial testimony. (106 RT 19804-19805.) In any event, Dr. March clarified that the date of conception was of minimal importance to his conclusions. (106 RT 19843-19844.)

10. *The circumstances around the time of appellant's arrest*

a. *Buying the Mercedes in his mother's name*

Jackie Peterson explained that it was her idea to have appellant buy the Mercedes in her name. This was because the police kept impounding appellant's vehicles. (107 RT 19986.) However, Jackie acknowledged that at the time appellant purchased the Mercedes in April 2003, none of appellant's vehicles were impounded. (107 RT 19989.)

b. *Golf plans for April 18—the day of appellant's arrest*

Appellant's father Lee explained that he made a golf reservation for he and his sons, including appellant, for the morning of April 18. He made the reservation a week or two before. (107 RT 19997.) Lee told appellant to borrow his brother's license so appellant could save $20 or $40 on golfing fees since local residents received discounts. (107 RT 19997-19999, 20004.) Lee was aware that had appellant used his brother's license, it would have been a misrepresentation. (107 RT 20004.)

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[88] During the defense case, Detective Craig Grogan testified that he had notes from Sharon Rocha that Laci called her at 7:00 a.m. on June 9, 2002, and told her that she was pregnant. (107 RT 19912.) Also, Jackie Peterson testified that Laci called her and Lee Peterson very early in the morning on June 9 to say that she had taken a test and was pregnant. (107 RT 19977.)

c. *Phone call between appellant and his brother Joe on the morning of April 18*

The defense played an audio recording of a phone call between appellant and his brother Joe that occurred at 7:08 a.m. on April 18, prior to appellant's arrest. (107 RT 19950-19951; Defense Exh. No. D8X.) A transcript of the call was projected for the jury. (107 RT 19951.)

During the call, appellant told his brother Joe that he was being followed by "private investigators" and that he could not shake them. (PowerPoint Transcript, page no. 1; Defense Exhibit No. D8X.) Appellant did not think he should "come play golf" because, as appellant said, "I don't think [*sic*] want a picture of me in the press playing golf."[89] (Transcript, pp. 1-2.)

Appellant and his brother went on to discuss the recent recovery of the then-unidentified bodies. (Transcript, pp. 3-5.) Joe conjectured that authorities knew that it was not Laci, but were taking their time to try and figure out how to convey that information publicly. (Transcript at 4.) Appellant thought he knew otherwise: "Oh, I think they're holding off because they don't know who it is anymore." (Transcript, p. 5.)

The prosecutor asked Lee about appellant's reaction to discovery of the bodies:

> [PROSECUTOR]: All right. To your knowledge, during that particular week, when -- after it was pronounced that the bodies had been discovered, to your knowledge did your son make any effort to travel up to Northern California to look into the situation regarding that?

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[89] Appellant's father testified that appellant had given him a list of license plate numbers of cars that had been following him. Lee said, "We were convinced it was the Enquirer." (107 RT 20002.) This would seem to be contradicted by evidence that appellant confronted surveilling agents and asked whether they worked for state or local agencies. (100 RT 18801.)

[LEE PETERSON]: I believe my wife called and spoke to someone at -- some authority in either Modesto or from the East Bay area about doing that, and was told that they weren't welcoming anybody to come up there.

[PROSECUTOR]: To your knowledge did your son -- did the defendant, in this case, make any effort?

[LEE PETERSON]: I don't know.

(107 RT 20005.)

d. *The large amount of cash*

Appellant's mother Jackie explained that she withdrew $10,000 from her Bank of America account on April 8, 2003. (107 RT 19966-19967.) She intended to loan the money to appellant's brother John so that John could buy appellant's white pick-up truck. (107 RT 19968.) When asked by the prosecutor if John was aware there was a GPS tracking device on the truck, Jackie said the family "used to joke about it," but "it didn't seem possible." (107 RT 19980.) According to Jackie, Bank of America mistakenly took the money out of appellant's bank account, not hers. (107 RT 19969.) Jackie explained that her name was also on appellant's bank account. (107 RT 19970.) Jackie gave $8,000 to appellant and John was responsible for paying appellant the balance of $2,000. (107 RT 19970-19971.) Jackie said that she gave appellant cash instead of a check because appellant was going to buy a car and people did not necessarily accept checks as payment. (107 RT 19973.)

On April 17, Jackie withdrew $10,000 from her account at Washington Mutual Bank to replace the $10,000 Bank of America mistakenly took out of appellant's account. She gave it to appellant that day. (107 RT 19972.) Jackie explained that she gave appellant cash again, instead of some other form of payment, because she was replacing the

money mistakenly taken out of his account and she did not want him to have to wait to access the money while the check cleared. (107 RT 19972.)

With respect to a recorded phone conversation between Lee and appellant, that occurred on January 14, 2003, which seemed to suggest that Lee had deposited $5,000 into appellant's bank account, Jackie testified that had no knowledge of this. (107 RT 19981-19983.) When asked by the prosecutor if she deposited money into appellant's bank account in January, February, or March, Jackie said, "Not to my memory." (107 RT 19983.)

During Lee's testimony, the prosecutor asked him if he gave appellant $5,000. (107 RT 20007-20008.) Lee responded: "You know, I do not remember that. Do you have a check, or --." (107 RT 20008.) The prosecutor then showed appellant's father a summary of the phone call between he and appellant on January 14. (107 RT 20008.) When asked if that refreshed his recollection, Lee said, "It really doesn't. But we were discussing it. I may have." (107 RT 20008.)

e. *The Mexican exhibit at the art museum*

Jackie testified that she accompanied appellant to the San Diego Museum of Art on April 17, which was when she gave him the large amount of cash. (107 RT 19972-19973.) They were both unaware that the museum was featuring a Mexican exhibit. (107 RT 19973.)

f. *Appellant's goatee*

Jackie described a photo that depicted appellant at the baptism of Ann Bird's son on January 12, 2003. (107 RT 19976-19977; Defense Exh. No. D8Z.) Referring to appellant in the photo, Jackie said that appellant was starting to grow a goatee then. (107 RT 19977.)

11. *Other evidence*

a. *Statements made to Investigator Bertalotto*

Investigator Bertalotto stated that when Ron Grantski made his 911 call to report Laci missing, Grantski relayed information that appellant had been golfing that day. (106 RT 19717.) In his interview with Bertalotto in October 2003, Grantski said that it was appellant who had told Grantski he had been golfing on Christmas Eve. (106 RT 19716.) But, in the 911 call, Grantski explained that he thought Sharon Rocha was the source of that information. (106 RT 19718.) Sharon told Bertalotto that when appellant called them on December 24 to tell them about Laci, Sharon assumed appellant had been out golfing. (106 RT 19741.)

Neighbor Susan Medina reported to Bertalotto that she saw Laci walking her dog, but could not remember when. (106 RT 19719.) Susan's husband said that he also saw Laci walking her dog sometimes and, on occasion, appellant would walk with Laci. (106 RT 19719.)

Bertalotto spoke to neighbor Karen Servas about her observations concerning the package in the Peterson's mailbox when she left her home in the late afternoon on Christmas Eve. (106 RT 19721.) Servas told Bertalotto that she did not think she could see the package and she did not remember it being dark before she left her home. (106 RT 19722.) Servas's comments to Bertalotto stemmed from Servas's realization, after she testified at the preliminary hearing, that the information she provided about the timing of her actions that day may have been inaccurate. (106 RT 19731.) Originally, Servas testified that she left her home around 5:05 p.m. to head to Ripon. (106 RT 19731.) However, she revised her time estimate to 4:05 p.m. because she realized her earlier estimate was inaccurate. (106 RT 19731.)

On June 18, 2004, during the pendency of the trial, Servas advised Bertalotto that she requested her automated teller transaction records for December 24, 2002, from her bank. (106 RT 19720.) Servas told Bertalotto that the records showed she completed her ATM transaction at 10:53 a.m. (106 RT 19720.)

Amy Rocha told Bertalotto that on December 23, 2002, while she was cutting appellant's hair, Laci called and ordered pizza that she and appellant planned to pick up on their way home. (106 RT 19723.) Appellant asked Amy if she wanted to come over for pizza, but she declined because she was entertaining a friend who was visiting. (106 RT 19724.)

With regard to the defense proposition that Investigator Steve Jacobson hid his familiarity with the Rocha family, defense counsel asked Bertalotto about a January 2003 phone conversation with Jacobson during which Jacobson explained his relationship to the Rocha family. (106 RT 19725-19726.) Jacobson said that he knew Robin Rocha due to circumstances involving a stolen saddle. (106 RT 19725-19726.) At the time, Jacobson did not mention that Robin Rocha was a good friend or that he was neighbors with the Rocha's. (106 RT 19726-19727, 19730.)

However, Bertalotto explained that the Oakdale area where Jacobson and the Rocha's lived was a very small, rural community where everyone in town knew each other. Bertalotto understood this because he also lived there. (106 RT 19730.) Under those circumstances, the fact that Jacobson helped Robin Rocha with the return of some personal property was not unusual. (106 RT 19731.)

In June 2003, Bertalotto interviewed Judge Cordova who told Bertalotto that he noticed a pair of platform sandals in the front yard of the residence at the corner of north Covena and Edgebrook on Christmas morning while he was out walking. (106 RT 19727.) Cordova pointed out the shoes to his walking companion that day who was a Modesto Police

Department detective. (106 RT 19728.) Cordova reported that the shoes were still there on December 26. (106 RT 19727.) Cordova told Bertalotto that he was not sure the shoes had anything to do with Laci's disappearance. (106 RT 19729.)

b. *Statements made to Detective Grogan*

Detective Craig Grogan testified that he spoke to Sharon Rocha on numerous occasions between December 24, 2002, and the end of January 2003. (107 RT 19922-19924.) January 28 was the first time Sharon mentioned that appellant had referred to Laci as "'missing'" during appellant's call to Sharon on December 24. (107 RT 19925.) Referring to a transcript of a television interview—not offered as evidence—defense counsel asked Grogan whether he was familiar with the interview. Grogan said he was not. (107 RT 19925.) Nonetheless, defense counsel asked Grogan if, during that interview, Sharon had said that she knew Laci was missing on December 24 because of the panic in appellant's voice. (107 RT 19925.) Presumably referring to a transcript of the interview, Grogan responded, "Yes, that's what it says." (107 RT 19925.) Yet, Grogan confirmed that during Ron Grantski's 911 call, Grantski said to the dispatcher, "'we've been told that Laci's missing, our daughter's missing.'" (107 RT 19934.)

This line of questioning by the defense suggested that Laci's family and friends began providing more information to Grogan after appellant's affair became public (107 RT 19925-19927), which, in turn, might have called into question whether the information was tainted by bias. However, Grogan explained that early on in the investigation he was mindful of the fact that those closest to Laci did not want to believe that she was murdered, even though Grogan knew it was a possibility. (107 RT 19929.) Therefore, he did not push Laci's family and friends for

information that would have suggested this possibility. (107 RT 19928-19929.)

Further, it appeared to Grogan that Laci's family and friends initially did not want to believe that appellant had anything to do with her disappearance. (107 RT 19930.) Detective Grogan explained why he went back to Laci's friends and family after the affair became public and asked them to think back on appellant's behavior:

> Well, the family was very supportive of Scott, both families were initially, and that information [referring to appellant's affair] did cause them to question what his actions may have been in this so they may have told me more things at that point then they would have told me at a time when they were in full support of Mr. Peterson.

(107 RT 19932.)

Grogan also explained that it was common during an investigation to continue to receive information from people after they were first interviewed. (107 RT 19934.) That was especially true in this case because there was a very long time period between Laci's disappearance and appellant's arrest, during which people had ongoing interactions with appellant. (107 RT 19934.)

In any event, the detective acknowledged that some witnesses, who provided later recollections, were mistaken or not entirely accurate in their assertions. (107 RT 19935-19937, 19940-19941.) Grogan explained that it was important for investigators to attempt to corroborate information provided by individuals. (107 RT 19937.)

c. *Statements made to Detective Buehler*

In February and March 2003, Detective Jon Buehler interviewed Salon Salon employees to try and determine what Laci had been wearing while at the salon on December 23. (107 RT 19945-19948.) Buehler

received inconsistent descriptions among those he interviewed. (107 RT 19946.)

d. *Austin's no-sale receipt*

A no-sale receipt was entered into evidence that was the subject of defense questioning of William Austin during the prosecution's case-in-chief.[90] (108 RT 20088.)

e. *Yahoo search*

The parties stipulated that a three-page printout of a Yahoo search using the terms "map+san+francisco+bay+chart" was recovered from appellant's computer by Lydell Wall on August 7, 2003. (108 RT 20089; Defense Exh. No. 9D.)

f. *Email regarding TradeCorp*

The parties stipulated that the email exchange between appellant and his TradeCorp manager concerning October 2002 revised sales targets and the possibility of outsourcing warehousing was found on the dining room table at 523 Covena during search of the premises on February 18, 2003. (108 RT 20088; People's Exh. No. 298.)

II. PENALTY PHASE

A. Prosecution Case

During the penalty phase, the prosecution presented four witnesses—members of Laci's family: Her brother Brent, her sister Amy, her stepfather Ron, and her mother, Sharon. They talked about who Laci was

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[90] Austin's was the store that the Peterson's neighbor Karen Servas patronized after seeing McKenzie out in the street on Christmas Eve morning. (48 RT 9434-9437.) During his cross-examination of Mr. Austin, defense counsel focused on whether the time on the receipt was accurate in that it partially served as the foundation for the timeline set forth in Servas's testimony. (48 RT 9487-9488.)

as a person, including the irreplaceable role she played in their lives, and the interminable grief wrought by appellant's murder of Laci and Conner.

1. *Laci was the lively one with a kind heart*

Brent was four years older than Laci. (113 RT 20978, 20981.) He described Laci as "a very outgoing person, always having a good time in all settings." (113 RT 20980.) Brent observed, "I'm the boring one, she was the lively one . . . ." (113 RT 20981.) He also described Laci as "kind" and "good-hearted." (113 RT 20985.) Laci "was just a really genuine person and she meant what she said and she said it from the bottom of her heart." (113 RT 20989.) Brent explained that as he and Laci got older, they became closer to each other. (113 RT 20979.) When Brent and Rose got married, Laci was a bridesmaid in their wedding. (113 RT 20982.) Brent recounted how Laci gave a speech at the wedding welcoming Rose into the family. (113 RT 20989.) It was one of the special memories about Laci that Brent said would always stay with him. (113 RT 20989.)

Amy was six years younger than Laci. They were half-siblings who shared the same father. (113 RT 20990.) Amy looked up to Laci and would often tag along when Laci had her friends over. (113 RT 20991.) Like Brent, Amy described Laci as outgoing and fun and someone who liked to have a good time. (113 RT 20993.) Laci also loved helping people. (113 RT 20994.)

Ron Grantski first met Laci when he went to Sharon's house to pick Sharon up for a date. Then two-year-old Laci came running to the door and answered it. (113 RT 20998-20999.) Ron said that Laci always had a smile and "lit up any room"; she drew people's attention to her. (113 RT 20999.) "She was the love of many peoples' lives . . . ." (113 RT 20999.) Ron added that Laci was "very, very smart" and got straight A's. (113 RT 21000.)

Laci's mother Sharon described Laci as someone who was positive, upbeat, and happy. (113 RT 21008.) She followed her heart and never dwelled on the negative. (113 RT 21005-21006.) Laci could laugh at herself. (113 RT 21011.) These qualities attracted people to Laci and she enjoyed a circle of close friends who had known each other since they were very young. (113 RT 21006, 21008.) Laci was very involved in clubs and activities in high school. (113 RT 21007, 21009.) While attending Cal Poly, where she was a horticulture major, Laci won the Outstanding Freshman award. (113 RT 21007.) But, it was Laci's affinity for children that led her to the teaching profession. (113 RT 21012-21013.)

Each of Laci's family members shared photographs and related memories of Laci. (113 RT 20979-20982, 20991-20995, 21000-21001, 21008-21012; People's Exhibits Nos. 302-A-D, 303A-F, 304A-B, 305A-J.)

2. *Laci was excited to be a mom*

As their lives progressed, Brent and Laci talked about wanting to have children around the same time so they could all stay close as a family. (113 RT 20983.) He never saw Laci as excited as she was when she called to say she was pregnant. That was partly because she had been having difficulty becoming pregnant. (113 RT 20983.) Laci was "thrilled" when she became pregnant. (113 RT 20983.) Amy agreed: Laci "was really excited." (113 RT 20996.) Brent could tell Laci was looking forward to being a mom and "was going to be a great mother." (113 RT 20984-20985.) Laci was in the delivery room when Brent and Rose's son Antonio was born. (113 RT 20985.) Often, Laci asked Rose about her pregnancy, since Rose had just given birth. (113 RT 20985.) Laci loved then one-year-old Antonio and was very tender toward him. (113 RT 20984-20985.)

Sharon recounted that Laci was really looking forward to becoming pregnant and talked to her frequently about becoming a mother. (113 RT 21013.) When Brent and Rose announced that Rose was pregnant, Laci

called Sharon and was crying because she really wanted to become pregnant. (113 RT 21013-21014.) Sharon recounted a conversation with Laci during which Laci explained that "Scott said he wasn't ready yet, but she really wanted to have a baby because she wanted to have a baby at the same time that Rose did." (113 RT 21014.)

After becoming pregnant, Laci kept Sharon very involved. She called Sharon after every doctor's appointment to talk about the results. (113 RT 21014.) Laci gave her mother a copy of the sonogram. Sharon recalled that around mid-December, Laci wanted Sharon to feel Conner moving. (113 RT 21014.) So, Laci had Sharon put her hand on her stomach. Sharon recounted how she kept her hand on Laci for the rest of that evening as she talked to Conner. (113 RT 21014.)

3. *The nightmare that began on Christmas Eve 2002*

When asked to describe her feelings upon learning that Laci was missing, Sharon said, "I was scared to death because I knew she wouldn't just be missing. Laci didn't just disappear. I knew something had happened to her." (113 RT 21014.) At first, Ron could not believe what Sharon told him about Laci being missing. (113 RT 21002.) He thought Laci was just at a friend's and had not called. (113 RT 21002.) But, Ron explained that it did not take him long to sense the panic in Sharon's voice and so he called the police. (113 RT 21002.) "It's just been a nightmare ever since. It's still not over." (113 RT 21002.)

Sharon recalled that it was cold that Christmas Eve night and so she brought coats and blankets for everyone, including Laci, "because I knew she'd be freezing when we found her." (113 RT 21014-21015.) That first night, Sharon, Ron, and Brent stayed up all night. (113 RT 21015.) Sharon did not go to bed for weeks; she wanted to be awake in case Laci called. Sharon was also afraid to sleep because she feared that she would have nightmares about what might be happening to Laci. (113 RT 21015.)

Sharon explained how she and the rest of Laci's family and her friends begged for the public's help in finding Laci and Conner. (113 RT 21015.) "And there was somebody who knew all along. And wouldn't tell us." (113 RT 21015.) The last time Sharon saw her daughter alive was December 15, 2002. (113 RT 21015.)

Sharon recalled that while Laci was still missing, one of Laci's young students came to the volunteer center with his mother. The boy was very upset about Laci and could not sleep at night. (113 RT 21013.)

Brent found out about Laci being missing around 7:00 p.m. on Christmas Eve. He immediately drove down to Modesto. (113 RT 20985.) Describing what those first hours were like, Brent said he just felt shock and disbelief. (113 RT 20986.) As time went on, he also felt guilt and remorse because he was not able to protect his sister. (113 RT 20986-20987.)

When Amy found out Laci was missing, it initially struck her as "strange" and she felt confused. (113 RT 20996.) Amy assumed that Laci was at one of her friend's or maybe at her mom's. (113 RT 20996.) But, as time went on, Amy became more worried. (113 RT 20996.) It "was like a nightmare." (113 RT 20997.)

Sharon described the time in April 2003 when the bodies were recovered:

> The day they were found I wasn't feeling well. I was at home and I heard footsteps come to my door and I didn't answer the door because I knew. I hadn't heard anything, but I just knew. I knew. And then when they went into the backyard to the back door I knew I had to answer the door. But I knew, in my soul I knew they'd been found. And later when I was told it would be several days before they'd be identified and I asked why. Because they told me that they could use dental charts immediately if it was her. And then when I was told she didn't have a head, I -- I didn't believe. I just dropped the phone and I

fell to the floor. It never occurred to me what condition she might be in.

(113 RT 21016.)

Regarding the burial, Sharon said:

I knew that I needed to spend some time with her and to have the opportunity to say good-bye to her alone. And I knew she was in the casket and I knew her baby was there, but I knew she didn't have arms to hold him either. She should have had her arms and her head on her entire body. It just haunts me all the time. I just hope she didn't know what was happening.

(113 RT 21017.)

4. *The void left behind*

Sharon described her life after Laci's and Conner's murders:

Every morning when I get up I -- I cry. It takes me a long time just to be able to get out of the house because I just keep thinking why did this happen. I miss her. I wanted to know my grandson. I wanted Laci to be a mother. I wanted to hear her called mom. When I go to buy birthday cards, Mother's Day cards, I just can't stand it. I always look at the ones with daughter and mom or mom to daughter. And she's gone. I don't sleep well. I think about her all of the time.

(113 RT 21017-21018.) On the first Mother's Day after Laci's murder, Sharon laid on the floor and cried most of the day. (113 RT 21012.)

Sharon explained that sometimes when the phone rang, she thought it was Laci calling. (113 RT 21018.) Sharon described one instance when she heard the phone ring and went back inside the house:

I remember one time walking into the house. I opened the door and walked into the entryway and I had to stop and she turned around and said, "Hi, Mom." It was though she was right there. I saw her. A lot of times I think when I have a question about something that's been going on, I'll just ask her and she'll tell me. But I can't. She'll always be here for me. Laci didn't deserve to die.

(113 RT 21018.)

Brent missed Laci very much. (113 RT 20988.) He explained that he woke up in the middle of the night and thought "constantly" about what had happened. (113 RT 20988.) Laci was Brent's only full-sibling and "a big part of the family that's missing now." (113 RT 20988.) Laci was "the centerpiece of the family" and the mobilizing force for family get-togethers, especially around the holidays. (113 RT 20988.) Amy added that Laci was a great cook and enjoyed entertaining. (113 RT 20993.)

Ron shed light on why the holidays, in particular, were difficult for their family: "Laci was murdered on Christmas Eve, the bodies were found at Easter, so we don't have the same meaning. They'll never be the same. At least, I can't see them being the same." (113 RT 21003.) Since Laci's and Conner's murders, Brent had not really celebrated the holidays; "it's awkward." (113 RT 20988-20989.) He only went through the motions on the holidays for his children. (113 RT 20988.) Amy missed Laci "a lot" and said the holidays would never be the same without her. (113 RT 20994, 20997.)

When asked to describe his life without Laci and Conner, Ron said:

> Well, I don't know how it would [be] with Conner. I never was given the opportunity. I know what it is without Laci. Unfortunately, a lot of it you don't realize because you're used to having them there and you don't realize a lot of things until they're gone. And I can't explain it right, but when you have somebody that you watch grow up for so long and things that you wished you had said differently or wished you would have said, and now you don't. You can't. It's hard. Nobody should have to go through this. I wished I could be the one gone and not her.

(113 RT 21002-21003.)

Ron had been looking forward to Conner's birth because he wanted to teach him about fishing, the stars, the ducks, and everything outside. (113 RT 21000.) "[T]hat was taken from me." (113 RT 21000.)

Amy could not imagine going on with the rest of her life without Laci. (113 RT 20997.) She also lamented the fact that she would never get to meet Conner. (113 RT 20997.)

B. Defense Case

The defense evidence, as presented by 39 witnesses, including members of appellant's family, as well as friends, teachers, school administrators, coaches, employers, and business associates, portrayed appellant as unfailingly kind, polite, generous, and thoughtful to all who knew him. Appellant, like his parents, was stoic, calm, and was never heard to utter a word in anger.

1. *Family background*

Appellant's father Lee shared information about his family background, including his formative years in Minnesota, and how his family recovered from a major financial setback. (114 RT 21046-21053.)

Lee married his high school sweetheart and had three children. (114 RT 21055, 21058-21059.) The family moved to San Diego where Lee worked for a trucking company. (114 RT 21060.) Lee's passion for golf began during this time when he was in his mid-twenties. (114 RT 21057-21058.) A couple of years after the family moved to San Diego, Lee and his first wife divorced. (114 RT 21061.)

Appellant's mother Jackie had no real memory of her father who was murdered during a robbery of his business when she was young. (117 RT 21361; 119 RT 21568.) After the murder, Jackie's mother developed scleroderma—a long and debilitating illness that resulted in a painful death. (117 RT 21361; 119 RT 21569.) Because her mother was unable to care

for Jackie and her three brothers when they were young, they were placed in a Catholic orphanage in San Diego. (117 RT 21362; 119 RT 21570-21571.) Jackie returned home when she was in eighth grade and took care of her ailing mother until Jackie was in high school, during which time her mother passed away. (119 RT 21573.) According to Jackie's older brother John Latham, Jackie was the "heartbeat" of the family. (117 RT 21366.)

Jackie became pregnant with her son Don when she was 19 years old. She gave Don up for adoption because she could not adequately care for him. (119 RT 21574-21575.) Jackie became pregnant a second time with her daughter Ann and gave her up for adoption. (119 RT 21576-21577.) As adults, Don and Ann endeavored to locate their birth mother and were eventually reunited with Jackie. (114 RT 21091-21092; 119 RT 21577.) Jackie's third child, John, was born later and Jackie raised him as a single parent for several years before she eventually married Lee. (119 RT 21577.)

Jackie suffered from a respiratory condition due to her lungs having been scarred by numerous bouts of pneumonia when she was a child. (119 RT 21567.) Over time, Jackie's health deteriorated and her lung capacity decreased significantly. (119 RT 21567.) She had been on the list for a lung transplant for a number of years and needed supplemental oxygen on a full-time basis. (114 RT 21101; 119 RT 21567.) This compromised Jackie's mobility such that she could only walk for two blocks at a time. (114 RT 21102.)

2. *Lee and Jackie marry and appellant is born*

Lee met Jackie while they were taking courses at a community college. (114 RT 21060-21061; 119 RT 21577-21578.) They married in 1971. (114 RT 21062.) Jackie's close friend Joanne Farmer described Jackie and Lee as a "very loving" couple who respected each other greatly. (114 RT 21118; 117 RT 21360-21370.) Another family friend observed that Jackie and Lee

were "calm and easy-going." (115 RT 21212.) The couple was also described as "very gracious, very giving." (116 RT 21277-21278.)

Lee started a crating company in 1975, which he still owned. (114 RT 21062-21063.) After three or four years, the business prospered. (114 RT 21064.) Lee and Jackie bought a dress shop in upscale La Jolla, which Jackie managed. (114 RT 21065.) However, after a couple of years, Jackie left to join Lee in the crating business. (114 RT 21065.)

About a year after they were married, appellant was born on October 24, 1972. (114 RT 21070; 119 RT 21578.) Appellant was the only child from their marriage. (114 RT 21059.) At the time, only Jackie's son John was living with the family in La Jolla. (114 RT 21070.) Lee's other children—Susan, Mark, and Joe—were living elsewhere. (114 RT 21070.) Jackie said that appellant was "a joy from the minute he was born." (119 RT 21578.) When appellant was a baby, Lee described appellant as "perfect" and having a "[g]reat disposition." Appellant woke up smiling and went to bed smiling. (114 RT 21070.) Lee's daughter and appellant's stepsister Susan Caudillo noted that appellant's birth connected the family. (114 RT 21138-21139.)

One family friend described appellant as a sweet child. (114 RT 21119.) Susan, who spent considerable time with appellant during his early years, described him: "He was a very easygoing kid." "Had a great disposition." (114 RT 21139.)

Appellant's brother John Peterson said that the only time he saw appellant lose his temper was after Lee spanked appellant when appellant was four years old. (115 RT 21248.) Appellant cried, went to his room, came back out, and punched his father in the stomach. (115 RT 21248.)

A family friend recalled that appellant related well to adults and would serve cookies at Jackie and Lee's holiday parties when he was 11 or 12 years old. (114 RT 21120-21121.)

Appellant's brother Joe Peterson described appellant as shy and quiet when he was young, but by the time appellant reached high school, he was more confident and outgoing. (116 RT 21308-21309.) Other family members also described appellant as quiet when he was younger. (117 RT 21390, 21396, 21407.)

3. *Appellant was loved and well-cared for*

Joanne Farmer observed that Jackie and Lee were very loving parents toward appellant and doted on him, as did the rest of their family. (114 RT 21122.) Appellant had a loving and strong bond with his parents. (115 RT 21213.) The strong bond came from working and playing together as a family. (115 RT 21213.)

Appellant's father Lee acknowledged that appellant had more advantages than his other children because the family business was very successful during appellant's formative years. (114 RT 21092.) Appellant's stepsister Susan explained that appellant lived in nicer, bigger houses than she and her brothers and went on more vacations. (114 RT 21141.) However, all the children were loved equally. (114 RT 21141.)

One of appellant's cousins observed that appellant "always had cool toys" when they were growing up and was "always generous" with them. (117 RT 21398.)

Appellant's brother Joe noted that his father and Jackie modeled warmth, love, and stability for their children, appellant included. (116 RT 21289.) Joe said that Lee and appellant had a very special relationship. (116 RT 21315-21316.) Appellant tried very hard to please his parents. (117 RT 21391.)

4. The formative years: Appellant was caring, responsible, polite, and a model student

Appellant was a good student in elementary school who received good grades. (114 RT 21081; 119 RT 21583.) Teachers "unanimously"

like appellant and he never got into trouble at school. (114 RT 21081.) He was a crossing guard, a cub scout, and a baseball little-leaguer. (119 RT 21580.) Appellant's teachers told Jackie that they wished they had a roomful of students like appellant. (119 RT 21580.) In eighth grade, appellant won the Distinguished Student Award. (119 RT 21583.) His principal in junior high school, Ronald Rowe, said that appellant was cooperative, dependable, and industrious. (117 RT 21331-21333.) Although appellant was on the quiet side, he fit in well with other students. (117 RT 21333.)

Former San Diego Padre Britton Scheibe was friends with appellant in junior high school. (115 RT 21197.) Scheibe described appellant as "gentle" and "kind"—a view shared by others (116 RT 21271; 117 RT 21408)—and the last person Scheibe would expect to be accused of such a heinous crime. (115 RT 21207.)

Referring to appellant, his cousin Abraham Latham opined that "there wasn't a violent bone in his body." (117 RT 21403.) Abraham never saw appellant react with anger or physical aggression. (117 RT 21403.)

As a teenager, appellant was a leader and continued to be a good student. (114 RT 21089.) He was very loving and polite. (114 RT 21122.) The principal at appellant's high school described appellant as reliable, responsible, and punctual. Appellant had no disciplinary issues. (117 RT 21336-21337.)

Aaron Fritz met appellant on the golf team in high school. (115 RT 21169-21170.) When Aaron moved to the San Diego area from Indiana, he did not know anyone at his new high school. Appellant, who was a year ahead of Aaron, went out of his way to befriend Aaron and make him feel comfortable at the school. (115 RT 21170-21171; 116 RT 21271.)

Appellant also enjoyed a close relationship with Aaron's parents, Conception and Paul, who found appellant to be respectful, caring, and

considerate. (115 RT 21174-21176; 116 RT 21272, 21283.) Paul recalled that appellant was especially enamored of the considerable traveling that he and Conception had done. (116 RT 21283.) Appellant treated Aaron's younger brother like his own. (116 RT 21276.)

Aaron's friendship with appellant continued through their adult years. (115 RT 21172.) Appellant was in Aaron's wedding. (115 RT 21191.) Aaron admired and respected appellant and wanted to emulate him. (115 RT 21193.)

To illustrate appellant's independence, his stepsister Susan recounted an incident when appellant was in high school and became involved in a car accident when he swerved to avoid an animal. (114 RT 21144.) He had just attended a Students Against Drunk Drivers meeting and on his way home to Rancho Santa Fe. (114 RT 21144.) After receiving assistance from the California Highway Patrol, appellant called Susan, who lived in Escondido, for a ride. However, appellant only called after he had taken care of other matters himself. (114 RT 21145.)

As for college, appellant enrolled at Arizona State University where famed golfer Phil Mickelson also attended school. (114 RT 21087.) Appellant's parents paid appellant's tuition and expenses. In return, appellant was to get good grades and become a professional golfer. (114 RT 21094.)

According to appellant's sister-in-law Janey Peterson, when appellant was in college, he had a delivery business and talked about starting a t-shirt screening business. (115 RT 21229.) This industriousness stemmed from Lee having modeled a strong work ethic and an appreciation for the value of a dollar. (116 RT 21289.) Janey's husband Joe—appellant's brother—described appellant as "ambitious" and "a go-getter." (116 RT 21313.)

5. *Appellant Leaves ASU and returns to San Diego*

Appellant did not graduate from Arizona State University. He left college and returned to San Diego where he worked for six months in the family business. (114 RT 21087, 21093.)

6. *Appellant leaves San Diego and attends community college in Morro Bay*

Appellant subsequently moved north to Morro Bay—as did his parents—where appellant attended Cuesta Community College. (114 RT 21088, 21095.) At that point, when appellant was 20 years old, he expressed a desire to become financially independent from his parents. (114 RT 21094-21095; 119 RT 21588.)

7. *Appellant leaves community college in Morro Bay and enrolls at Cal Poly in San Luis Obispo where he meets Laci*

Appellant next moved further north to San Luis Obispo. (114 RT 21092.) Eventually, Lee and Jackie also moved to San Luis Obispo where appellant and Lee started a crating business. (114 RT 21096.)

James Gray owned the business next door. (118 RT 21459-21460.) Gray's initial impression of appellant was: "Very low key individual. Friendly. Low key. I mean just an all around super guy. I mean never an anger moment, or whatever." (118 RT 21461.) Eventually, appellant and his father sold the crating business to Gray. (118 RT 21462.)

While attending classes at Cal Poly, appellant worked in the crating business, at a local golf course, and also as a waiter at a local restaurant. (114 RT 21097-21098.) Appellant met Laci at Cal Poly and introduced her to his parents shortly after they started dating. (114 RT 21099.) According to Jackie, Laci adored appellant. (119 RT 21589.) The two of them were inseparable. (119 RT 21589.) Lee said that Laci was the first of appellant's girlfriends that they met. (114 RT 21099.) Lee and Jackie

spent a great deal of time with Laci and appellant during that time period. (119 RT 21589.) Laci was like a daughter to Jackie and Lee. (117 RT 21370-21371; 119 RT 21589-21590.)

Those that came to know Laci were favorably impressed. Janey Peterson described Laci as "bubbly and fun and energetic and beautiful." (115 RT 21233.) James Gray felt that Laci and appellant were the "[p]erfect couple." (118 RT 21465.) Appellant's cousin Leeta Latham thought Laci was "the perfect match" for appellant because he had a tendency to be "very quiet" and "a bit standoffish." (117 RT 21397.)

Robert Thompson, Jr., who taught Agricultural Economics at Cal Poly, had appellant and Laci in one of his classes. (118 RT 21492.) Thompson stated that appellant was a very good student. Appellant made the Dean's List several times and was a member of an academic fraternity. (118 RT 21493.) Appellant's overall grade point average was 3.38. (118 RT 21493.)

Thompson and appellant cultivated a close friendship over time. (118 RT 21495.) Thompson had dinner at appellant and Laci's home four or five times. (118 RT 21494.) Thompson described the couple as "fun people" who were "friendly, very outgoing, polite. . . ." (118 RT 21494.) With particular regard to appellant, Thompson said he was "very intelligent, bright, but confident and able, productive. He seemed more mature at the time. He seemed more focused, like he was fully formed, like he was well raised and well rounded." (118 RT 21496-21497.) As an example of appellant's thoughtfulness, Thompson noted that appellant made him one of the best martinis Thompson ever had and brought him cigars. (118 RT 21496, 21498.) Even after Laci and appellant moved to Modesto, appellant would visit Thompson and stayed at Thompson's house. (118 RT 21494.) In fact, appellant stayed with Thompson on two occasions after Laci's disappearance. (118 RT 21498-21499.) Although Thompson grieved

Laci's murder, he believed appellant was a "fine young man." (118 RT 21501.)

Julie Galloway was the hostess at the Pacific Café in Morro Bay where appellant worked as a waiter. (117 RT 21432.) They worked together for four years while they were both attending college. (117 RT 21440.) Galloway said that appellant was "the most generous man I ever met, ever." (117 RT 21437.) Although appellant was somewhat reserved, Galloway explained that appellant was such a personable waiter that some customers would come in on days he was working just to see him. (117 RT 21439, 21443.) Appellant was very patient and, for that reason, he would be the one to step in and interact with disgruntled customers. (117 RT 21442.)

Abbas Imani owned the Pacific Café. (118 RT 21477-21478.) Imani said that appellant was a very, very good waiter and the most courteous and polite person Imani had ever known. (118 RT 21481.) Appellant went out of his way for certain customers and had a "fantastic" work ethic. (118 RT 21483-21484.) Imani trusted appellant. (118 RT 21488.) Employees of the café who had daughters wanted them to marry appellant. (118 RT 21487.) Imani came to know Laci after she and appellant started dating. (118 RT 21486.) Imani described her as "full of life." (118 RT 21486.) He said that appellant was excited about Laci and made sure that there were roses on the table when he met Laci's family for the first time at the restaurant. (118 RT 21487-21488.)

Eric Sherar and his wife were neighbors and friends with Laci and appellant when they were living in San Luis Obispo. (118 RT 21448.) Sherar explained that the couples lived in close proximity to one another. (118 RT 21450.) Sherar did not recall "any real bad arguments" between the couple and described appellant and Laci as "an average couple." (118 RT 21452.) Sherar recounted an incident when his dog, which liked to

fight, "got ahold" of Laci and appellant's dog McKenzie. (118 RT 21452-21453.) Sherar explained that Laci became very upset, but appellant's intervention "[m]ellowed things out." (118 RT 21453.)

Sometime during their association, Sherar sold appellant a 12-foot boat. (118 RT 21453.) Sherar assumed appellant wanted it for fishing or hunting because he was aware that appellant had gone out on Morro Bay a few times to hunt down ducks. (118 RT 21453.) As it turned out, the motor on the boat did not work. Although appellant questioned Sherar about whether Sherar had intentionally deceived him, appellant told Sherar he was going to let it slide. (118 RT 21454.)

Shelly Reiman had a casual friendship with appellant and Laci while they were in college. (119 RT 21547.) Reiman came to know appellant and Laci through her cousin Mike Richardson who had a close friendship with the couple. (119 RT 21547.) Reiman described appellant as a "very gracious, caring person" who "always seemed to be upbeat, happy." (119 RT 21549.) At a barbecue, appellant took the time to interact with Reiman's two-year-old daughter. (119 RT 21550.) Reiman thoroughly enjoyed her conversations with appellant. (119 RT 21549.) Reiman's husband remarked to her one time that appellant seemed thrilled about becoming a father. (119 RT 21551.) Although Reiman had conversations with appellant in December 2002, appellant never mentioned his relationship with Amber Frey or that he had told Frey that he did not want to have children. (119 RT 21552.)

8. *Appellant and Laci marry and move to Modesto*

Appellant and his father sold their crating company in San Luis Obispo to James Gray so that appellant and Laci could start their own restaurant, which they called "The Shack." (114 RT 21100.)

After a while, Lee and Jackie returned to the San Diego area because there were some problems with the family's main crating business. (114

RT 21096.) Around that time, Laci and appellant sold "The Shack" and moved to Modesto. (114 RT 21100-21101.)

Gray said that appellant would sometimes return to San Luis Obispo and stop by to see him. (118 RT 21467.) Gray observed: "I think he missed San Luis. The Shack, the business, et cetera." (118 RT 21467.)

Appellant's close friend Aaron Fritz and his wife spent time with Laci and appellant, including vacationing together. (115 RT 21192.) Fritz never saw appellant lose his temper with Laci; appellant was "very even-keeled."[91] (115 RT 21192.)

Susan Medina, appellant and Laci's neighbor on Covena, recounted that appellant offered to drive Medina to an appointment one day when she was had car trouble. (118 RT 21503-21504.) During the ride, appellant told Medina how he was rearranging his work schedule so that he could accompany Laci to her prenatal appointments. (118 RT 21505.)

Thomas Beardsley was appellant's first customer after TradeCorp was formed. (119 RT 21537-21538.) Beardsley explained that appellant came to him first because Beardsley knew people who were friends of the Peterson's. (119 RT 21539.) They had an instant friendship. (119 RT 21544.) Beardsley described appellant as someone who was calm and at

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[91] The jury heard evidence to the contrary during the guilt phase: Harvey Kemple, the husband of Sharon's cousin Gwendolyn, contrasted appellant's calm demeanor on the evening of December 24, 2002, with his observation of appellant's emotional state when they were at Laci and appellant's home the previous July 4th. (48 RT 9353, 9407.) On July 4, Kemple observed appellant get angry and slam down the lid of the barbecue after appellant burned the chicken on the grill. (48 RT 9407.) Kemple testified, "I didn't see him upset that night [referring to December 24] about Laci being gone." (48 RT 9407.) The jury also was aware that appellant told Amber Frey that he wanted "to kill" the "fucking dog" that would not stop barking. (7 Supp. CT Exhs. 1499.)

ease with people; he was a person who made plans and then executed them. (119 RT 21542.)

9. *Appellant's and Laci's evolving thinking on having children*

Jackie said that it took Laci and appellant three years to get pregnant. (119 RT 21590.) Jackie elaborated:

> And originally Laci made jokes she didn't want any children because she thought she couldn't have any. And we all understood it. [¶] And one Thanksgiving my grand kids were wrestling, she said, that's a good reason for birth control right over there. But nobody took it that way because we knew she would not be unkind. And over the years she had some medical treatments and was able to -- they talked about adoption. They wanted a baby. And when she got pregnant we were all elated. Thrilled.

(119 RT 21590-21591.)

Janey Peterson described the evolution in Laci's and appellant's views on having children:

> And I used to remember the comments that she [referring to Laci] would make about our kids, or Scott might make that, you know, first it would be they would comment about how watching rambunctiousness was good birth control. Just fun to come there and play with all the kids, and then they would get to go home. [¶] And they would -- I remember they progressed from in the -- I remember Laci first talking about, we don't know if we are going to have kids. Then the next year would come along, and they would say probably going to have the kids after we're 30. I remember thinking I wish I had a tape recorder, you know, to play this back, you know, in five, ten years for her. [¶] And then another Thanksgiving or two later, she was taking her Folic Acid. They were trying to get pregnant. And it was just neat to watch them mature and grow as a couple.

(115 RT 21239-21240.)

10. *Appellant's charitable works in high school*

At appellant's high school, students had to complete 100 hours of community service as a graduation requirement. (117 RT 21338.) Appellant did charity work in Tijuana, Mexico at a home for the elderly. (114 RT 21089-21090.) He also tutored the homeless when he was in high school (119 RT 21587), and was a designated driver for the Students Against Drunk Drivers chapter of his high school (115 RT 21179). According to his good friend Aaron Fritz, appellant did more volunteer work than that dictated by the high school class requirement. (115 RT 21179.)

11. *Appellant's caring attitude toward his family*

Various family members talked about appellant's caring attitude toward his family. One family friend said that appellant enjoyed an "excellent" relationship with Jackie and Lee. (115 RT 21213.) Appellant was instrumental in helping to organize his parents' twenty-fifth wedding anniversary luncheon. (114 RT 21149; 115 RT 21236-21237.)

Appellant taught some of his younger relatives how to snowboard (115 RT 21238-21239), and taught one of his nieces how to drive (116 RT 21318). He attended his nieces' sporting events. (119 RT 21557.) Appellant was the best man in his brother John's wedding and was present for the birth of John's daughter. (115 RT 21253.)

12. *Appellant's passion for golf*

Golf was a staple in the lives of the Peterson family. Lee introduced appellant to golf when appellant was three years old. (114 RT 21076.) In fact, all of the family played golf and would often play on holidays. (114 RT 21086.) Appellant and his family spent Christmas at Pebble Beach. (117 RT 21488.)

Appellant developed into a very good golfer and made his high school's varsity golf team when he was a freshman. (114 RT 21082-21083.) Appellant eventually became captain of the golf team. (115 RT 21183.) Phil Mickelson was one of appellant's teammates in high school. (114 RT 21083.) Frequently, Lee would leave work around 3:00 p.m. and he and appellant would play golf together. (114 RT 21085.) Appellant wanted to be a professional golfer, but in Lee's view, although appellant was talented, he did not have the necessary drive. (114 RT 21085.)

David Thoennes was appellant's high school golf coach. (117 RT 21341.) Thoennes played golf with appellant's father Lee quite frequently during that time. (117 RT 21343.) Appellant, Lee, and Jackie hosted Thoennes at their club. (117 RT 21343.) Appellant was an excellent player and the most valuable player on the team during his junior and senior years. (117 RT 21342-21343.) In fact, Thoennes appointed appellant as the very first captain of the golf team. (117 RT 21343-21344.)

Thoennes opined that one can learn a great deal about another person's character from playing golf with them. (117 RT 21343.) He never saw appellant lose his temper or patience with other players who were much less talented. (117 RT 21345.) In Thoennes view, appellant was very devoted to his parents because, instead of going out on the weekends on his own, appellant opted to play golf with them. (117 RT 21344-21345.) To Thoennes, appellant was one of the finest young men that he ever coached and Thoennes knew that appellant would be a success in whatever he did. (117 RT 21346.)

Aaron Fritz's father Paul observed that appellant was a very good golfer. Although appellant was very competitive, Paul Fritz never saw him become angry on the golf course. (116 RT 21282.)

Around the time he was 16 years old, appellant worked at the Rancho Santa Fe Golf Club where his family had a membership. (117 RT 21349,

21355.) Charles Courtney, the head professional at the club at the time, noted that appellant was "a very reliable employee" and "just a great kid." (117 RT 21350.) Although appellant came from a privileged background, Courtney remarked that appellant did not have an attitude. (117 RT 21352.) Another club employee, Sandra Betram, said appellant was an "[i]nteresting, very smart young man" who "was always a pleasure." (117 RT 21354.)

While appellant was living in Morro Bay, he worked at a golf course. (117 RT 21415.) His friend and former roommate William Archer met appellant at the golf course where Archer also worked. (117 RT 21415.) Archer perceived that appellant and his father Lee had a good relationship judging from their interaction playing golf. (117 RT 21421.) Archer explained the ways in which appellant had been a very good friend to him. (117 RT 21419-21420.)

While attending community college in San Luis Obispo, appellant played on the golf team. Hugh Gerhardt was his coach for two years. (118 RT 21470-21471.) Gerhardt related that he had played 10 rounds of golf with appellant and appellant had never cheated once or lost his temper. (118 RT 21472.) If appellant made a mistake, he would just grit his teeth and move on. (118 RT 21472.) Gerhardt provided a few of examples of appellant's kindness toward him during that time, including making sure that when Gerhardt brought his girlfriend to the Pacific Café, their table was adorned with flowers. (118 RT 21473-21474.)

Appellant helped others become more proficient in their respective abilities to master the game of golf. Appellant helped his former Cal Poly teacher, Robert Thompson, Jr., with his golf game. (118 RT 21496.) Appellant also assisted his stepsister's husband so he would be proficient enough to play with his in-laws. (114 RT 21148.)

Thomas Beardsley, appellant's first TradeCorp customer, recounted one time when appellant played in a tournament with Beardsley and some of Beardsley's business associates, appellant helped them to win and then turned the monetary prize over to the business association. (118 RT 21543-21544.)

13. *The Peterson family culture and dynamics*

Lee described himself as "pretty stoic," owing to his Scandinavian roots. (114 RT 21104.) He observed that although Jackie was also "very stoic" and never cried, she was "a hugger" and loved appellant as much as any parent loved her child. (114 RT 21103.) According to her brother John, Jackie's stoicism stemmed from the tragic circumstances of their childhood. (117 RT 21367.) Another observer said that the Peterson family temperament was generally "quiet" and family members were prone to keeping much inside. (114 RT 21121.) Appellant's cousin Rachel Latham described Lee as quiet and reserved. (117 RT 21376.)

Witnesses who worked for the Peterson's spoke positively of the experience. Joanne Farmer's son, Craig, worked for the Peterson's in their business. As employers, the Peterson's were welcoming and treated people fairly. (114 RT 21121132-21133.) Jeff Cleveland also worked for the family. (114 RT 21126.) He described the Peterson's as "mellow" and a family that worked well together. (114 RT 21126-21127.) "They were always in control." "Always contained." (114 RT 21129.) There were never great displays of emotion either way. (114 RT 21129.) It was apparent that Lee and his sons, including appellant, maintained a positive working relationship. (114 RT 21127, 21134.) According to Craig Farmer, the Peterson's were "a very, very close family." (114 RT 21135.)

Aaron Fritz's mother described the Peterson's as a loving, supportive, and positive family. (116 RT 21278.) They were welcoming to those individuals that married into the family. (115 RT 21261.) Also, Jackie's

niece Rachel explained that Lee and Jackie cleared out their office while they were living in Morro Bay so Rachel could live there while she attended grade school. (117 RT 21375-21376.)

The Peterson's enjoyed going fishing and hunting. (116 RT 21303-21304.) Appellant and his brother Joe went fishing together at lakes around Northern California. (116 RT 21301-21302.) When appellant and his family visited relatives in Alaska, appellant went hunting with the men. (117 RT 21378-21379.)

14. *Present circumstances*

When asked by defense counsel how the present circumstances had affected his life, Lee said he was depressed, deeply saddened, and also frightened for appellant. (114 RT 21104.) He and Jackie visited appellant in jail as much as they could. (114 RT 21111.) Lee loved appellant very much and had great respect for him. (114 RT 21103.) Like Lee, Jackie enjoyed a close relationship with appellant. (114 RT 21102-21103.)

Jackie said that she and Lee felt like "shells" with "nothing left inside us." (119 RT 21591.) If appellant received a death sentence, it would mean a whole family was wiped off the face of the earth. (119 RT 21591.) "[I]t would be like they never existed." (119 RT 21591.) Jackie believed that appellant could "do a lot of good things with his life." (119 RT 21591.) She believed that appellant was victimized by the media and police and was nothing like how he had been portrayed. (119 RT 21591-21592.)

Jackie's close friend Joanne Farmer remarked that the circumstances had aged Jackie and Lee considerably and broken their hearts. (114 RT 21123.) Farmer did not want to consider the possibility that appellant might receive a death sentence. (114 RT 21123.)

Appellant's stepsister Susan stated that during appellant's time in jail he maintained contact with Susan's children. (114 RT 21154.) One time, Susan's 14-year-old daughter wrote to appellant about an issue she was

having with Susan. Appellant provided a valuable perspective that improved the situation. (114 RT 21155.) Appellant also kept regular contact with his other nieces and nephews. (115 RT 21243; 116 RT 21319; 119 RT 21557, 21563.) Appellant's niece Brittney said that appellant's letters made her feel loved and important. (119 RT 21564.)

Robert Thompson, Jr., appellant's former teacher at Cal Poly, still communicated with appellant by letter. (118 RT 21499.) Thompson recalled that in his first letters, appellant talked about missing Laci. (118 RT 21499.)

Susan said that if appellant were put to death, it would "kill" Jackie and Lee. (114 RT 21157.) Jackie's close friend Joan Pernicano was worried about the effect it would have on Jackie's health, as was Susan Medina who had gotten to know Jackie and Lee after Laci disappeared. (115 RT 21218; 118 RT 21506.) Others agreed that if appellant was put to death, it would have a devastating effect on the family. (117 RT 21372, 21384, 21392, 21409; 119 RT 21559.)

Aaron Fritz said it would be "a horrendous tragedy" if appellant were executed. (115 RT 21194.) Other witnesses generally agreed. (115 RT 21208, 21218, 21244, 21259.) Numerous witnesses, when asked, affirmed their belief that appellant could continue to positively impact the lives of others and make a contribution to society if sentenced to life in prison. (115 RT 21194; 116 RT 21278-21279, 21285, 21320; 117 RT 21358, 21383, 21392, 21423, 21430, 21444-21445; 118 RT 21476, 21489, 21499-21500; 119 RT 21559.)

Some witnesses made it clear that they thought the jury arrived at the wrong verdict. (117 RT 21372, 21391.) This sentiment was shared by appellant's niece Brittney, who said, "I can't stand back and watch my innocent uncle go through this." (119 RT 21562.)

Lee recounted that he was in San Diego when the jury returned with the guilt-phase verdict. He did not think the jury would have arrived at a verdict so quickly. (114 RT 21110.) When the verdict was announced, all of his grandchildren burst into tears. (114 RT 21110-21111.) Appellant was upbeat through it all, trying to protect Lee and Jackie. (114 RT 21111-21112.)

15. *Documentary evidence*

Numerous photographs that depicted appellant and different events in his life were discussed by various witnesses. Those defense exhibits are found in volume number 15 of the Supplemental Clerk's Exhibits Transcript beginning at page number 3,753.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCUSED THE IDENTIFIED THIRTEEN PROSPECTIVE JURORS FOR CAUSE BECAUSE THEIR QUESTIONNAIRES DEMONSTRATED THAT EACH WAS "SUBSTANTIALLY IMPAIRED" WITHIN THE MEANING OF *WAINRIGHT V. WITT*

Appellant contends the penalty judgment must be reversed because the trial court improperly discharged 13 prospective jurors for cause based on their opposition to the death penalty, as reflected in their respective questionnaire responses. (AOB 72-107.)

We disagree. Reversal of the penalty judgment is unwarranted because substantial evidence supports the trial court's exclusion of the identified jurors. Review of the identified jurors' questionnaires demonstrates that each was substantially impaired in the ability to consider both penalties. Also, a number of the prospective jurors were properly excused on alternative grounds. At any rate, even if one or more of these identified jurors was erroneously excluded, the error was harmless.

A. The Jury Selection Process

There were approximately 1,250 jurors summoned for this case (36 RT 7096) of which over 300 were brought in for voir dire (39 RT 7896). Of those 300, the trial court determined that 76 were qualified to serve as jurors. (41 RT 8310.)

As will be shown, appellant's contention on appeal that the trial court—facilitated by the prosecution's purported silence—tipped the venire to favor death is baseless. Appellant, through his able counsel, helped to shape the venire. And, from this constitutionally acceptable venire, impartial and unbiased jurors were culled.

Further, insofar as appellant asserts the trial court misapprehended the law governing the jury selection process in a capital case and excused jurors who merely registered opposition to the death penalty, instead of those who were incapable of imposing it, appellant's contention is without merit, as we explain below.

At the start of jury selection, the trial court, which had presided over at least 20 capital cases (11 RT 2083), assured defense counsel: "[W]hen I go through this in jury selection, I'm going to see that a level playing field is here. To the best of my ability that will happen." (3 RT 738.) The court repeated this reassurance: "I'm going to try my very best to see that you end up with a level playing field in this case." (3 RT 738.) The court made good on its promise. Throughout the trial, the court worked tirelessly to ensure that appellant received the fair trial due him. That was nowhere more true than during the jury selection process. Indeed, well into jury selection, defense counsel said, "I think the court has exercised Herculean efforts in trying to get a fair panel here." (36 RT 7082.)

Before jury selection began, the trial court provided the parties with sample juror questionnaires that the court had used in the past. (1 RT 355.) The court invited the parties to propose additional questions (1 RT 356) and

also suggested that the parties confer and try to stipulate regarding jurors that could not be death-qualified (1 RT 357). The court expected there would be as many as 250 prospective jurors brought in each day to complete the questionnaire. (1 RT 356.)

The court and parties developed the proposed questions one by one (6 RT 1230-1270), including those which addressed the question of penalty (6 RT 1262-1268). During this process, the court explained that it did not want to make the questionnaire too complicated for the prospective jurors. (6 RT 1268.) About a week later, the court and parties conferred over the questionnaire a second time before it was finalized. (10 RT 1960-1968.)

In its final form, the questionnaire was 20 pages and composed of 116 questions. (See, e.g., Vol. No. 21, *Hovey*[92] Voir Dire ("HV") – Excused Questionnaires, pp. 5752-5771.) Thirteen questions addressed the prospective juror's view on the issue of penalty. (See, e.g., 21 HV 5770-5771.) Ten of the questions on penalty invited a juror to amplify their checked answers. (See, e.g., 21 HV 5770-5771.)

Before prospective jurors completed the questionnaire, the trial court explained its contents. For example, on the question of punishment, the trial court explained:

> Now, when you come back, we're going to spend some time here talking about these two punishments; how you feel about the death penalty, how you feel about life without the possibility of parole. And when you come back I'm going to tell you also that this is not some kind of a test when we ask you these questions. There is no right or wrong answer. We just want to know how you feel about these two possible penalties and how you feel about this particular charge, this particular trial in general.
>
> Now, in order to do that, we're going to have you fill out a questionnaire here. And I'll explain that to you in just a second.

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[92] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

> But before we get into the questionnaire, there is one thing I want to throw out there, because I want you to think about [].
>
> Forgetting about Mr. Peterson, forget about this case. Just you, knowing the type of person that you are. And the question is this. You don't have to answer it now, but I want you to think about it before you came back here. This is one of the first questions I'm going to ask you when you come back here. Forgetting about there [*sic*] case, do you think you could [] vote to execute another human being? Could you do something like that? Okay. So think about that.

(11 RT 2051-2052.) Prior to asking the jurors to do some soul-searching on their attitudes about the death penalty, the court had explained, among other things, the function of the guilt and penalty phases and evidence in mitigation and aggravation. (See, e.g., 11 RT 2048-2049.) Therefore, the identified jurors' questionnaire answers, discussed below, are informed by the court's admonition to give careful and thoughtful consideration to the questions concerning the death penalty, along with its explanation of the penalty phase process.

During voir dire, it was not unreasonable for the court to simultaneously consider and balance a number of issues which could potentially impact a juror's ability to serve, including hardship requests, *Witherspoon-Witt*[93] considerations, and other biases which might spawn for-cause challenges by either party. As we explain in more detail below, the trial court determined that some jurors, by their questionnaire answers alone, had demonstrated disqualification under *Witt*. This Court has recognized the efficacy in using the questionnaires alone in excluding *Witt*-impaired jurors. (*People v. Thompson* (2010) 49 Cal.4th 79, 96-97 ["[T]he reason for using the questionnaires to exclude obviously *Witt*-impaired

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[93] *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521 (*Witherspoon*); *Wainwright v. Witt* (1985) 469 U.S. 412, 416 (*Witt*).

prospective jurors was not to gain speed for its own sake; rather, it was to spend more time with the remaining jurors at voir dire."] see also *United States v. Rahman* (2d Cir. 1999) 189 F.3d 88, 121-122 [holding, where district court removed some potential jurors for cause based on responses to questionnaires while conducting oral voir dire of remaining venirepersons, that court's "voir dire skillfully balanced the difficult task of questioning such a large jury pool with the defendants' right to inquire into the sensitive issues that might arise in the case"].)

The following colloquy, for example, reflects three things, all of which undermine appellant's negative characterization of the jury selection process in this case. First, the trial court was determined to impanel jurors who were open-minded and fair when it came to both phases of the trial. Second, the court was willing to voir dire prospective jurors who did not demonstrate an inability to consider both penalties based on their questionnaire answers alone. And, third, the prosecution was actively engaged in the selection of fair and impartial jurors.

> THE COURT: Job will pay for trial time. This is juror number 29556. Full time leadership position and school might suffer. I am not sure if payment is over six months. [¶] Let's see if it's going to interfere with his job performance. [¶] Supports the death penalty. He said it's a heavy burden, should only be used in the most serious cases. LWOP, he says I'm glad there is a choice, which is the way they should be. That's the right answer. [¶] Unfortunately he said he's likely guilty. Have you formed an opinion. Yes. But the juror says I would certainly be open, try to be open to all the evidence.
>
> [DEFENSE COUNSEL]: Gets paid or doesn't get paid?
>
> [PROSECUTOR NO. 1]: Does get paid.
>
> [DEFENSE COUNSEL]: Does get paid?
>
> [PROSECUTOR NO. 2]: I think that's one we should just order back. See how it goes.

> THE COURT: I don't know if this guy would make it through a challenge for cause.
>
> [DEFENSE COUNSEL]: Let's just see. I don't mind ordering him back.
>
> THE COURT: You want to talk to him?
>
> [DEFENSE COUNSEL]: I'm with [prosecutor no. 2]. I'll talk to him.
>
> THE COURT: All right. We'll order him back. He's a geologist. [¶] 29556. But I want to ask him about the impact on his employment before I order him back.

(14 RT 2933-2935.)

The record shows many instances in which the court, after reviewing questionnaire answers, conducted voir dire—or planned to—of those jurors whose views were not entirely clear, or those who, irrespective of their views for or against the death penalty, manifested an apparent willingness to set their views aside. (See 13 RT 2487 [No. 8135—opposed to death penalty] 16 RT 3286-3304 [No. 4821—opposed to death penalty]; 18 RT 3720 [No. 4089—opposed to death penalty]; 27 RT 5205-5206 [No. 16740—conflicting answers on penalty]; 29 RT 5571 [No. 8457—"mixed feelings" regarding death penalty]; 31 RT 6186 [No. 6271—opposed to death penalty, but may be justified in certain instances]; 37 RT 7440-7441 [No. 1214—unclear answers on issue of penalty].)

The court's assessment under *Witherspoon-Witt* appropriately focused on whether the prospective juror would be able to impose either penalty. If in the court's assessment the answer was no, then the juror was not fit to serve. (12 RT 2283.) In suggesting otherwise, appellant lifts out of context a comment made by the trial court when the court excused prospective juror number 6033—a ruling not challenged on appeal. (AOB 72.) Here is the comment in context:

> THE COURT: [] 6033.
>
> [DEFENSE COUNSEL]: 6033.
>
> THE COURT: Okay. [Referring to an answer in the juror's questionnaire] 19:108 says: I could never accept responsibility in the death of another person. Opposes the death penalty. So there's a stipulation, with the reservation [referring to defense counsel] that he's objecting I'm excluding a person *who could never impose the death penalty*, correct?
>
> [DEFENSE COUNSEL]: That's correct.
>
> THE COURT: All right. So with that reservation, we'll excuse 6033 because the court's of the opinion that she can't -- if you don't support the death penalty you cannot be death qualified.

(18 RT 3716, emphasis added.) In her questionnaire, this juror explained that she was "*unable* to sentence another a person to death." (5 HV 1153, emphasis added.) The juror also wrote that, "I could not live with myself if I imposed that sentence." (5 HV 1170.) She would be unable to impose the death penalty regardless of the facts. (5 HV 1170.) Given the context of the court's comments, it was evident that the court excluded the prospective juror because, if this was true, the juror was unable to impose the death penalty, not because she merely opposed it.

On page 73 of his opening brief, appellant references other comments made by the trial court, which suggest the trial court did not abide by the law and excused jurors for mere opposition to the death penalty. With respect to the first of these references at page 3556 of volume 16 of the Reporter's Transcript, the trial court made clear, during the relevant colloquy with defense counsel, that it had earlier qualified a prospective juror who was "opposed to the death penalty." This further demonstrates that, in the court's view, opposition to the death penalty did not equate with disqualification. The next cited reference concerns prospective juror

number 24095. The trial court first summarized some of the juror's questionnaire responses:

> Opposes the death penalty. What are your feelings regarding the death penalty. Against the death penalty. Thinks your client's guilty. Court proceedings are expensive. The prosecution must feel they have a strong case to take this case to trial, otherwise we wouldn't be here. [¶] I don't know if I could set aside my pre-existing opinions or attitudes. This guy opposes the death penalty.

The court continued, "I'm going to excuse him because he opposes the death penalty and also thinks--," at which point defense counsel interrupted the court and implicitly acknowledged there were issues with this juror. (17 RT 3388-3389.) Appellant next cites a comment the court made with respect to the excusal of juror number 29280—one of the jurors challenged here. This was a juror who described the death penalty as "ethically unjust" and who had been involved in circulating anti-death penalty petitions. (17 RT 3485.) As we argue below, the court correctly determined that this juror's opposition to the death penalty rose to a level that rendered them incapable of performing his duties under *Wainright v. Witt.* (17 RT 3486.) Appellant also highlights the trial court's comments concerning prospective juror number 630. In his questionnaire, this juror answered that he held religious or philosophical beliefs that would interfere with his ability to serve as a juror. He explained that he was opposed to the death penalty for humanitarian reasons. (Vol. 36, Hardship - Excused Questionnaires ("HS"), p. 10140.) The prospective juror's religious beliefs rendered him unable to impose the penalty of death regardless of the facts. (36 HS 10157.) Notably, defense counsel stipulated to the excusal of this juror. (14 RT 2868.) So, when appellant suggests the trial court applied an erroneous legal standard, he is wrong. The quote that appellant isolates does not tell the whole story, absent the context of the colloquy in its entirety and the prospective juror's questionnaire answers.

On the contrary, a reasonable reading of the cited comments in the specific context in which they were rendered, as well as in the context of the record of voir dire on the whole, demonstrates that when the trial court referred to a juror's opposition to the death penalty and opined that the juror failed *Wainright v. Witt*, it meant that, in the court's view, the juror was incapable of conscientiously giving the death penalty serious consideration as a sentencing alternative. Thus, the trial court's understanding of the guiding legal principles was correct. In this regard, this Court has observed, "*Witt* has long been the law and it is clear the court was aware of the appropriate standard to apply. In the absence of evidence to the contrary, we presume that the court 'knows and applies the correct statutory and case law.'" (*People v. Thomas* (2011) 52 Cal.4th 336, 361.)

As for the defense's position during voir dire, defense counsel made this blanket statement: "If I haven't said it before, obviously anybody who strongly opposes the death penalty, it goes without saying I object to them being excused." (17 RT 3367.) Yet, that was not truly the position of the defense. It became clear throughout the course of voir dire, that the defense was primarily concerned with finding favorable jurors for the guilt phase, *regardless* of their suitability for a possible penalty phase. (3 RT 737 [Defense counsel: "And the guilt phase is the whole ball of wax here. We don't care about the penalty phase."].)

B. Legal Principles

Under our state and federal Constitutions, a criminal defendant is guaranteed the right to be tried by an impartial jury. (Cal. Const., art. I, § 16; U.S. Const., 6th & 14th Amends.)

While "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause [citing *Witherspoon*]," "the State has a strong interest in having jurors who are able to apply capital

punishment within the framework state law prescribes [citing *Witt*]." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9.)

In accord with these principles, a prospective juror may properly be excused for cause if the juror's views on the death penalty "would 'prevent or substantially impair the performance'" of the juror's duties such that she or he is unable to comply with the court's instructions and his or her oath. (*Witt, supra*, 469 U.S. at p. 424.) Under *Witt,* the notion of substantial impairment encompasses whether a prospective juror can "conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. McWhorter* (2009) 47 Cal.4th 318, 340.)

On appeal, this Court independently reviews the trial court's decision to excuse a prospective juror for cause when the excusal is based solely upon that juror's written responses to a questionnaire. (*People v. McKinnon* (2011) 52 Cal.4th 610, 643 (*McKinnon*).) The Court must determine whether the trial court's rulings were fairly supported by the record. (*People v. Duff* (2014) 58 Cal.4th 527, 541.)

"'[A] prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is *clear* from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law.' [Citations.]" (*McKinnon, supra*, 52 Cal.4th at p. 643, original italics.) "The juror's written answers need not, however, dispel '*all possible or theoretical* doubt' regarding the juror's fitness to serve [citation], ..." (*People v. Jones* (2013) 57 Cal.4th 899, 915, original italics.)

This Court has recognized that

> [t]rial courts possess broad discretion over both "[d]ecisions concerning the qualifications of prospective jurors to serve" [citation] and the manner of conducting voir dire [citation]. Indeed, decisions of the United States Supreme Court in this area "have made clear that 'the conduct of voir dire is an art, not

> a science,' so ' "[t]here is no single way to voir dire a juror." ' [Citation.]" [Citation.] " 'The Constitution ... does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.' " [Citation.]

(*People v. Whalen* (2013) 56 Cal.4th 1, 29-30.) The trial court is in the best position to assess the attitudes and qualifications of prospective jurors. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1329.)

The United States Supreme Court's decisions in *Witherspoon* and *Witt* "limit the extent to which jurors may be excused for cause because of their views on capital punishment, but they do not hold such views are the only grounds on which a challenge for cause may be granted. [Citations.]" (*People v. Jackson* (2014) 58 Cal.4th 724, 752.)

C. The Trial Court's Excusal of Each of the Thirteen Identified Jurors Is Supported by Substantial Evidence

In this claim, appellant is not asserting that the jurors who heard the evidence at the guilt and penalty phases and who rendered verdicts against him were biased or otherwise partial. After all, he repeatedly expressed his satisfaction with the jury that tried him. (42 RT 8345, 8362.) Instead, appellant challenges the venire from which the seated jurors were drawn and contends the trial court's discharge of 13 prospective jurors based on their opposition to the death penalty tipped the balance of the venire such that it was weighted in favor of death.

In ascribing error to the trial court's excusal of the identified jurors, appellant rests his argument on the pro forma assurances in the jurors' questionnaires that they could be fair and impartial. (See generally AOB 85-100.) Likewise, appellant relies on the identified jurors' perfunctory and unadorned responses to the question of whether they possessed any moral, religious, or philosophical views that would render them incapable of serving as jurors. (AOB 106.)

However, this Court has made clear that such token answers by a prospective juror do not bar the juror's excusal:

> Importantly, neither we nor the high court has asserted that any statement—however unconvincing or ambiguous—by a prospective juror of willingness to apply the law despite strong death penalty views bars the juror's excusal, even if other statements by the prospective juror clearly demonstrate that he or she cannot do so. We have been careful to note that, even when an excusal was based on questionnaire responses alone, the excusal may be upheld if those answers, "taken together," clearly demonstrate the juror's unwillingness or inability, because of attitudes about the death penalty, to perform his or her duties in a capital trial. [Citation.]

(*McKinnon*, *supra*, 52 Cal.4th at p. 647.) The United States Supreme Court has indicated that an expressed willingness to abide by the law does not necessarily overcome other indications of bias. (*Morgan v. Illinois* (1992) 504 U.S. 719, 735.)

We also note that insofar as appellant's claim relies upon this Court's decision in *People v. Stewart* (2007) 33 Cal.4th 425 (*Stewart*), wherein the Court found error in the trial court's excusal of certain prospective jurors based on their questionnaire answers alone (AOB 104, 105), the questionnaire used in this case was far more comprehensive and inviting of detailed responses, and thus illuminating, than the questionnaire used in *Stewart*. In *Stewart*, the questionnaire was 13 pages in length and contained only one question that focused on prospective jurors' views about the death penalty. (*Stewart*, *supra*, 33 Cal.4th at pp. 441-443.) And, that one question inadequately stated the relevant standard under *Witt*, which made it impossible for the trial court to properly evaluate whether the prospective juror was, indeed, substantially impaired in the ability to impose the death penalty. (*Id.* at pp. 446-447.) As we set forth in greater detail in section III, *post*, the questionnaire employed by the trial court in this case did not suffer from any such weakness.

As we argue below, substantial evidence supports the trial court's excusal of each of the identified 13 jurors. The court properly discerned from the jurors' questionnaires, taking each juror's answers together (see *People v. Avila* (2006) 38 Cal.4th 491, 533), that these jurors were substantially impaired in that they could not fairly consider both possible punishments.

In some cases, the prospective juror's beliefs or attitudes also revealed additional bases for disqualification, including hardship and bias. In *People v. Ghent* (1987) 43 Cal.3d 739 (*Ghent*), the Court considered the contention that several prospective jurors were erroneously excused for cause based on their attitudes toward the death penalty. (*Id.* at p. 767.) After assessing that each juror ultimately demonstrated an inability to impose death, the Court stated:

> The record indicates that prospective juror Mrhre was excused *on the proper alternative ground of hardship*. In addition, the responses of two other challenged veniremen (Chasuk and Villalobos) indicated substantial doubt regarding their ability to render an impartial decision of the special circumstances issue, *a proper ground for their exclusion wholly apart from their feelings regarding the penalty*. (See *Hovey v. Superior Court, supra*, 28 Cal.3d 1, 11; *People v. Lanphear* (1980) 26 Cal.3d 814, 841 [163 Cal. Rptr. 601, 608 P.2d 689].)

(*Id.* at p. 768, emphasis added.)

As we explain below, in addition to proper *Witt*-based disqualification, various of the identified prospective jurors' questionnaire answers also presented "substantial doubt" regarding their ability to be fair and impartial jurors. In those instances, the juror's excusal was also properly predicated on these additional grounds.

1. *Prospective Juror Number 6963*[94]

The trial court and parties discussed this prospective juror during the trial court's evaluation of hardship issues in early March 2004.[95] (14 RT 2715.) The juror had a three-week vacation planned with his family for that coming July. (31 HS 8754; 14 RT 2715.)

As a threshold matter, discharge of this juror was a proper exercise of the trial court's authority based on personal hardship. "'[A] trial court has authority to excuse a person from jury service for undue personal hardship. [Citations.] Exercise of that authority is reviewed for abuse of discretion. [Citation.]' [Citations.]" (*People v. Tate* (2010) 49 Cal.4th 635, 663.) Given that the juror was going to be unavailable for an extended period during the course of the trial, which was expected to last five to six months (11 RT 2043), the trial court's excusal of this prospective juror was properly predicated on the additional ground of hardship. (See *Ghent*, *supra*, 43 Cal.3d at p. 768.)

In any event, substantial evidence supports the trial court's discharge of the juror under *Witherspoon-Witt*. Under that standard,

> "'[t]here is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable

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[94] We address each prospective juror in the order set out by appellant in his opening brief.

[95] The defense interposed blanket objections on occasion and specific objections to certain prospective jurors, as referenced throughout this section of our brief. In any event, the no-forfeiture rule set forth by the Court in *People v. Velasquez* (1980) 26 Cal.3d 425, was in operation at the time of trial and an objection was not necessary to preserve *Witherspoon-Witt* excusal error for appeal. (See *People v. Jones* (2013) 57 Cal.4th 899, 914-915 [overruling *Velasquez*'s no-forfeiture rule for cases tried in the future].)

> to faithfully and impartially apply the law in the case before the juror.' [Citation.]"

(*People v. Vines* (2011) 51 Cal.4th 830, 853; see also *People v. Tully* (2012) 54 Cal.4th 952, 996 ["unmistakable clarity" of view not required]; *People v. Jones* (2012) 54 Cal.4th 1, 41 [same]; *People v. Abilez* (2007) 41 Cal.4th 472, 497-498 [same].) It is not uncommon that prospective jurors "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." (*Witt, supra*, 496 U.S. at p. 425.) Whether a juror is excludable under the *Witherspoon-Witt* standard is a question of fact. (*Witt*, at pp. 423-424.)

The court noted from the questionnaire that juror number 6963 checked that he was "strongly opposed" to the death penalty and wrote that he was "against it." (14 RT 2715.) Not surprisingly, defense counsel stated, "I'll rehabilitate him."[96] (14 RT 2715.) The trial court did not provide counsel that opportunity and excused the juror. (14 RT 2716.) The trial court was under no obligation to indulge counsel given the clarity of the juror's responses concerning his views about the death penalty. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 355.) Further, in *People v. Mendoza* (2000) 24 Cal.4th 130, 165-166, this Court observed in the context of an ineffective assistance of counsel claim:

> When, as here, prospective jurors indicate they would have difficulty imposing the death penalty, but their answers are somewhat ambiguous, defense counsel may reasonably conclude from the answers given that the ability of each prospective juror to follow the law was substantially impaired, and that additional rehabilitative questioning would be futile. Alternatively, counsel may conclude that further questioning might provide

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[96] The trial court and defense counsel held fundamentally different views about the propriety and efficacy of trying to "rehabilitate" a juror who harbored unequivocal views about the death penalty that rendered the juror morally incapable of voting for death. (See, e.g., 21 RT 4251.)

> additional indications of the prospective juror's unwillingness to impose the death penalty, thus increasing the likelihood of getting a juror favorable to the defense excused. [Citations.] Under these circumstances, counsel cannot be said to have rendered ineffective representation. [Citation.]

Although *Mendoza* concerned counsel's actions during voir dire of the prospective jurors, the Court's reasoning applies with more force in this instance because there was no such ambiguity in this juror's questionnaire answers.

Juror number 6963 checked "Strongly Oppose" when asked his views about the death penalty in question number 109 and checked "yes" when asked in question number 110 whether it would be difficult to impose the death penalty if the crime was the guilty party's first offense (31 HS 8753), as was the case here. When asked in the next question about possible influences for his views about the death penalty, number 6963 stated, "It's just my feelings against it." (31 HS 8753.) His views against the death penalty had not changed in the previous 10 years. (31 HS 8753.) Thus, there existed no conflict or ambiguity in this juror's attitude toward the death penalty.

Additionally, the juror's answers demonstrated that he harbored a pro-defense bias, regardless of what the evidence might show. To question number 95, which concerned whether the juror had formed an opinion about appellant's guilt or innocence, number 6963 checked "innocence" and wrote, "No evidence he murder the wife." (31 HS 8750.) Question number 98 asked if the juror could set aside any opinions already formed about the case and base a decision on the evidence presented in the courtroom. Number 6963 did not answer the question. However, he did answer every other applicable question on that page. (31 HS 8751.) In response to a question asking whether he would abide by the court's

instructions to avoid news coverage of the case, the juror checked "no." (31 HS 8751.)

This juror also harbored a bias against police. When asked in question number 73 about his attitude toward law enforcement, number 6963 wrote, "not good." (31 HS 8747.) His answers to questions 81 and 82 concerning the credibility of police officers and whether they were generally too quick to arrest a suspect when there was a significant amount of publicity confirmed his bias. (31 HS 8748.) (See *People v. Thompson* (2010) 49 Cal.4th 79, 101 [expressed bias against the legal system and law enforcement by prospective juror indicated an inability to engage in deliberative process].)

Further, when asked in question number 83 about his level of confidence in certain types of evidence, the juror checked "not much" with respect to nearly every item of evidence listed, including DNA evidence, expert testimony, and photographic evidence (31 HS 8748), all of which were eventually presented in the trial.

As shown above, because this juror's questionnaire answers demonstrated substantial impairment under *Witherspoon-Witt* and "substantial doubt" as to his ability to be fair and impartial (*Ghent*, *supra*, 43 Cal.3d at p. 768), he was unfit to serve as a juror and was properly excused.

2. *Prospective Juror Number 6284*

This prospective juror was also discussed during the court's evaluation of hardship issues. (12 RT 2384.) The trial court first noted the juror was unemployed, but had a near-term employment opportunity. (12 RT 2384; 17 HS 4558.) Defense counsel also observed: "He's unemployed and may have a job." (12 RT 2384.) The court went on to note that the juror's position on the death penalty excluded him from

serving as a juror. The court excused the juror over defense objection. (12 RT 2384.)

Discharge of this juror was a proper exercise of the trial court's authority based on the juror's personal hardship, given that the juror was then unemployed and had what appeared to be an opportunity for employment. (See *People v. Tate*, *supra*, 49 Cal.4th at p. 663; *Ghent*, *supra*, 43 Cal.3d at p. 768.)

The juror's dismissal was likewise properly based on the juror's unequivocal views against the death penalty, which constituted substantial impairment. In response to question number 107, which asked the juror's feelings about the death penalty, number 6284 wrote: "I don't believe in the death penalty." (17 HS 4556.) His answer to question number 108, which asked the jurors about their feelings concerning life without parole, was: "more suited to life in prison." (17 HS 4556.) He rated his attitude toward the death penalty as "Oppose." (17 HS 4556.) When asked in question number 114 whether his views on the death penalty had changed over the previous 10 years, the juror checked "no." (17 HS 4557.) Thus, the juror was not merely stating that he would have difficulty imposing a death sentence; he did not believe in the death penalty and favored life without parole. (See *People v. Avila*, *supra*, 38 Cal.4th at p. 530 ["mere *difficulty* in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties"], original italics.)

Moreover, juror number 6284 did not answer numerous questions on the questionnaire, some of which addressed whether the juror or his family members had ever been arrested or charged with an offense, attitudes about

the credibility of police officers, following the court's instructions, and level of confidence in certain types of evidence.[97] (17 HS 4550, 4552.)

3. *Prospective Juror Number 27605*

The court initially observed that this prospective juror was "qualifiable," meaning that he could potentially serve on the jury. (16 RT 3102.) However, the court subsequently noted the juror was opposed to the death penalty, citing information from the juror's questionnaire. (16 RT 3104.) Later, when the court and parties discussed this juror again, the court detailed the basis for its excusal under *Witt*. (16 RT 3179.) Although the prosecution was willing to stipulate to the juror's excusal based on other answers which suggested prejudgment of the case and unwillingness to consider the evidence, defense counsel would not. (16 RT 3104-3106, 3178-3179.)

This prospective juror was properly excused without the need for voir dire because the juror's questionnaire answers demonstrated that he was substantially impaired under *Witt*. The juror checked "Strongly Oppose" when describing his attitude toward the death penalty and wrote that he was "against it." (2 HV 88.) His views on the death penalty had not changed in the previous 10 years. (2 HV 89.) In answering question number 110, as to whether it would be difficult for him to impose the death penalty if the crime was the guilty party's first offense, number 27605 checked "Yes." (2 HV 89.) "A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried" is subject to challenge for cause whether or not the particular circumstance is alleged in the charging document.

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[97] Contrasting juror number 6284's omissions with those of number 7110 who had a language problem (13 RT 2510-2511), suggests number 6284's omissions were not inadvertent or due to a language barrier.

(*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In addition to *Witt*-based disqualification, in response to question number 97a, which asked whether the juror could base his or her decision on evidence adduced at trial and not from other sources, prospective juror number 27605 checked "No." (2 HV 86.) In this regard, the juror would have been unable to fulfill his obligations to follow the court's instructions and his excusal was properly predicated on this additional ground. (See *Ghent*, *supra*, 43 Cal.3d at p. 768)

4. *Prospective Juror Number 4841*

When the court and parties first discussed this prospective juror, the court noted the juror's strong opposition to the death penalty as reflected in the questionnaire. (16 RT 3103.) Defense counsel responded, "Right" and offered to stipulate to the court's excusal of number 4841. (16 RT 3103.) The prosecution was also willing to stipulate. (16 RT 3179.) However, defense counsel reversed course and objected to the juror's excusal. (16 RT 3178.) The court, again, cited the juror's position on the death penalty and excused her. (16 RT 3180.)

The trial court's excusal of this juror on *Witherspoon-Witt* grounds is supported by substantial evidence. In response to question number 107, this juror stated she had no feelings about the death penalty. (2 HV 226.) However, with respect to question number 108, which asked the juror's feelings regarding life without the possibility of parole, number 4841 wrote, "If guilty, that person deserves that." (2 HV 226.) Thus, this prospective juror indicated that life without parole was the only sentencing alternative she would consider.

And, of the six possible answers to question number 109, which asked the juror to rate her attitude toward the death penalty, this juror checked "Strongly Oppose"—the choice that registered the greatest amount of

disapproval. (2 HV 226.) This juror's views about the death penalty had remained fixed for the previous 10 years. (2 HV 227.)

The trial court's decision discharging the identified juror here is unlike the erroneous excusal of juror "N.K." in *People v. Riccardi* (2012) 54 Cal.4th 758 (*Riccardi*). In *Riccardi*, the trial court excused N.K. based on her questionnaire answers alone. (*Id.* at p. 778.) However, N.K.'s answers were clearly in conflict with one another when it came to her views on the death penalty. (*Id.* at p. 782.) On the one hand, N.K. wrote in her questionnaire that she supported the death penalty and that it was not used enough. Conversely, she stated that she would "not feel right" in imposing the death penalty, even if it was warranted in some cases. The latter answer was in response to the question of whether she had any views that would affect her ability to be fair and impartial. (*Ibid.*) The Court found that the trial court should have conducted voir dire of N.K. given N.K.'s equivocation and inconsistent answers on her views on the death penalty. (*Ibid.*)

Here, there was no such equivocation. And, while appellant highlights the juror's perfunctory assurances to be fair and impartial (AOB 90), such assurances did not bar the court from excusing her. (See *McKinnon*, *supra*, 52 Cal.4th at p. 647.) This juror's written questionnaire responses left no reason to think that bringing her in for extensive questioning would make her eligible to serve as a juror in this case.

5. *Prospective Juror Number 29280*

Juror number 29280 wrote that the death penalty was "'ethically unjust'" and he was strongly opposed to it. (5 HV 939; 17 RT 3485.) Also, the juror had been involved with circulating petitions against the death penalty. (5 HV 940; 17 RT 3485.) Nonetheless, defense counsel objected to excusal of this juror. (17 RT 3485.) The court excused juror number 29280 based on *Witherspoon-Witt* considerations. (17 RT 3486.)

In his questionnaire, this juror described life in prison as being "better than the death penalty." (5 HV 939.) He also checked the "yes" response when asked in question number 110 if he would have difficulty voting for the death penalty if it were the guilty party's first offense. (5 HV 940.) When asked what, if anything, informed his views on the death penalty, he wrote: "My ethics class in high school." (5 HV 940.)

Taking the juror's questionnaire responses together (*McKinnon*, *supra*, 52 Cal.4th at p. 647), the trial court's excusal of this juror is supported by substantial evidence. There was no sense of equivocation in the juror's questionnaire about his views on the death penalty that warranted further elucidation. The juror believed the death penalty was ethically unjust, he had worked on behalf of abolishing it, and believed that life in prison was the preferred alternative.

6. *Prospective Juror Number 6960*

After a brief discussion with the parties about this juror's opposition to the death penalty that, in the trial court's view, was held "without reservation," the court excused the juror. (8 HV 2043; 21 RT 4245.)

The trial court's exclusion of this juror is supported by substantial evidence. When asked to describe her feelings about the death penalty, this juror wrote, "I wish it was not a thing needed." (8 HV 2043.) Consistent with this view, she felt that life without parole was "good in some cases." (8 HV 2043.) The juror responded in the affirmative when asked if it would be difficult for her to vote for the death penalty if it was the guilty party's first offense. (8 HV 2044.) As this Court has stated, "[a] prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried" is subject to challenge for cause whether or not the particular circumstance is alleged in the charging document. (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.) In terms of what may have

influenced her opposition to the death penalty, the juror stated: "Did see on T.V. someone being electrocuted—awful." (8 HV 2044.) Her views on the death penalty had remain fixed for the previous 10 years. (8 HV 2044.)

This juror was properly excluded because her questionnaire answers constitute substantial evidence that imposition of the death penalty was not a reasonable possibility. (See *People v. Williams* (2013) 58 Cal.4th 197, 278 [a prospective juror must be able to do more than simply consider imposing the death penalty; the death penalty must be a reasonable possibility].)

7. *Prospective Juror Number 7056*

The court excused this juror based on the juror's position on the death penalty. (23 RT 4469.) In opposing the excusal, defense counsel cited the juror's answers to questions which primarily impacted the guilt phase. (23 RT 4469.)

Substantial evidence supports the trial court's excusal of this juror. In her questionnaire, juror number 7056 wrote, "I don't believe in the death penalty." (10 HV 2572.) She also checked the response "Oppose" when asked to rate her attitude about the death penalty. (10 HV 2572.) The juror replied in the affirmative when asked if it would be difficult for her to vote for death if it was the guilty party's first offense. (10 HV 2573.) (See *People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.) Her views on the death penalty had not wavered in the previous 10 years. (10 HV 2573.)

Like the others, this juror's questionnaire answers demonstrated an inability to conscientiously consider death as a sentencing alternative. Her questionnaire responses revealed no ambivalence about her views on the death penalty which would have put the trial court on notice to bring her in for further clarification of her views. A juror does not have to admit to a particular bias before a court can discharge a sitting juror for reasons that

would have supported a challenge for cause. (*People v. Lomax* (2010) 49 Cal.4th 530, 589.)

Last, when this juror was asked if she harbored any attitudes or beliefs that would prevent her from relying on circumstantial evidence, she responded by checking "yes." (10 HV 2569.) This view squarely conflicted with the court's eventual instruction to the jurors that "direct and circumstantial evidence are acceptable as means of proof. Neither is entitled to any greater weight than the other." (43 RT 8419; CALJIC No. 2.00 [Direct and Circumstantial Evidence—Inferences].) "A juror whose personal views on any topic render him or her unable to follow jury instructions or to fulfill the juror's oath is unqualified. [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 901.) This juror's excusal was properly predicated on this additional ground. (*Ghent*, *supra*, 43 Cal.3d at p. 768.)

8. *Prospective Juror Number 16727*

Initially, the court and parties discussed the fact that the juror failed to appear that day. When the court's clerk called the juror, the juror said he made a mistake and thought he was not due in court for another five days. (24 RT 4769-4770.) The court went on to note that the juror was strongly opposed to the death penalty. (10 HV 2641; 24 RT 4770.) The court excused the juror over defense objection. (24 RT 4770.)

In his questionnaire, juror number 16727 wrote: "I am against death penalty"—but, when it came to life without parole, the juror stated, "100% support it." (10 HV 2641.) He rated his attitude about the death penalty as "Strongly Oppose." (10 HV 2641.) The juror explained that his opposition to the death penalty was based on his spirituality. (10 HV 2642.) As this Court observed, a trial court may properly excuse a prospective juror in a capital case when that juror has an "internal conflict" as evidenced by indicating "it would be very hard for him to ignore his belief system in order to carry out his duties as a juror." (*People v. Rountree* (2013) 56

Cal.4th 823, 848.) The juror's views in this regard had remained steadfast for the previous 10 years. (10 HV 2642.)

This juror's strong opposition to the death penalty contrasted with his full endorsement of life without parole supported the trial court's excusal of the juror. There was no need to voir dire this individual merely to confirm the substantial impairment reflected in the juror's questionnaire.

9. *Prospective Juror Number 8340*

When the court and parties discussed this juror, the court noted from the juror's questionnaire that the juror's religious views caused him to be strongly opposed to the death penalty. (28 RT 5485.) Although the prosecution was willing to stipulate to the juror's excusal, the defense objected. (28 RT 5485.) The trial court excused the juror based on "the juror's opposition to the death penalty on religious grounds." (28 RT 5485.)

The trial court's decision was supported by substantial evidence. In answering question number 107, which asked the juror about her feelings concerning the death penalty, the juror wrote: "I feel strongly against this; due to religious beliefs." (15 HV 4043.) The trial court's assessment of the juror's death-penalty views, as they were informed by her religious beliefs, was an appropriate consideration in evaluating the juror's ability to vote for either penalty. (See *People v. Rountree*, *supra*, 56 Cal.4th at p. 848.) As for her feelings about life without parole, the juror stated: "I prefer this over the previous penalty to be given to any defendants found guilty being that it gives the person an opportunity to live and accept his mistakes." (15 HV 4043.) Like some of the other identified jurors, number 8340 indicated that it would be difficult for her to vote for death if it was the guilty party's first offense. (15 HV 4044.)

10. *Prospective Juror Number 23873*

When this juror was discussed, the court pointed out that the juror believed it unfair that the case had received so much attention. (32 RT 6384-6385.) Specifically, question number 102 asked if there was a reason the juror could not be fair in this case. This juror responded "Yes" and explained: "I just think there is too much attention, and I don't think that is fair." (21 HV 5584.) The juror reiterated this concern when asked if there was anything about her qualifications as a juror of which the court should be aware. (21 HV 5584.) The court excused the prospective juror for cause based on the juror's questionnaire answers about the death penalty. (32 RT 6385.)

Given the unequivocal nature of the juror's questionnaire responses, substantial evidence supports the trial court's excusal of this juror on *Witherspoon-Witt* grounds. In her questionnaire, this juror rated her attitude toward the death penalty as "Strongly Oppose." (21 HV 5585.) In describing her feelings about the death penalty, she wrote: "Not good." (21 HV 5585.) As for life without parole: "that's ok." (21 HV 5585.) Juror number 23873 responded in the affirmative when asked if it would be difficult to vote for death if the crime were the guilty party's first offense. (21 HV 5586.) Her views on the death penalty had remained unaltered over the previous 10 years. (21 HV 5586.)

This prospective juror also harbored other views that supported her excusal on additional grounds. (See *Ghent, supra*, 43 Cal.3d at p. 768.) For example, the juror's views on the criminal justice were unfavorable. The juror had a family member who spent 10 years in prison. (21 HV 5579.) When asked how she felt the criminal justice system treated this person, the juror responded, "Badly." (21 HV 5579.) As a victim of crime, the juror also complained about "the process" going on "forever." She explained that she "had to continue to go to court." (21 HV 5580.)

This juror also made clear that she did not have much confidence in circumstantial evidence; she wrote, "Need the real thing." (21 HV 5581.) Yet, circumstantial evidence is "the real thing." (43 RT 8419 [CALJIC No. 2.00].) "A juror whose personal views on any topic render him or her unable to follow jury instructions or to fulfill the juror's oath is unqualified. [Citation.]" (*People v. Clark*, *supra*, 52 Cal.4th at p. 901.)

11. *Prospective Juror Number 593*

The trial court excused this prospective juror based on the juror's questionnaire answers concerning the death penalty. (17 RT 3486.) The prosecutor observed that the juror had indicated it would be difficult for him to vote for death if it was the guilty party's first offense. (4 HV 871; 17 RT 3486.)

The trial court's discharge of this juror is supported by substantial evidence. In addition to having checked "Strongly Oppose" when asked to rate his attitude toward the death penalty (4 HV 870), the juror reiterated this answer to question number 107, by writing "strongly oppose" to describe his feelings about the death penalty. (4 HV 870.) The juror's views on the death penalty had remained unchanged over the previous 10 years. (4 HV 871.) The answers, taken together, demonstrated substantial impairment in the juror's ability to consider both punishments. This Court has made clear that a juror's questionnaire need not "establish beyond *all possible or theoretical* doubt that the juror cannot apply the law and instructions, or follow the juror's oath in a capital case." (*McKinnon*, *supra*, 52 Cal.4th at p. 647, original emphasis.)

Further, apart from *Witt*-related impairment, this juror's questionnaire answers demonstrated other potential for-cause issues. When asked to rate his degree of confidence in certain types of evidence, as provided in question number 83, the juror checked "Not much" for circumstantial evidence and expert testimony, among others. (4 HV 866.) As is clear, this

was a circumstantial evidence case. This juror's excusal was properly predicated on this additional ground. (*Ghent*, *supra*, 43 Cal.3d at p. 768.)

12. *Prospective Juror Number 23916*

Immediately preceding discussion of this prospective juror, defense counsel suggested the parties had arrived at stipulations. (34 RT 6672.) Counsel then said, "What about 23916?" 23916 I was going to submit." The court explained that the juror would only be paid for three days of jury duty. (34 RT 6672.) In the juror's questionnaire, she indicated that if she was not paid for the duration of service, it would be a hardship. (21 HV 5772.) The court noted a page and question number from the juror's questionnaire. And, the prosecutor pointed out the juror's views opposing the death penalty. (34 RT 6672.) Defense counsel stated that he would submit the matter. (34 RT 6673.) The court excused the juror without explicitly stating its grounds, noting it excused the juror "by stipulation." (34 RT 6673.)

First, the court's excusal was a proper exercise of discretion based on the juror's hardship request. (See *People v. Tate*, *supra*, 49 Cal.4th at p. 663; *Ghent*, *supra*, 43 Cal.3d at p. 768.) The trial was expected to last five or six months—well beyond the three days the juror's employer was willing to compensate her.

Second, because the juror's questionnaire evinced a decided and unequivocal bias against the death penalty in favor of life without parole, the trial court's excusal on *Witherspoon-Witt* grounds is supported by substantial evidence. In answering question number 107 regarding her feelings about the death penalty, the juror wrote: "I do not believe in the death penalty." (21 HV 5770.) As for her feelings about life without parole, she stated: "I feel this is a better sentence for someone convicted of murder." (21 HV 5770.) She also replied, "yes" when asked if it would be

difficult for her to vote for death if it were the guilty party's first offense, as it was in this case. (21 HV 5771.)

13. *Prospective Juror Number 5909*

The court excused this prospective juror for because the juror was not qualified under *Witt*. (39 RT 7862.)

Substantial evidence supports the court's actions. In her questionnaire, this juror rated her attitude toward the death penalty as "Strongly Oppose." (27 HV 7360.) In describing her feelings about the death penalty, she wrote: "I'm against the death penalty." (27 HV 7360.) On the other hand, life without parole was "fine." (27 HV 7360.) Like a number of the other identified jurors, number 5909 indicated that it would be difficult for her to vote for death if the guilty party had committed no prior offenses. (27 HV 7361.) As cited above, "A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried" is subject to challenge for cause whether or not the particular circumstance is alleged in the charging document. (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.) Thus, substantial evidence supports the trial court's excusal of this juror.

D. Any Error Was Harmless

As argued above, the record refutes appellant's contention that "the questionnaires of these 13 jurors show only that they were opposed to the death penalty, nothing more." (AOB 106.)

Further, even if any one of the identified prospective jurors was erroneously excluded (AOB 76, 78, 106-107), appellant's death sentence should still be affirmed.

With respect to those identified prospective jurors who were properly subject to excusal for cause on grounds in addition to those under *Witherspoon-Witt*, the Court has stated that "'[t]he general rule [is] that an

erroneous exclusion of a juror for cause provides no basis for overturning a judgment.' [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 655-656; see also *People v. Tate*, *supra*, 49 Cal.4th at p. 672.) Appellant has "a right to jurors who are qualified and competent, not to any particular juror." (*People v Holt*, *supra*, 15 Cal.4th at p. 656; *People v. Tate*, *supra*, 49 Cal.4th at p. 672.) As we pointed out above, appellant does not contend that, as a result of the excusal of the identified 13 prospective jurors, he was tried by a jury that was not fair and impartial. "Moreover, defendant cites no authority for his assumption that an error in excusing a juror for reasons unrelated to the jurors' views on imposition of the death penalty requires reversal." (*Ibid.*)

With regard to those jurors whose excusal was limited to *Witherspoon-Witt* grounds, the Court has explained:

"[U]nder existing United States Supreme Court precedent, the erroneous excusal of a prospective juror for cause based on that person's views concerning the death penalty automatically compels the reversal of the penalty phase without any inquiry as to whether the error actually prejudiced defendant's penalty determination." (*Riccardi*, *supra*, 54 Cal.4th at p. 783, citing *Gray v. Mississippi* (1987) 481 U.S. 648; see *People v. Riccardi*, at p. 840 (conc. opn. of Cantil-Sakauye, C. J.).)

Assuming the Court finds any of the identified prospective jurors were erroneously excused under *Witherspoon-Witt*, the error was nonetheless harmless. As the Chief Justice recognized in *Riccardi*, *supra*, 54 Cal.4th 758, 840-846 (conc. opn. Of Cantil-Sakauye, C.J.), in *Gray v. Mississippi* (1987) 481 U.S. 648, 666, the United States Supreme Court examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*. In *Gray*, a majority of the Supreme Court rejected only one of those theories: the contention than an erroneous *Witherspoon-Witt* exclusion had no effect

on the composition of the jury. *Gray* found that the exclusion necessarily had an effect on the jury composition, even if it were assumed the prosecutor would have exercised a peremptory challenge against the death-scrupled prospective juror. As the Chief Justice's concurrence concluded in *Riccardi*, "*Gray* stands for the proposition that *Witherspoon-Witt* error is reversible per se because the error affects the composition of the panel "'as a whole'" . . . by inscrutably altering how the peremptory challenges were exercised." (*Riccardi, supra*, 54 Cal.4th at p. 842 (conc. opn. Of Cantil-Sakauye, C.J.).) As the concurrence in *Riccardi* further recognized, the Supreme Court thereafter rejected the *Witherspoon-Witt* remedy in *Ross v. Oklahoma* (1988) 487 U.S. 81, as well as the rationale employed in *Gray*, as applied to an erroneously included pro-death juror, explaining that the Sixth Amendment was not implicated simply by the change in the mix of juror viewpoints (either death penalty supporters of skeptics) who were ultimately sworn. (*Id.* at pp. 842-844 (conc. opn. Of Cantil-Sakauye, C.J.).)

Notwithstanding these observations, this Court "felt compelled to follow that precedent that is most analogous to the circumstances presented here[,]" which was *Gray*, as opposed to *Ross*. (*Riccardi, supra*, 54 Cal.4th at p. 845 (conc. opn. Of Cantil-Sakauye, C.J.).) Respondent respectfully asks this Court to revisit this conclusion in light of the observation that in *Gray*, the State (as well as the dissent) had argued the error had no effect on the case. Here lies a "reasoned basis" (*id.* at p. 844 fn. 2), for the different results in these cases. The "no-effect" rationale for adopting a harmless error rule only goes so far, and allowed the *Gray* Court to reject it so long as there was some effect on the jury composition. The state's proffered rationale therefore never required the Court to account for the nature of a *Witherspoon-Witt* violation. Respondent, however, now asks this Court to do so. The appropriateness of harmless error analysis should take into

account the "differing values" particular constitutional rights "represent and protect[.]" (*Chapman v. California* (1967) 386 U.S. 18, 44.)

Witherspoon protects capital defendants against the State's unilateral and unlimited authority to exclude prospective jurors based on their views on the death penalty. Therefore, "'*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . .' [Citation.]" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) Beyond this protection is the simple misapplication of the *Witherspoon-Witt* standard because it does not grant the prosecution the unilateral and unlimited power to exclude death-scrupled jurors, and as this Court has recognized, there is no cognizable prejudice simply in the absence of any viewpoint or any balance of viewpoints on the jury. (*Riccardi*, *supra*, 54 Cal.4th at p. 843-844 (conc. opn. Of Cantil-Sakauye, C.J.); *Lockhart v. McCree* (1986) 476 U.S. 162, 177-178.) As a result, any prospective juror who may have been excluded because of the erroneous application of the *Witherspoon-Witt* standard results in purely "technical error that should be considered harmless[.]" (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 666.)

II. THE GUILT-PHASE VERDICTS AND SPECIAL CIRCUMSTANCE FINDING ARE CONSTITUTIONALLY SOUND BECAUSE DEATH QUALIFICATION OF A JURY COMPORTS WITH CONSTITUTIONAL MANDATES, INCLUDING THOSE UNDER THE EIGHTH AMENDMENT

Appellant contends that because the 13 identified jurors were erroneously excluded, the reliability of the guilt phase judgment is necessarily compromised under Eighth Amendment principles. (AOB 108-116.) Appellant's argument is predicated on the oft-repeated assertion that death-qualification of jurors results in a jury that is more prone to convict. (AOB 114-116.) In other words, death-scrupled jurors tend to be less likely to convict. In appellant's view, excusing the 13 identified *Witt*-impaired

jurors harmed the deliberative process during the guilt phase. Accordingly, he contends the guilt verdicts must be overturned. (AOB 108-116.)

We disagree. The presumption that death qualification of jurors in capital trials breeds constitutionally impaired conviction-prone juries is a contention which the United States Supreme Court and this Court have repeatedly rejected. In point of fact, the jury selection process in this case suggests that death-scrupled jurors are not less likely to convict and death-inclined jurors are not less likely to acquit.

In any event, this Court has made clear that the erroneous exclusion of jurors for cause based on *Witherspoon-Witt* considerations does not compel reversal of the guilt phase judgment, even in light of Eighth Amendment considerations.

A. Established Precedent Provides That Even if Any One of the Identified Prospective Jurors Was Erroneously Excluded, Reversal of the Guilt-Phase Judgment is Unwarranted

The United States Supreme Court has found that "'[d]eath qualification' ... is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial. There is very little danger . . . that 'death qualification' was instituted as a means for the State to arbitrarily skew the composition of capital-case juries." (*Lockhart v. McCree*, *supra*, at pp. 175-176, fn. omitted.)

Accordingly, this Court has repeatedly rejected the claim that death qualification of a jury in a capital case violates a defendant's right to a jury selected from a representative cross-section of the community. (*People v. Taylor* (2010) 48 Cal.4th 574, 603; *People v. Gurule* (2002) 28 Cal.4th 557, 597-598; *People v. Carrera* (1989) 49 Cal.3d 291, 331]; see also (*Lockhart v. McCree*, *supra*, 476 U.S. at pp. 173-184 [rejecting contention that

exclusion of "guilt phase includables" violates "fair-cross-section" or "impartial jury" constitutional mandates]; *People v. Ashmus* (1991) 54 Cal.3d 932, 956-957 [same, under federal and state law].)

And, dispositive of appellant's claim here, *Witt* error does not require reversal of the guilt judgment or special circumstance finding in this case. (See *Riccardi*, *supra*, 54 Cal.4th at p. 783 [reversing penalty phase judgment for erroneous exclusion of prospective juror for cause, but affirming guilt judgment and one special circumstance finding]; *People v. Stewart* (2004) 33 Cal.4th 425, 455 [reversing penalty phase judgment for erroneous exclusion of prospective jurors for cause, but affirming guilt judgment and special circumstance finding]; *People v. Heard* (2003) 31 Cal.4th 946, 958-969 [same].) Appellant concedes the point. (AOB 108-110.)

B. This Court Has Considered the Erroneous Excusal of Jurors in the Context of the Eighth Amendment and Rejected Similar Claims

Despite the aforementioned authority, appellant maintains that no court has vetted *Witt*-exclusion error on Eighth Amendment grounds; specifically, as it relates to the need for increased reliability in both the guilt and penalty phases of a capital trial. (AOB 112.)

As a threshold matter, we acknowledge that, even if appellant's trial counsel did not interpose a specific objection to the court's exclusion of each of the identified jurors on Eighth Amendment grounds, trial counsel made clear the defense view that death-qualified jurors were more likely to convict. (3 RT 737 ["all you do when you death qualify, you get pro-prosecution jurors"].)

Appellant's Eighth Amendment reliability claim is not novel. This Court has previously considered and rejected a similar argument:

> Raising for the first time an Eighth Amendment challenge, [defendant] observes that neither we nor the high court has

> specifically considered the propriety of death-qualification in light of the constitutional interest in heightened reliability of guilt and penalty phase determinations in capital cases. Insofar as our research enables us to say, his observation is correct. However, his Eighth Amendment claim appears to be merely a restatement of his Sixth Amendment claims, and as such we find it to be without merit.

(*People v. Johnson* (1992) 3 Cal.4th 1183, 1213; see also *United States v. Brown* (11th Cir. 2006) 441 F.3d 1330, 1354 [rejection of Eighth Amendment challenge to death-qualification].) The same holds true here where appellant claims, at essence, that his rights to a fair cross section or impartial jury were abridged.

In *People v. Taylor*, *supra*, 48 Cal.4th at pp. 603-604, the Court rejected other Eighth Amendment arguments:

> We likewise find flawed the premise underlying defendant's assertion that death qualification, by eliminating the segment of the community that opposes the death penalty, skews the data courts typically rely on to determine "evolving standards of decency" for Eighth Amendment purposes. Through the death qualification process, individuals may be excused not only for their unyielding opposition to capital punishment but also for their intractable support of it. [Citations.] We reject defendant's contention that death qualification is irrational because it disqualifies individuals based on their moral beliefs when the penalty phase determination is " 'inherently moral and normative.' " [Citations.]

And, in *People v. Thompson*, *supra*, 49 Cal.4th 79, the Court implicitly rejected the defendant's claim that the trial court's exclusion of 18 prospective jurors for cause, based on their questionnaire answers alone, violated the Eighth Amendment. (*Id.* at pp. 95-105.)

As stated above, the United States Supreme Court flatly rejected the claim that excluding jurors from the guilt phase resulted in a jury unconstitutionally "slanted" in favor of conviction. (*Lockhart v. McCree*, *supra*, 476 U.S. at pp. 177-78.) Appellant provides no rationale for why the

identical argument would be any more persuasive if considered under the Eighth Amendment.

C. Voir Dire in This Case Undermines the Social Science Studies Upon Which Appellant Relies

As set forth in section I.A., *ante*, there were many prospective jurors in this case who were opposed to the death penalty, but who tended to believe appellant was guilty (i.e., death-scrupled jurors who were conviction-prone). (See, e.g., 11 RT 2174 [prospective juror number 4845], 2180-2181 [No. 21241], 2183 [No. 75], 2187 [No. 21315], 2204-2205 [No. 4870]; 12 RT 2276-2277 [No. 29314], 2282-2283 [No. 1110], 2285 [No. 22], 2290 [No. 8141], 2293-2294 [No. 818], 2294-2295 [No. 5856], 2300 [No. 667], 2302-2303 [No. 29298], 2308 [No. 29316]; 13 RT 2550 [No. 7208], 2596 [No. 6151]; 14 RT 2712-2713 [No. 6995], 2716 [No. 7186], 2743 [No. 29498], 2746 [No. 29520], 2748 [No. 643], 2765 [No. 658], 2855 [No. 796]; 15 RT 2950 [No. 9777], 2964 [No. 9588], 2976 [No. 534], 2977 [No. 30293], 3048 [No. 29823], 3078 [No. 9985]; 17 RT 3390 [No. 23978].) Thus, undermining appellant's theory that opposition to the death penalty necessarily portends a predisposition toward innocence over guilt.

Further, insofar as appellant cites several timeworn studies which posit that death qualification of juries tends to result in juries predisposed to guilty verdicts (AOB 115), this Court has previously considered social sciences studies of this ilk and found them unpersuasive. (See *People v. Taylor*, *supra*, 48 Cal.4th at p. 602; *People v. Lenart* (2004) 32 Cal.4th 1107, 1120; *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199; see also *Lockhart v. McCree*, *supra*, 476 U.S. at p. 173 [upholding the constitutionality of death qualification despite study findings].)[98]

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[98] The trial court explained that of the 20-plus juries that it had death-qualified, 6 returned death verdicts. (11 RT 2083.)

In sum, appellant has not provided any persuasive basis upon which to reconsider the established authorities on the issue or view any purported error as a "structural defect" that compromised the entire trial, including the guilt phase.

III. THE IDENTIFIED SEVENTEEN PROSPECTIVE JURORS WERE PROPERLY EXCUSED FOR CAUSE AS THE QUESTIONNAIRE ADEQUATELY DISCERNED A PROSPECTIVE JUROR'S ABILITY TO IMPOSE EITHER PENALTY UNDER *WITHERSPOON-WITT*

Appellant next challenges the exclusion of 17 additional jurors whom he claims were erroneously excused for cause based on their opposition to the death penalty as reflected in the affirmative answer of each to question number 115 in the juror questionnaire, which asked whether the juror's moral, religious, or philosophical opposition to the death penalty was so strong that she or he would be unable to impose the death penalty regardless of the facts. (AOB 117-127.)

Appellant's claim, at essence, is that the questionnaire did not make it "'sufficiently clear'" (AOB 124), that the identified jurors were excludable under *Witherspoon-Witt* because the questionnaire, "looked at as a whole" (AOB 124), did not assess whether a prospective juror could set aside her or his moral, religious, or philosophical opposition to the death penalty and follow the law (AOB 125).

Appellant's claim lacks merit. First, insofar as he is challenging the adequacy of the questionnaire on appeal, he has forfeited the issue. Appellant's trial counsel participated in formulation of the questions and did not otherwise object to its content.

In any event, like the previously identified prospective jurors, these 17 jurors were properly excluded from service because their questionnaire answers, taken together, demonstrated substantial impairment under *Witt*. As we explain, substantial evidence supports the trial court's rulings.

A. Appellant Has Waived His Claim Insofar As It Is Predicated on the Adequacy of the Questionnaire

As we stated in section I.A., *ante*, the trial court invited the parties to provide input on the juror questionnaire. (1 RT 355-356.) The court and parties also went through each of the proposed questions, including question number 115. (6 RT 1266 [number 111 when discussed].) When the trial court suggested that some of the questions might be cumulative, defense counsel agreed. (6 RT 1267.) A short while later, defense counsel said, "Right. The more I think about it the more I would rather do that individually as opposed to keep beating them over the head with the death penalty in the questionnaire." (6 RT 1268.)

When the court and parties finalized the questionnaire a week later, defense counsel did not object to question number 115. Nor did counsel specifically object to the questionnaire as misstating the *Witherspoon-Witt* standard. (10 RT 1960-1968.) Therefore, insofar as appellant's claim rests in whole or in part on the adequacy of the questionnaire, the claim has not been preserved for appeal. (*People v. Thompson*, *supra*, 49 Cal.4th 79, 97 ["Because defense counsel initially drafted the questions, agreed to the various revisions the trial court and prosecutor suggested, and accepted, without apparent objection, the final form of the questionnaire, defendant waived these claims."]; see also *People v. Rogers* (2009) 46 Cal.4th 1136, 1149; *People v. Robinson* (2005) 37 Cal.4th 592, 617.)

B. The Questionnaire, Taken As a Whole, Was Sufficiently Clear on the *Witherspoon-Witt* Standard As Aided by the Trial Court's Explanation Regarding Penalty Considerations

Even if viable, appellant's claim is without merit. The questionnaire was sufficiently clear on the *Witherspoon-Witt* standard.

As appellant rightly anticipated (AOB 125-127), this Court's decision in *People v. Thompson*, *supra*, 49 Cal.4th 79, undermines his claim. In

Thompson, the defendant challenged the wording of a penalty-related question, which asked "'can you see yourself': (A) voting for the death penalty or (B) voting for life imprisonment." (*Id.* at p. 98.) The defendant argued that a prospective juror might respond in the negative to "(A) simply because he or she could not 'imagine' the situation, rather than because he or she would be unable to consider the option of imposing the death penalty." (*Ibid.*) Although the Court found the defendant waived the claims predicated on the purported flaws in the questionnaire (*id.* at p. 97), the Court addressed the merits and found the defendant's interpretation of the question was "unreasonable and thus unpersuasive" (*id.* at p. 98). The Court went on to explain: "Within the context of the questionnaire as a whole and the court's explanations to the prospective jurors, the jurors would reasonably have understood the question as referring to their willingness to consider the option of imposing the death penalty. [Citation.]" (*Id* at p. 98.)

Likewise, in *People v. Wilson* (2008) 44 Cal.4th 758 (AOB 123-124), the Court's analysis of the questionnaire was informed by contextual considerations. The Court considered "the import of the questionnaire as a whole," "[t]he prefatory statement at the beginning of the section of the questionnaire concerning the death penalty," and "the trial court's oral statement, delivered before the jurors were given the questionnaires, which provided similar background information." (*Id.* at p. 788.) The Court found no error in the trial court's excusal of the identified jurors based on their questionnaire responses alone. (*Id.* at p. 790.)

Also, in *People v. Avila* (2006) 38 Cal.4th 491, 531 (AOB 122-123), the Court found the questionnaire at issue was not defective, noting with favor that the design of the questionnaire format included "expansive and detailed questions on capital punishment and gave jurors the clear

opportunity to disclose views against it so strong as to disqualify them for duty on a death penalty case."

This context-driven inquiry, utilized by this Court in *Thompson*, *Wilson*, and *Avila*, was previously employed by the high court in *Darden v. Wainwright* (1968) 477 U.S. 168, 176 ["We therefore examine the context surrounding [the prospective juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would 'substantially impair the performance of his duties as a juror' was fairly supported by the record."].)

The aforementioned authorities support the adequacy of the questionnaire employed in this case for determining whether a prospective juror was substantially impaired in the ability to vote for either penalty. Prior to the jurors completing the questionnaires, the trial court explained the trial process, the questionnaire, including the questions on penalty, and the need for the jurors to give careful consideration to whether they could vote to execute another human being. (See, e.g., 11 RT 2051-2052 [first panel], 2125, 2133-2134, 2139, 2143 [second panel]; 12 RT 2251, 2263 [third panel], 2349-2350 [fourth panel]; 13 RT 2473, 2475-2476 [fifth panel], 2593-2594 [sixth panel]; 14 RT 2702-2703 [seventh panel], 2798 [eighth panel]; 15 RT 2909 [ninth panel], 3035 [tenth panel]; 35 RT 6843-6844 [eleventh panel], 6941 [twelfth panel], 7014 [thirteenth panel]; 38 RT 7566-7567 [fourteenth panel], 7687-7688 [fifteenth panel]; 39 RT 7807 [sixteenth panel].)[99] Therefore, the prospective jurors reasonably understood the context and import of the questions on punishment, particularly those on the death penalty.

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[99] We cite those pages from the trial court's explanations that are most relevant to the questions about the death penalty. The court worded its remarks differently each time, but the message was generally the same.

Moreover, the wording of question number 115, in the context of the questionnaire as whole, would reasonably have been understood by the prospective jurors as an attempt to ascertain their willingness to consider voting to impose the death penalty under any circumstances. In all, there were 13 questions on the matter of penalty. (See, e.g., 21 HV 5770-5771.) Question number 115 was next to the last and asked: "Do you have any moral, religious, or philosophical opposition to the death penalty so strong that you would be unable to impose the death penalty regardless of the facts? (See, e.g., 21 HV 5771.) Immediately following the question, the juror was given the opportunity to check "yes" or "no," followed by an opportunity to explain, if the juror answered in the affirmative. (21 HV 5771.) As we detail below, many of the identified prospective jurors took advantage of this opportunity to expound upon their stated inability to vote to impose death.

The contextual considerations inherent in the design of the questionnaire itself, as aided by the trial court's admonition, were further buttressed by the following statement in the questionnaire, which preceded the questions on penalty:

> The court is asking the following questions regarding your feelings about the death penalty because one of the possible sentences for a person convicted of the charges the prosecution has filed is the death penalty. Therefore, the court must know whether you could be fair to both the prosecution and the defense on the issue of punishment if you reach that issue. By asking these questions, the court is not suggesting that you will ever need to decide this question because the court has no way of knowing what the evidence in this case will be, or whether or not you will find the defendant guilty of anything at all. In other words, the only way the issue of punishment will be decided by the jury is if it should find the defendant guilty beyond a reasonable doubt of the first degree murder of at least one count, and guilty of first or second degree murder on the other count, and the alleged special circumstance true beyond a reasonable doubt.

> By asking about your views on penalty now, the court is not suggesting that the jury in this case will find the defendant guilty.

(See, e.g., 21 HV 5770, original emphasis.)

Other sections of the questionnaire contained questions which specifically asked the prospective juror if she or he could follow the court's instructions. (See, e.g., 21 HV 5766 [questions nos. 79, 80], 5767 [no. 89], 5769 [no. 100].) Therefore, by the time the jurors reached question number 115, they were conditioned to accept the principle that following the court's instructions (i.e., the law) was of paramount importance if they were to serve as jurors in this case.

C. The Trial Court's Exclusion of the Seventeen Identified Prospective Jurors Is Supported by Substantial Evidence

In somewhat summary fashion, appellant contends 17 individual jurors were erroneously excluded for cause under *Witherspoon-Witt*. (AOB 118, 124.) Although appellant's claim is primarily predicated upon these jurors' answers to one question, which appellant argues is infirm, this Court has made clear that "the excusal may be upheld if those answers, 'taken together,' clearly demonstrate the juror's unwillingness or inability, because of attitudes about the death penalty, to perform his or her duties in a capital trial. [Citation.]" (*McKinnon*, *supra*, 52 Cal.4th at p. 647.)

Substantial evidence supports the trial court's exclusion of these jurors. Appellant acknowledges that every one of these jurors indicated that their moral, religious, or philosophical opposition to the death penalty was so entrenched that they would be unable to impose the death penalty. (AOB 118.) However, in support of his claim, appellant relies on the perfunctory assurances of certain of these jurors that their religious, moral, or philosophical beliefs would not interfere with their ability to serve as jurors. (AOB 124.) Yet, the trial court was not bound to give such pro

forma assurances more weight than the bulk of each identified juror's answers which, together, evinced substantial impairment under *Witherspoon-Witt*.

1. *Prospective Juror Number 651*

With respect to the question of her feelings about the death penalty, the juror wrote: "I don't believe in the death penalty." (21 HS 5890.) However, life in prison was a "humane [and] just outcome." (21 HS 5890.) The juror checked "Oppose" when she rated her attitude about the death penalty. (21 HS 5890.) She explained that the fact that she did not believe in the death penalty would make it difficult for her to vote for death if the crime was the guilty party's first offense. (21 HS 5891.)

With respect to her opposition to the death penalty on moral, religious, or philosophical grounds (no. 115), the juror explained: "At this moment, I do not believe in the death penalty—if faced with something truly heinous—I don't know my response—" (21 HS 5891.) On the other hand, this juror had no moral, religious, or philosophical beliefs that rendered her unable to vote for life without parole, regardless of the facts. (21 HS 5891.) Her position against the death penalty had remained unchanged for 10 years. (21 HS 5891.)

Question number 79 asked if the juror would be able to follow the trial court's instruction that a defendant arrested for any offense is presumed to be innocent. This juror did not check either of the answer options: "yes" or "no." Instead, she wrote, "For this case I am not sure." (21 HS 5886.) The juror wrote the same answer when asked in question number 80 whether she would be able to follow the court's instruction that the defendant is innocent unless and until the prosecution proves guilt beyond a reasonable doubt. (21 HS 5886.) The juror also wrote in response to question number 95 that appellant's "actions (granted—as presented by the press) do not fit with my perception of a grieving husband."

(21 HS 5888.) When asked in question number 97a whether she could base her decision entirely on the evidence produced in court and not from an outside source, the juror again declined to check "yes" or "no." Instead, she wrote: "Not sure. I would like to think I could be objective but cannot state [] so absolutely." (21 HS 5888.)

Additionally, when the court and parties first discussed this juror, the court observed that the juror would not be paid during the period of jury service. (12 RT 2425.) The juror appended a letter to her questionnaire from her employer to this effect. (21 HS 5892, 5895.) Thus, the trial court's excusal would have also been a proper exercise of its discretion based on hardship. (See *People v. Tate*, *supra*, 49 Cal.4th at p. 663; *Ghent*, *supra*, 43 Cal.3d at p. 768.) But, in any event, the excusal under *Witherspoon-Witt* is supported by substantial evidence.

2. *Prospective Juror Number 4931*

When the court and parties discussed this juror, the court noted from the questionnaire that this juror was opposed to the death penalty and did not believe in "'cutting a life short.'" (17 RT 3463, 3467.) Defense counsel responded, "Why don't you bring in [*sic*], see if we can rehabilitate him." (17 RT 3467.) The court declined. (17 RT 3467.)

This juror was strongly opposed to the death penalty. (4 HV 617.) He explained his feeling that "cutting a life short" denied the spirit a chance to gain wisdom. (4 HV 617 [question no. 107].) Conversely, life without parole enabled the person to learn and grow in spiritual wisdom. (4 HV 617 [question no. 108].) This juror responded in the affirmative when asked if it would be difficult for him to vote for the death penalty if the crime was the person's first offense. (4 HV 618.) His views against the death penalty had remained steadfast for the previous 10 years. (4 HV 618.) And, with respect to his affirmative answer to question number 115, the

juror explained that the "death penalty just brings the spirit back in a future physical life to cause trouble since learning was cut short." (4 HV 618.)

3. *Prospective Juror Number 912*

During the discussion of this juror, the court observed that the juror was strongly opposed to the death penalty. (17 RT 3486-3487.) The prosecutor referenced other anti-death penalty answers. (17 RT 3487.) The court excused the juror based on her opposition to the death penalty. (17 RT 3487.)

Substantial evidence, as found in the juror's questionnaire answers, supports the trial court's decision. Juror number 912 identified herself as a Baptist who actively participated in her religion. (5 HV 909.) This juror rated her attitude about the death penalty as "Strongly Oppose." (5 HV 916.) She wrote that life without parole was "a more accepta[b]le punishment." (5 HV 916.) Her views in this regard were influenced by her "religious beliefs." (5 HV 917.) The juror replied in the affirmative when asked if it would be difficult for her to vote for death if the crime was the guilty party's first offense. (5 HV 917.) And, she, like the others, indicated that her moral, religious, or philosophical opposition to the death penalty rendered her incapable of voting to impose it. (5 HV 917.)

4. *Prospective Juror Number 6263*

The trial court noted this prospective juror's vehement opposition to the death penalty and strong preference for life without parole. (18 RT 3717.) The court stated the juror was excused by stipulation, noting defense counsel's "reservation." (18 RT 3717.)

This juror responded affirmatively when asked in question number 10 if her religious or philosophical beliefs would interfere with her ability to serve as a juror in this case. (6 HV 1222.) She explained, "Philosophically,

I feel I have no right to judge another person's fate." (6 HV 1222.) The juror described herself as "very liberal." (6 HV 1227.)

In the latter section of the questionnaire that specifically addressed penalty, this juror repeated that she "vehemently" opposed the death penalty. (6 HV 1238.) Asked about life without parole, she wrote: "I strongly recommend it." (6 HV 1238.) She checked "Strongly Oppose" in rating her attitude about the death penalty. (6 HV 1238.) This juror checked "yes" when asked if it would be difficult to impose the death penalty for a first offense. (6 HV 1239.) And, with respect to her affirmative answer to question number 115, this juror wrote: "Moral—I would not want to be responsible for another person's death. I believe in Karma." (6 HV 1239.) In response to question number 101, which asked if there was anything else the court should know about her qualifications as a juror, this juror checked "yes" and wrote: "Yes, I am vehemently opposed to the death penalty and sitting in judgment of someone's life." (6 HV 1237.)

As for potential biases addressed by questions 94 through 97a, the juror admitted that she had formed the opinion that appellant was guilty: "I've assumed he's guilty because he was closest." "He had the most opportunity, and I don't believe his alibi. The fact that he was out fishing and they found the bodies in the Bay." (6 HV 1236.) This juror checked "no" and wrote "not sure" in response to the question that asked if she could base her decision entirely on the evidence. (6 HV 1236.) This prospective juror was subject to excusal on this additional basis. (See *Ghent*, *supra*, 43 Cal.3d at p. 768.)

5. *Prospective Juror Number 6399*

From this juror's questionnaire, the trial court related that the juror was strongly opposed to the death penalty and believed the State should not be committing acts of murder. (18 RT 3718.) Acknowledging the juror's

issues with the death penalty, defense counsel nonetheless maintained the juror was otherwise suitable. (18 RT 3718.) The court excused the juror. (18 RT 3719.)

In the penalty section of the questionnaire, this juror wrote: "The State should not be commit[t]ing acts of murder[.]" (6 HV 1284.) He rated his attitude about the death penalty as "Strongly Oppose." (6 HV 1284.) The juror explained that his "spiritual beliefs" influenced his opposition. (6 HV 1285.) He checked "yes" that it would be difficult for him to vote for death if it was the guilty party's first offense. (6 HV 1285.)

Question number six asked the juror to specify race or ethnic background. This juror checked the "Other" option and wrote "Human." (6 HV 1268.) This juror responded "yes" when asked in question number 10 if his religious or philosophical beliefs would interfere with his ability to serve as a juror in this case. He explained: "The State of California in the name of the People of California, should not commit murder." (6 HV 1268.) The juror described himself as "very liberal." (6 HV 1273.) In response to question number 101, which asked if there was anything else the court should know about his qualifications as a juror, this juror checked "yes" and wrote: "I strongly oppose the death penalty." (6 HV 1283.)

Also, the prospective juror's answers to questions 67c through 69, 76, and 82 revealed a decided bias against law enforcement based on his wife's personal experience in being charged with contributing to the delinquency of a minor. (6 HV 1278-1279.) The juror was, thus, subject to being excused on this additional ground. (See *People v. Thompson* 49 Cal.4th, *supra*, at p. 101 [expressed bias against the legal system and law enforcement indicated an inability to engage in deliberations]; *Ghent*, *supra*, 43 Cal.3d at p. 768.)

6. *Prospective Juror Number 6162*

The trial court excused this prospective juror based on the juror's *Witt*-related impairment. (18 RT 3718.) The juror's questionnaire answers constitute substantial evidence supporting the trial court's excusal. This juror rated their attitude toward the death penalty as "Strongly Oppose." (6 HV 1215.) He described his feelings about the death penalty as "not in favor," but life with parole was "ok with me." (6 HV 1215.) His views on the death penalty had not changed over the previous 10 years. (6 HV 1216.) As noted, he responded "yes" that he would unable to impose the death penalty regardless of the facts. In explanation, he wrote: "Moral." (6 HV 1216.) (See *People v. Thornton* (2007) 41 Cal.4th 391, 424-425 [upholding excusal of juror because moral opposition to the death penalty "was close to absolute"].) The juror also responded "yes" that it would be difficult to vote for death if it was a first offense. (6 HV 1216.)

7. *Prospective Juror Number 7152*

The court initially observed there might be a language barrier with regard to this juror. (21 RT 4162.) The court, with some apparent difficulty reading the juror's questionnaire answers, noted the juror's opposition to the death penalty based on the juror's Buddhist religious beliefs. (21 RT 4162.) The court asked defense counsel for his interpretation of the questionnaire. Afterward, the court said: "I don't think she would be qualifiable. So is there a stipulation, or do you want me to bring her in and ask her?" (21 RT 4162.) The prosecution offered to stipulate. Defense counsel stated, "I'll submit," and the court confirmed that it was with defense counsel's "usual objection." (21 RT 4162-4163.) Notably, defense counsel did not take the trial court up on its offer to bring this juror in for voir dire.

The court excused the juror because "for all those reasons I don't think she ever could impose the death penalty." (21 RT 4163.) The trial court's explanation undermines appellant's general assertion that the trial court excused jurors based solely on some generalized discomfort with the death penalty instead of the juror's inability to impose it (AOB 72, 73, 75).[100] As we explained in section I.C., *ante*, while the trial court repeatedly referred to a prospective juror's opposition to the death penalty upon excusing the juror, the animating principle was the court's evaluation that the juror could not vote to impose death.

The juror's questionnaire supports the trial court's assessment that this juror lacked sufficient facility with the English language. First, the questionnaire is replete with misspellings. Additionally, this juror made question marks next to numerous questions—including in the section addressing penalty—which indicated a lack of comprehension. (9 HV 2107-2112 [questions numbers 78, 79, 80, 88, 94, 97a, 103a, 103b, 108, 110, 116].) Individuals cannot serve as prospective jurors in California unless they are "possessed of sufficient knowledge of the English language." (Code Civ. Proc., § 203, subd. (a)(6); *People v. Eubanks* (2011) 53 Cal.4th 110, 130.) Given the lack of English fluency, as reflected in the questionnaire, excusal was proper for this reason alone. (See *People v. Lomax*, *supra*, 49 Cal.4th at p. 566 [insufficient command of the English language is a nondiscriminatory basis for excusing a prospective juror].)

Nonetheless, to the extent this juror was able to communicate her views on the death penalty, she indicated she was against it and opposed it. (9 HV 2112.) In answering question number 115 affirmatively, the juror

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[100] In any event, the trial court was under no obligation to announce its conclusions that a juror was biased, nor make detailed findings on the record, where, as here, such bias was evident from the record. (See *Witt*, *supra*, 469 U.S. at p. 430.)

wrote that she will not kill people. (9 HV 2113.) She described herself as a Buddhist who was active in the practice of her religion. (9 HV 2096.) Under *Witherspoon-Witt*, this juror was properly dismissed.

The propriety of the trial court's actions are also supported by defense counsel's choice to decline the trial court's offer to bring the juror in for clarification of her views. Although counsel's actions do not rise to the level of a forfeiture with regard to this juror, such actions are not without import in the Court's consideration of this claim. (*McKinnon*, *supra*, 52 Cal.4th at p. 644 [inference that defense counsel acquiesced in *Witherspoon-Witt* excusal reinforced when, faced with a tentative ruling that the prospective juror is excusable, defense counsel declined offer of further voir dire].)

8. *Prospective Juror Number 10012*

When this juror was discussed, the court stated on the record that the juror checked "yes" in response to question number 10 that he possessed philosophical or religious beliefs that interfered with his ability to serve as a juror. (30 RT 5808-5809; 16 HV 4326 ["cannot consider death penalty"].) The court went on to note that other answers confirmed the juror's opposition to the death penalty, including the juror's explanation for answering in the affirmative to question number 115: "'we may not take a human life.'" (30 RT 5809; 16 HV 4343.) In describing his feelings on life without parole, the juror wrote: "justified." (16 HV 4342.) He also expressed that it would be difficult for him to impose the death penalty for a first offense. (16 HV 4343.) The court observed the juror identified as "Christian" (30 RT 5808; 16 HV 4326) and the juror indicated that he was active in the practice of his religion. (16 HV 4326.) Thus, substantial evidence supported this juror's excusal under *Witherspoon-Witt.*

Additionally, this juror checked "not much" when asked how much confidence he had in circumstantial evidence and expert testimony. (16 HV

4338.) Thus, this juror was subject to excusal on these additional grounds. (See *Ghent*, *supra*, 43 Cal.3d at p. 768.)

9. *Prospective Juror Number 29331*

Referencing the juror's view that the death penalty was "'morally wrong," and noting other questionnaire answers that evinced a decided opposition to the death penalty, the trial court excused this juror for cause. (29 RT 5684.)

Substantial evidence supports this excusal. When asked in question number 101 if there was anything else the court should know about the juror's qualifications, this juror checked "yes" and wrote: "Don't believe in the death penalty." (16 HV 4157.) Asked in question number 107 about his feelings concerning the death penalty, this juror wrote: "I don't like the death penalty." (16 HV 4158.) However, life without parole "is fine." (16 HV 4158.) His views in this regard were influenced by "the book that was made into a movie with Susan Sarandon." (16 HV 4159.) The juror also indicated that he may have previously signed a petition in opposition to the death penalty. (16 HV 4159.) His views in this regard had remained fixed for the previous 10 years and he responded that it would be difficult to impose the death penalty if the crime was a first offense. (16 HV 4159.)

Last, in response to question number 88, which asked if the juror held any attitudes or beliefs that prevented him from relying on circumstantial evidence, the juror checked "yes" and wrote "seems to me direct [evidence] is strong." (16 HV 4155.) This view was especially problematic in a case such as this where the prosecution relied heavily on circumstantial evidence.

10. *Prospective Juror Number 29631*

The court read aloud this juror's answer to question 10 concerning whether the juror held religious or philosophical views that would interfere with his ability to sit as a juror in this case: "'I do not believe in death

penalty or giving extreme judgment.'" (30 RT 5914; 16 HV 4280.) This juror described himself as a practicing Catholic who was "very religious." (16 HV 4280-4281.) The juror cited praying as one of his hobbies, along with walking, music, and movies. (19 HV 4286.)

The court also referenced the juror's answer to the question which asked about the juror's feelings regarding the death penalty: "I do not really agree due to religious belief." (30 RT 5914; 16 HV 4296.) Beyond checking "yes" to question 115 regarding his inability to impose the death penalty, this juror explained: "'Thou shall not kill.'" (16 HV 4297.) On the subject of life without parole, this juror wrote: "Ok." (16 HV 4296.)

This juror was properly excluded under *Witherspoon-Witt* based on his staunch opposition to the death penalty, as informed by his religious beliefs. (See *People v. Rountree*, *supra*, 56 Cal.4th at p. 848.)

11. *Prospective Juror Number 8607*

The court quoted from this juror's answer to the question concerning his feelings about the death penalty: "'Against my belief because I am a Christian.'" (30 RT 5915; 16 HV 4319.) On the other hand, as the court observed, this juror believed that life without parole was okay, if the person was guilty. (30 RT 5915; 16 HV 4319.)

With regard to question number 10 and whether the juror possessed any religious or philosophical views which rendered him unable to serve as a juror in this case, this juror checked "yes" and wrote: "No death penalty." (16 HV 4303.) He rated his opposition to the death penalty as "Strongly Oppose." (16 HV 4319.) When asked what, if anything, influenced his feelings about the death penalty, the juror wrote "Bible." (16 HV 4320.) He checked "yes" that it would be difficult to vote for death on a first offense. (16 HV 4320.) He explained his affirmative answer to question number 115 and his inability to vote for death: "Christian." (16 HV 4320.)

Apart from this substantial evidence supporting *Witherspoon-Witt* impairment, this juror also checked "no" when asked in question number 103 if he would be able to return a guilty verdict if he was convinced beyond a reasonable doubt based on the evidence presented. (16 HV 4318.) Conversely, the juror checked "yes" when asked the same question, but in reference to his ability to return a not guilty verdict. (16 HV 4318.) This prospective juror's bias in this regard supported his excusal on this additional ground. (See *Ghent*, *supra*, 43 Cal.3d at p. 768.)

12. *Prospective Juror Number 9503*

The court observed that this juror was strongly opposed to the death penalty and wrote that he did not believe in an eye for an eye. (31 RT 6107.) As the court continued to reference answers in the juror's questionnaire, defense counsel interrupted and said: "I'll [] submit it, with my usual." Which the court took to mean defense counsel's "usual objection." (31 RT 6107.) The juror was excused for cause. (31 RT 6107.)

No doubt defense counsel cut the court short on making a record because this juror's intractable views on the death penalty, like the others identified, were unambiguous. When asked for his feelings about the death penalty in question number 107, the juror wrote, "strongly against." (18 HV 4825.) He checked "Strongly Oppose" when he rated his attitude about the death penalty. (18 HV 4825.) It was his "personal belief," which influenced his feelings in this regard. (18 HV 4826.) The juror checked "yes" that he had previous involvement with petitioning for abolition of the death penalty. (18 HV 4825.) In explaining his moral, philosophical, or religious opposition to the death penalty, as the court noted, the juror wrote: "I do not believe in 'eye for an eye.'" (18 HV 4826.) Conversely, this juror had no moral, philosophical, or religious opposition to life without parole. (18 HV 4826.)

Also, this juror held negative views of law enforcement. He had family members who had been convicted of crimes. (18 HV 4819.) The juror opined that one of those family members "didn't deserve jail time, but head officer didn't like him and always tried to find something to arrest him with." (18 HV 4819.) The juror had been the victim of a residential burglary. He felt the police "acted poorly unsympathetic." (18 HV 4820.) The juror believed that law enforcement was "weak in some harsh cases, and to[o] strong on weak cases." (18 HV 4820.) He checked "Strongly agree" when asked in question number 82 whether the police were too quick to arrest a suspect in cases where there was a significant amount of publicity or pressure to find the perpetrator. (18 HV 4821.)

The juror's questionnaire answers also raised other potential for-cause considerations related to evidence and following the court's instructions, which supported his excusal on additional grounds. (See *Ghent*, *supra*, 43 Cal.3d at p. 768.) The juror responded affirmatively to question number 88 which asked if he had any attitudes or beliefs that would prevent him from relying on circumstantial evidence. Consistently, he checked "No" when asked in the following question if he could follow the court's instruction that direct and circumstantial evidence were entitled to the same weight. (18 HV 4822.) The juror checked "no" to questions numbered 103 and 104, which asked if he could return either a guilty verdict or not guilty verdict. (18 HV 4824.)

13. *Prospective Juror Number 9736*

After the court and parties discussed juror number 9736, defense counsel characterized the juror as "a submit." (31 RT 6188.) The court then queried, "Do you want to submit with your usual objection?" Defense counsel replied in the affirmative. (31 RT 6188.) The court stated that the juror was excused for cause. (31 RT 6188.)

The court was correct in its evaluation of this juror. In response to question number 107 asking the juror for his feelings about the death penalty, he wrote: "I am completely against it under any circumstance." (19 HV 5217.) Regarding his feelings about life without parole, the juror wrote: "I approve, when deserved." (19 HV 5217.) He rated his attitude toward the death penalty as "Strongly Oppose." (19 HV 5217.) This juror checked "Yes" when asked if it would be difficult for him to vote for death on a first offense. (19 HV 5218.) His position against the death penalty had remained unchanged for the previous 10 years. (19 HV 5218.) The juror explained: "Killing is wrong—the government shouldn't do it either—I've always felt this way." (19 HV 5218.) He elaborated on his inability to impose the death penalty on moral, religious, or philosophical grounds: "As above—I would never advocate the death penalty under any reason." (19 HV 5217 [question number 115].)

14. *Prospective Juror Number 24073*

Referencing this juror's answers, the court described her as being "really emphatic." (33 RT 6484.) The court pointed out the juror was a Jehovah's Witness and would not sit in judgment of another human. (33 RT 6484-6485; 20 HV 5454 [questions numbers 9, 10.) The court went on to note that the juror did not believe that human beings had the right to take another's life and that the death penalty was contrary to her religious convictions. (33 RT 6485.)

This juror wrote that she "will not vote for the death penalty." (20 HV 5469, original emphasis.) This was in response to question number 102, which asked if there was any reason she would not be a fair juror in this case. The juror also double-underlined "this case" in the question. (20 HV 5469.) With respect to her feelings about the death penalty, the juror wrote: "I do not have moral right to vote for it." (20 HV 5470.) She rated her attitude toward the death penalty as "Strongly Oppose." (20 HV 5470.)

The juror explained that her feelings were influenced by "religious teachings." (20 HV 5471.) In explaining her unwillingness to vote for death, this juror wrote: "Not morally right for humans to judge another to extent of death as we're all imperfect." (20 HV 5471 [question number 115].)

Further, this juror felt that life without parole should be reserved only for those individuals that are likely to reoffend, such as in cases of child rape and pornography. (20 HV 5470.) Presumably, even life without parole was off the table as far as this juror was concerned since appellant was not charged with those recidivist-type offenses.

The prosecution offered to stipulate to the juror's excusal and the trial court asked defense counsel if he wanted to join in the stipulation. (33 RT 6485.) Unsurprisingly, even in the face of such unequivocal religious opposition to the death penalty and steadfast unwillingness to impose such a penalty on the part of this juror, defense counsel submitted the matter with his usual objection. (33 RT 6485.) Appropriately, the trial court excused the juror for cause based on the juror's opposition to the death penalty.

15. *Prospective Juror Number 455*

The court observed that this juror was against the death penalty because it did not serve any purpose. (36 RT 7105; 23 HV 6325 ["I am against the death penalty because I don't think it serves any purpose besides revenge."].) Defense counsel, quoting from the juror's explanation for why he was unable to impose the death penalty, stated: "'I think it's barbaric and uncivilized and an embarrassment to this country.'" (36 RT 7105 [question no. 115].) On the other hand, the juror wrote that he was "neutral" on life without parole. (23 HV 6326.)

The trial court excused this juror for cause after defense counsel submitted the matter. (36 RT 7105.) Submitting the matter and objecting

to the court's ruling are not the same thing. "Although 'this failure to object does not forfeit the right to raise the issue on appeal, . . . it does suggest counsel concurred in the assessment that the juror was excusable.'" (*People v. Hawthorne* (2009) 46 Cal.4th 67, 82-83, abrogated in part as stated in *McKinnon*, *supra*, 52 Cal.4th at p. 637.) Substantial evidence supports the trial court's evaluation of this juror.

In addition to the answers cited above, this juror checked "yes" in that he would find it difficult to vote to impose the death penalty if the crime was the guilty party's first offense. (23 HV 6326.) He rated his attitude toward the death penalty as "Strongly Oppose." (23 HV 6325.) This juror's opposition to the death penalty had not changed over the previous 10 years. (23 HV 6326.)

16. *Prospective Juror Number 6712*

After the court made reference to this juror's opposition to the death penalty, defense counsel stated: "And [question number] 115 says yes. So I'll submit based upon the answer to 115. (36 RT 7106.) The trial court excused the juror for cause. (36 RT 7106.) Counsel's statement, at the very least, is a lukewarm acknowledgement that the trial court's for-cause excusal of this juror was reasonable based on the juror's inability to impose the death penalty.

When asked for his feelings about the death penalty in question number 107, this juror wrote: "detrimental to society." (22 HV 5957.) Responding to the next question regarding his feelings about life without parole, the juror stated: "preferable to death penalty." (22 HV 5957.) In rating his attitude about the death penalty, the juror checked "Oppose." (22 HV 5957.) His attitudes about the death penalty had not changed over the last 10 years. (22 HV 5958.) The juror checked "yes" that it would be difficult for him to vote for death if the crime was a first offense. (22 HV 5958.)

Thus, the trial court's actions are supported by substantial evidence, along with defense counsel's seeming acquiescence to the juror's excusal. (See *People v. Hawthorne*, *supra*, 46 Cal.4th at pp. 82-83.)

17. *Prospective Juror Number 7236*

The court first noted that this juror rated her attitude toward the death penalty as "'Strongly oppose.'" (36 RT 7113; 22 HV 5980.) The court next quoted the juror's response regarding her feelings about the death penalty: "'No right to take another['s] life.'" (36 RT 7113; 22 HV 5980 [question number 107].) Defense counsel then stated: "Based on the [affirmative] answer to 115, as well, I would submit." (36 RT 7113; 22 HV 5981.) Juror number 7236 checked "yes" when asked in question number 10 if her religious or philosophical views would interfere with her ability to serve as a juror in this case. (22 HV 5964.) She explained that she did not believe she had any right to vote for a death sentence for another human being. (22 HV 5964.) This juror's views against the death penalty had not wavered in the previous 10 years. (22 HV 5981.) When asked in question number 108 for her feelings on the penalty of life without parole, this juror wrote: "Yes, person has to pay for their crime." (22 HV 5980.)

Substantial evidence supports the trial court's exclusion of this juror. Again, defense counsel's implicit approval of the court's actions weighs in favor of the propriety of the court's evaluation of this juror.

D. Any Error Was Harmless

Further, even if any one of the identified prospective jurors was erroneously excluded, appellant's death sentence should still be affirmed. As we explained in section I-D, *ante*, with respect to those identified prospective jurors who were properly subject to excusal for cause on grounds in addition to those under *Witherspoon-Witt*, this Court has stated that "'[t]he general rule [is] that an erroneous exclusion of a juror for cause

provides no basis for overturning a judgment.' [Citation.]" (*People v. Holt*, *supra*, 15 Cal.4th 619, 655-656; see also *People v. Tate*, *supra*, 49 Cal.4th at p. 672.) Appellant has "a right to jurors who are qualified and competent, not to any particular juror." (*People v Holt*, *supra*, 15 Cal.4th at p. 656; *People v. Tate*, *supra*, 49 Cal.4th at p. 672.) Appellant does not contend that, as a result of the excusal of the identified 17 prospective jurors, he was tried by a jury that was not fair and impartial. "Moreover, defendant cites no authority for his assumption that an error in excusing a juror for reasons unrelated to the jurors' views on imposition of the death penalty requires reversal." (*Ibid.*)

As for those prospective jurors who may have been erroneously excused under *Witherspoon-Witt*, respondent respectfully asks this Court to revisit its conclusion in *Riccardi*, *supra*, 54 Cal.4th at p. 783, for the reasons previously advanced in section I-D, *ante*, and to uphold the penalty judgment.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S EXCUSAL OF THE FIVE IDENTIFIED PURPORTEDLY EQUIVOCAL PROSPECTIVE JURORS AS EACH WAS SUBSTANTIALLY IMPAIRED IN THE ABILITY TO IMPOSE THE DEATH PENALTY

Appellant's last claim challenging the trial court's for-cause excusals of prospective jurors under *Witherspoon-Witt* focuses on five jurors who, appellant argues, were equivocal in their expressed inability to vote for death, but not substantially impaired. His argument is predicated on the contention that United States Supreme Court precedent dictates that the trial court's assessment of the juror's actual state of mind, which may have contributed to its conclusion that each juror was substantially impaired, should not be credited by this Court. (AOB 128-147.)

There is no merit to appellant's claim. As an initial matter, this Court's jurisprudence on the issue is in accord with United States Supreme

Court precedent: In the case of an equivocal juror, deference is paid to the trial court's determination if supported by substantial evidence. However, the questionnaire and voir dire responses of the identified jurors disclose that none of them were equivocal in the inability to vote for the death penalty. And, even if equivocal, substantial evidence supports the trial court's determination that each of the identified jurors was nonetheless substantially impaired.

A. This Court's Decisions on the Standard of Review Governing a Trial Court's Determination of a Prospective Juror's Actual State of Mind Are in Accord with United States Supreme Court Precedent

Appellant initially argues that this Court's decisions according deference to a trial court's resolution of ambiguities and inconsistencies regarding a prospective juror's state of mind is contrary to the holdings of the United States Supreme Court in *Adams v. Texas* (1980) 448 U.S. 38 and *Gray v. Mississippi* (1987) 481 U.S. 648. (AOB 128-138.)

The Court has previously considered and rejected this argument. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 400; *People v. Thomas* (2012) 53 Cal.4th 771, 7901-791.) As this Court stated in *People v. Williams* (2013) 58 Cal.4th 197:

> Although defendant is correct that at times each prospective juror gave equivocal or conflicting responses, under such circumstances the trial court's determination as to the juror's actual state of mind is binding if supported by substantial evidence. [Citation.] After giving appropriate deference to the trial court's determination regarding the state of mind of these prospective jurors, we find the trial court's ruling fairly supported by the record and conclude that the trial court did not err in excusing [the prospective jurors] for cause.

(*Id.* at pp. 278-279; accord *People v. Jackson* (2014) 58 Cal.4th 724, 752; *People v. Duenas* (2012) 55 Cal.4th 1, 10; *People v. Wilson, supra*, 44 Cal.4th at p. 779.)

This Court's decisions comport with United States Supreme Court precedent. The high court has stated that a trial court's finding of impairment

> "may be upheld even in the absence of clear statements from the juror that he or she is impaired because 'many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.' [Citation.] Thus, when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.'"

(*Uttecht v. Brown*, *supra*, 551 U.S. 1, 7.)

Yet, the Supreme Court has also stated that "[t]he need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 20; accord *Gentry v. Sinclair* (9th Cir. 2013) 705 F.3d 884, 912.) Therefore, appellant's concern, as expressed by his citation to *Adams v. Texas* and *Gray v. Mississippi* (AOB 129-137), has been addressed and resolved by the high court more recently in *Uttecht v. Brown*.

In sum, this Court's decisions are in line with Supreme Court precedent, which allows for meaningful review of a trial court's assessment of a prospective juror's actual state of mind. Nonetheless, "[t]he trial court is in the best position to determine the potential juror's true state of mind because it observes firsthand the prospective juror's demeanor and verbal responses." (*People v. Clark* (2011) 52 Cal.4th 856, 895.)

B. The Trial Court Properly Excluded the Five Identified Prospective Jurors for Cause

A review of the five identified jurors' questionnaire responses and the record of voir dire supports the trial court's determination that each juror was properly excluded.

As a threshold matter, appellant complains that the trial court did not ask any of these jurors whether they could set aside their "preferences" and follow the court's instructions. (AOB 139, 140, 142, 143, 145.) However, the trial court was under no obligation to ask that question. "[T]rial courts possess considerable discretion to formulate the questions to be asked on voir dire and to tailor those questions to the needs of each individual prospective juror. [Citations.]" (*People v. Whalen* (2013) 56 Cal.4th 1, 50 [trial court need not ask "set aside" question when questionnaire responses make clear prospective juror could not set aside personal beliefs].)

1. *Prospective Juror Number 21369*

Although appellant gives short shrift to this juror's questionnaire responses (AOB 138-139), a thorough review discloses an unambiguous and unequivocal unwillingness on the part of this juror to vote for death.

When asked in question number 10 if the juror had religious or philosophical beliefs that would interfere with his ability to serve as a juror in this case, this juror checked "yes" and wrote: "I would not like to be responsible for sentencing anyone to death." (8 HS 1958.) In response to question number 102, which asked if there was any reason the juror could not be fair in this case, this juror checked "yes" again and explained: "I would not like to be a part of putting anyone in jail or putting them to death." (8 HS 1973.)

As for the juror's answers in the penalty section of the questionnaire, in response to question number 107, which asked the juror's feelings on the death penalty, this juror wrote: "I am against it. If guilty he should suffer

in jail." (8 HS 1974.) As to his feelings about life without parole, the juror wrote: "If he is guilty it is fine but I would not like to be a part in the decision." (8 HS 1974.) This juror rated his attitude toward the death penalty as "Oppose." (8 HS 1974.) He checked "yes" in response to question number 115 which asked if he had any moral, religious, or philosophical opposition to the death penalty so strong that he would be unable to impose the death penalty regardless of the facts. (8 HS 1975.) The juror explained: "I would not like to be a part of putting anyone to death even if guilty." (8 HS 1975.)

Apart from *Witt*-related impairment, this juror answered "no" when asked whether he would be able to return a guilty verdict based on proof beyond a reasonable doubt or a not guilty verdict in the absence of such evidence. (8 HS 1973 [questions numbers 103, 104].) The juror also admitted that he harbored negative feelings toward law enforcement. (8 HS 1969 [questions numbers 73, 76, 77].)

Additionally, this juror made a hardship request: "Just started new job have started to plan for vacation in June told boss dates I wanted to leave but have not bought tickets." (8 HS 1976.)

When the court and parties first discussed this juror, the court referenced the juror's hardship request. The court went on to cite some of the juror's questionnaire responses. (11 RT 2200.) Defense counsel indicated that excusal of this juror would be over defense objection. The court asked counsel if he wanted the court to interview the juror. (11 RT 2200.) Counsel said yes and the court brought the juror in for voir dire. The juror first affirmed his opposition to the death penalty. (11 RT 2200.) The court continued its questioning:

> THE COURT: And you could never select it as a penalty in this case?
>
> PROSPECTIVE JUROR: I wouldn't want to.

THE COURT: Well, could you ever pick it?

PROSPECTIVE JUROR: I don't think so.

THE COURT: Okay. What kind of -- you just started a new job. What kind of work do you do?

PROSPECTIVE JUROR: Auto body painter.

THE COURT: Auto body painter. Are you on probation now at your work?

PROSPECTIVE JUROR: Yeah, for three months.

THE COURT: Okay, we'll excuse you over the defense objection. Okay. You'll be excused.

(11 RT 2200-2201.)

After the juror left, the court stated: "I don't think he would qualify. Failed *Wainright v. Witt*." (11 RT 2201.)

The record of voir dire suggests the juror was excused based on the juror's hardship request. Under the circumstances, there was no abuse of the court's discretion. (See *People v. Tate*, *supra*, 49 Cal.4th at p. 663; *Ghent*, *supra*, 43 Cal.3d at p. 768.) The court's post-excusal comment suggests that the court was also of the view that, absent the hardship, the juror would be properly excluded for cause under *Witt*. Clearly, the juror's questionnaire answers supported the court's view.

Further, insofar as this juror responded "I don't think so" and "I wouldn't want to" during voir dire, such statements do not undermine the trial court's finding that this juror was substantially impaired. In *People v. Guzman* (1988) 45 Cal.3d 915, 956 (overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, footnote 13), the Court held that a prospective juror's use of equivocal phrases such as "I think" or "I believe" when communicating an inability to vote for the death penalty did not prevent the trial court from properly concluding that the juror's ability

to follow the trial court's instructions would be substantially impaired. Therefore, appellant's argument to the contrary (AOB 146), is unavailing.

2. *Prospective Juror Number 4486*

In her questionnaire, this juror described her feelings about the death penalty as "mixed." (2 HV 134.) She felt that life without parole "may be a suitable punishment for some crimes." (2 HV 134.) The juror rated her attitude toward the death penalty as "Weakly Oppose" and "Weakly Support." (2 HV 134.) She checked "Depends on the Evidence" when asked in question number 110 if it would be difficult for her to vote for death if it were the guilty party's first offense. (2 HV 135.)

During voir dire, the court first asked this juror if she could ever vote to execute another human being. (16 RT 3142-3143.) The juror responded: "I really don't think I could." (16 RT 3143.)

> THE COURT: You don't think you could? That's okay. A lot of people feel the same way that you do. [¶] So is it reasonable for me to assume that if you [were] selected as a trial juror in this case, the death penalty would not be an option for you?
>
> PROSPECTIVE JUROR: I would have a really hard time.
>
> THE COURT: Well, if you say you'd have a hard time, you're sort of leaving it open that you could maybe select it; but is it really an option for you?
>
> PROSPECTIVE JUROR: I don't think so.
>
> THE COURT: You don't think so? Okay. We'll excuse you, okay?
>
> PROSPECTIVE JUROR: Okay.
>
> [DEFENSE COUNSEL]: Over the defense objection.
>
> THE COURT: Over the defense objection; all right. This is *Wainwright vs. Witt.*

(16 RT 3143.)

During voir dire, this juror provided three consistent responses ("I really don't think I could"; "I would have a really hard time"; "I don't think so"), which signaled to the trial court that voting for death was not an option for this juror. These responses constitute substantial evidence supporting the trial court's decision. Further, the court was in a position to observe firsthand this juror's demeanor and verbal responses (*People v. Clark, supra*, 52 Cal.4th at p. 895), which presumably informed its decision to excuse this juror.

This juror also possessed problematic views on circumstantial evidence. She checked "not much" when it came to rating her confidence in circumstantial evidence. In fact, it was the only category of evidence that she rated that low. (2 HV 130 [question number 83].) She explained: "would like to have something to back it up . . . ." (2 HV 130.) Additionally, when asked in question number 88 whether she harbored any attitudes or beliefs that would prevent her from relying on circumstantial evidence in a murder case, the juror did not check either the "yes" or "no" responses provided. Instead, she wrote: "would want something to back it up[.]" (2 HV 131.)

3. *Prospective Juror Number 4475*

In response to question number 107, which asked for the juror's feelings about the death penalty, this juror wrote: "hard to take away another human being's life." (10 HV 2503.) The juror rated her attitude about the death penalty as "Weakly Support." (10 HV 2503.) As for her feelings about life without parole, this juror wrote: "If it's warranted." (10 HV 2503.) She checked "depends on the evidence" when asked in question number 110 if it would be difficult for her to vote for death if it were the guilty party's first offense. (10 HV 2503.)

Before this juror was brought in for voir dire, the court remarked that it had preliminarily assessed the juror "as a plus." (23 RT 4473.) The court

started by asking the juror: "[K]nowing the type of person that you are, could you ever see yourself voting to execute another human being? Is that something you think you could ever do? (23 RT 4475.)

> PROSPECTIVE JUROR: I think that would be something for me to -- to do very hardly.
>
> THE COURT: I can't hear you, ma'am.
>
> PROSPECTIVE JUROR: It was -- it would be extremely hard.
>
> THE COURT: Of course it's hard, but do you think you could ever do it if you thought somebody deserved it?
>
> PROSPECTIVE JUROR: If I had to.
>
> THE COURT: Well, nobody's ever going to tell you are going to have to do it. Forget about whether you have to do it or whether you don't have to do it. [¶] The question is just you, knowing the type of person that you are, could you ever see yourself voting to execute another human being? Is that something that you have in you to do that?
>
> PROSPECTIVE JUROR: I don't think I could do it.
>
> THE COURT: You don't think you could do it; is that right?
>
> PROSPECTIVE JUROR: Yes.
>
> THE COURT: Okay. That's fair enough. You can be excused. Thank you.

(23 RT 4475-4476.)

Substantial evidence supports the trial court's excusal. First, the court was correct in advising this prospective juror that she would never be required to vote for the death penalty. (See *People v. Brown* (1988) 46 Cal.3d 432, 475.) It is apparent from the record that this juror was struggling to try to assure the court that she would seriously consider voting for death. However, the court rightly sensed from the juror's voir dire responses and, presumably from the her demeanor, that the juror herself

was not convinced of her ability to vote for death. Notably, the defense did not object to this juror's excusal.

4. *Prospective Juror Number 4823*

This juror was discussed during hardship evaluations. In her questionnaire, the juror stated: "I do not know if my employer paid for to many days in case I be select." (11 HS 2808.) The court and parties discussed the hardship request. (12 RT 2366.) The court then noted the juror was opposed to the death penalty. However, it was the fact that the juror left "a lot of blank spots" in her questionnaire, which caused the court concern. (12 RT 2366.) The defense objected when the court stated its intention to excuse the juror. The court brought the juror in for questioning. (12 RT 2366-2367.)

After the court determined that the juror's employer would pay for five months of jury service (12 RT 2367; 11 HS 2791), the court questioned the juror about her views on the death penalty:

> THE COURT: There are two possible penalties in this case, if you were opposed to the death penalty does that mean you can never pick the death penalty under any circumstances in a case like this?
>
> PROSPECTIVE JUROR: Well, too many questions in paper. I understand some. I don't understand.
>
> THE COURT: Okay. But you know what the death penalty is?
>
> PROSPECTIVE JUROR: Yes.
>
> THE COURT: You checked you oppose the death penalty.
>
> PROSPECTIVE JUROR: Does that mean you can never select?
>
> PROSPECTIVE JUROR: I don't like death penalty.
>
> THE COURT: Okay. You don't like it, but can you ever select it?
>
> PROSPECTIVE JUROR: I don't think so.

THE COURT: You don't think so. Okay. You can be excused. Thank you.

(12 RT 2367-2368.)

The court properly excused this juror. Her questionnaire, and voir dire, suggest there was a language barrier beyond any issues with impairment under *Witt*. When asked in question number 34 if she had further education plans for the future, the juror checked "yes" and wrote: "learn English." (11 HS 2794.) She watched and listened to Spanish television and radio programs. (11 HS 2797.) Further, as the trial court noted, the juror left many questions blank. (11 HS 2792 [no. 26], 2801 [no. 78], 2803 [nos. 88, 89], 2804 [nos. 91, 97a], 2805 [nos. 97b, 98, 99, 100, 101, 102, 103, 104, 105, 106], 2806 [A, B].) Given this juror's lack of English fluency, as reflected in the questionnaire, as well as the lack of understanding she expressed during voir dire, her excusal was proper for this reason alone. (Code Civ. Proc., § 203, subd. (a)(6); *People v. Eubanks*, *supra*, 53 Cal.4th at p. 130; *People v. Lomax*, *supra*, 49 Cal.4th at p. 566.)

As for those penalty-related questions this juror did answer, she conveyed her negative view of the death penalty and inability to vote for it. Regarding her feelings about the death penalty, the juror wrote: "I am not agree." (11 HS 2806.) But, she wrote "depends on the evidence" when it came to her feelings about life without parole. (11 HS 2806.) This juror rated her attitude about the death penalty as "Oppose." (11 HS 2806.) She checked "yes" when asked in question number 110 if it would be difficult for her to vote for death if it was the guilty party's first offense. (11 HS 2807.) Her views on the death penalty had remained unaltered over the previous 10 years. (11 HS 2807.) And, she checked "yes" that she had moral, religious, or philosophical views that were so strong that she would be unable to vote for death regardless of the facts. (11 HS 2807.) Thus, the juror's answers during voir dire merely confirmed that she was

substantially impaired in her ability to seriously consider voting to impose the death penalty.

There were other for-cause issues with this juror. For example, she admitted to an anti-police bias. (11 HS 2801 [questions numbers 76, 77].) Also, the juror checked "undecided" regarding her confidence level in every category of evidence listed in question number 83. (11 HS 2802.)

5. *Prospective Juror Number 17976*

In her questionnaire, this prospective juror rated her attitude toward the death penalty as "Oppose." (12 HV 3055.) Regarding her feelings about the death penalty, she wrote that she wished the law was different, but that she understood that jurors needed to follow the law. (12 HV 3055.)

The court and parties discussed the juror's answers. (26 RT 5039.) The court noted the juror's opposition to the death penalty, but the court stated its intention to bring the juror in and ask her if she could ever vote to execute another human being. (26 RT 5039-5040.) The court stated that if the juror could not vote for the death penalty, she was excluded under *Witherspoon-Witt*. (26 RT 5040.)

After the court's prefatory remarks, the following dialogue occurred:

> THE COURT: This is just as if you and I were just talking. Now, you know the type of person that you are; could you ever see yourself voting to execute another human being? Is that something you think you could do?
>
> PROSPECTIVE JUROR: The way I see it is that -- it is the law, that's the way I see it, even though I don't believe that -- I think it's wrong to kill another human being, that many things in society that exist there that I don't like it, but because it is part of the law, I abide by them. So that would be --
>
> THE COURT: But, you see, in this case no one is ever going to tell you that you have to vote for the death penalty. No one is ever going to tell you that. That's a choice that you would have to make after your heard all the evidence if you felt that that was the appropriate penalty. See what I'm saying?

PROSPECTIVE JUROR: Yeah. Well, I understand is that there are –I'm sorry, I -- there are certain -- . . . circumstances in which the law said that -- that the death penalty will apply if these are the conditions that the case -- . . . .

THE COURT: But we never come to a point in this case where you add up all the points and say, okay, if he gets ten points he gets the death penalty. That doesn't happen that way.

PROSPECTIVE JUROR: Okay.

THE COURT: Because nobody in this case is ever going to tell you that you must select the death penalty. That's a choice you have to freely and voluntarily make after you've heard all the evidence. [¶] So that's why I want to ask you if you could ever see yourself voting to execute another human being. Is that something that you could ever do? Nobody's going to make you do that choice in this case.

PROSPECTIVE JUROR: No, it would be – I've never placed myself in that situation. I think it would be very difficult for me to do that.

THE COURT: Okay. Well, would the death penalty then be an option for you in this case if you were selected as a trial juror?

. . .

THE COURT: [W]ould the death penalty be an option for you in this case, understanding that no one will ever tell you that you must pick the death penalty?

PROSPECTIVE JUROR: If the death penalty will be an option for me?

THE COURT: Yes.

PROSPECTIVE JUROR: After hearing the case?

THE COURT: Mm-hm.

PROSPECTIVE JUROR: Probably not.

(26 RT 5041-5043.)

This juror's voir dire answers confirm that her opposition to the death penalty, disclosed by her questionnaire answers, prevented her from voting to impose the death penalty. Taken together, this juror's questionnaire and voir dire responses ("it's wrong to kill another human being"; "I think it would be very difficult for me to do that"; "probably not") constitute substantial evidence supporting the trial court's evaluation and excusal of this juror.

Insofar as there may have been any equivocation by this juror regarding her inability to vote for death, it is explained by her candid acknowledgement that "I've never placed myself in that situation . . . ." (26 RT 5043). It is not uncommon that prospective jurors "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." (*Witt, supra*, 496 U.S. at p. 425.)

C. Any Error Was Harmless

Even if any one of the five identified prospective jurors was erroneously excluded, appellant's death sentence should still be upheld. As we explained in sections I-D and III-D, *ante*, with respect to those identified prospective jurors who were properly subject to excusal for cause on grounds in addition to those under *Witherspoon-Witt*, this Court has stated that "'[t]he general rule [is] that an erroneous exclusion of a juror for cause provides no basis for overturning a judgment.' [Citation.]" (*People v. Holt*, *supra*, 15 Cal.4th 619, 655-656; see also *People v. Tate*, *supra*, 49 Cal.4th at p. 672.) Appellant has "a right to jurors who are qualified and competent, not to any particular juror." (*People v Holt*, *supra*, 15 Cal.4th at p. 656; *People v. Tate*, *supra*, 49 Cal.4th at p. 672.) Appellant does not contend that, as a result of the excusal of the identified five prospective jurors, he was tried by a jury that was not fair and impartial. "Moreover, defendant cites no authority for his assumption that an error in excusing a

juror for reasons unrelated to the jurors' views on imposition of the death penalty requires reversal." (*Ibid.*)

As for those prospective jurors who may have been erroneously excused under *Witherspoon-Witt*, respondent respectfully asks this Court to revisit its conclusion in *Riccardi*, *supra*, 54 Cal.4th at p. 783, for the reasons previously advanced in sections I-D and III-D, *ante*, and to uphold the penalty judgment.

V. AN IMPARTIAL JURY WAS IMPANELED TO TRY APPELLANT IN SAN MATEO COUNTY

Appellant challenges the decision of the San Mateo County court denying his motion to transfer venue a second time from that county to a third county. Appellant argues that prejudice should be presumed in this case given the extent and nature of the pretrial publicity in San Mateo County, which he contends resulted in an unacceptable level of prejudgment among the 1,250 summoned prospective jurors. (AOB 148-178.)

We disagree. As a threshold matter, controlling authority from this Court and the United States Supreme Court requires appellant to demonstrate error and actual prejudice. He has done neither. Substantial evidence supports the trial court's determination that appellant could receive a fair trial in San Mateo County. And, the record of voir dire shows that appellant did, in fact, receive a fair trial in the county.

Appellant, who did not exhaust his peremptory challenges at trial and who, on appeal, has not identified a single prospective juror to whom the trial court erroneously denied a defense challenge for cause, cannot show a circumstance that invalidates the trial court's ruling refusing to transfer the trial from San Mateo County.

A. Second Venue Change Motion: Southern California May Have Been Better Suited to the Specific Needs of the Defense, But San Mateo County was the Best Venue for the Trial

There was never any doubt from the start as to where the defense wanted this case transferred: Southern California. As defense counsel candidly stated, "I always prefer Los Angeles, Your Honor." (1/8/04 Stanislaus RT 206.) Defense counsel was engaged in various cases in the Los Angeles area as this case got underway. (See, e.g., 9/2/03 Stanislaus RT 408; 10/17/03 Stanislaus RT 421-422; 11/3/03 Stanislaus RT 680-682; 11/5/03 Stanislaus RT 732-736; 1/20/04 Stanislaus RT 265-266; 1 RT 321-322.) So, moving the trial to Southern California would have been much more convenient for defense counsel. It would also have been more convenient for appellant's family members who resided in Southern California. (1/20/04 Stanislaus RT 254, 258.) It appeared the defense assumed its wishes in this regard would be granted. (12/3/03 Stanislaus RT 5 [defense counsel: "once that [venue change] motion is granted, if it is granted, is just move the discrete part, which is the trial itself and starting the jury selection *down there*," emphasis added].) Indeed, defense counsel had already engaged in a discussion with a judge in Los Angeles county about the prosecution's request for a prospective juror list and how such a request would fare in Los Angeles county:

> I can only imagine [the judge's] reaction in Los Angeles when he receives that order across his desk. I dare say it would hit the receptacle next to his desk very quickly. Nobody's going to honor that in Los Angeles would be my guess, based upon my -- I think I had previously made a representation, when I approached [the judge] in Los Angeles about doing anything like this, he considered it to be tampering with the jury pool.

(12/3/03 Stanislaus RT 47.)

The defense's preference for Los Angeles prompted the Stanislaus County court to counter that in choosing a new venue it was considering the logistical needs and convenience of the majority of the witnesses in the case: "Better one person be inconvenienced than a whole lot of others." (1/8/04 Stanislaus RT 206.) Given this, Los Angeles County was disfavored in the court's view. (1/8/04 Stanislaus RT 206 ["I'm not preferring Los Angeles"].)

After the Stanislaus County court granted appellant's motion to move the trial from that county, it conducted an extensive hearing (see generally *McGown v. Superior Court* (1977) 75 Cal.App.3d 648), to select a new venue from among the four counties identified by the Administrative Office of the Courts: Santa Clara, Alameda, San Mateo, or Orange. Appellant preferred Orange, while the People preferred Santa Clara. (12 CT 4058-4059.)

Persisting in his desire to move the case south, defense counsel offered an inducement if the court moved the case to Orange County: The defense would not make an application for Penal Code section 987.9 funding. (1/20/04 Stanislaus RT 254-255.) This tactic was called out by the prosecution: "[E]very time the Court has a decision to make where money comes up, the defense suddenly starts attempting to persuade [] the Court that they're going to charge the Court money if the Court doesn't give them their way." (1/20/04 Stanislaus RT 257-258.)

At the conclusion of the hearing, the Stanislaus County court, in a ruling supported by detailed factual findings (11 CT 3776; 1/20/04 Stanislaus RT 264-265), ordered the matter transferred to San Mateo County.

Appellant enjoyed no right to have his trial moved to Southern California. Rather, due regard for hardship and the ameliorating effects of proximity argued strongly for selecting San Mateo County. Defense

counsel acknowledged the persuasive reasons for holding the trial there. (1/20/04 Stanislaus RT 262-263.) Indeed, an evaluation of the relevant factors and circumstances confirms that the trial court did not err in denying transfer from that county. In assessing the correctness of that ruling, "the fact that venue has already been changed once affects the analysis" (*People v. Cooper* (1991) 53 Cal.3d 771, 805 (*Cooper*)), for common sense dictates that successive transfers will, at best, be diminishingly effective at enhancing the fairness of the jury selection process (*id.* at p. 807 ["It is speculation to suppose the results of jury selection would [be] significantly different in *any* county"], original italics).

Following the transfer to San Mateo County, on May 3, 2004, appellant moved to change venue to a third county, after jury selection was underway. (14 CT 4487-4507.) Again, the defense preference was for Los Angeles or another county in Southern California. (25 RT 5009-5010.) The crux of the defense argument in favor of moving the trial again was that San Mateo was in the same television market as Modesto and that resulted in a prejudgment rate adverse to appellant.[101] (36 RT 7080.) Defense counsel contended there would be less media coverage in Southern California. (36 RT 7084.)

On May 11, appellant's efforts were rejected by the San Mateo County court after the issue was thoroughly briefed and argued by the parties.[102] The court detailed its findings for the record. (36 RT 7094-7102.) We discuss these findings below.

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[101] This was not true. As the prosecutor pointed out, San Mateo County was in the same broadcast market as San Francisco. On the other hand, Modesto was part of the Sacramento broadcast market. (15 CT 4720; 36 RT 7089.)

[102] The defense motion with exhibits can be found in volume number 14 of the Clerk's Transcript at pages 4487-4716. The prosecution's

(continued...)

On May 27, the parties selected the jury and six alternate jurors. (42 RT 8313-8365.) Appellant expressed his satisfaction with the jurors and alternate jurors. (42 RT 8345, 8362.)

B. Legal Principles: Appellant Must Show Error and Actual Prejudice

A defendant is entitled to a change of venue when she or he shows "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (Pen. Code, § 1033, subd. (a).) In determining an initial motion to change venue, a trial court considers the nature and gravity of the offense, the size of the community, the status of the defendant, the popularity and prominence of the victim, and the nature and extent of the publicity. (*People v. Vieira* (2005) 35 Cal.4th 264, 279.) "The same factors apply to a motion for a second change of venue, except that 'the fact that venue has already been changed once affects the analysis.'" (*People v. Davis* (2009) 46 Cal.4th 539, 578 (*Davis*), quoting *Cooper*, *supra*, 53 Cal.3d at p. 805.)

On appeal, it is the defendant's burden to show: (1) that denial of the venue motion was error (i.e., a reasonable likelihood that a fair trial could not be had at the time the motion was made); and (2) that the error was prejudicial (i.e., a reasonable likelihood that a fair trial was not in fact had). (*People v. Lewis* (2008) 43 Cal.4th 415, 447, overruled on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 920; *People v. Williams* (1989) 48 Cal.3d 1112, 1126.) The reviewing court sustains any factual determinations supported by substantial evidence, and independently reviews the trial court's determination as to the reasonable likelihood of a fair trial. (*People v. Rountree* (2013) 56 Cal.4th 823, 837.)

(...continued)
opposition is in volume number 15 at pages 4717-4785. The defense reply is at pages 4786-4819.

Appellant contends that the level of pretrial publicity in this case was of such magnitude that prejudice should be presumed, thereby relieving him of the burden to show actual prejudice—that the seated jurors, who appellant selected, were biased against him.

Former Enron executive Jeffrey Skilling presented a similar argument to the United States Supreme Court without success. Appellant's argument here should meet the same fate.

In *Skilling v. United States* (2010) 561 U.S. 358 (*Skilling*), the high court explained why prejudice was presumed in *Rideau v. Louisiana* (1963) 373 U.S. 723, *Estes v. Texas* (1965) 381 U.S. 532, and *Sheppard v. Maxwell* (1966) 384 U.S. 333—three cases which appellant likens to his own (AOB 163-168). Referring to *Rideau*, the high court stated:

> "What the people [in the community] saw on their television sets," we observed, "was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder." [Citation.] "[T]o the tens of thousands of people who saw and heard it," we explained, the interrogation "in a very real sense was Rideau's trial--at which he pleaded guilty." [Citation.] We therefore "d[id] not hesitate to hold, without pausing to examine a particularized transcript of the voir dire," that "[t]he kangaroo court proceedings" trailing the televised confession violated due process. [Citation.]

(*Skilling*, *supra*, 561 U.S. at p. 379.) The opinion continued:

> In *Estes v. Texas*, [citation], extensive publicity before trial swelled into excessive exposure during preliminary court proceedings as reporters and television crews overran the courtroom and "bombard[ed] . . . the community with the sights and sounds of" the pretrial hearing. The media's overzealous reporting efforts, we observed, "led to considerable disruption" and denied the "judicial serenity and calm to which [Billie Sol Estes] was entitled." [Citation.]

(*Skilling*, *supra*, 561 U.S. at pp. 379-380.) And,

> in *Sheppard v. Maxwell*, [citation], news reporters extensively covered the story of Sam Sheppard, who was accused of

> bludgeoning his pregnant wife to death. "[B]edlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," thrusting jurors "into the role of celebrities." [Citation.] Pretrial media coverage, which we characterized as "months [of] virulent publicity about Sheppard and the murder," did not alone deny due process, we noted. [Citation.] But Sheppard's case involved more than heated reporting pretrial: We upset the murder conviction because a "carnival atmosphere" pervaded the trial, [citation].

(*Skilling*, *supra*, 561 U.S. at p. 380.)

Justice Ginsburg, writing for the high court, explained that the convictions were overturned in these three cases because the press coverage corrupted the trial atmosphere. (*Skilling*, *supra*, 561 U.S. at p. 380.) Here, on the other hand, there was no such corruption. Despite the information-age challenges that existed in this case,[103] thanks to the efforts of the then presiding judge of the San Mateo County Superior Court, and the trial court in this case, the media was not permitted to turn the courthouse or the courtroom into a carnival atmosphere.[104] Appellant's trial counsel even acknowledged that "the lion's share of the media has been very responsible in this case." (54 RT 10615.) All that appellant can muster in support of his argument for a finding of presumptive prejudice are photos of two billboards: One was in downtown Redwood City near the courthouse and

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[103] Defense counsel acknowledged these challenges: "The fact of the matter is that the Internet has exploded in terms of its influence and its pervasiveness since [the O.J. Simpson criminal trial]. Cable TV has exploded in terms of its influence." (Stanislaus RT 8/14/03 356.)

[104] The record is replete with hearings and orders regarding the San Mateo County court's efforts to balance the legitimate interests of the media to cover the proceedings and the trial court's mandate to ensure appellant received a fair trial, including the trial court's decision to exclude cameras from the courtroom (1 RT 319-321) and the order of the presiding judge of the San Mateo County Superior Court limiting one pool camera to the first floor of the courthouse positioned at least 25 feet away from the security checkpoint (54 RT 10615-10617).

the other near a freeway.[105] (AOB 151-152.) Notably, appellant says nothing about the atmosphere *inside* the courtroom.

In *Skilling*, the Supreme Court reiterated the bedrock principle that "[p]rominence does not necessarily produce prejudice, and juror impartiality . . . does not require ignorance." (*Skilling*, *supra*, 561 U.S. at p. 381, citing *Irvin v. Dowd* (1961) 366 U.S. 717, 722.) To reinforce this principle, the high court quoted its decision in *Reynolds v. United States* (1879) 98 U.S. 145, 155-156:

> "[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."

(*Skilling*, at p. 381.) Therefore, the high court made clear that: "[a] presumption of prejudice, our decisions indicate, attends only the extreme case." (*Ibid.*)

This Court agrees. It is well-settled that pretrial publicity itself—even if pervasive, adverse publicity—does not invariably lead to an unfair trial. (*People v. Prince* (2007) 40 Cal.4th 1179, 1216; see also *People v. Farley* (2009) 46 Cal.4th 1053, 1084 [discussing "extraordinary cases" reviewed in

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[105] The trial court ordered the San Mateo County Sheriff to have the billboard in town moved away from the courthouse. (1 RT 316-317.) As for the one near the freeway, appellant assumes that all potential jurors took the same route to reach the courthouse in Redwood City and, therefore, must have seen the billboard adjacent to one freeway. (AOB 151 ["This is what potential jurors who drove to the courthouse saw on their way . . .:"].) However, it is a matter of common knowledge that, like most Bay Area cities, there existed a number of different routes that the residents of San Mateo County could have traveled to reach the courthouse in Redwood City. Therefore, the contention that all potential jurors saw the billboard is unfounded.

People v. Prince wherein high court presumed prejudice from pretrial publicity].)

In this case, the press coverage and public interest were admittedly far-reaching and pervasive. But, the media onslaught stopped at the courtroom doors. Contrary to appellant's contention, this was not an "extreme case," according to the decisions of the United States Supreme Court or an "extraordinary" case, as this Court has so defined. Therefore, appellant must show not only error, but also actual prejudice. As we argue below, he cannot show either.

C. Appellant Has Not Established That the Trial Court Erred When it Determined There Was No Reasonable Likelihood That Appellant Could Not Receive a Fair Trial in San Mateo County

"Although a defendant's right to a fair trial in a capital case, as in any case, may not be infringed, considerations of relative hardship, and the conservation of judicial resources and public funds, are important factors in deciding between various possible venue sites. [Citations.]" (*Cooper*, *supra*, 53 Cal.3d at p. 805.)

Here, substantial evidence supports the trial court's determination that consideration of the relevant factors counseled against another change of venue. Although relegated to a footnote, appellant acknowledges that he has premised his claim on only one of these factors: the extent and nature of the pretrial publicity. He characterizes the other factors as "largely neutral." (AOB 170, fn. 38.) Appellant's characterization is not persuasive.

1. *Size of community*

The size of San Mateo County weighed against another change of venue. The trial court noted that San Mateo county was the 13th most populous county in the state with a population at the time of over 701,000. (36 RT 7095-7096.) This Court has described San Mateo County as having

a "geographically dispersed and economically diverse population." (*People v. Sully* (1991) 53 Cal.3d 1195, 1237.)

Indeed, San Mateo County is substantially larger than other venues that have proved adequate to the task, even in exceptionally high-profile cases, of ensuring the selection of a fair and impartial jury. (See, e.g., *United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1180 [upholding transfer of Oklahoma City bombing case to Denver, Colorado (population 554,636 (2000 census))].)

Cases in which venue changes were granted or ordered upon review by this Court have typically involved counties with significantly smaller populations than that of San Mateo. (See, e.g., *Williams v. Superior Court* (1983) 34 Cal.3d 584, 592 [Placer County, 117,000 population]; *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582 [same, 106,500 population]; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293, fn. 5 [Santa Cruz County, 123,800 population]; *People v. Tidwell* (1970) 3 Cal.3d 62, 64 [Lassen County, 17,500 population]; *Fain v. Superior Court* (1970) 2 Cal.3d 46, 52, fn. 1 [Stanislaus County, 184,600 population]; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 385, fn. 10 [Mendocino County, 51,200 population].)

In fact, this Court has upheld denials of requests for change of venue in cases involving counties with significantly smaller populations than that of San Mateo County. (See, e.g., *People v. Vieira, supra,* 35 Cal.4th at pp. 280-283 [Stanislaus County, population 370,000]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1251 [Santa Cruz County, under 200,000 population] *People v. Coleman* (1989) 48 Cal.3d 112, 134 [Sonoma County, 299,681 population].)

2. *Gravity of crime*

There is no question that this case is serious in that it is a capital murder. It has long been recognized, however, that the nature and gravity

of the offense are not dispositive. (*People v. Dennis* (1998) 17 Cal.4th 468, 523, quoting *People v. Pride* (1992) 3 Cal.4th 195, 224.) Here, the trial court found this factor to be neutral. (36 RT 7095.)

In *People v. Williams* (1997) 16 Cal.4th 635, this Court concluded that while the case was a capital murder involving the murder of four people, including two children, those factors were not dispositive in favor of a change of venue. (*Id.* at p. 655.) This Court has frequently upheld the denial of change of venue motions where there were multiple murders. (*People v. Ramirez* (2006) 39 Cal.4th 398, 407, 435 [12 counts of first degree murder, one count of second degree murder, five counts of attempted murder, four counts of rape, three counts of forcible oral copulation, four counts of forcible sodomy]; *People v. Welch* (1999) 20 Cal.4th 701 [six counts of first degree murder, including two young children]; *People v. Bonin* (1988) 46 Cal.3d 659, 668, 678 [four counts of first degree murder and four counts of robbery], overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

3. *Status of appellant and his victims*

The community status of appellant also weighed against another change of venue. There was no evidence that appellant or his family was known before Laci and Conner Peterson went missing. Appellant grew up in Southern California, not Northern California. He "was not associated with any group (such as a disfavored racial minority or juvenile street gang) towards which the community was 'likely to be hostile,'" (*People v. Famalaro* (2011) 52 Cal.4th 1, 23 (*Famalaro*)). In the words of the San Mateo County court: Appellant was "not somebody who sticks out. He was a fertilizer salesman that's been accused of this crime." (36 RT 7097.)

While Laci and Conner became well-known after Laci's disappearance, there was no evidence that she was from a family with ties

to the community or that the jury pool was made up of people who knew her. (*Famalaro*, *supra*, 52 Cal.4th at pp. 23-24.)

This Court has recognized that

> [a]ny uniquely heightened features of the case that gave the victim[] and defendant any prominence in the wake of the crimes, which a change of venue normally attempts to alleviate, would inevitably have become apparent no matter where defendant was tried.

(*People v. Prince*, *supra*, 40 Cal.4th at p. 1214, quoting *People v. Dennis*, *supra*, 17 Cal.4th at p. 523.) It is the victim's status prior to the crime that is relevant to this particular issue (see *People v. Prince*, *supra*, 40 Cal.4th at p. 1214; *People v. Ramirez, supra,* 39 Cal.4th at p. 434), and post-crime publicity is more appropriately addressed under the category of nature and extent of media coverage.

Thus, the reasons which resulted in Laci and Conner becoming known to the public were aspects that "would have followed the case to any county to which venue was changed." (*Famalaro*, *supra*, 52 Cal.4th at p. 1203.) The trial court presaged this Court's observations in *Famalaro* and *Prince*: "[J]urors and people in general can sympathize with the victim and her family wherever the case is tried." (36 RT 7097.)

4. *Extent and nature of news coverage*

There is no debate: This case received an enormous amount of attention from the media and the public. But, not just in Stanislaus or San Mateo counties. The Stanislaus County court characterized the notoriety of the case as "worldwide." (5/2/03 Stanislaus RT 16.) Which explains why the court had concerns, given the level of publicity that followed the case, about "hopscotching all over the state." (5/9/03 Stanislaus RT 64.) As the San Mateo County court observed later in the trial:

> The only place you could send this case probably where they wouldn't hear about it – I'm not so sure about that -- would be

> send it to Mars, you know. That's the only place where you could try this case where nobody would know anything about it. It's been all over the world.[106]

(111 RT 20608.)

In this case, where approximately 1,250 prospective jurors were summoned, appellant's contention that 12 unbiased jurors could not be found is contradicted by the record, as we argue below. As this Court has observed: "The huge number of prospective jurors initially summoned (1,200) ensured that an ample number of unbiased prospective jurors remained after the biased ones had been excused." (*Famalaro*, *supra*, 52 Cal.4th at p. 30.)

a. *Extent of coverage*

In assessing this factor, the San Mateo County court found that the defense had made "no showing that this case would receive any less publicity in another venue, let alone in Los Angeles, which is the media capital of the world." (36 RT 7097; see also *Famalaro*, *supra*, 52 Cal.4th at p. 22 [characterizing Southern California as "media-saturated"].)

The trial court's assessment was supported by the research and conclusions of the prosecution's expert, Dr. Ebbe Ebbesen,[107] whose report was appended to the prosecution's opposition to the second venue motion. (15 CT 4729-4774 [Exhibit No. 1].) Dr. Ebbesen concluded that the Los

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[106] The San Mateo County court disclosed that it had received letters about the case from states as far away as Florida and North Dakota. (36 RT 7098.) And, as indicated in the Statement of Facts, *ante*, there were purported sightings of Laci in 26 states and overseas.

[107] Dr. Ebbesen received his Ph.D. in experimental and research psychology from Stanford University with specializations in social psychology and methodology. (15 CT 4730.) At the time, Dr. Ebbesen was a Research Professor of Psychology at the University of California, San Diego. (15 CT 4730.) He had either testified or submitted affidavits in connection with 45 change of venue motions. (15 CT 4731.)

Angeles and San Diego metropolitan area media markets were no less "'saturated'" with media coverage than the Sacramento Valley or San Mateo. (15 CT 4750-4753; Figure No. 1 [graph showing total number of television news broadcasts that mentioned this case for Los Angeles, San Diego, and Sacramento markets between December 25, 2002 and November 27, 2003]; Figure No. 2 [graph showing proportion of population in each market that constituted potential audience for news accounts].) From this data, Dr. Ebbesen concluded that newspaper coverage of the case in Southern California would be no less prolific than in the northern portion of the state. (15 CT 4752.)

Further, Dr. Ebbesen's report showed that recognition rates for Los Angeles County were marginally *higher* than for San Mateo County. (15 CT 4744; Table No. 1.) Using the figures presented by defense experts and as reflected in the juror questionnaires, Dr. Ebbesen's data for San Mateo County was 96.3 percent. (15 CT 4744.) The recognition data for Los Angeles County—based on an average of the results of Dr. Ebbesen's surveys—was 97.95 percent. (15 CT 4744.)

Additionally, Dr. Ebbesen's research findings demonstrate that although the television news coverage of the case was persistent over time, there was an ebb and flow nature to the coverage, with the zenith of the coverage occurring around the time Laci's and Conner's bodies were recovered, followed by appellant's arrest in mid-April 2003. (15 CT 4751 [Figure No. 1], 4752 [Figure No. 2].) In that regard, Dr. Ebbesen's graph reveals that by November 27, 2003—approximately three and one-half months before jury selection commenced—coverage had somewhat abated. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 449 [the passage of time diminishes the potential prejudice from pretrial publicity].)

The trial court's ruling was likewise supported by the opinion of another prosecution expert, Howard Varinsky, detailed in exhibit number 2

of the prosecution's opposition. (15 CT 4776-4783.) Varinsky previously consulted on a number of high-profile criminal and civil trials, including the trial of Timothy McVeigh. (15 CT 4777-4779.) Based on his experience, and noting that this case was "national in scope," Varinsky concluded moving it to a third venue, like Los Angeles, would not result in decreased publicity. (15 CT 4780.)

This Court has previously upheld the denial of a change of venue when there was extensive publicity attending the trial resulting in high recognition rates. (*People v. Rountree, supra*, 56 Cal.4th at p. 836 [85 percent of the public had heard of the case]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1396 [85 percent of the public had heard of the case]; *People v. Ramirez, supra*, 39 Cal.4th at p. 433 [94.3 percent of the public had heard of the case].)

Thus, substantial evidence supports the trial court's conclusion that changing venue to a third county "'offered no solution to the publicity problem.'" (*Davis, supra*, 46 Cal.4th 539, 579, quoting *People v. Manson* (1976) 61 Cal.App.3d 102, 177.)

b. *Nature of coverage*

Insofar as appellant argues that the nature of the press coverage in this case resulted in heightened rates of prejudgment against appellant (AOB 170-176), the San Mateo County court also addressed this issue and found there was nothing presented by the defense to suggest that prejudgment rates would be appreciably better for appellant in any other county. (36 RT 7099.)

The trial court's determination was, again, supported by the research and conclusions of Dr. Ebbesen. Dr. Ebbesen's report specifically addressed whether appellant would have fared better with respect to prejudgment rates in Southern California, particularly Los Angeles, and Dr. Ebbesen's opinion was no. (15 CT 4746-4749.) His research data revealed

that 27 percent of prospective jurors in San Mateo County reported in their questionnaire responses that they could not set aside their fixed opinions that appellant was guilty. (15 CT 4744; Table No. 1.) The average percentage for Los Angeles County was 28.7.[108] (15 CT 4744; Table No. 1.)

Additionally, jury consultant Howard Varinsky watched "all but two days" of jury selection in this case and stated "unequivocally" that the trial court had "exercised extraordinary caution to ensure the selection of a fair jury." (15 CT 4781-4782.) In fact, as Varinsky explained, the San Mateo County court excused jurors for cause who would have otherwise been subject to challenge by the defense through the use of peremptories. (15 CT 4782.) Moreover, Varinsky observed: "Even though many jurors have said they can put the publicity aside and judge the case by evidence presented in court, the court has used utmost care to ensure any juror who had even a vague suspicion or even had discussions with family members or co-workers was excused." (15 CT 4782.)

In support of its determination, the trial court quoted *Irvin v. Dowd*, *supra*, 366 U.S. at pp. 722-723:

> [To] hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

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[108] As Dr. Ebbesen explained in his report, he did not employ the same "'guilt'" question in his December 2003 surveys that was presented in the juror questionnaire (which predated the development of the questionnaire in this case) and, therefore, prejudgment rates between the counties could not be compared in a meaningful fashion. (15 CT 4746.) However, because the relevant question posed in Dr. Ebbesen's surveys assessed fixed opinions about appellant's guilt or innocence (15 CT 4746-4747), the question was actually more probative of bias since a fixed opinion is essentially the product of prejudgment that cannot be set aside.

(36 RT 7100.) In this regard, the court explained that it had qualified 66 prospective jurors at that juncture, all of whom had satisfactorily assured the court of their impartiality and none of whom the defense had challenged for cause. (36 RT 7100.)

Appellant cites *Sheppard v. Maxwell, supra*, 384 U.S. 333, and contends there were substantial references in the media to facts that were inadmissible at trial. (AOB 166-168.) However, appellant has not demonstrated that such references would have been limited to San Mateo County only. Further, there simply "is 'no presumption of a deprivation of due process of law aris[ing] from prior exposure to publicity concerning the case.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 945.) And this is true even when, as here, the pretrial publicity may have included accounts of dog-tracking efforts and the fact that appellant hired a lawyer before charges were filed. (See *People v. Weaver* (2001) 26 Cal.4th 876, 906-907 [coverage included some reports that mentioned defendant's incriminating statements, uncharged crimes in which he was suspected of involvement, dismissed charges, and some especially "lurid details" of a charged offense that "proved largely untrue"]; *People v. Hart* (1999) 20 Cal.4th 546, 599 [coverage included information "that defendant had been treated as a mentally disordered sex offender for nearly three years . . . and had been released despite warnings from doctors that he was still dangerous others"]; *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [coverage included mental health history, convictions of 10 counts of murder, and death sentence]; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 44-45 [coverage included more than 150 articles and television videos, some of which referred to the defendants' commission of other crimes and confessions to the charged crimes, and characterized the defendants as "armed and dangerous transients implicated in serial killings"]; *Mu'Min v.*

Virginia (1991) 500 U.S. 415, 430-431 [reports that included "indications that [defendant] had confessed" did not foreclose seating an unbiased jury].)

Last, we would be remiss if we neglected to point out that, despite appellant's castigation of the media coverage in this case, he did not hesitate to use the media's interest to his advantage when he took to local and national television to try and sell his innocence to the public. (See People's Exhs. Nos. 131A-131D, 270B, 272B, 273B.)

D. Appellant Has Not Established a Reasonable Likelihood That He Did Not Receive a Fair Trial in San Mateo County

1. *Voir dire in San Mateo County*

"When pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes [especially] good sense' because the judge 'sits in the locale where the publicity is said to have had its effect' and may base [the] evaluation on [the judge's] 'own perception of the depth and extent of news stories that might influence a juror.'" (*Skilling*, *supra*, 561 U.S. at p. 362.)

There is no requirement that jurors be totally ignorant of the facts of a case, so long as they can lay aside their impressions and render an impartial verdict. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 450.) "The defendant bears the burden of proof that the jurors chosen have such fixed opinions that they cannot be impartial." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1250, italics added.)

Here, the voir dire of the jurors impaneled to try appellant's case does not establish a reasonable likelihood that appellant did not have a fair trial. On the contrary, it demonstrates that every juror selected was equipped to render decisions on guilt and penalty based strictly on the evidence presented at trial.

a. *Juror Number 1 (11175)*

During voir dire, Juror Number 1 stated that he had not followed the case in the media "at all." (40 RT 8068.) His questionnaire disclosed that the first time he had read, seen, or heard anything about the case was about two years before. (Vol. 1, Main Juror Questionnaires ("MJQ"), page 17.) Juror Number 1 was aware from news coverage that two bodies were found in the Bay and one was a baby. (1 MJQ 17.)

This juror had not formed any opinions about the case, including about appellant's guilt or innocence. Juror Number 1 checked, "Not enough information to decide" and explained: "Don't follow the news enough." (1 MJQ 17.) As for his ability to base his decision on the evidence, Juror Number 1 assured the prosecutor during voir dire, "I can go by the facts . . . ." (40 RT 8071.) The juror affirmed this in his questionnaire response: "Listen to the case go from there." (1 MJQ 17.) The juror likewise told defense counsel that he was open to the possibility that appellant had been accused of a crime he did not commit. (40 RT 8075.) He explained: "[I]f I was in that situation, I [would] want somebody to give me a fair deal, as fair [a] deal as possible." (40 RT 8076.) Juror Number 1 made clear that he understood the presumption of innocence and that the burden of proof was with the prosecution. (40 RT 8081.)

At the conclusion of voir dire, the court admonished him "not to listen, read, or watch any media reports of this trial, nor discuss it with any representatives of the media or their agents." (40 RT 8084.)

b. *Juror Number 2 (8510)*

This juror had some familiarity with the case from watching television news reports and reading a few news articles. (1 MJQ 40; 34 RT 6777.)

The first time he had read, seen, or heard anything about the case was about a year before. (1 MJQ 40.)

Juror Number 2 indicated in his questionnaire and during voir dire that he initially thought appellant had committed the crime. (1 MJQ 41; 34 RT 6786, 6788-6789.) However, this juror made clear that had not made a decision about appellant's guilt or innocence. (34 RT 6777-6778; see also 1 MJQ 40 [answer to question no. 95: "Not enough information to decide"].)

Some of Juror Number 2's business associates had expressed opinions, with some believing appellant was innocent, while others thought he was guilty, but this juror stated that those opinions would not influence him. (34 RT 6781-6783.)

Juror Number 2's answers to defense counsel's questions during voir dire confirmed his willingness and ability to base his decision regarding appellant's guilt or innocence on the evidence adduced at trial. The juror stated that he was open to the possibility that appellant had been charged with a crime that appellant did not commit. (34 RT 6789.) When this juror was pressed by defense counsel about his ability to set his preliminary opinion aside, the juror responded: "[I]f the instructions are to put it aside, don't worry, just base it on what you've heard, then I'm comfortable with that. Just basing the case on the evidence." (34 RT 6791.)

Juror Number 2 explained that his prior jury service would assist him if called as a juror in this case. He had previously served on two juries—one civil and one criminal. (1 MJQ 39; 34 RT 6773.) One of those trials received media attention. (34 RT 6790.) He understood that his decision would be based on what was presented at trial; he learned that from "the last trial." (34 RT 6779.) Juror Number 2 abided by the principles that appellant was presumed innocent (34 RT 6779-6780), and that the burden

of proof was on the prosecution (34 RT 6787). He said: "I've been on juries and I know the procedure." (34 RT 6793.)

Although defense counsel described Juror Number 2 as "very candid" (34 RT 6801), "completely sincere," "admirable" (34 RT 6802), "very honest," and "reflective" (34 RT 6803), counsel expressed concerns about the juror's ability to base his decision on the evidence and not on any preformed opinion (34 RT 6801-6804). The trial court had no such concerns, making similar observations about the authenticity of Juror Number 2's assurances to base his decision on the evidence, especially in light of the juror's prior jury service. The court qualified Juror Number 2. (34 RT 6801-6805.)

The court then gave this juror the admonishment regarding avoiding any media exposure involving this case. (34 RT 6805.)

c. *Juror Number 3 (23874)*

Juror Number 3 described her level of knowledge of the case, gleaned from the media, as "probably superficial." (33 RT 6568.) The first time she had read, heard, or seen anything about the case was when the media initially reported the story. (1 MJQ 63.)

Juror Number 3 had not formed any opinions about the case. (33 RT 6569; 1 MJQ 63 ["Not enough information to decide"].) Others had expressed their opinions to her; some thinking appellant was guilty. (33 RT 6569.) Juror Number 3 did not tend to engage in discussions when others expressed their opinions. (33 RT 6577-6578.)

In response to defense questioning, this juror said that she was open to the possibility that appellant was charged with a crime he did not commit. (33 RT 6578.) She subsequently stated: "I strongly believe in fairness in any regard." (33 RT 6583.)

As with the others, the trial court gave this juror the admonishment to stay away from any media reports of the trial or discussions with representatives of the media. (33 RT 6584.)

d. *Juror Number 4 (4741)*

The first time Juror Number 4 had any media exposure to this case was in December 2002, when Laci first went missing. (1 MJQ 86.)

Juror Number 4 harbored no preconceived notions about appellant's guilt or innocence, as revealed by his questionnaire responses. When asked in question number 94 if he had formed any preliminary opinions about the case, the juror responded in the negative. (1 MJQ 86.) Question number 95 specifically asked if the juror had formed or expressed any opinions about appellant's guilt or innocence. Juror Number 4 checked "Not enough information to decide." (1 MJQ 86.) In response to question number 97a that asked if the juror could set aside anything he may have read, heard, or seen about the case and base his decision on the evidence adduced at trial, this juror checked "yes" and explained: "I have not seen nor heard anything that would so far suggest guilt or innocence." (1 MJQ 86.)

This juror assured defense counsel that he understood that the prosecution carried the burden of proof. (17 RT 3432.) Juror Number 4 also acknowledged his understanding that appellant was presumed innocent. The fact that appellant was seated at the defense table did not change that. (17 RT 3433 ["Just means he has a chair at the table."].)

Before ordering Juror Number 4 back, the trial court gave him the admonishment about avoiding publicity about the case. (17 RT 3434.)

e. *Juror Number 5 (9997)*[109]

When asked in the questionnaire if he had read, seen, or heard anything about the case, Juror No. 5 responded, "as little as possible." (1 MJQ 339.) In this juror's view, the media portrayed appellant as being guilty. (1 MJQ 339.) However, the juror was also of the view that the media did not always portray the story accurately. (34 RT 6698-6699.)

The juror checked "Not enough information to decide," when asked whether he had formed or expressed his own opinions about appellant's guilt or innocence. The juror explained: "Court room evidence is the deciding factor." (1 MJQ 339.) Although others had expressed their varying opinions about appellant's guilt or innocence to him, Juror No. 5 indicated in his questionnaire that he could base his decision entirely on the evidence produced in court (1 MJQ 339) and that he could be fair to both sides (1 MJQ 340). He said, "Opinions are cheap." (34 RT 6700.)

Juror No. 5 disclosed in his questionnaire that his future son-in-law owned "The Shack," which the Peterson's had previously owned. (1 MJQ 340.) During voir dire, the juror explained that his future son-in-law worked for appellant and Laci when the couple owned the business, but only for about six weeks. (34 RT 6686, 6687.) Juror No. 5's future son-in-law had very little to say about appellant. (34 RT 6688.) The juror explained that his future son-in-law, as the then owner of the restaurant, had received some attention from the media at one point. (34 RT 6688.) Although the juror and his son-in-law discussed the interview, they never discussed anything about the case. (34 RT 6705.) The future son-in-law "never" said anything negative or positive about appellant. (34 RT 6705.)

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[109] This juror, originally Alternate Juror No. 3, replaced the second Juror No. 5 (5806, originally Alternate Juror No. 1), who had replaced the first Juror No. 5 (20840). (19 CT 5991; 56 RT 10978; 112 RT 20805-20806.)

This juror never met appellant or Laci and he did not feel that his connection to the restaurant would have any effect on his ability to serve as a juror. (34 RT 6687, 6689.)

Juror No. 5 had previously served on criminal and civil juries. (34 RT 6676, 6695.) He described his service: "They were both pleasurable, I guess. I enjoyed being on them. It was interesting. And it was nice to see the system work. It seemed to work as far as I could see." (34 RT 6696.)

Juror No. 5 recalled at one point having breakfast with some of his co-workers and expressing his suspicion that appellant was guilty. (34 RT 6706-6707.) However, as far as any previously held notions about appellant's guilt, the juror explained that he was aware that there were people who had been on death row and released from prison after it was determined that evidence against them was "fabricated, or whatever." (34 RT 6701.) He observed that there had been "more than one person falsely accused." (34 RT 6709.) Juror No. 5 assured defense counsel that he could be fair to the defense and pointed out that when he served on a criminal jury, he and his fellow jurors found the defendant not guilty. (34 RT 6709.) Referring to the prosecution, the juror stated: "[U]nless they can prove it, he's definitely innocent." (34 RT 6710.)

The court admonished Juror No. 5 about avoiding media coverage of the case. (34 RT 6715.)

f. *Juror Number 6 (17903)*

In his questionnaire responses, Juror Number 6 stated that the first time he had read, heard, or seen anything about the case was when Laci went missing. (1 MJQ 132.) He heard the case was moved to San Mateo County and that the death penalty was being considered. (1 MJQ 132.) The juror explained during voir dire that he did not watch very much television "at all." (27 RT 5268.)

Juror Number 6 had not formed an opinion about appellant's guilt or innocence. (1 MJQ 132.) He explained: "I don't feel strongly in either direction." (1 MJQ 132.)

Insofar as others may have expressed the opinion to this juror that appellant was guilty, he was not influenced by such sentiments. (27 RT 5268-5270.)

During voir dire by the prosecutor, the juror affirmed his willingness to abide by the principle that appellant was presumed innocent. (27 RT 5268.) Juror Number 6 assured defense counsel that he could accept the possibility that appellant had been charged with a crime he did not commit. (27 RT 5276.)

At the conclusion of voir dire, the trial court gave this juror the same admonition about avoiding news coverage and contact with media representatives. (27 RT 5284-5285.)

g. *Juror Number 7 (6756)*[110]

This juror first became aware of the case when Laci first disappeared. (1 MJQ 316.) As far as what she may have read, seen, or heard about the case, the juror responded that it was just basic information. (1 MJQ 316.) During voir dire, Juror No. 7 explained that any interest she may have initially had in the case "just died off" because it was "the same thing day after day." (23 RT 4615.) Juror No. 7 had not formed any preliminary opinions about the case and checked "Not enough information to decide" when it came to her views about appellant's guilt or innocence. (1 MJQ 316.) She did not think the media always presented the story accurately. (1 MJQ 317.)

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[110] This juror was originally Alternate Juror No. 2. She replaced the original Juror No. 7 (6869). (19 CT 5990; 112 RT 20775.)

Although others had expressed their opinions to Juror No. 7 about appellant's guilt, she could base her decision entirely on what was presented in court. (1 MJQ 316, 317.) In her questionnaire, the juror responded that she could be fair to both sides and follow the court's instruction to avoid any news coverage about the case. (1 MJQ 317.)

During voir dire, Juror No. 7 acknowledged that, at one point, she was of the opinion that it was "not looking good" for appellant. (23 RT 4624.) However, the juror assured defense counsel that she was open to the possibility that appellant, although charged with murder, had not committed the crimes. (23 RT 4625 ["I'm open to hear anything . . . I mean this is somebody's life."].) Juror No. 7 harbored no suspicion that appellant was guilty. (23 RT 4626.) She abided by the principles that the burden of proof was entirely with the prosecution. (23 RT 4627-4628.)

The trial court admonished the juror not to listen to, read, or watch any media accounts of the case. (23 RT 4630.)

h. *Juror Number 8 (18106)*

This juror's questionnaire responses disclosed that he had seen, read, or heard "very little" about the case. (1 MJQ 178.) During voir dire, Juror Number 8 characterized his exposure to publicity about the case as "maybe a news blip, a headline or something, but—pretty much that's about it." (26 RT 5063.) He first became aware of the case in 2003. (1 MJQ 178.) Through news coverage, the juror learned that the trial was moved to Redwood City. (1 MJQ 178.) When the prosecutor asked Juror Number 8 if the publicity about the case would affect him, the juror responded: "Not at all." (26 RT 5068.)

This juror harbored no opinions about the case generally or about appellant's guilt or innocence specifically. (1 MJQ 178.) He checked "yes" in response to question number 97a, which asked if he could set aside information gleaned from outside sources and base his decision solely on

the evidence presented at trial. (1 MJQ 178.) The juror reiterated this promise during voir dire. (26 RT 5068.) In response to defense counsel's question, Juror Number 8 stated that he was amenable to considering that appellant had been charged with a crime he did not commit. (26 RT 5077.) This juror felt "strongly" that it was appropriate that the prosecution had to prove the charges beyond a reasonable doubt. (26 RT 5078.)

Juror Number 8 previously served as a juror on a civil trial that was tried to a verdict after "fairly long" deliberations. (1 MJQ 177; 26 RT 5069-5071.) He described that process as "rewarding" and was of the view that the jury "did the right thing." (1 MJQ 177.)

The trial court gave the juror the admonition to avoid news coverage and representatives of the media. (26 RT 5084.)

i. *Juror Number 9 (8659)*

When asked in question number 91 what she had seen, heard, or read about the case, Juror Number 9 responded: "The same as everybody else." (1 MJQ 201.) She first learned about the case around Christmas when Laci went missing. (1 MJQ 201.) During voir dire, defense counsel, noting that this juror listed a particular radio station among those media outlets she consulted from time to time, asked Juror Number 9 if she was familiar with the radio station's billboards positing whether appellant was a man or a monster and asking listeners to vote. (29 RT 5733.) The juror said, "No, I missed that." (29 RT 5733.) She did, however, acknowledge having "[h]eard it all" when defense counsel asked what types of things she learned about the case from the media. (29 RT 5734.)

This juror had not formed any opinions about the case or, particularly, with respect to appellant's guilt or innocence. (1 MJQ 201 [question no. 95 response: "Not enough information to decide"].) However, others had expressed their opinions to the juror. (1 MJQ 201.) Some of the juror's family members voiced the view that appellant was innocent, while some

co-workers felt that appellant was guilty. (29 RT 5728.) Juror Number 9 did not agree or disagree when these views were articulated. (29 RT 5729.) In her questionnaire, the juror responded "yes" that she could set aside outside influences or preexisting opinions and base her decision on the evidence presented at trial. (1 MJQ 201.) The juror expounded upon her response: "I am very fair and the media is not always accurate." (1 MJQ 201.) She reiterated this view during the prosecution's questioning. (29 RT 5730-5731.)

Juror Number 9 understood that appellant was "presumed innocent until he's proven guilty." (29 RT 5735.) Likewise, she grasped the concept that the defense carried no burden of proof. (29 RT 5736.)

The trial court instructed the juror not to pay attention to any media accounts of the case and not to discuss the case with any representatives from the media. (29 RT 5741.)

j. *Juror Number 10 (9533)*

In her questionnaire responses, this juror stated that she first heard of the case on Christmas Eve when Laci was first reported missing. (1 MJQ 224.) Juror Number 10 characterized her exposure to news accounts as "Laci missing" and "basic headline news." (1 MJQ 224.) During voir dire, she explained:

> To be honest, probably I noticed it more so of late, probably because I'm a little more involved in it. In the beginning I knew of it on the news and stuff. I have a busy family, so I don't stop everything I'm doing [*sic*] watch the news at five. I may hear it in another room, what's going on. I may hear the news on the radio when I'm driving someone to school. I don't make it a point to seek it out basically.

(31 RT 6343.) The juror clarified that if she heard something that caught her interest on the news, she would pay attention. (31 RT 6343.) Otherwise, she did not typically seek out information about the case. (31

RT 6343-6344.) However, she did consult the internet to determine if the trial had been moved to San Mateo County. (31 RT 6344.) In response to defense counsel's question asking where she had read about the case, this juror explained: "Since [the trial] has been changed from Modesto to San Mateo County, I don't get the paper regularly. But when I see it, you know, it's been in the San Mateo County Times. Maybe the San Francisco Examiner might have something here and there. But not on a daily basis." (31 RT 6353.) Juror Number 10 watched the movie "The Perfect Husband: The Laci Peterson Story." (1 MJQ 225; 31 RT 6353-6354.) The movie did not affect her views or opinions about the case. (1 MJQ 225.) As for cable television viewing, Juror Number 10 said that it was "[m]ostly sports going on 24-7" in her household. (31 RT 6354.)

This juror did not hold any preconceived opinions about the case in general or appellant's guilt or innocence in particular. (1 MJQ 224 ["Not enough information to decide"].) She confirmed this during the prosecutor's questioning. (31 RT 6344.) This juror explained that when family or friends expressed their opinions to her that appellant was guilty, her reply was to remind them that a person was innocent until proven guilty. (31 RT 6345.) In fact, once she had been summoned as a prospective juror, Juror Number 10 did her best to avoid such conversations. (31 RT 6345-6346.) Juror Number 10 responded in the affirmative when asked in question number 97a if she could base her decision only on the evidence adduced at trial and not on any preexisting opinion or outside influence. (1 MJQ 224.)

The juror assured defense counsel that she could presume appellant innocent. (31 RT 6347-6348.) She understood that the burden was on the prosecution to prove appellant's guilt beyond a reasonable doubt. (31 RT 6348-6349.)

Juror Number 10 stated during voir dire that she might have had a "suspicion" that appellant could be guilty, but that she would "try to keep an open mind." (31 RT 6350.) She reiterated her belief that "he's innocent until proven guilty." (31 RT 6350.)

At the conclusion of voir dire, the trial court reminded Juror Number 10 that, as a prospective juror, she should not be following the case in the news. (31 RT 6356.) The court gave her the standard admonition and told her that she was to follow the instruction "religiously." (31 RT 6356-6357.)

k. *Juror Number 11 (24023)*

As stated in her questionnaire, the first time Juror Number 11 became aware of the case was when the news broke that Laci was missing. (1 MJQ 247.) However, she did not follow the case closely after initial news reports. (34 RT 6740.) Juror Number 11 stated in her questionnaire and during voir dire that she could set aside what she may have read, heard, or seen about the case and base her decisions on the evidence. (1 MJQ 247; 34 RT 6743.)

This juror had not formed or expressed any opinions about the case generally or about appellant's guilt or innocence specifically. (1 MJQ 247 ["Not enough information to decide"].) When a co-worker expressed the view that appellant was guilty, this juror did not engage her co-worker in further discussions. (34 RT 6742-6743.)

The juror understood that appellant was presumed innocent, the defense had no obligation to prove appellant's innocence, and the prosecution carried the burden to prove appellant's guilt. (34 RT 6743-6744.) She answered affirmatively when defense counsel asked if she would, indeed, hold the prosecution's feet to the fire (34 RT 6746) and whether she could entertain the possibility that appellant had been charged with a crime he did not commit (34 RT 6746-6747).

This juror had previous jury service on a civil case. (1 MJQ 246; 34 RT 6735-6736.)

The trial court admonished Juror Number 11 to avoid news accounts of the trial and not to discuss the trial with media representatives. (34 RT 6752-6753.)

l. *Juror Number 12 (17901)*

This juror first became aware of this case when Laci went missing around Christmas 2002. (1 MJQ 270.) Juror Number 12 gleaned the information primarily from local television news and from the San Francisco Chronicle. (1 MJQ 270.) During voir dire, this juror said: "I just haven't been that involved or following [the case], or that intrigued by it." (26 RT 5105.) The juror checked "yes" in response to question 97a, which asked if she could set aside information from outside sources and base her decision exclusively on the evidence presented at trial. (1 MJQ 270.)

Although the juror's co-workers talked about appellant's arrest when it occurred and their views that appellant was likely guilty, Juror Number 12 tried to steer clear of such judgments; she did not like the "sensationalism" that attended the case. (26 RT 5104.) Juror Number 12 explained that her own employer had been the subject of frequent news reports at the time and she was aware that "the facts aren't in the newspapers." (26 RT 5105.) She also told defense counsel that she understood the impartial role of a juror having investigated alleged instances of child abuse "you look at the situation, you find the facts." (26 RT 5107.)

In her questionnaire responses, Juror Number 12 stated that she did not hold any preconceived opinions about the case in general or about appellant's guilt or innocence in particular. (1 MJQ 270.) After checking the response "Not enough information to decide," this juror elaborated on

her answer: "I have said 'I wasn't there.' I do believe a person is innocent until proven guilty. The news media can easily distort facts." (1 MJQ 270.)

This juror assured defense counsel that she was open to the possibility that appellant was charged with a crime he did not commit. (26 RT 5107.) She also embraced the principle that appellant did not have to testify or otherwise prove his innocence and that the burden was on the prosecution to prove appellant was guilty. (26 RT 5110.)

At the conclusion of voir dire, the court admonished Juror Number 12 about refraining from consulting news accounts about the case or interacting with members of the media. (26 RT 5111.)

In summary, the voir dire process confirmed that appellant could and did, in fact, receive a fair trial in San Mateo County despite the widespread pretrial publicity the crime received. (*People v. Welch*, *supra*, 20 Cal.4th at p. 745.) No juror's initial impressions of the case were resolutely held, and all of the jurors provided assurance—accepted by the trial court—that pretrial publicity would not prevent them from performing their duties fairly and impartially. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1396 ["jurors selected to try this case bear out the trial court's conclusion that an unbiased jury could be found"].)

Further, as stated, at the conclusion of individual voir dire, the court admonished each of the jurors to avoid news coverage of the case and any contact with members of the media.[111] And, each juror responded in their respective questionnaires that they would follow the court's instruction to avoid news coverage about the case. (1 MJQ 18 [Juror No. 1], 41 [No. 2],

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[111] The trial court repeatedly admonished the jury throughout the proceedings about avoiding news coverage of the trial and contact with the media. (See, e.g., 44 RT 8683; 45 RT 8894; 46 RT 9080; 47 RT 9337; 48 RT 9553; 49 RT 9779; 51 RT 10137; 52 RT 10332; 53 RT 10473; 54 RT 10664; 55 RT 10852.)

64 [No. 3], 87 [No. 4], 340 [No. 5], 133 [No. 6], 317 [No. 7], 179 [No. 8], 202 [No. 9], 225 [No. 10], 248 [No. 11], 271 [No. 12].) It is presumed the jury followed the trial court's instructions. (*People v. Montes* (2014) 58 Cal.4th 809, 888.)

2. *Appellant's demonstrated satisfaction with the jury as selected*

Finally, we note appellant "expressed no dissatisfaction with the jury as selected." (*People v. Fauber* (1992) 2 Cal.4th 792, 819-820.) This fact, especially when coupled with the fact that he did not exhaust his peremptory challenges, "strongly suggests the jurors were fair and that the defense so concluded." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 46; *People v. Dennis*, *supra*, 17 Cal.4th at p. 524; *People v. Panah* (2005) 35 Cal.4th 395, 448.)

Appellant acknowledges that he did not exhaust his available peremptory challenges (AOB 176), but contends it was a defensive act based on the possibility that there might be individuals in the remaining pool of qualified prospective jurors who were less appealing to the defense than those jurors who were ultimately chosen (AOB 177-178).

This argument fails. Appellant, we note again, expressed no dissatisfaction with the jury as selected, and he cannot credibly claim that he accepted a juror he believed (but did not then assert) was "unfair"—despite having the means and opportunity to remove him or her—because he feared the speculative consequences of having a replacement juror randomly drawn from the remaining pool of prospective jurors. But even putting aside how inconceivable it is that appellant's trial counsel actually conducted themselves on the basis of such remote probabilities, appellant's resort to the defensive acts doctrine must be rejected. The law reasonably contemplates that parties will use the means available to them to ensure the fairness of their proceedings (see, e.g., *People v. Ashmus* (1991) 54 Cal.3d

932, 964, fn. 8), not attempt to justify their inaction by resort to unfounded speculation. Accordingly, appellant should have used as many of his remaining peremptory challenges as were necessary to remove any juror or jurors he genuinely believed to be unfair, and at that point, if he were still dissatisfied and had exhausted all available challenges, he could have asked the trial court for more.

Moreover, on appeal, appellant does not identify a single prospective juror as to whom the court erroneously denied a defense challenge for cause. Nor has appellant shown that "exhausting his remaining peremptories would necessarily have resulted in the seating of a juror who ought to have been removed for cause." (*People v. Price* (1991) 1 Cal.4th 324, 401.)

As this Court has made clear:

> Because the existence of unused peremptory challenges strongly indicates defendant's recognition that the selected jury was fair and impartial, the failure of the defense to exhaust all peremptory challenges, without a reasonable explanation, can be a decisive factor, even in close cases, in confirming that the denial of a change of venue was justified. [Citations.]

(*Davis*, *supra*, 46 Cal.4th at p. 581.)

In sum, appellant has not provided this Court with any legally sufficient or persuasive reason for failing to exhaust his peremptory challenges. Thus, the defense's conduct and the record of voir dire strongly support the conclusion that appellant and his counsel were in fact satisfied with the jury they accepted.

VI. THE TRIAL COURT PROPERLY ADMITTED THE MARINA DOG TRAILING EVIDENCE

Appellant claims the trial court abused its discretion in admitting dog trailing evidence. (AOB 179-238.) He contends the admission of such evidence was so prejudicial that it warrants reversal of the judgment. (AOB 232-238.)

We beg to differ. The jury heard evidence that "Trimble"—a certified trailing dog—detected Laci's scent at the Berkeley Marina four days after she was reported missing. A few months later, Laci's and Conner's bodies washed ashore not far from the marina where Trimble picked up Laci's scent and where appellant had been on the day Laci disappeared. There exists no stronger testament to Trimble's capabilities than the corroborative nature of that tragic circumstance.

In any event, appellant misconstrues the nature of the dog scent evidence admitted at his trial. Ample foundation for admission of dog trailing evidence was presented at an Evidence Code section 402 hearing. Appellant's complaints go merely to the weight, rather than the admissibility, of the evidence. Given this, appellant fails to meet his burden of showing the trial court's ruling constituted an abuse of discretion.

Last, any alleged error in admitting the dog trailing evidence was harmless in light of the overwhelming evidence against appellant. Finally, appellant's claim that admission of the dog scent evidence violated his constitutional rights under the Eighth and Fourteenth Amendments is forfeited. But, if viable, the claim is without merit.

A. Pretrial Hearings and Rulings

Over several days in late February 2004, the trial court conducted an extensive section 402 hearing on the admissibility of the dog trailing evidence. (See 7 RT 1285-1481; 8 RT 1490-1646; 9 RT 1678-1836.)

The court permitted introduction of Trimble's alert at the Berkeley Marina because the detection of Laci's scent at the marina was independently corroborated, unlike the other proffered dog trailing evidence that the court excluded. (10 RT 2000-2004.)

1. *Testimony*

a. *Dog handler Eloise Anderson*

Anderson was a certified dog handler who participated in trailing and cadaver searches for the Contra Costa County Sheriff's Department. (7 RT 1469.) She had over 20 years of experience working with dogs. In 1982, Anderson started doing professional obedience training for dogs, including dogs involved in American Kennel Club competitions. (7 RT 1467; 8 RT 1488.) In 1990, she shifted her focus to working with dogs in a volunteer search and rescue capacity. (7 RT 1467; 8 RT 1489.) Anderson trained dogs for area, cadaver, water, evidence, and trailing searches.[112] (7 RT 1467.)

Anderson served as a trainer for the California Rescue Dog Association ("CARDA").[113] In that position, she evaluated dogs for certification in the areas of area, cadaver, water, and trailing searches. (7 RT 1474.) Anderson had conducted over 100 certification tests. (7 RT 1475.) She was also a Certified Search Manager having completed training on basic search management plans and operations. (7 RT 1475.)

Trimble, Anderson's trailing dog, was a CARDA-certified Labrador Retriever. (7 RT 1469, 1473, 1478; People's Exh. No. 209 [photo of

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[112] A scent-based trail can be deposited by a subject while he or she is on foot, on a bicycle, or while riding in a vehicle. Thus, a scent trail can be left even where the subject's feet do not make contact with the ground. The *trailing* dog follows the residual scent left by the subject. (7 RT 1286-1287.) A person's scent consists of skin "rafts" or tiny particles of skin that are shed by the body. (8 RT 1547.) *Tracking* involves the dog working from footprint to footprint. (7 RT 1287.)

[113] Cindee Valentin, who was also a dog handler for the Contra Costa County Sheriff's Office and worked on the same search and rescue team with Anderson and Trimble, testified that CARDA certification was required before dogs were permitted to work for the state Office of Emergency Services ("OES"). (7 RT 1291-1292, 1478, 1481.)

Trimble in harness].) Part of the certification required that Trimble work trails of different ages, which included a trail that was 96 hours old. (7 RT 1472.)

Trimble participated in ongoing training, which included running trails in different scent environments. For example, Trimble trained in urban settings where there was vehicle traffic and asphalt, which presented unique challenges for scent conditions. (7 RT 1477; 8 RT 1489-1490.) In October 2003, Trimble attended training in Texas that was typically reserved for bloodhounds. In that training session, Trimble was exposed to various "scent pictures," which included different terrains and some interior environments, as well. (7 RT 1477-1478.) Anderson stated that she and Trimble also attended training seminars in 1999 and 2000, in California and Kansas. (7 RT 1478-1479.) The practical training took place in various locales because it was important that Trimble be exposed to different terrain and environmental influences to learn how scent was affected in those environments. (7 RT 1479; 8 RT 1497.) The training exercise also honed Anderson and Trimble's skills as a team (7 RT 1480), including Anderson's ability to accurately read Trimble's cues (8 RT 1493).

When Trimble ran a trail, she wore a harness with a line (a leash of sorts) that could extend up to 30 feet as Trimble worked a trail. (8 RT 1492.) As the handler, Anderson watched Trimble's behavior as Trimble worked a trail. Typically, when Trimble had picked up the subject's scent, she would "line out" meaning she was at the end of her line, with her head and body level, driving straight ahead. (8 RT 1494; People's Exh. No. 209 [inset showing Trimble's trail posture].) If Trimble lost the trail, which could be due to the scent becoming diluted or Trimble missing a turn in the trail, she worked her way back and tried to pick up the scent again. (8 RT 1494.) Anderson explained that trailing dogs identified the freshest scent, which was typically the strongest scent. (8 RT 1500-1501.) Trimble's

"alert" involved tagging the subject with her nose and then standing off and barking at the subject. (8 RT 1492.)

Anderson kept a training log for Trimble and testified about specific training exercises. On November 23, 1999, Trimble worked an outdoor trail that was five days old. (8 RT 1491.) During the intervening time after the trail was laid and before Trimble's training exercise, there were heavy rains. (8 RT 1491.) The trail involved a grass median, intersection, park, and a parking lot. (8 RT 1491.) Trimble successfully found the subject of the search. (8 RT 1491.)

On December 30, 2001, Trimble participated in a non-contact trailing exercise where the subject rode a bicycle from Walnut Creek to the Bay Area Rapid Transit ("BART") commuter station in Dublin and then traveled on BART to his home. (8 RT 1495.) The subject then returned to the BART station parking lot in a vehicle and waited in the station. (8 RT 1495.) The trail required that Trimble navigate an area with vehicle traffic, a bike trail, and a commuter station. (8 RT 1495-1496.) The 22-mile trail was 96 hours old when Trimble successfully found the subject in the BART station. (8 RT 1496.)

On January 19, 2002, Anderson conducted another non-contact vehicle trailing exercise with Trimble. (8 RT 1497-1498.) The subjects drove their vehicles from a side road where the vehicles were initially parked and out onto a freeway. (8 RT 1498.) Trimble and Anderson traveled in a vehicle to three exit ramps along the same freeway. (8 RT 1498.) At each exit, Trimble was presented with the subject's scent again and then Anderson watched to see if Trimble would take a path off the freeway exit or continue on the freeway. (8 RT 1498.) At the third exit, the subjects were instructed to take the exit, turn right, and park their cars. When the dogs arrived at that exit, the subjects were instructed to begin walking on the sidewalk as if they were pedestrians. (8 RT 1498.) That

same day, Anderson also had Trimble attempt a six-day-old wilderness trail. (8 RT 1498-1499.) The trail was a combination contact and non-contact bicycle trail where the subject rode the bike along a bike trail and then walked up a steep hill. (8 RT 1499.) Although Trimble had to take some time to work through one particular area of the trail, she tagged the subject after he walked by her in the dark. (8 RT 1499-1500.)

On March 9, 2002, Trimble successfully completed a trail that was 14 days old. (8 RT 1501.)

On April 7, 2002, Anderson had Trimble work a bike trail that was four and one-half days old. (8 RT 1502.) There were two bicycle riders, one of whom was the subject. The non-subject rider made contacts with the trail along the way, which required Trimble to differentiate between the scent of the subject and the scent of the non-subject bike rider. Trimble tagged the subject at the end of the trail. (8 RT 1502.)

On May 18, 2002, Anderson conducted another bicycle trail with Trimble that was 24 hours old. (8 RT 1503, 1504.) Most of the trail was non-contact because the subject was riding a bike, but at one point, the subject sat on a bench with another bike rider. (8 RT 1503.) Anderson explained that bicycle trails presented the challenge of "a discontinuous scent picture" for Trimble. (8 RT 1504.) Trimble successfully completed the exercise. (8 RT 1504.)

On September 1, 2002, Trimble participated in a trailing exercise inside a mall that was designed to present as many distractions as possible. (8 RT 1504-1505.) The exercise took place on a Sunday evening after many people had passed through the mall over the weekend. (8 RT 1505.) The subject was placed in a hamburger restaurant inside the mall. (8 RT 1505.) Trimble negotiated different smells and surfaces than those which she was accustomed to and successfully tagged the subject. (8 RT 1505.)

On July 25, 2003, Trimble ran a vehicle trail. The subject was in the trunk of a vehicle. (8 RT 1505.) The exercise also involved a cadaver dog team and cadaver sources, which tested Trimble's ability to differentiate the subject scent in the trunk of one vehicle from cadaver scent in a different vehicle. (8 RT 1505-1506.) Trimble successfully completed the exercise. (8 RT 1506.)

On July 26, 2003, Trimble was tested in her ability to follow the subject's scent off a street and onto a foot path trail going up a hill. (8 RT 1506.) The trail was 48 hours old. (8 RT 1507.) A decoy was placed in the middle of the trail—someone who Trimble had previously trailed. (8 RT 1506.) Another distraction was built into the exercise because the subject's husband also walked the trail with the subject. (8 RT 1506.) So, Trimble needed to work past the decoy and then differentiate the subject from her husband. (8 RT 1506-1507.) Trimble tagged the subject. (8 RT 1507.)

As for real-life situations, Anderson related that Trimble followed the trail of a runaway boy who had left home on his bicycle. She tagged the boy as he was heading back to his home. (8 RT 1508.) On another occasion, a girl ran away from home. The girl left in a van with two adult males. (8 RT 1508.) The group stopped at the girl's friend's house, but the friend declined to go with them. (8 RT 1508.) Trimble was scented under the bedroom window of the friend's house two days later. (8 RT 1508.) Trimble followed the trail to the main highway, but while Trimble worked the trail, authorities had developed other investigative information and Anderson and Trimble were called off. (8 RT 1508.)

Anderson acknowledged one instance in March 2001, where Trimble did not successfully locate the subject during a trailing exercise. (8 RT 1549-1550.)

On December 28, 2002, the Modesto Police Department, working through OES, engaged the services of Anderson and Trimble for the purpose of determining whether Laci's scent was present at the Berkeley Marina. (8 RT 1516.) The scent article was Laci's sunglasses contained in a hard cover case, which were collected from the Peterson's Covena residence. (8 RT 1517.) Anderson explained that because sunglasses were exposed to an individual's skin oils or make-up, the sunglasses were a potentially good source for scenting a dog. (8 RT 1580.)

At the marina, there were two possible entrances to the harbor area. (8 RT 1517; People's Pretrial Exh. No. 12.)[114] There were also three piers that ran north to south. (8 RT 1585.) Anderson first scented Trimble with Laci's glasses behind a line of trees that separated the two asphalt parking areas at the marina northeast of the boat launch area. (8 RT 1519, 1585.) Trimble went to the end of her line, but gave Anderson a "no trail indication." (8 RT 1519.) As Anderson explained, she moved Trimble closer to vegetation in the same area since scent adhered to vegetation more readily than to asphalt. (8 RT 1519; People's Pretrial Exh. No. 12.) Again, Trimble gave a negative trail indication. (8 RT 1519.)

Anderson next moved Trimble to the opposite side of the parking lot on the northwest side of the boat launch area. (8 RT 1519-1520, 1586; People's Pretrial Exh. No. 12.) Anderson scented Trimble a second time behind the line of trees that separated the two entrances to the marina. (8 RT 1520.) Anderson described Trimble's behavior after the dog was scented in this second location:

> She drove away from me for a very short distance, to the end of her line, came back, went up against -- on the pavement, but up

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[114] This exhibit can be found in the Clerk's Pretrial Motions Exhibits Transcript at page 155. The specific areas that Anderson and Trimble searched are highlighted in yellow.

> along the edge of the tree line and the vegetation line, and made a straight line -- where there's a circle there? [Referring to exhibit number 12.] That was a little open area. She did a circle up onto the vegetation and then came back out, lined out, led -- head level, tail up and lined out straight to the end of the -- to the end of that particular pier where it made a sharp turn to the right, and stopped by a pylon that's right there at that pier.

(8 RT 1520; People's Pretrial Exh. No. 12.) The western-most pier was connected to the pylon. (8 RT 1520-1521, 1587.) A boat could be tied to the pylon, but not launched from the pier. (8 RT 1521, 1593-1594.)

After giving Trimble "a moment to settle" while at the end of the pier, Anderson described Trimble's subsequent behavior:

> She went, took the turn and went to the portion of the pier where it went about ten or 15 feet, made a sharp left, went about another 15 feet there, stopped, came back, and came back to the pylon. Again hard eye contact on my left side. End of trail.

(8 RT 1521.)

During cross-examination, Anderson explained that even if Laci was deceased when she was present at the marina, her body could have continued to release skin rafts. (8 RT 1588.) That was because, in Anderson's view, friction from clothing on the body could slough off particles of skin. (8 RT 1588.) When defense counsel asked Anderson if she could point to a particular book that discussed the potential for skin rafts to be shed by deceased individuals, Anderson cited "Syrotuck, Scent and the Scenting Dog." (8 RT 1590.)[115]

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[115] Although appellant's trial counsel declined to cross-examine Anderson on the cited source during the pretrial hearing, appellate counsel attempts to do so in a footnote. (AOB 200, fn. 45.) However, no such evidence was presented in the trial court at the hearing. (See, e.g., *People v. Fulcher* (2006) 136 Cal.App.4th 41, 54 [any erroneous factual assumptions by expert could be addressed through cross-examination].) Had appellant presented this "evidence" at the hearing rather than wait to

(continued...)

When asked by defense counsel if Trimble's trail from the northwestern portion of the launch area out to the pier was a contact or vehicle trail, Anderson opined that owing to the manner in which Trimble worked the trail, it was a non-contact trail. (8 RT 1590.) Anderson acknowledged that a non-contact trail could be affected by environmental factors, including wind. (8 RT 1590.) Although the wind typically moved west to east from the ocean to the Bay, Anderson stated that her recollection was that the wind was not coming in from the west that day. (8 RT 1592-1594.) In fact, in Anderson's opinion, there were no environmental factors that day that created interference with Trimble's ability to run the trail. (8 RT 1618.)

Even if the wind had been moving from west to east, Anderson's experience with Trimble was that she could work either side of the trail—the near or far side relative to the direction of the wind. (8 RT 1592-1593.) Anderson had already explained that Contra Costa County, where she and Trimble worked, was an area with strong cross winds, which necessitated that Trimble learned how to successfully navigate scent in the wind. (8 RT 1504.) Anderson disagreed with defense counsel's assertion that a wind blowing west to east would necessarily have deposited all of a person's scent on the eastern-most pier. (8 RT 1594-1595.) Depending on the velocity of the prevailing wind, skin rafts could still have remained deposited in the wake of the wind. (8 RT 1595.) Anderson said she "probably wouldn't" expect skin rafts to withstand winds above five miles per hour. (8 RT 1595.)

(...continued)
present it for the first time on appeal, Eloise Anderson or the prosecutor would have had an opportunity to address appellant's specific assertion about skin rafts and wind velocities. Appellant's attempt to impeach Anderson on appeal with information outside the record should be rejected.

As for the prospect of contamination on Laci's sunglasses, Anderson explained that, based on the information she received at the time the sunglasses were collected, she understood that appellant may have handled Laci's purse, which contained the sunglasses case, but Anderson had no information which suggested that appellant handled Laci's sunglasses, or the sunglasses case. (8 RT 1551-1552.)

Further, Anderson explained that Trimble was trained with contaminated scent articles so that she could learn to distinguish among scents. (8 RT 1615.) For example, Anderson had different individuals—in addition to the subject—handle a scent article. This was called a "missing member" test. (8 RT 1615-1616.) Before setting out to attempt a trail on the subject scent, Trimble was initially required to "check" to see if the person who deposited the non-subject scent was present. If so, Trimble touched the person with her nose. She then understood that she was to trail the scent of the person who was "missing" or not present. (8 RT 1615-1617.) Anderson estimated that she had run this type of test about 12 times with Trimble. (8 RT 1625.) However, Anderson did not see a need to run the missing member test with Trimble at the marina using appellant as a non-subject scent. (8 RT 1625.)

Anderson also testified to Trimble's vehicle trailing along Highways 33 and 132 in and around Modesto on January 4, 2003, which were also undertaken in response to a request from the Modesto Police Department. (8 RT 1515, 1522-1528, 1566-1580.)

Anderson was familiar with an instructor by the name of Andrew Rebmann from Washington State. (8 RT 1614.) Rebmann had worked with Trimble and Anderson. Anderson documented the training logs Trimble completed with Rebmann, which were successful. (8 RT 1614.)

The trial court made a finding that Trimble was "[r]eliable in tracking humans."[116] (8 RT 1613.)

b. *Captain Christopher Boyer*

Captain Christopher Boyer was the head of Contra Costa County's volunteer search and rescue team. (8 RT 1629.) His supervisory responsibilities included oversight of five K-9 search teams. (9 RT 1691.) Boyer started with the agency as a volunteer about 10 years previously. (8 RT 1634.) Boyer explained that the California Governor's Office of Emergency Services ("OES") was the agency responsible for search and rescue and rescue mutual aid in the state. (8 RT 1634.) He taught a 40-hour course in search and rescue management for the agency. (8 RT 1634-1635.) Boyer also taught at national and regional search and rescue seminars (8 RT 1636-1637), including a two-hour seminar on scent theory, which was part of the National Search and Rescue Seminar held in Reno, Nevada, in September 2003 (8 RT 1636). He trained representatives from federal agencies, such as the Federal Emergency Management Agency ("FEMA") and the FBI. (8 RT 1637.)

In addition to his role as the head of the county search and rescue team, Boyer was also a K-9 handler. (8 RT 1629.) He worked with a certified cadaver dog, which was a Labrador Retriever. (8 RT 1633, 1634.) Boyer had also trained a Bloodhound as a trailing dog for one year before ending the dog's training due to the dog developing hip dysplasia. (8 RT 1633-1634.) With respect to the breed of dog it employed, OES did not distinguish between Bloodhounds and Labrador Retrievers. The agency

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[116] The trial court used the term "tracking," but the record suggests the correct term was "trailing." Throughout the hearing, the court and parties occasionally used the terms "trailing" and "tracking" interchangeably.

based its certification on the qualifications of the dog, not the breed. (8 RT 1635.)

Boyer described "[s]cent theory" as "how the dog detects the scent, how the environment affects the scent, and how to manage your dog and work your dog so that you put it in a better position to find those things and work through any problems that you might have in the environment." (8 RT 1638.)

He made clear that it was possible for a person to give off a live scent as well as a necrotic or decomposing scent. (8 RT 1640.) Live scent was produced typically from shedding of skin cells. In short, live scent was produced externally. (9 RT 1678.) Boyer analogized the body's process of producing live scent to "Post-it notes fall[ing] off." (9 RT 1680.) A human shed roughly 150,000 skin rafts every hour. (9 RT 1689.) Skin rafts degraded as they were consumed by bacteria over time. (9 RT 1688.) They were also subject to being dispersed due to environmental conditions, like wind. (9 RT 1690.) However, Boyer pointed out that sometimes wind actually created a trail. (9 RT 1794.) He also explained that the conditions on the Bay were not necessarily unfavorable to a trailing dog's ability to detect scent: "In fact, some salt water environments it's much simpler. The hydroscopic nature of salt water maintains humidity and the fog in that area maintains humidity. It's much simpler and easier to work in that area, actually." (9 RT 1784.)

On the other hand, "[d]ead scent" was the result of internal bodily processes, which were vented through the body's orifices. (9 RT 1678-1679.) The cooler the environment, the less quickly dead scent was produced. (9 RT 1680.) However, even after a person died, skin rafts remained on the body. (9 RT 1680.) According to Boyer, "you can still have a very overwhelming live smell attached to that person for a very long

time. Especially if the environmental conditions are very cool." (9 RT 1680.)

Boyer explained the circumstances presented to search and rescue K-9 teams when a person was reported missing:

> Every time a dog is called out that's a cadaver dog, we obviously are looking for decomposing human remains. But any dog that's called out for a search where we have a missing person, we never know whether that person has expired or not. And so the search is always for an assumed live human. But that person could be dead at the end of a trail for [a] trailing dog, or they could be dead in the area that an area search, or a wilderness search, a dog that's looking for live remains. Even in an avalanche you don't know whether the victim is alive or dead under the avalanche. Dog has to figure that out.

(8 RT 1639.)

Boyer described K-9 searches as both science and art. In his view, the aspect of the search function that was more of an art was the relationship between the handler and the dog, including the handler's ability to interpret the dog's behavior. (9 RT 1796-1797.) Generally speaking, it had been Boyer's experience that CARDA-certified dogs were typically able to follow a scent trail to its end. (9 RT 1799.) With particular regard to his participation in Anderson's training exercises with Trimble, Boyer stated that Trimble was able to successfully locate the subject of the search. (9 RT 1799.)

With respect to scent contamination issues, Boyer pointed out that because scent articles were not necessarily pure in the sense that they contained only the subject's scent, search dogs were trained to work the "predominant scent" from a scent article. (9 RT 1681, 1682.) The dogs were also trained to follow the freshest scent trail, even if the scent was weaker than other scents. (9 RT 1803.)

Ideally, "very personal" scent articles were optimal; those that the subject's skin came in contact with on a daily basis, such as a watch,

toothbrush, glasses, hair barrettes, sleepwear, and pillows. (9 RT 1681-1682.) With particular regard to Laci's sunglasses, Boyer explained that he and search team member Cindee Valentin collected the item from Laci's purse, while at the Covena residence on December 26. (9 RT 1714.) Boyer held the purse, pulled items out, and showed them to Valentin. (9 RT 1720.) Valentin decided the sunglasses, which were in their case, would be a good scent item. (9 RT 1720.) Boyer was the person who removed the glasses case from the purse. (9 RT 1720, 1721.) Boyer and Valentin wore latex gloves during the collection of scent items. (9 RT 1714, 1717.) The items were individually packaged in plastic bags. (9 RT 1714.) Boyer changed gloves after handling each scent item. He could not recall if Valentin did the same. (9 RT 1717.) Boyer did not believe that Valentin handled appellant's brown slipper, which was the last scent item collected. (9 RT 1720-1721.)

Boyer was the search and rescue scene manager at the Berkeley Marina on December 28 when Anderson and Trimble were deployed in the search for Laci. (8 RT 1643.) To aid in the marina search, the Modesto Police Department had requested a water dog—a dog that could find human remains under water—and a trailing dog. (9 RT 1772-1773.) In addition to Anderson and Trimble, Boyer arranged for a second trailing team to search at the marina, along with a K-9 team that specialized in water searches. (9 RT 1773.) Ronald Seitz from the Alameda County Sheriff's Office was the other trailing dog handler who responded as part of mutual aid. (9 RT 1773-1774, 1780.)

Boyer supervised the trailing dog teams and was familiar with the areas Anderson and Trimble searched, as well as those searched by Seitz and his dog. (8 RT 1643; 9 RT 1775.) Boyer had Seitz scent his dog with one of Laci's slippers to see if they could locate a trail in the boat launch ramp area. (9 RT 1776, 1822.) Seitz and his dog went off to search while

Boyer briefed Anderson. (9 RT 1776.) Subsequently, Seitz reported to Boyer that his dog did not locate Laci's scent along the tarmac area on the side of the marina nearest to the restrooms. (9 RT 1776-1777, 1822.) Seitz and his dog searched the area for about 10 or 15 minutes. (9 RT 1778.)

Boyer was aware that Anderson and Trimble searched the "choke points" at the marina, which were the areas where Laci would necessarily have had to pass through. (9 RT 1803-1804, 1805.) Specifically, there were two vehicle choke points to the marina's parking lot. (9 RT 1805.) Referencing the exhibit Eloise Anderson used to illustrate the locations Trimble searched, Boyer stated that the area where Anderson indicated Trimble had found no trail was the same area that Seitz and his dog had also searched with the same result. (9 RT 1823-1824; People's Pretrial Exh. No. 12.) Boyer described the pier where Trimble detected Laci's scent, as being on the Bay side, near the marina exit, and "towards the open area of Brooks Island." (9 RT 1686.) The pier extended out over the water about 30 yards. (9 RT 1686.)

At the time of the marina search, Boyer was unaware that appellant stated he had gone out on the Bay from the marina. (9 RT 1806-1807, 1821.) Therefore, Boyer did not advise his search teams prior to the search on December 28 that appellant stated he had been at the marina. (9 RT 1806-1807.)

Boyer was also acquainted with the areas where Laci's and Conner's bodies washed ashore. (9 RT 1685.) The recovery site for Laci's body was approximately two miles from the Berkeley Marina. (9 RT 1685-1686.) It was approximately the same distance from the marina to Brooks Island. (9 RT 1686.)

The captain was familiar with dog handler and instructor Andy Rebmann. (8 RT 1636.) Boyer had attended two of Rebmann's cadaver-search training seminars, while Rebmann attended Boyer's two-hour

seminar on scent theory in Reno in September 2003. (8 RT 1636; 9 RT 1700.)

As for vehicle trailing, Boyer stated that there were differing views on the capabilities of search dogs to undertake such efforts. (9 RT 1701.) CARDA certification did not include vehicle trailing. (9 RT 1705.) Boyer was not familiar with Eloise Anderson's training log as it concerned Trimble's vehicle trailing exercises. (9 RT 1702.) However, Boyer pointed out that what was more important in assessing a dog's capabilities was whether they could follow a non-contact trail; it did not have to be a vehicle trail. For example, it could be a bicycle trail. (9 RT 1800.)

2. *Appellant's objection and the trial court's ruling*

Although defense counsel referred to the dog trailing proffer generally as "voodoo" (10 RT 1982), "nonsense" (10 RT 1996), and the equivalent of "pin the tail on the donkey" (10 RT 1997), it was clear that the defense's primary objection was not to the evidence involving Trimble's detection of Laci's scent at the Berkeley Marina. On the contrary, the defense was concerned with the dog trailing that was done around the Covena residence and appellant's warehouse. (10 RT 1984-1985.) The defense likewise objected to the vehicle trailing that involved Cindee Valentin's dog Merlin. (10 RT 1983-1984, 1996.) Defense counsel repeatedly argued the lack of corroboration necessary to admit such evidence. (10 RT 1981, 1984, 1985, 1998.)

Having considered the criteria articulated in *People v. Malgren* (1983) 139 Cal.App.3d 234 (*Malgren*), and other relevant authorities, the trial court excluded most of the dog trailing evidence. However, the court found sufficient foundation had been laid for admission of Trimble's trailing at

the marina.[117] (10 RT 1984, 2000-2004.) The court found that *Kelly* was inapplicable to the trailing evidence.[118] (10 RT 1987.) Defense counsel interposed no objection to the court's finding. The court first noted that Trimble had previously detected scents that were up to six days old and that he was certified for trailing up to 96 hours. (10 RT 2002.) Further, Eloise Anderson's description of Trimble's behavior supported that the dog was following Laci's scent. (10 RT 2002.) The court found that Trimble's detection of Laci's scent at the marina was corroborated by the fact that Laci's and Conner's bodies washed ashore a few months later (10 RT 2002), and their bodies were discovered about two and one-half miles from the marina (10 RT 2002, 2004), where appellant admitted he had been just four days prior to Trimble's trailing at that location (10 RT 2004).

Under Evidence Code section 352, the trial court found that, with the exception of Trimble's trailing at the marina, the other evidence of dog trailing would be confusing for the jury and would result in an undue consumption of time. (10 RT 2003.)

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[117] During argument, the prosecutor pointed out that the trial court had already made findings on the first three *Malgren* factors: the handlers had the requisite level of experience, the dogs were trained to track humans, and Trimble, in particular, was reliable in tracking humans. (8 RT 1613; 10 RT 1986.) Defense counsel did not dispute this assertion. We discuss the *Malgren* factors in detail below.

[118] "*Kelly-Frye*" refers to the rule for admitting "evidence derived from a new scientific methodology" (*People v. Roybal* (1998) 19 Cal.4th 481, 505) and is based on *People v. Kelly* (1976) 17 Cal.3d 24, and *Frye v. United States* (D.C.Cir. 1923) 293 F. 1013. The proponent of such evidence must sufficiently establish that the technique has gained general acceptance in its particular scientific field, the expert witness proffering testimony concerning the technique is qualified to do so and correct scientific procedures were used. (*People v. Roybal, supra,* 19 Cal.4th at p. 505; *People v. Kelly, supra,* 17 Cal.3d at p. 30.)

Notably, defense counsel did not express displeasure with the trial court's ruling. To the contrary, counsel said, "Thank you, your Honor." (10 RT 2004.)

B. Applicable Legal Principles: This Case Did Not Involve Teaching an Old Dog New Tricks

As a threshold matter, appellant has inaccurately framed the evidence of Trimble's trailing at the marina as "non-contact vehicle trailing in a marine environment" (AOB 217). Trimble's activities at the marina did not involve her trailing of a vehicle. Further, while the marina could be considered adjacent to a "marine environment," Trimble's trailing occurred in specific areas of the marina, which were not unique scent environments beyond Trimble's capabilities, as we explain below.

Dog-trailing evidence is admissible upon a sufficient showing of the particular dog's ability and reliability in tracking humans. (*Malgren*, *supra*, 139 Cal.App.3d at p. 238, disapproved on other grounds in *People v. Jones* (1991) 53 Cal.3d 1115, 1144-1145.) Each particular dog's ability and reliability must be shown on a case-by-case basis. (*People v. Craig* (1978) 86 Cal.App.3d 905, 915 (*Craig*).) "This testimony should come from a person sufficiently acquainted with the dog, his or her training, ability, and past record of reliability." (*Ibid.*)

Thus,

> the following must be shown before dog trailing evidence is admissible: (1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated."

(*Malgren, supra,* 139 Cal.App.3d at pp. 237-238 [adopting "majority view" from other states].)

Mistakenly framing the issue as he does, appellant contends the evidence here needed to have satisfied additional foundational requirements set forth in *People v. Willis* (2004) 115 Cal.App.4th 379 (*Willis*), including a *Kelly* analysis. (AOB 212-213.) Indeed, appellant throws down the gauntlet and argues that his conclusion derives from "the only sensible reading of the case." (AOB 213.)

We take up that challenge and argue the contrary: *Willis* does not control because *Willis* involved dog scent identification techniques,[119] not a dog scent trailing (or tracking) case, as these methods have been understood by lower courts, including the trial court in this case. Indeed, that is the understanding noted by this Court when it referred to *Willis* as detailing "the foundational requirements for dog scent *identification* evidence . . . ," (*People v. Eubanks* (2011) 53 Cal.4th 110, 142, emphasis added.) In fact, the *Willis* court made clear that its decision did not apply to dog trailing: "As has already been observed, dog trailing is a lot different from dog scent recognition. [citing *Mitchell*]." (*Willis*, at p. 386, internal quotation marks omitted.) In *Willis*, the Court of Appeal was concerned with the use of the scent transfer unit,[120] which the court viewed to be a novel scientific technique and, for that reason, should have been subjected to a *Kelly* hearing at trial. (*Id.* at p. 385.) The *Willis* court explained other foundational issues with the case:

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[119] Canine scent identification line-ups involve a dog sniffing scent "from an object a person is known to have touched and determining whether a second object has been touched by the same individual." (*People v. Mitchell* (2003) 110 Cal.App.4th 772, 779 (*Mitchell*).)

[120] A scent transfer unit ("STU") is a vacuum device that holds a gauze pad, which "ostensibly collects and preserves the scent from virtually any object a person has touched. The dog handler uses the scent pad from the STU instead of simply using the object itself . . . ." (*Willis*, *supra*, 115 Cal.App.4th at p. 384.)

> A more difficult case is presented when the dog is not tracking a suspect but rather is given a scent from a gauze pad some length of time after an incident and is watched to see if the dog "shows interest" in various locales frequented by the defendant. Showing interest in locations is a far cry from tracking a suspect and giving an unambiguous alert that the person has been located. Furthermore, there is no proof that appellant ever touched the matchbook from which a scent was collected. The matchbook was found in a parking lot used by many people, any one of whom could have thrown the matchbook on the ground.

(*Id.* at p. 386.)

So, there are two major distinctions between *Willis* and the case here: 1) a scent transfer unit was not used in this case to extract scent from the scent item (i.e., the novel technique subject to *Kelly*), and 2) the scent item was known to be Laci's. *Willis* is, therefore, inapposite. In short, Trimble's search at the marina involved non-contact trailing—a search that employed no novel techniques and one that Trimble had performed reliably many times in the past. Therefore, the evidence here needed only to hurdle the foundational considerations discussed in *Malgren*.

Moreover, insofar as appellant contends *Mitchell, supra*, 110 Cal.App.4th 772, controls (AOB 224-228), his argument is likewise erroneous. In *Mitchell*, the dog was presented with various scents extracted by a scent transfer unit and then presented with two "lineups" of various pads from the scent transfer unit. (*Id.* at pp. 780-781.) The dog matched scent pads obtained from shell casings and a victim's shirt to a pad collected from one defendant's shirt, but was unable to match any scents to a pad obtained from another defendant. (*Ibid.*) In addition to trial court error in failing to conduct a *Kelly* hearing for such novel evidence, the Court of Appeal held insufficient foundation was laid for its admission. (*Mitchell, supra,* 110 Cal.App.4th at pp. 790-794.) The court expressed concerns about "the precise nature and parameters of a dog's ability to discriminate scents," multiple sources of possible contamination of the

objects from which the scent pads were extracted, the lack of "evidence that every person has a scent so unique that it provides an accurate basis for a scent identification lineup." (*Id.* at pp. 790-793.)

In light of these considerations, the *Mitchell* court revised the fifth *Malgren* factor for purposes of scent identification lineups. (*Mitchell, supra*, 110 Cal.App.4th at pp. 790-791.) In cases involving scent identification lineups where scents are transferred to an STU so that dogs can discriminate among them, the courts have found a *Kelly* hearing is required because an STU is considered to be a novel device. (*Mitchell*, at pp. 787-789; accord *Willis*, *supra*, 115 Cal.App.4th at p. 385.)

Here, while the case resided with the Stanislaus County Superior Court, the prosecution brought its motion to admit dog trailing evidence at appellant's preliminary hearing. In its motion, the prosecution argued that a *Kelly* hearing was not required. (7 CT 2242-2244.) The defense filed an opposition. (6 CT 2151-2157) The Stanislaus County court declined to hold a *Kelly* hearing. (10/24/03 Stanislaus RT 436.) As stated above, the San Mateo County court also found *Kelly* inapplicable. (10 RT 1987.) Both courts were correct:

> "*Kelly* is applicable only to 'new scientific techniques.' [Citations.]" [Citation.] It "only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law.' [citation.]"

(*Mitchell, supra,* 110 Cal.App.4th at p. 782, quoting *People v. Leahy* (1994) 8 Cal.4th 587, 605, original emphasis; see also *People v. Roybal*, *supra*, 19 Cal.4th at p. 505.)

> Thus, *Kelly* analysis is limited to situations where it will "forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. [Citation.] In most other instances, the jurors are permitted to rely on their

> own common sense and good judgment in evaluating the weight of the evidence presented to them. [Citations.]"

(*Mitchell, supra,* 110 Cal.App.4th at p. 783, quoting *People v. Venegas* (1998) 18 Cal.4th 47, 80.)

There is nothing new about dog trailing evidence. As the *Craig* case shows, such evidence has been recognized in California since 1978. In *People v. Gonzales* (1990) 218 Cal.App.3d 403 (*Gonzales*), the Court of Appeal acknowledged "the antiquity" of the use of dog tracking evidence, while noting ongoing disputes as to its reliability. (*Id.* at p. 311.) In acknowledging the historical significance of dog trailing, the Court of Appeal cited this oft-quoted passage:

> "'If we may credit Sir Walter Scott, such evidence was looked upon with favor as early as the twelfth century. In the Talisman it is related that in the joint crusade of Richard I of England and Phillip II of France, Roswell, the hound, pulled from the saddle Conrade, Marquis of Montserrat, thus mutely accusing him of the theft of the banner of England. Phillip defended the Marquis with the remark:
>
> "'"Surely, the word of a knight and a prince should bear him out against the barking of a cur."'
>
> "'To which Richard replied:
>
> "'"Royal brother, recollect that the Almighty who gave the dog to be companion of our pleasures and our toils, both invested him with a nature noble and incapable of deceit. He forgets neither friend nor foe; remembers, and with accuracy, both benefit and injury. He hath a share of man's intelligence, but no share of man's falsehood. You may bribe a soldier to slay a man with his sword, or a witness to take life by false accusation; but you cannot make a hound tear his benefactor; he is the friend of man save when man justly incurs his enmity. Dress yonder Marquis in what peacock robes you will, disguise his appearance, alter his complexion with drugs and washes, hide himself amidst a hundred men; I will yet pawn my scepter that the hound detects him, and expresses his resentment, as you have this day beheld."'"'

(*Gonzales*, *supra*, 218 Cal.App.3d at pp. 411-412.) In an accompanying footnote, the *Gonzales* court clarified: "To the statement of Phillip of France, 'Surely the word of a knight and a prince should bear him out against the barking of a cur,' we would simply add a more modern response: 'It depends on what prince and which dog.'" (*Id.* at p. 412, fn. 5.)

Indeed, it is common knowledge that dogs have keener senses of smell than people, and there is nothing unusually difficult for a lay person to evaluate the weight to be given to a dog trailing a scent in light of all the circumstances presented. As explained in *Craig*, "[g]eneral acceptance in the scientific community of inanimate scientific techniques" is distinguishable from "specific recognition of one animal's ability to utilize a subjective, innate ability [which] depends upon many variables within the animal itself. . . ." (*Craig, supra,* 86 Cal.App.3d at p. 916.)

Thus, dog tracking evidence is not subject to the foundational hearing requirements articulated in *Kelly*. (*Craig, supra,* 86 Cal.App.3d at pp. 915-916.) To be sure, the *Mitchell* court recognized the law was "well established" that "dog tracking or trailing evidence does not involve a scientific technique within the meaning of *Kelly*." (*Mitchell, supra,* 110 Cal.App.4th at p. 790.) In contrast, as explained above, the *Mitchell* court found scent transfer units which utilized gauze pads for scent identification lineups were novel scientific devices within the meaning of *Kelly*. (*Id.* at pp. 787, 793; accord *Willis, supra,* 115 Cal.App.4th at pp. 385-386,)

Here, the evidence at issue involved dog trailing not scent discrimination through the use of a scent transfer unit machine and scent pads. Therefore, neither the Stanislaus nor San Mateo County courts erred in not conducting a *Kelly* hearing. (*Craig*, *supra*, 86 Cal.App.3d at pp. 915-916; *Mitchell*, *supra*, 110 Cal.App.4th at p. 790.)

Moreover, the additional foundational requirements discussed in *Mitchell* and *Willis* are inapplicable to the trailing evidence here.

"The *Craig* court itself suggested that what the law in this state actually requires is not that dog trailing evidence be viewed with caution, but that it be treated as any other evidence, with its weight left to the trier of fact." (*Malgren, supra*, 139 Cal.App.3d at p. 242.)

C. Appellant Fails to Show the Trial Court's Admission of Trimble's Detection of Laci's Scent at the Marina Constituted an Abuse of Discretion

The trial court's ruling under Evidence Code section 352 admitting only that portion of the dog trailing evidence at the Berkeley Marina is supported by substantial evidence. Appellant fails to demonstrate otherwise.

Trial courts enjoy broad discretion in determining whether an adequate foundation has been laid for admission of evidence before the jury. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1011.) Thus, a trial court's ruling on a foundational question cannot be reversed absent a showing that "the court clearly abused its discretion." (*Ibid.*, citing *People v. Beeler* (1995) 9 Cal.4th 953, 978; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 362 [expert testimony]; *People v. Curl* (2009) 46 Cal.4th 339, 359-360 [expert testimony].)

Abuse of discretion is a "deferential standard" of review. (*People v. Curl, supra,* 46 Cal.4th at p. 359.) Typically, a trial court abuses its discretion when it rules in an "arbitrary, capricious, or patently absurd manner" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Jones* (1998) 17 Cal.4th 279, 304), the ruling "exceeds the bounds of reason" (*People v. Montes* (2014) 58 Cal.4th 809, 859-860), or the trial court's decision is "irrational or arbitrary" (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310).

Where there is substantial evidence supporting the trial court's finding that dog tracking evidence is sufficiently reliable for admission, that ruling will be upheld on appeal. (*Craig*, *supra*, 86 Cal.App.3d at p. 917.)

1. *The Malgren factors*

All five foundational criteria, outlined in *Malgren*, were established in the section 402 hearing to admit the marina dog trailing evidence.

First, the evidence showed Eloise Anderson was qualified by training and experience to utilize Trimble as a trailing dog. At the time of the hearing, Anderson had worked with K-9 search and rescue for approximately 14 years. (7 RT 1467; 8 RT 1489.) Prior to her involvement with search and rescue, Anderson worked in a professional capacity in obedience training of dogs. (7 RT 1467; 8 RT 1488.) Also, Anderson served as a training adviser for CARDA and had conducted over 100 certification tests of dogs in various types of searches, including trailing. (7 RT 1474-1475.) She was also certified as a Search Manager. (7 RT 1475.)[121] In all, Anderson spent the previous 20 years working with dogs and understanding their behavior.

As part of Contra Costa County's Search and Rescue team, and in compliance with CARDA directives, Anderson was required to maintain and train Trimble on an ongoing basis. (7 RT 1476, 1480.) Given Anderson's credentials and experience, she was well-qualified to handle Trimble. A trial court is given "considerable latitude" to determine an expert's qualifications, and its ruling will not be disturbed on appeal absent a manifest abuse of discretion. (*Malgren*, *supra*, 139 Cal.App.3d at p. 238.) Thus, *Malgren*'s first prong is supported by substantial evidence.

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[121] Anderson's curriculum vitae was admitted as People's Pretrial Exhibit number 11 during the hearing. (7 RT 1468; Clerk's Pretrial Motions Transcript, Vol. 1, pp. 152-153.)

Insofar as appellant contends that Anderson's training of Trimble was possibly tainted by "handler cuing" (AOB 221), such argument is purely speculative and entirely unfounded. The fact that Anderson, like other handlers, knew "most of the time" where the trail was, does not equate with Anderson having somehow influenced Trimble during the dog's exercises. And, Anderson certainly did not know the particular trail Laci's body took in the marina; only appellant knew that information.

Second, substantial evidence showed Trimble was adequately trained in trailing humans. She was certified by CARDA. (7 RT 1469, 1473.) That certification included, among other things, Trimble's successful completion of a number of trails, the oldest of which was 96 hours. (7 RT 1472.) In fact, Trimble had successfully located a subject whose trail was 14 days old. (8 RT 1501.) As part of Trimble's training, Anderson also exposed Trimble to an array of different scent environments and terrains: shopping mall (8 RT 1505), commuter station (8 RT 1495-1496), grass median, parking lot, and park (8 RT 1491), vehicle traffic and asphalt (7 RT 1477; 8 RT 1489-1490), and outdoor wilderness areas (8 RT 1498-1499). Some of the outdoor trails were encumbered by environmental effects, such as heavy rains (8 RT 1491), and strong winds (8 RT 1503-1504). Also, Trimble's training included non-contact trails left by subjects who had traveled all or part of the designed route on bicycles. (8 RT 1499, 1502, 1503, 1504.) In some cases, this necessitated that Trimble work through a "discontinuous scent picture." (8 RT 1504.) There were also training exercises during which Trimble had to differentiate a decoy from the intended subject of the search. (8 RT 1502, 1506-1507.) Trimble's training included trails of varying lengths with the longest trail at 22 miles. (8 RT 1496.) Trimble was also familiarized with contaminated scent articles so that she could learn to distinguish among scents. (8 RT 1615.)

Third, substantial evidence supported the trial court's finding that Trimble was sufficiently reliable in tracking humans (8 RT 1613). "This testimony should come from a person sufficiently acquainted with the dog, his training, ability and past record of reliability." (*Craig, supra,* 86 Cal.App.3d at p. 915.) Eloise Anderson was such a witness. In addition to the detailed record of Trimble's success with certification requirements and other trailing exercises, Anderson testified to Trimble's real-life trailing of a runaway boy who had left home on a bicycle (8 RT 1508), and a runaway girl who had left home in a van with two adult males (8 RT 1508).

Trimble's accuracy provided substantial evidence of reliability for the trial court to admit the dog tracking evidence. We recognize that the dogs in *Malgren* and *Craig* were certified as 100 percent accurate. (See *Malgren, supra,* 139 Cal.App.3d at p. 238; *Craig, supra,* 86 Cal.App.3d at pp. 916-917.) And, although Trimble did not successfully complete a trailing exercise in March 2001 (8 RT 1549-1550),[122] "each dog's ability and reliability [must] be shown on a case-by-case basis." (*Craig, supra,* 86 Cal.App.3d at p. 915.) Any variance from perfection went to the weight rather than admissibility of the evidence.

Fourth, Trimble was placed on a trail where circumstances indicated the subject to have been. In this case, the subject of the search was Laci. The prosecution's theory was that appellant, who admitted to being at the marina on Christmas Eve (10 RT 2004), transported Laci's body to that location. As the trial court observed: "[Eloise Anderson] testified that the dog's head was level, gave evidence of [a] trail at the marina that ended at

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[122] Appellant contends there were two unsuccessful trails, implying Trimble could not locate the subject either time (AOB 188), but a closer reading of the record suggests it was only one unsuccessful trail. The April 2001 trailing exercise was aborted because the subject had to leave on short order. (8 RT 1549.)

the end of the pier with the water at a pylon. So we have a scent, ostensibly the scent of Miss Peterson at the marina." (10 RT 2002.) The court was referring to Anderson's testimony that Trimble's head was level, her tail up, and she was lined out, which indicated Trimble had picked up Laci's scent. (8 RT 1520.) Trimble's behavior at the marina was consistent with Anderson's description of Trimble's posture when following a scent trail. (8 RT 1494.) By the time of the hearing, it was clear that someone had deposited Laci's body in the Bay and the Berkeley Marina—where appellant admitted he was on Christmas Eve—was not far from the location where their bodies were discovered. (10 RT 2002.) Therefore, the circumstances suggested Laci was at the marina.

Also, Trimble's reliability was corroborated by Captain Boyer's testimony that Trimble did not detect Laci's scent when she and Anderson searched the same area where Ronald Seitz and his dog had searched. Both dogs arrived at the same result: no scent detected. (9 RT 1823-1824; People's Pretrial Exh. No. 12.) This additional corroboration of Trimble's accuracy provides further support for Trimble's detection of Laci's scent later in the search.

Further, Trimble's practical training exercises involved controlled situations where the path of the subject was predetermined and therefore Trimble's trailing efforts were immediately verifiable.

Fifth, the trail had not become stale or contaminated. At the time Trimble searched the marina on December 28, Laci had been missing for about four days. No evidence was adduced at the hearing to suggest the trail was stale relative to Trimble's capabilities. Trimble was certified on trails as old as four days. (7 RT 1472.) Beyond that she had successfully completed multiple trailing exercises where the trail was laid down in excess of four days before the exercise. (8 RT 1491 [5 days], 1498-1499 [6 days], 1501 [14 days].)

Likewise, substantial evidence demonstrated that there was no contamination of the search. First, as stated above, Trimble's dog handler stated that Trimble was trained to detect a subject's scent from other scents. As Captain Boyer explained, search dogs were trained to work the predominant scent on any scent article that contained more than one scent. (9 RT 1681, 1682.) In this regard, Trimble's practical exercises included testing her ability to detect a subject's scent from that of a decoy—including one situation where the wife was the subject and her husband was the decoy. (8 RT 1506-1507.) Trimble's successful trailing of the wife was especially probative because presumably the husband-decoy was exposed to the wife-subject's scent during the normal course of the day, which would have made it all the more challenging for Trimble to distinguish the subject from the decoy.

Further, the manner in which the scent item—Laci's sunglasses—were collected ensured they were not contaminated with anyone else's scent, particularly that of appellant. Captain Boyer held Laci's purse while removing different potential scent objects for handler Cindee Valentin's evaluation. (9 RT 1720.) Boyer and Valentin wore latex gloves as they packaged the sunglasses case into a plastic bag. (9 RT 1714, 1717.) Even if appellant had touched the sunglasses case, it was the sunglasses themselves that Anderson used to scent Trimble. (8 RT 1517.) As Anderson explained, the sunglasses were a particularly good scent item because they would have contained Laci's skin oils or make-up. (8 RT 1580.) Therefore, there was no need for Anderson to have conducted the "missing member" test. Accordingly, appellant's contention that Anderson did not follow correct procedures (AOB 220) is baseless.

Moreover, there was no evidence to suggest that the trail that Trimble followed was itself contaminated. Although there was a fair amount of defense questioning of Anderson about prevailing winds at the marina and

the dispersion of scent, Anderson testified that, in her opinion, there were no adverse environmental factors at the marina on December 28, which would have complicated Trimble's ability to trail Laci's scent. (8 RT 1618.) Even if wind had been a factor, Anderson explained that Contra Costa County, where Trimble and Anderson worked, was subject to strong cross-winds. (8 RT 1504.) Therefore, wind was not something new to Trimble. Anderson also stated that Trimble was capable of working either side of a trail when it was windy—up-wind or down-wind. (8 RT 1592-1593.) And, Captain Boyer testified that, in some instances, the wind actually created a trail. (9 RT 1794.)

As for appellant's suggestion that Trimble's capabilities did not extend to a "marine environment," that is simply wrong. Trimble did not trail on the water. She worked the parking lot, vegetation around the parking lot, and the pier. These surfaces were certainly within Trimble's range of ability based on the training exercises discussed in detail by Eloise Anderson. Further, as Captain Boyer explained, the scent environment around salt water, given its hydroscopic nature, was actually more conducive to holding scent than other environments. (9 RT 1784 ["[i]t's much simpler to work in that area, actually"].)

Also, the trail in appellant's case was only a matter of feet or yards, at best. (8 RT 1520.) The track found reliable in *Malgren* was seven-tenths of a mile through a "game reserve of bushes and high grass" between a burglarized home and the location where the defendant was found. (*Malgren*, *supra*, 139 Cal.App.3d at p. 237.)

Thus, all five foundational criteria for the admission of the dog trailing evidence were established in appellant's case and supported by substantial evidence. Accordingly, the evidence was properly admitted. (See *Malgren, supra,* 139 Cal.App.3d at pp. 238-239; *Craig, supra,* 86 Cal.App.3d at p. 917.)

Expectedly, appellant is unhappy with the trial court's ruling since it provided the prosecutor with additional incriminating evidence to admit at trial.

> It is essentially an argument that the evidence should have been excluded because it pointed to his guilt. A party cannot seek to exclude evidence merely because it is helpful to the other side. Only if there is substantial risk of prejudice, confusion, or time consumption sufficient to outweigh relevance is an Evidence Code section 352 objection well founded. [Citation.]

(*People v. Brown* (2014) 59 Cal.4th 86, 102.)

Here, appellant cannot show the trial court's evidentiary ruling was arbitrary, capricious, irrational, patently absurd or outside the bounds of reason. (See *People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10; *People v. Jones, supra,* 17 Cal.4th at p. 304; *People v. Montes, supra,* 58 Cal.4th at pp. 859-860; *People v. Myers, supra,* 69 Cal.App.4th at pp. 309-310.) Mere disagreement with the trial court's assessment of Anderson's and Boyer's testimony does not satisfy appellant's burden of showing a clear abuse of discretion. (See *People v. Hovarter, supra,* 44 Cal.4th at p. 1011.)

2. *Scent theory and the non-contact trail*

Appellant's arguments here go to weight rather than admissibility of the dog trailing evidence. Yet, even were the Court to credit appellant's argument calling for additional foundation, an adequate foundation on the subjects of scent theory and non-contact trailing was presented to the trial court.

Again, despite appellant's characterization to the contrary, the evidence at issue here was not a vehicle trail. Trimble did not trail Laci in appellant's truck, or in the boat, from Modesto to the marina. Instead, Trimble trailed Laci's scent the short distance from one choke point in the parking lot out to the pier. The evidence involved Trimble's ability to follow the scent from Laci's body (i.e., skin rafts) as a non-contact trail.

In that regard, Captain Boyer, who headed Contra Costa County's search and rescue team, explained the science of scent theory (8 RT 1638), and the manner in which humans left scent trails when skin cells were shed (9 RT 1678), at a rate of roughly 150,000 skin rafts per hour (9 RT 1689). Boyer also stated that even after a person died, the body still contained skin rafts that could be shed. (9 RT 1680.) Thus, an "overwhelming live smell" could theoretically remain attached to the body "for a very long time," especially if the environmental conditions were "very cool" (9 RT 1680), as the conditions were in December 2002.

Although appellant contends Captain Boyer was not an expert (AOB 226-227), Boyer's credentials demonstrated otherwise.[123] In addition to leading the county search and rescue team, including all of the K-9 units, Boyer had trained his own trailing dog for a year and worked with a certified cadaver dog. (8 RT 1629, 1633, 1634.) He taught at national and regional search and rescue seminars and had also trained members of FEMA and the FBI. (8 RT 1636-1637.) And, Boyer's teaching credentials included a two-hour seminar on scent theory. (9 RT 1700.) Additionally, at trial, Boyer explained that CARDA and at least one other agency required handlers to take a scent theory class before they could be certified. (83 RT 15898.) Boyer was one of three scent-theory instructors in the state. (83 RT 15898-15899.)

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) This "may be shown by any otherwise admissible evidence, including his own testimony." (Evid. Code, § 720, subd. (b).) As

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[123] Captain Boyer's resume is found in the Clerk's Pretrial Motions Exhibits Transcript at pages 158-159.

discussed above, Boyer's expertise in scent theory and trailing dogs was satisfactorily established through his testimony concerning his relevant training, education and experience. Insofar as the trial court credited Boyer's expertise, "[t]he trial court is given considerable latitude in determining the qualifications of an expert; its ruling will not be disturbed on appeal, absent a manifest abuse of discretion." (*Malgren, supra,* 139 Cal.App.3d at p. 238.)

Also, as detailed above, Trimble had demonstrated reliability on non-contact trails: December 2001, bicycle and BART trailing (8 RT 1495-1496); January 2002, vehicle trailing (8 RT 1497-1498); January 2002, combination contact and bicycle trail (8 RT 1499-1500); April 2002, bicycle trail (8 RT 1502); May 2002, bicycle trail (8 RT 1503-1504); and, July 2003, vehicle trail (8 RT 1505-1506). Thus, appellant's arguments also fail to appreciate that "each particular dog's ability and reliability be shown on a case-by-case basis." (See *Craig, supra,* 86 Cal.App.3d at p. 915.)

D. Any Alleged Error in Admission of the Dog Trailing Evidence Was Harmless

The harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, applies to dog tracking or trailing evidence, as well as scent identification evidence. (*Willis, supra,* 115 Cal.App.4th at p. 388; *Mitchell, supra,* 110 Cal.App.4th at p. 795; *Gonzales, supra,* 218 Cal.App.3d at p. 415; *Malgren, supra,* 139 Cal.App.3d at p. 242.) Under *Watson*, reversal is unwarranted unless "'an examination of the entire cause, including the evidence'" shows "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."[124]

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[124] Whereas *Watson* provides the standard for errors of state law, *Chapman v. California* (1967) 386 U.S. 18, provides the standard for errors (continued...)

(See *People v. Watson, supra*, 46 Cal.2d at p. 836.) Although *Watson* controls the analysis here, we contend the admission of the trailing evidence, if erroneous, was also harmless under the more stringent federal constitutional standard.

First, culling a mere 19 words (111 RT 20534 ["If Laci Peterson's scent is at the Berkeley Marina, then he's guilty. I mean that's as simple as that."]) out of the thousands uttered by the prosecutors during opening and rebuttal arguments, appellant contends the prosecution bet the farm on Trimble's ability to fetch guilty verdicts. (AOB 179 ["relying solely on dog-scent evidence"], 229 ["central to the prosecution's case"].) These assertions are not supported by the record. The prosecutor's statement tying Trimble's detection of Laci's scent at the marina to appellant's guilt was of nominal importance not only in terms of it being a brief reference in an otherwise lengthy closing argument, but because the prosecutor made clear during argument that the fact that the bodies washed ashore in the area of the Bay where appellant said he went fishing was among the most damning pieces of evidence pointing to appellant's guilt. (109 RT 20197-20198, 20278, 20286, 20326; 111 RT 20525.)

Further, defense counsel conducted a thorough and searching cross-examination in an attempt to undermine Eloise Anderson's testimony (85 RT 16103-16133, 16144-16146), as well as that of Captain Boyer (84 RT 15935-16011, 16020). This included the circumstances surrounding an exercise that Anderson and Trimble participated in with retired trailing dog

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(...continued)
of federal constitutional dimension. (See *People v. Boyette* (2002) 29 Cal.4th 381, 428, citing *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Under *Chapman*, reversal is required unless the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

handler Andrew Rebmann and whether Anderson had omitted this information when she testified at the pretrial hearing the previous February. (85 RT 16112-16132; Defense Exh. No. D5Y [video of trailing exercise played for jury].) During cross-examination, the defense characterized the exercise as a failed vehicle trailing and suggested Anderson hid it from the court. Appellant reiterates this view on appeal. (AOB 188-190.) However, on redirect examination, Anderson clarified what the exercise was intended to test (i.e., it was not a vehicle trail) and she explained why she disagreed with defense counsel's characterization of Trimble's performance as having failed the test. (85 RT 16138-16143.)

Additionally, the defense called dog handler Seitz during its case to talk about Seitz's dog's inability to detect Laci's scent at the marina. (105 RT 19603-19629.) This was an attempt to neutralize any residual value the prosecution may have derived from Anderson's and Boyer's testimony after defense counsel's cross-examination. Therefore, cross-examination and Seitz's testimony may have lessened the weight of the trailing evidence but did not undermine the foundation for admission of the evidence.

Notably, that portion of the defense argument which concerned the trailing evidence takes up just three pages of transcript (110 RT 20437-20440), out of approximately 161 pages worth of closing argument (110 RT 20333-20454, 20475-20498; 111 RT 20504-20518), which in mathematical terms equates to less than two percent of the defense argument as a whole. This suggests the defense was not that concerned with the dog trailing evidence.

Moreover, the trial court's instruction on the dog trailing evidence provided the jury with meaningful guidance with respect to the evidence. CALJIC number 2.16, as modified by the court and parties, made explicitly clear that the dog trailing evidence was not sufficient by itself to prove appellant's guilt (111 RT 20549), thereby dispelling any arguable

suggestion by the prosecutor to the contrary. The instruction also stated that the dog trailing evidence needed to be independently corroborated before it could be considered accurate and used to infer appellant's guilt. In according any weight to the trailing evidence, the jury had to consider six separate factors, modeled on those set forth in *Malgren*, with an additional catch-all factor. (111 RT 20549-20550.) We discuss this instruction in greater detail in Argument VIII, *post.*

And, of course, the jury was instructed that the arguments of counsel were not evidence (111 RT 20545), and that if anything the attorneys said conflicted with the court's instructions, the jurors were to follow the instructions (111 RT 20544). The jurors are presumed to have followed these instructions. (*People v. Montes*, *supra*, 58 Cal.4th at p. 888.)

Last, the prosecution presented overwhelming evidence, independent of the dog trailing evidence, which proved that appellant murdered Laci and Conner. We briefly summarize some of the evidence against appellant:

For weeks before Laci and Conner disappeared, appellant was carrying on a clandestine affair with Amber Frey. (See generally 76 RT 14556-14694.) In early December 2002, when Frey found out that appellant might be married, appellant reassured Frey that he was single, but he used to be married and had "'lost'" his wife. (76 RT 14619-14620.) It was around this time that appellant purchased a boat (62 RT 12148, 12156), which he never told anyone about (45 RT 8889-8890; 46 RT 8991-8993; 47 RT 9097-9098), and he researched the currents and tides in San Francisco Bay (75 RT 14397, 14400-14401, 14405-14407).

When Laci disappeared on Christmas Eve, appellant was weeks away from a life-altering event: the birth of his first child (91 RT 17228, 17236)—a responsibility that would last a lifetime. Or, so it seemed. During a conversation with Frey, appellant lamented that he had never enjoyed "a prolonged period of freedom [] from responsibility" in his life.

(7 Supp. CT Exhs. 1480.) He found the responsibility-free existence, as recounted by author Jack Kerouac, to be "interesting" and something that could be incorporated into life. (7 Supp. CT Exhs. 1480.) Appellant also told Frey that he felt no need to have his own offspring and that her daughter was enough for him. (76 RT 14674.)

Appellant's statement that he went fishing by himself on Christmas Eve was, indeed, a fish story. His manufactured alibi was belied by the fact that he did not have the right fishing gear for catching sturgeon or striped bass in the Bay, including an "anchor" that was incapable of adequately anchoring the boat, and that part of San Francisco Bay near the Berkeley Marina was not the place to go sturgeon or striped bass fishing at that time of year. (71 RT 13746-13747, 13753-13757, 13762.) In fact, appellant's halting reaction to the most innocuous of questions from responding officers on December 24 about his fishing excursion demonstrated that appellant was lying. (50 RT 9868-9869.) Realizing that his answers had served to garner suspicion instead of dispel it, appellant threw his flashlight down in anger and muttered a curse word under his breath. (50 RT 9871, 9882.) No doubt this was illuminating to the jury. It was also curious that appellant spoke to his father and a close friend after leaving the marina on Christmas Eve, but never mentioned that he had gone fishing. (75 RT 14425, 14436-14437; 88 RT 16865.)

Incredibly, in the hours immediately following Laci's disappearance, appellant was overly concerned with comparatively inconsequential things such as when Detective Brocchini bumped the door of appellant's truck against the door of Laci's Land Rover (55 RT 10746), and when Captain Boyer was told by appellant to put something between Boyer's writing pad and the dining room table to prevent the table from getting damaged (84 RT 15923-15924). This was not owing to any fastidiousness on appellant's part, as we explain below.

Appellant's arrogance in thinking that he could get away with murder provided him with a false sense of security which, in turn, spawned a number of highly suspicious behaviors inconsistent with what one could reasonably expect of a worried husband and soon-to-be father: 1) subscribing to pornographic television programs less than two weeks after Laci disappeared (74 RT 14240, 14244, 14254); 2) inquiring about selling the couple's home furnished, less than a month after Laci went missing (9 Supp. CT Exhs. 1999-2000, 2004; 86 RT 16418-16419); 3) selling Laci's Land Rover at the end of January 2003 (86 RT 16429); 4) stopping all mail, including Laci's, from being sent to the Covena residence (101 RT 18952-18953); and, 5) using the nursery for storage (68 RT 13248-13249). Appellant knew Laci and Conner were not coming home.

As the search for Laci and Conner expanded to include San Francisco Bay, appellant made repeated surreptitious trips to the Berkeley Marina in January 2003, driving a different vehicle every time. He never stopped to talk to anyone at the marina. (85 RT 16163-16164, 16169-16172, 16268, 16280-16281.) As the prosecutor argued, appellant was checking to see if searchers were looking in the right place. (109 RT 20271.) As time wore on, appellant stopped going to the marina.

But, as fate would have it, Laci's and Conner's bodies washed ashore along the Bay not far from where appellant stated he went fishing a few months before. (2 Supp. CT Exhs. 294; 61 RT 11873-11874, 11880, 11990, 11993; 70 RT 13599, 13598, 13602.) The condition of the bodies suggested they had been in the Bay for a matter of months (92 RT 17471, 17528), and Laci died while she was still carrying Conner (92 RT 17432). The forces of nature carrying Laci's and Conner's bodies ashore constituted unimpeachable evidence that appellant did not go to the Bay to fish; he went to dispose of his pregnant wife's body.

Appellant's penchant for lying was on a par with his unfailing dedication to self-interest. It was also corroborative of his guilt. For example, he told some people on the evening of December 24 that he went golfing that day (48 RT 9362, 9510, 9534), not fishing. The clothing found on Laci's body did not match what appellant told police she had been wearing when he left the house. (96 RT 18062.) Appellant lied to everyone about his affair with Amber Frey, including the police (61 RT 11825; 93 RT 17653). He repeatedly lied to Shawn Sibley and Amber Frey about his marital status. (60 RT 11724; 76 RT 14611.) He even told Frey that he was in Paris on Christmas Eve, when he was, in fact, at the vigil for Laci and Conner. (7 Supp. CT Exhs. 1449-1452 [describing for Frey the fireworks at the Eiffel Tower and the playing of American pop songs].) In early January, appellant told Laci's family members that police showed him a photo of him with another woman (Amber Frey). Appellant suggested the photo had been altered and the man depicted (who was appellant) looked a lot like him. (46 RT 9021-9022; 93 RT 17708.) On January 11, appellant lied about his whereabouts to his mother (81 RT 15397-15398), his father, Sharon Rocha (9 Supp. CT Exhs. 1970, 1975, 1979), and to a number of his close friends (9 Supp. CT Exhs. 1985-1991). Appellant lied to Diane Sawyer, and a national television audience, telling her that he revealed the affair to Laci and then suggesting to Sawyer that Laci was at peace with it. (11 Supp. 2657.) After Frey confronted appellant about being married, he told her that Laci knew about the affair and that she was "fine" about it. (7 Supp. CT Exhs. 1705.) Appellant's assertions about Laci's knowledge of the affair are contradicted by the fact that he lied to Laci about the reason he could not accompany her to the Christmas party. (46 RT 9025; 86 RT 16422.) Appellant assured Detective Brocchini that the loaded gun found in appellant's truck was not functional (2 Supp. CT Exhs. 307-308), but it was tested and found to fire normally (59 RT 11597,

11599). Appellant even lied to the man from whom he purchased the Mercedes in April 2003, saying that his name was Jacqueline ("'a boy-named-Sue type thing'"). (101 RT 18978.)

As for some of the physical evidence adduced at trial, there was: 1) hair that was microscopically consistent with Laci's found in pliers in appellant's boat (70 RT 13617, 13644, 13658; 87 RT 16599, 16603; 94 RT 17837); 2) numerous multiple round voids of cement powder suggestive of additional "anchors" having been made in appellant's warehouse (64 RT 12591; 67 RT 13061-13062); 3) cuts on appellant's hands (11 Supp. CT Exhs. 2632); and, 4) appellant's blood on the comforter in the couple's bedroom (63 RT 12338; 89 RT 17033; 90 RT 17196), and in his truck (89 RT 17039-17040; 90 RT 17197).

One would reasonably expect that if appellant had truly been concerned about the disappearance of his wife and child, then he would take some action when he learned that the bodies of a woman and a baby were recovered. He did not. Appellant never returned Sharon Rocha's call about the discovery of the bodies. (46 RT 9035-9036.) Nor did he phone Detective Grogan. (96 RT 18066.) To be sure, the record suggests appellant never made any attempt to head north to the Bay area from San Diego, where he was huddled with his family during the time he was being surveilled. When the prosecutor asked Lee Peterson if appellant made any attempt to return to the Bay Area upon learning about the bodies washing ashore, Lee was evasive. (107 RT 20005.)

Instead of appellant traveling north, the police headed south to San Diego. Authorities arrested appellant before he could go on a planned golf outing with his father and brothers. (107 RT 20003.) Appellant was found with approximately $15,000 in cash (102 RT 19106), his brother's identification (102 RT 19096), multiple cell phones (102 RT 19101), foreign currency (102 RT 19100-19101), a large amount of clothing and

outdoor gear and equipment (102 RT 19097-19099), and a changed appearance (95 RT 17968, 17972). This evidence suggested that appellant was on the move, but he was not heading north where his wife's and child's bodies were in the process of being identified.

During the course of the prosecution's case, evidence was also adduced which undermined the defense theory that a roving band of homeless people in the neighborhood kidnapped and killed Laci when she went out for a walk in the park Christmas Eve morning. Or, that Laci was kidnapped by three assailants in a van while out walking. As the prosecutor argued, the record demonstrated that Laci was in no condition to walk the trail through the park during the latter stages of her pregnancy. (109 RT 20274-20275.) Further, the timeline evidence derived from several sources contradicted appellant's statement that Laci could have taken McKenzie for a walk. (109 RT 20219-20226.)

Since appellant's claim here involves a canine, it seems fitting to recount one last piece of evidence: On New Year's night, appellant spoke to Amber Frey on the phone. According to appellant's story, he was still in Paris, sampling French cuisine. (7 Supp. CT Exhs. 1499.) Of course, he was not. During that conversation, appellant complained that there was "a fucking dog" next to his Paris hotel that "just keeps barking." (7 Supp. CT Exhs. 1499.) Appellant told Frey: "*I just want to kill it.*" (7 Supp. CT Exhs. 1499, emphasis added.) Frey could hear the dog barking on appellant's end of the phone during this call, as well as during a previous call. (77 RT 14761-14762.) When appellant talked to Frey the following night he complained again about the barking dog. He asked Frey, "Can you hear that damn dog?" (7 Supp. CT Exhs. 1513.) Given the state of the evidence, the prosecution argued that the dog in question was the family's dog McKenzie. (109 RT 20316.) Whether the barking dog was, indeed, McKenzie matters little. However, what *was* probative of appellant's guilt

was his instinctive reaction to a living being whose existence he viewed as inconvenient: appellant wanted to kill it.

Given the compelling evidence against appellant, this was not a close case, as appellant suggests (AOB 231). We contend that such evidence amply meets the beyond-a-reasonable-doubt federal constitutional standard under *Chapman*. Accordingly, it is not reasonably probable that appellant would have received a more favorable outcome in the absence of the dog trailing evidence, under California law.

Nor is there anything about the length of jury deliberations (AOB 233), that suggests the case was close in light of the fact that the guilt phase lasted nearly six months, with approximately 200 witnesses, and was founded on circumstantial evidence. The fact that deliberations occurred over a nine-day period hardly demonstrates this was a close case. "Rather than proving the case was close, the length of the deliberations suggests the jury conscientiously performed its duty. [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 422.)

In *Willis*, the Court of Appeal found the dog scent evidence harmless where the defendant had a motive for a murder and warned a friend not to tell anyone that he had seen him. (*Willis, supra,* 115 Cal.App.4th at pp. 387-388.) As shown above, the evidence identifying appellant as the murderer was far stronger than that which rendered the evidentiary error harmless in *Willis*. Likewise, appellant's case stands in stark contrast to *Gonzales* where "not one piece of unambiguous corroborative evidence supported the [dog scent] identification." (See *Gonzales, supra,* 218 Cal.App.3d at p. 415.)

In *Mitchell*, the Court of Appeal found the dog scent evidence harmless where a victim identified the defendant as looking like the suspect in a photo lineup, the defendant later bragged about the shooting, bullets of the same brand and caliber used in the murder were found in the

defendant's home, and the defendant acquired a gang tattoo following his arrest. (*Mitchell, supra,* 110 Cal.App.4th at pp. 794-795.) The evidence here is, at a minimum, of equal force to that in *Mitchell.*

Therefore, in light of the overwhelming independent evidence proving appellant's identity as Laci and Conner's killer, any alleged error in admitting the dog trailing testimony was harmless. Accordingly, reversal is unwarranted.

E. Appellant's Eighth and Fourteenth Amendment Claims Are Forfeited and Meritless

Appellant contends the purportedly erroneous admission of dog trailing evidence violated his rights under the Eighth and Fourteenth Amendments of the federal Constitution. (AOB 228-230.) However, because appellant failed to object on these grounds in the trial court, he has forfeited his ability to claim any such violations on appeal.

Evidence Code section 353 states:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

In order to preserve a challenge to the admission of trial evidence for appeal purposes, a party must comply with Evidence Code section 353. (*People v. Catlin* (2001) 26 Cal.4th 81, 131 ["Defendant's perfunctory claim that the admission of this evidence constituted a denial of due process of law and a violation of the Eighth Amendment guarantee of a reliable

guilt and penalty determination was not raised below, and it is without merit."]; see also *People v. Ramos* (1997) 15 Cal.4th 1133, 1171.)

These requirements may be satisfied by a "properly directed motion in limine" in which the party obtains an express ruling from the trial court. (*Ibid.*) Here, appellant did not assert these federal constitutional grounds contemporaneously with the admission of the dog trailing evidence. (See 6 CT 2151-2157; 7 RT 1285-1481; 8 RT 1490-1646; 9 RT 1678-1836; 10 RT 1980-2004.) This Court has "consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable" on appeal. (*People v. Seijas* (2005) 36 Cal.4th 291, 302, quoting *People v. Green* (1980) 27 Cal.3d 1, 22; see also *People v. Williams* (1988) 44 Cal.3d 883, 906.)

This rule of forfeiture applies to due process claims not raised in the trial court with the exception of "a very narrow due process argument" that the error asserted in his or her objection below "had the additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435; see *People v. Riggs* (2008) 44 Cal.4th 248, 292 [to the extent "constitutional claim is merely a gloss on the objection raised at trial, it is preserved"]; *People v. Guerra, supra,* 37 Cal.4th at p. 1084, fn. 4.)

Even if viable, for the reasons outlined above, appellant's argument that he was denied his federal constitutional rights is without merit. The admission of the challenged evidence did not violate due process or fail to meet the Eighth Amendment requirement of heightened reliability for the reasons outlined above. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

VII. ANY INFERENCE PERMITTED BY THE DOG TRAILING INSTRUCTION DID NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROOF

Appellant contends the trial court's instruction with CALJIC No. 2.16 provided the jury with an impermissible alternative theory of murder that allowed the jury to convict him based on dog trailing evidence alone, without any proof of the requisite mental state. (AOB 239.) Appellant argues the instruction constituted a constitutionally infirm evidentiary presumption that omitted the element of malice and served to lighten the prosecution's burden of proof. (AOB 241.) Accordingly, appellant argues this was either structural error or error under *Chapman v. California* warranting reversal. (AOB 253.)

We disagree. The instruction was properly given in light of the charge as a whole and the arguments of counsel. Further, the instruction contained a permissive inference that did not by its nature implicate any burden-shifting. Nor, did the inference otherwise violate due process because the inference permitted by the instruction was rationally related to the proven facts. In any event, if the instruction was erroneously given, it was harmless.

A. Procedural Background

The court and parties discussed the dog trailing instruction on October 29, 2004. The court first pointed out that the instructions had to be modified to comport with the facts of this case since the search involved a missing person, not a suspect. (108 RT 20143.) The court, having reviewed the parties' proposed instructions on the trailing evidence (108 RT 20143-20144), read its own proposed instruction, including the court's addition of a catch-all provision, which allowed the jury to consider "any other factor that could affect the accuracy of the dog tracking evidence" (108 RT 20144-20145). The court declined several requests by the defense

to alter the instruction because such modifications were impermissible commentary or argument. (108 RT 20145-20148.) When the trial court asked defense counsel if he was objecting to the instruction "for the record," defense counsel said "[y]es." (108 RT 20148.) However, the grounds for the objection were not stated.

A few days later on November 1, the court and parties reviewed the instruction again. (109 RT 20188-20189.)

The following day, after the close of evidence, the court went over the proposed instructions with the parties. (110 RT 20329.) While the trial court noted defense counsel's strong objection to the instructions on second degree murder and flight, no mention was made of any further objection to CALJIC No. 2.16, including any concerns that it might lessen the prosecution's burden of proof or otherwise confuse the jury on the issue of the element of malice. (110 RT 20329-20330.)

Defense counsel previewed the dog trailing instruction during his closing argument. First, counsel cautioned the jury that "this is evidence you must use in a certain way." (110 RT 20439.) Then, counsel read the instruction to the jury (110 RT 20439) and argued the reasons the jury should disregard the dog trailing evidence (110 RT 20439-20440).

After argument was concluded, the court instructed the jury with CALJIC No. 2.16, as modified:

> Now, in this case we had dog tracking evidence. Remember Trimble? And this relates to this dog tracking evidence.
>
> Evidence of dog tracking of the victim has been received for your consideration. This evidence is not, by itself, sufficient to permit an inference that the defendant is guilty of the crime of murder. Before guilt may be inferred, there must be other evidence that supports the accuracy of the dog tracking evidence. The evidence can be direct or circumstantial, and must support the accuracy of the dog tracking evidence.

> In determining the weight to give to dog tracking evidence, you should consider:
>
> One, whether or not the handler was qualified by training and experience to use the dog;
>
> Two, whether or not the dog was adequately trained in tracking humans;
>
> Three, whether or not the dog has been found reliable in tracking humans;
>
> Four, whether the dog was placed on the track where circumstances have shown the victim to have been;
>
> Five, whether or not the trail has become stale or contaminated by the environment, weather, or any other factor;
>
> And, six, any other factor that could affect the accuracy of the dog tracking evidence.

(19 CT 6071; 111 RT 20549-20550.)

In addition to the dog trailing instruction, the trial court instructed the jury regarding other legal principles relevant here: duty to consider instructions as a whole (19 CT 6060 [CALJIC No. 1.01]), requirement of union of act and specific intent (19 CT 6089 [CALJIC No. 3.31]), elements of murder, including malice (19 CT 6092 [CALJIC No. 8.10]), definition of malice (19 CT 6093-6094 [CALJIC No. 8.11]), deliberate and premeditated murder (19 CT 6095-6096 [CALJIC No. 8.20]), unpremeditated second degree murder (19 CT 6097 [CALJIC No. 8.30]), second degree murder resulting from an unlawful act dangerous to life (19 CT 6098 [CALJIC No. 8.31]), duty of the jury as to degree of murder (19 CT 6101 [CALJIC No. 8.70]), and, doubt as to whether first or second degree murder (19 CT 6102 [CALJIC No. 8.71]).

B. Appellant Has Forfeited the Claim

We question the adequacy of defense counsel's pro forma objection to CALJIC No. 2.16 in preserving the specific error he now asserts on appeal. In order to avoid forfeiture, appellant must have objected on the "specific grounds" asserted as error on appeal. (*People v. Fuiava* (2012) 53 Cal.4th 622, 689].) Certainly, we recognize that this Court can address the merits of appellant's claim to the extent any instructional error affected appellant's substantial rights. (*People v. Prieto* (2003) 30 Cal.4th 226, 247.)

However, not only did trial counsel neglect to assert the same grounds—or any for that matter—contemporaneously with the objection, the dog trailing instruction proposed by the defense, in effect, approved the language which appellant now finds objectionable. (Court Exh. No. 27; Supplemental Clerk's Court Exhibits Transcript, Vol. 1, pp. 64-65.) On this record, the claim has not been preserved for appeal.

Even if viable, the claim is without merit, as we argue below.

C. General Legal Principles

"'It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] "[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial." [Citation.] "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." [Citation.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 328.)

As the Court has explained:

> "In reviewing the purportedly erroneous instructions, 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the

> Constitution.' [Citations.] In conducting this inquiry, we are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."' [Citations.]"

(*People v. Frye* (1998) 18 Cal.4th 894, 957, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

A reviewing court considers the instructions as a whole, the jury's findings, and the closing arguments of counsel. (*People v. Cain* (1995) 10 Cal.4th 1, 35-36.) Error will only be found if it is reasonably likely the instructions as a whole caused the jury to misunderstand the applicable law. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1217; *Estelle v. McGuire* (1991) 502 U.S. 62, 74.)

D. CALJIC No. 2.16 Was Properly Given Because it Ensured the Dog Trailing Evidence Could Only Be Considered if Reliability and Corroboration Prerequisites Were Met

In *Malgren*, the Court of Appeal found that a jury is properly instructed on dog trailing evidence when it is informed that there must be some other evidence, direct or circumstantial, supporting the accuracy of the identification and, in determining what weight to give such evidence, the jury should consider the training, proficiency, experience, and proven ability of the dog, its trainer, and its handler, together with the circumstances surrounding the trailing in question. (*Malgren*, *supra*, 139 Cal.App.3d at p. 242.) *Gonzalez* elaborated that the "corroborating evidence necessary to support dog trailing evidence need not be evidence which independently links the defendant to the crime; it suffices if the

evidence merely supports the accuracy of the dog tracking." (*Gonzales*, *supra*, 218 Cal.App.3d at p. 408.)

CALJIC No. 2.16 correctly stated the law set forth in *Malgren*. (*Mitchell*, *supra*, 110 Cal.App.4th at p. 786, fn. 3.) The *Mitchell* court's approval of CALJIC No. 2.16 is especially probative in light of the fact that *Mitchell* involved an appeal from first degree murder convictions (*id.* at p. 775) where the jury was instructed with CALJIC No. 2.16 and, presumably, the requisite instructions on murder.

In *People v. Najeera* (2008) 43 Cal.4th 1132, this Court cited *Malgren* and *Gonzales* in explaining the propriety of instructing the jury that corroboration is necessary with respect to certain evidence involving considerations related to reliability. (*Id.* at p. 1137, fn. 2.)

Here, CALJIC No. 2.16 did not give the jury license to convict based solely on the dog trailing evidence. The prerequisites acted as a safeguard, guaranteeing that any dog-related evidence would be deemed reliable before it was considered. (See *Gonzales*, *supra*, 218 Cal.App.3d at p. 411 [the main concern is whether the tracking animal is reliable].) Since the "other evidence" pertains to the accuracy of the dog's detection, logic dictates that no link to appellant was required. Accordingly, to ensure reliability the evidence must show that the dog is trained and certified, as well as some independent evidence demonstrating accuracy. In this case, there was adequate, if not ample, independent evidence supporting Trimble's accuracy, discussed in section VI.C., *ante*, which had nothing to do with appellant. Thus, the "other evidence" had no link to appellant because none was needed.

Inasmuch as appellant advances the contention that CALJIC No. 2.16 conflicted with the battery of instructions on murder (AOB 241-242), he is wrong. There was no conflict. And, appellant points to nothing in the record to support his argument. To the contrary, during the course of

deliberations, the jury requested exhibits and evidence. (19 CT 5981, 5983, 5985.) Notably, there was no question from the jury on the instructions. This demonstrates the instructions were clear and posed no conflict.

Additionally, the instructions provided the jury with the requisite law on murder, including the element of malice, along with its definition. (19 CT 6092-6098, 6101-6102.) The trial court also instructed the jury that before appellant could be convicted of one or both charges of murder, he needed to have the requisite mental state, which could be found in the definition of the crime. (19 CT 6089 [CALJIC No. 3.31].) Therefore, even if one were to abide appellant's characterization of the dog trailing instruction, CALJIC No. 3.31 would have put the jury on notice that it needed to find appellant had the requisite mental state before convicting him of murder. The jury was also told to disregard any instruction "which applies to facts determined by you not to exist." (19 CT 6110 [CALJIC No. 17.31].) Given this record, the instructions taken as a whole cannot be characterized as conflicting or ambiguous, in that the jury had to choose between two conflicting instructions. (See *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 72-73.)

Moreover, the prosecution's closing arguments reinforced the applicable legal standards relating to the requisite mental states for first and second degree murder. In his opening argument, the prosecutor explained:

> First degree requires premeditation, which I have talked to you about. Second degree requires no premeditation. Still requires malice. You still have to have specific mental intent to kill somebody.
>
> Malice, actually there is two types. There is express, which means I'm going to kill, and I do it, but I don't really think about it. If you really think about it, that's going to fall into first degree and premed[itation].
>
> Implied malice means you do an act that's so dangerous that the law implies malice. Put a bag over somebody's head, hold it

> shut, even in your mind you don't mean to kill them. Kind of an -- kind of a hard example, hard concept to grasp. That would probably be implied malice.

(109 RT 20323-20324.) There was no objection from the defense that the prosecutor misstated the applicable law. It was the prosecution's theory that Laci's and Conner's murders were of the first degree. (111 RT 20523.) Hence, the prosecutor argued the facts as evidence of appellant's premeditation and deliberation. (109 RT 20324.) During rebuttal argument, the prosecutor analogized the elements of a crime to the ingredients of a recipe. (111 RT 20522.) He tailored the analogy to the crime of murder, including highlighting the necessary ingredient of "malice aforethought." (111 RT 20522.)

In addition to the instructions as a whole and the prosecutor's argument, the verdicts also demonstrate the jury did not misapprehend the instructions. Having returned verdicts of first and second degree murder, it is evident the jury abided by the court's instructions, which required it to find whether, if a murder occurred, it was of the first or second degree. (19 CT 6101.) In making that determination, the jury had to consult CALJIC No. 8.20, which defined first degree murder, including that it was "killing with express malice aforethought." (19 CT 6095.) And, CALJIC 8.30 explained that second degree murder "was the unlawful killing of a human being with malice aforethought." (19 CT 6097.)

Further, CALJIC No. 2.16 was helpful to appellant because it explained to the jury how to consider the dog trailing evidence and warned that the evidence, even if believed, was not enough to establish appellant's guilt.

In light of this record, it is not reasonably likely the jury understood CALJIC No. 2.16 to permit them to find appellant guilty of first and second degree murder absent the requisite mental states.

E. CALJIC No. 2.16 Contained a Permissive Inference That Comported with Due Process

Appellant further argues that the instruction was an unconstitutional permissive instruction (AOB 244-251), but that contention is likewise without merit. Even though the instruction created a permissive inference, such an instruction was proper because the evidence permitted a rational juror to make such an inference based on the proven facts before the jury.

The Fourteenth Amendment's Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) As part of this protection, a state may not create evidentiary presumptions which relieve it of its burden of proving each element of the charged crime. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Jury instructions which contain mandatory presumptions regarding an element of the offense, whether or not the presumption is rebuttable, violate due process. (*Francis v. Franklin* (1985) 471 U.S. 307, 315-317 (*Francis*) [instructions telling jurors that the "acts of a person of sound mind and discretion are presumed to be the product of the person's will," and that a person "is presumed to intend the natural and probable consequences of his acts"]; *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 515 [instruction telling jurors that "the law presumes that a person intends the ordinary consequences of his voluntary acts"].)

However, instructions which merely create permissive inferences are constitutional, unless the suggested conclusion is not one which reason and common sense justify in light of the proven facts before the jury. (*County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 157-163 [upholding state statute which provided that if one occupant of vehicle possesses unlawful weapon, all occupants in vehicle presumed to know of weapon's presence].) In other words, a permissive inference violates due process if it

is irrational. (*Francis*, *supra*, 471 U.S. at pp. 314-315.) Unlike a mandatory presumption, "[a] permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." (*Francis*, at p. 314.)

Here, given the foregoing authorities, there is no burden-shifting because CALJIC No. 2.16 does not contain a mandatory presumption. Appellant acknowledges that the instruction involved a permissive inference. (AOB 244.)

Moreover, the permissive inference at issue here—that appellant murdered Laci, transported her pregnant body to the Berkeley Marina, and disposed of her body in San Francisco Bay—is one which reason and common sense justified in light of the proven facts before the jury, as detailed in section VI.C., *ante*.

In *People v. San Nicolas* (2004) 34 Cal.4th 614, this Court rejected the defendant's contention that instructions which told the jury it could infer guilt if it found the defendant made a false or misleading statement, or willfully attempted to suppress evidence, created unreasonable inferences. The court found that a rational juror could draw the inferences contained in the instructions, and the instructions simply told jurors to evaluate certain evidence with "reason and common sense." (*Id.* at pp. 666-667.)

In *People v. Mendoza* (2000) 24 Cal.4th 130, the Court, utilizing the high court's framework in *Francis*, addressed the defendant's claim that the standard flight instruction (CALJIC No. 2.52)[125] created an unconstitutional

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[125] As given to the jury, CALJIC No. 2.52 read: "'The flight of a person immediately after the commission of a crime, or after he is accused of the crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. The weight to

(continued...)

permissive inference. (*Id.* at p. 179.) The Court found that the test set forth in *Francis* permitted a jury to infer, if it chose to, that the flight of a defendant immediately following the commission of a crime indicated a consciousness of guilt. (*Id.* at p. 180.) Therefore, as the Court held, the flight instruction did not violate due process. (*Ibid.*)

On the other hand, this Court found error in *People v. Rogers* (2013) 57 Cal.4th 296 (*Rogers*) with respect to instruction with CALJIC No. 2.15,[126] concerning the inferences to be drawn from the defendant's possession of stolen property as they related to the charged crimes of arson and murder. The Court observed that the permissive inference contained in the instruction was properly given in a case that involved theft-related offenses, but not non-theft-related cases where the instruction could create the inference that possessing stolen property meant the defendant was guilty of murder. (*Id.* at p. 335.) However, because the instruction did not create a mandatory presumption in favor of guilt, the Court rejected the defendant's related contention, which appellant makes here, that the instruction shifted or otherwise lowered the prosecution's burden of proof. (*Id.* at p. 336.)

(...continued)
which such circumstance is entitled is a matter for the jury to determine.'" (*Mendoza*, *supra*, 24 Cal.4th at p. 179.)

[126] As given to the jury, CALJIC No. 2.15 read: "'If you find that [defendant] was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of murder or arson. Before guilt may be inferred, there must be corroborating evidence tending to prove his guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt. [¶] As corroboration, you may consider the attributes of possession—time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, or any other evidence which tends to connect him with the crime charged.'" (*Rogers*, *supra*, 57 Cal.4th at p. 334.)

This case is more akin to *San Nicolas* and *Mendoza* because the jury could rationally make the connection between the detection of Laci's scent at the marina and appellant's murder of Laci. In other words, the inferred fact—appellant transported Laci's body to the marina after killing her and disposed of her body in the Bay—more likely than not flowed from the proved fact of Trimble having detected Laci's scent at the marina, as corroborated by a wealth of other evidence, including that appellant was at the marina on the day Laci disappeared and the bodies washed ashore not far from the marina.

Appellant's reliance on *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, is unavailing. In that case, the Court of Appeals found that the permissive inference in the instruction at issue, which allowed the jury to infer reckless driving from excessive speed, was unconstitutional. (*Id.* at p. 316.) The challenged instruction stated: "'A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner. [¶] This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.'" (*Id.* at p. 315.)

The court's interpretation of the instruction was that "[t]he jury was told, in effect, that it could ignore all the other evidence, consider only the evidence of [the defendant's] speed, and if it found [the defendant] was exceeding the speed limit, that was enough to convict him - not of speeding, but of reckless driving." (*Ibid.*) The instruction impermissibly focused the jury on the evidence of speed alone. (*Ibid.*)

Here, CALJIC No. 2.16 provided, in part:

> Evidence of dog tracking of the victim has been received for your consideration. *This evidence is not, by itself, sufficient to permit an inference that the defendant is guilty of the crime of murder.* Before guilt may be inferred, *there must be other evidence that supports the accuracy of the dog tracking evidence.*

> The evidence can be direct or circumstantial, and must support the accuracy of the dog tracking evidence.

(19 CT 6071, emphasis added.) In light of the plain language of the instruction, unlike that at issue in *Schwendeman*, CALJIC No. 2.16 did not permit the jurors to infer guilt from the dog trailing evidence alone. There needed to be other corroborating evidence to support the reliability of the dog trailing evidence before guilt could be inferred. (See *People v. Parson* (2008) 44 Cal.4th 332, 356 [finding no due process violation and distinguishing *Schwendeman*].)

F. If Error, It Was Harmless

This Court has made clear that *Watson* governs the analysis here. In *People v. Moore* (2011) 51 Cal.4th 1104, the Court addressed the proper standard of prejudice to apply in determining whether this type of error required reversal, and concluded that "contrary to defendant's arguments that the error is one of federal constitutional magnitude, . . . the error is one of state law only." (*Moore*, *supra*, at p. 1130.) In reaching this conclusion, the Court reasoned, in part:

> First, informing the jury that it may infer defendant's guilt of murder in these circumstances did not allow it to convict defendant based on a "fundamentally incorrect theory of culpability." The instruction in no way altered the trial court's proper instructions concerning the elements of murder that the prosecution was required to prove beyond a reasonable doubt. The jury was instructed it could draw merely "an inference of guilt" from the fact of possession with slight corroboration, which any rational juror would understand meant he or she could consider this inference in deciding whether the prosecution has established the elements of murder (and the other offenses) elsewhere defined in the trial court's instructions. The instruction purported to explain to the jury its proper consideration of a particular item of circumstantial evidence in reaching a verdict on the charges; it did not alter the defining elements of those charges.

(*Moore*, *supra*, at p. 1131.)

In *Rogers*, *supra*, 57 Cal.4th 296, the defendant made an argument similar to that advanced by appellant here that the instructional error was subject to automatic reversal because the jury was presented with both legally correct and legally incorrect theories and the reviewing court could not discern from the record on which of the theories the subsequent general verdict of guilt rested. (*Rogers*, *supra*, 57 Cal.4th at p. 336.) However, citing numerous cases that held otherwise, the Court stated: "[I]t is well established the *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243], test applies. [Citations.]" (*Ibid.*)

Here, there is no reasonable probability a result more favorable to appellant would have occurred had the trial court not given the CALJIC No. 2.16 instruction in this case. Even without the permissive inference arising from Trimble's detection of Laci's scent at the marina, the other evidence of appellant's guilt was exceedingly strong, as we set out in section VI.C., *ante*.

Further, given the other instructions that aided the jury's consideration of the evidence (e.g., CALJIC Nos. 2.90 [presumption of innocence and reasonable doubt standard of proof], 2.00 [defining direct and circumstantial evidence], 2.02 [sufficiency of circumstantial evidence to prove specific intent], 3.31 [requirement of union of act and specific intent], 1.01 [duty to consider instructions as a whole]), in addition to the battery of instructions on murder, there is no reasonable likelihood of a more favorable outcome for appellant.

Appellant had a full opportunity to argue his case, including any flaws in Trimble's ability to detect scent or in the credibility of Eloise Anderson's testimony about Trimble's capabilities. As stated, appellant's trial counsel worked diligently to uncover any inadequacies in this testimony. Therefore, under the *Watson* test—whether it is reasonably probable defendant would

have obtained a more favorable result had the instruction not been given—the error here in extending CALJIC No. 2.16 to the murder charges was manifestly harmless.

Appellant's alternative contention is that a variation of the *Chapman* standard applies. Citing *Schwendeman*, appellant argues that we must prove beyond a reasonable doubt that the jury did not rest its verdicts on the predicate fact and ignore all other evidence. (AOB 249-251.) In other words, we have to dispel the notion that the jury convicted appellant only because Trimble detected Laci's scent at the marina. Although we disagree that *Schwendeman* stands for that proposition, the *Chapman* standard is inapplicable, not just in light of this Court's authority, but also because CALJIC No. 2.16 did not instruct the jury to ignore all other evidence save the dog trailing evidence. Therefore, the absence of constitutional error refutes appellant's contention that the *Chapman* standard applies. In any event, the compelling evidence of guilt renders any instructional error harmless beyond a reasonable doubt.

VIII. THE DOG TRAILING INSTRUCTION, AS GIVEN, WAS NOT A PINPOINT INSTRUCTION THAT BENEFITTED THE PROSECUTION

Appellant asserts the dog trailing instruction constituted a constitutionally defective pinpoint instruction in the prosecution's favor because it did not also state that the jury could rely only on the dog trailing evidence to acquit appellant. In short, appellant argues the instruction was unbalanced and that reversal of the guilt verdicts is warranted. (AOB 255-265.)

We disagree. First, as we argued in section VII., *ante*, CALJIC No. 2.16 did not tell the jury it could convict appellant of murder based on the dog trailing evidence alone. Further, the instruction did not direct the jury to consider potentially inculpatory dog trailing evidence to the exclusion of

potentially exculpatory dog trailing evidence. Nor, did it otherwise shift the burden of proof to the defense. In any event, if the instruction was erroneous, it was harmless.

A. Appellant Has Forfeited the Claim

As a threshold matter, appellant's trial counsel did not ask the court to modify CALJIC No. 2.16 by adding language to balance the instruction in the manner appellant now argues was necessary. (108 RT 20143-20148; 109 RT 20188-20189; 110 RT 20330; see also Court Exh. No. 27 [proposed defense instruction].)

As we acknowledged in section VII.B., *ante*, a defendant need not object to preserve a challenge to an instruction that incorrectly states the law and affects his or her substantial rights. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 247; see also Pen. Code, § 1259.) Even so, "'[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Sully* (1991) 53 Cal.3d 1195, 1218, quoting *People v. Lang* (1989) 49 Cal.3d 991, 1024.)

As we maintained in section VII., *ante*, CALJIC No. 2.16 correctly stated the law under *Malgren* and was responsive to the dog trailing evidence adduced at trial. Had appellant wanted more balance to the instruction, he should have incorporated language to that effect in his proposed instruction. He did not. (See Court Exh. No. 27.) The omission deprived the trial court of the opportunity to consider the request and make the modification, if appropriate. Accordingly, appellant has forfeited the claim.

In any event, his claim is unavailing, as we contend below.

B. CALJIC No. 2.16 Did Not Instruct the Jury That Exculpatory Evidence Had to Be Proved Beyond a Reasonable Doubt

Appellant rests his argument on *Cool v. United States* (1972) 409 U.S. 100 (*Cool*). (AOB 258-261.) His reliance on that case is misplaced. In *Cool*, the defense relied heavily on the testimony of an accomplice, who admitted his own guilt and insisted that the defendant had no culpability. The trial court instructed the jury that the accomplice's testimony should be viewed with suspicion, but that it could be considered if the jury was "'convinced it is true beyond a reasonable doubt.'" (*Cool*, *supra*, 409 U.S. at p. 102.) The trial court further instructed the jury that the accomplice's testimony, if believed, could "support your verdict of guilty . . . ." (*Id.* at p. 103, fn. 4.)

The United States Supreme Court relied on *In re Winship*, *supra*, 397 U.S. 358, and *Washington v. Texas* (1967) 388 U.S. 14, 18 in holding that the instruction required reversal of the defendant's conviction because: 1) it "place[d] an improper burden on the defense" to prove that the accomplice's testimony was true beyond a reasonable doubt (*Cool*, *supra*, 409 U.S. at p. 103), and 2) it was "fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis" (*Ibid.*, fn. 4).

Contrary to appellant's argument, *Cool* is not controlling and does not establish that it was error to instruct the jury here with CALJIC No. 2.16. The language appellant challenges in CALJIC No. 2.16 does not remotely resemble the blatant constitutional flaw of the instruction in *Cool*. The instruction in *Cool* basically told the jury that exculpatory testimony of an accomplice had to be proven true beyond a reasonable doubt before it could be given any consideration. The overriding concern of the high court in *Cool* was the improper use of the "beyond a reasonable doubt" language in

the instruction. (*Cool*, *supra*, 409 U.S. at p. 103.) Unlike the instruction in *Cool*, which shifted the burden to the defendant, CALJIC No. 2.16 did not isolate potentially exculpatory testimony and instruct the jury that such evidence could not be considered unless proven beyond a reasonable doubt. Rather, CALJIC No. 2.16 reminded the jury that, before it could use the dog trailing evidence to infer appellant's guilt, there were numerous reliability hurdles that had to be cleared. Therefore, this instruction favored appellant, and it was not error to give it. (See *People v. Lawley* (2002) 27 Cal.4th 102, 161-162; *United States v. Anderson* (9th Cir. 1981) 642 F.2d 281, 286.)

As discussed in sections VII.C. and VII.D., *ante*, CALJIC No. 2.16 did not suggest the jury could infer guilt merely from the dog trailing evidence; the elements of first or second degree murder must have been proved beyond a reasonable doubt. The charge to the jury elsewhere instructed that appellant was presumed innocent, that appellant did not have to prove he was not guilty, and that the prosecution had the burden of proof beyond a reasonable doubt. (CALJIC Nos. 2.61, 2.90.) The instructions are considered as a whole, not in isolation. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) So read, CALJIC No. 2.16 did not erroneously shift the burden of proof.

Further, the instruction did not bar the jury from considering other dog trailing evidence as being indicative of appellant's innocence (i.e., testimony of dog handler Ronald Seitz). Appellant was free to argue, and did, the import of the fact that Seitz's trailing dog T.J. did not detect Laci's scent at the marina. (110 RT 20438.) The instruction here merely told the jurors that if they were to use the dog trailing evidence to infer guilt, there were certain preconditions that must be met. Otherwise, the jury was free to discount the evidence entirely or use it to infer appellant's innocence; there were no preconditions in that regard.

Moreover, our position is bolstered by the high court's language in *Cool*: "[T]here is an essential difference between instructing a jury on the care with which it should scrutinize certain evidence in determining how much weight to accord it and instructing the jury, as the judge did here, that as a predicate to the consideration of certain evidence, it must find it true beyond a reasonable doubt." (*Cool, supra*, 409 U.S. at p. 104.)

Appellant argues that the purported error here was actually more egregious than that in *Cool*. First, appellant asserts that because CALJIC No. 2.16 followed the instruction on motive—the motive instruction being "a balanced and proper instruction" in appellant's view—the sequencing signaled to a reasonable juror that the dog trailing evidence could only be used to convict appellant. (AOB 260.) Not so. Actually, the instruction on dog trailing evidence *preceded* the instruction on motive. (19 CT 6071-6072 [CALJIC No. 2.16], 6079 [CALJIC No. 2.51]; 111 RT 20549-20550 [CALJIC No. 2.16], 20552 [CALJIC No. 2.51].) So, any preconditioning could not have occurred.

Second, appellant's contention that the balance issue compounded the infirmities discussed in section VII, *ante*, (AOB 260-261) is also unpersuasive. As we argued, there was no impermissible burden-shifting created by CALJIC No. 2.16, or other constitutional flaws, both on its own terms and in light of the instructions as a whole. Stated simply, there was no error to compound.

C. If Error, It Was Harmless Under Any Standard

If the instruction was erroneous, it was not prejudicial under any standard of review. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [reasonable probability of different outcome standard applies to state law instructional error affecting defense; harmless beyond a reasonable doubt standard applies to instructional error that prevents presentation of

complete defense]; *People v. Rogers* (2006) 39 Cal.4th 826, 867-868, & fn. 16, 886-887.)

Appellant contends the error was not harmless under *Chapman* for several reasons. None of the reasons have merit. First, contrary to appellant's assertion, the dog trailing evidence was not of "overarching importance" (AOB 261) to the prosecution's case. As we discussed in section VI.D., *ante*, there was a tremendous amount of evidence, independent of the dog trailing evidence, that pointed the finger of guilt squarely at appellant. At the risk of redundancy, it bears repeating that the fact that Laci's and Conner's bodies washed ashore not far from where appellant said he was fishing on the day his pregnant wife disappeared eclipsed any probative value to be accorded to Trimble's detection of Laci's scent at the marina. The defense tried to minimize the import of this crushing blow to appellant's claim of innocence by suggesting that appellant was framed by the real killer who, along with the rest of humanity, knew appellant was at the marina on Christmas Eve. (110 RT 20483-20484.) However, the-defendant-was-framed theory was rendered incredible by, among other evidence, appellant's numerous surreptitious trips to the marina. In different vehicles each time. And, never speaking to anyone.

Next, appellant contends the dog trailing evidence relating to Trimble was unreliable, while that concerning Ronald Seitz's dog was reliable. (AOB 262-265.) As we maintained in section VI., *ante*, Trimble had a demonstrated history of reliability when it came to trailing, including non-contact trails. This was corroborated by the fact that Laci's and Conner's bodies were discovered not far from the marina a few months after Trimble detected Laci's scent. In any event, CALJIC 2.16 mandated that the jury make specific findings about reliability before it could consider the evidence relating to Trimble.

Further, the record shows that the evidence concerning the search conducted by dog handler Ronald Seitz and his dog T.J. was not more reliable than the search by Eloise Anderson and Trimble. There was absolutely no evidence adduced that the scent item used by Anderson to scent Trimble—Laci's sunglasses—was contaminated with appellant's scent. Therefore, appellant's somewhat veiled assertion that the scent item used by Seitz—Laci's slipper—was a better scent item which, in turn, facilitated a more reliable search by Seitz's dog (AOB 263-264), is simply unsupported by the record. Defense counsel asked Seitz if the sunglasses could become cross-contaminated "if" appellant "had cleaned the sunglasses" or reached into Laci's purse and touched the sunglasses. (105 RT 19625.) But, there was no evidence showing that appellant had, in fact, touched the sunglasses themselves or, for that matter, the case in which they were contained. Even if appellant had touched the sunglasses, according to Seitz, Laci's scent would have been the predominant scent on the article and the scent which Trimble would have followed. (105 RT 19657.)

Also, Seitz acknowledged that T.J. had an accuracy rate that hovered around 80 percent and that sometimes T.J. made mistakes in trailing. (105 RT 19661-19662.) Seitz recognized that, based on his training, Anderson could have been correct in her assessment that Trimble reliably detected Laci's scent at the marina. (105 RT 19662.) Therefore, the results of Trimble's and T.J.'s respective search efforts at the marina cannot be reasonably characterized as one being reliable and the other not. Accordingly, appellant's argument that the instruction was not harmless because it permitted the jury to consider inculpatory dog trailing evidence to the exclusion of exculpatory dog trailing evidence is not supported by the law or the record.

IX. THE TRIAL COURT PROPERLY ADMITTED EXPERT TESTIMONY CONCERNING THE WIND, TIDES, AND CURRENTS ASSOCIATED WITH SAN FRANCISCO BAY

Appellant next contends the trial court erred by admitting expert testimony supplied by the prosecution's expert, Dr. Ralph Cheng, who testified about conditions on the Bay, including as the conditions related to movement of Laci's and Conner's bodies. More pointedly, appellant argues the testimony should not have been admitted without first assessing the reliability of Dr. Cheng's methodology and conclusions under the *Kelly* rule. (AOB 266-285.) Appellant further contends the purported error requires reversal. (AOB 285-296.)

We disagree. A *Kelly* hearing was unnecessary because there was nothing new or novel about Dr. Cheng's application of the principles of fluid mechanics. In any event, the expert testimony met the foundational requirements under *Kelly* and was otherwise properly admitted. Regardless, any error in the admission of the testimony was harmless.

A. Appellant Has Waived the Claim

During the section 402 hearing on September 30, 2004, the prosecutor noted that defense counsel had preemptively elicited much of the information concerning Dr. Cheng's involvement in the case during counsel's cross-examination of Detective Hendee. The effect of which was to essentially impeach Dr. Cheng before Dr. Cheng was even permitted to testify. (100 RT 18854.) The cross-examination occurred on July 15, 2004, which was nearly three months before the 402 hearing involving Dr. Cheng. (See 66 RT 12809-12819.)

During the hearing, defense counsel referred to Dr. Cheng's proffered testimony, admitting: "[I]n actuality, in some ways I want it to come in because I believe his ultimate conclusion is that he can't say anything about Laci." (100 RT 18855.) The court asked counsel why he was objecting

then. To which counsel replied, "besides being ludicrous, there is no basis upon which he can come to that conclusion." (100 RT 18855.)

Given these circumstances, we find appellant's implicit suggestion—that a party opponent can introduce the opposing party's evidence for its own benefit, later move to exclude that evidence on the ground that an inadequate foundation has been laid for its admission, and subsequently challenge the admission of that evidence on appeal—anomalous, to put it mildly. We contend that by introducing Dr. Cheng's findings during cross-examination (66 RT 12809-12819), appellant waived his right to complain about the trial court's decision to officially admit the evidence months later. (See *People v. Medina* (1995) 11 Cal.4th 694, 750 [defendant's challenge on appeal to testimony elicited during defense cross-examination of witness deemed waived]; see also *Jackson v. Superior Court* (1937) 10 Cal.2d 350, 358 [a party is estopped from asserting on appeal an error that was invited or provoked by the party or his or her counsel].) And, in *Lissak v. Crocker Estate Co.* (1897) 119 Cal. 442, 446, in an analogous context, the Court cited the following passage:

> "*The contestant could not sit by during the examination of the physicians, and after their evidence had been elicited by examination and cross-examination, upon finding it injurious to her case, claim as a legal right to have it stricken out.* There are bounds to the enforcement of the statutory provisions which will not be disregarded at the instance of a party who, being entitled to their benefit, has waived or omitted to avail himself of them. It is perfectly true that public policy has dictated the enactment of the code provisions by which the communications of patient and client are privileged from disclosure; but the privilege must be claimed, and the proposed evidence must be seasonably objected to. The rule of evidence which excludes the communications between physician and patient must be invoked by an objection at the time the evidence of the witness is given. *It is too late after the examination has been insisted upon, and the evidence has been received without objection, to raise the question of competency by a motion to strike it out.*" [Citation.]

(Emphasis added.)

If appellant is permitted to pursue his claim, it is nonetheless without merit.

B. Evidence Code Section 402 Hearing

At the outset of the proceeding on September 30, 2004, defense counsel stated that a *Kelly-Frye* hearing was necessary. (100 RT 18853.) The trial court, having reviewed Dr. Cheng's PowerPoint presentation (100 RT 18852-18553; see also People's exhibit number 283), disagreed since "[t]hey've been charting tides since Sir Francis Drake went up the coast." (100 RT 18853.) The prosecutor explained that Dr. Cheng, at the request of the Modesto Police Department, worked backward from the location where Laci's and Conner's bodies were recovered, to try and isolate where in the Bay the bodies had started their movement to the shore. (100 RT 18854.) Even so, the court did not agree that a *Kelly* hearing was needed to vet the ebb and flow of tides and why sea levels rise and fall. (100 RT 18855.)

As explained above, although defense counsel took issue at the hearing with certain aspects of Dr. Cheng's intended testimony, counsel had no problem preemptively introducing portions of Dr. Cheng's findings insofar as it may have helped take the wind out of the prosecution's sails. (100 RT 18855.)

Regardless, the trial court was of the opinion that defense counsel's concerns went to the weight to be accorded Dr. Cheng's testimony, not to its admissibility. (100 RT 18855.)

C. Summary of Dr. Cheng's Trial Testimony

1. *Voir dire*

Doctor Ralph Cheng was a senior research hydrologist for the U.S. Geological Survey ("USGS"). In 1967, he obtained master's and doctorate degrees in the field of applied mathematics and fluid dynamics from the

University of California at Berkeley. (100 RT 18859.) Afterward, Dr. Cheng taught at the State University of New York ("SUNY") and then joined the USGS in 1974. (100 RT 18859.)

The primary focus of Dr. Cheng's research with the USGS was studying the "hydraulics" or physical processes of how water moved in San Francisco Bay. (100 RT 18860.) Dr. Cheng explained that the movement of water in the Bay was mostly driven by tides, which, in turn, were driven by the rotations of the sun and moon around one another. The inflow from freshwater rivers also affected water movement in the Bay. (100 RT 18860.) Dr. Cheng was part of a research team that addressed issues concerning water quality, biological processes, plankton balance, and other environmental factors affecting San Francisco Bay. (100 RT 18864.) However, his focus was on physical aspects of the Bay; particularly, movement of water in the Bay. (100 RT 18864-18865.)

Among his professional achievements, Dr. Cheng authored numerous articles, which were published in peer-reviewed journals and served as an advisor to international conference organizations. Also, Dr. Cheng had been bestowed with numerous awards honoring his work, including one from the U.S. Department of the Interior. (100 RT 18861-18863.)

This case was Dr. Cheng's first time testifying as an expert witness in court. (100 RT 18863.) He explained that his opinions were "based on science" with the understanding "that all science has a little room of tolerance." (100 RT 18865.) The trial court accepted Dr. Cheng as "an expert hydrologist and qualified to give an opinion about the movement of water in San Francisco Bay, among other things." (100 RT 18866.)

2. *Expert testimony*

Using a PowerPoint presentation, Dr. Cheng provided an overview of tidal action and water currents and how they were influenced by

astronomical forces. (100 RT 18866-18868; People's Exh. No. 283.)[127] He explained that there were two high tides and two low tides each day and that the rise and fall of tides along the shoreline was more extreme in the spring. (100 RT 18870-18871; 101 RT 18889-18890.) The magnitude of the tidal current was generally proportional to the depth of the water; water moved fastest in shallow areas. (100 RT 18878.)

As for San Francisco Bay, Dr. Cheng stated that the current was strongest where the water was deepest, which was underneath the Golden Gate. (100 RT 18878.) He also discussed the effects of seasonal wind patterns on the Bay, particularly, how winds affect the wave motion of water in the Bay, which, in turn, transmitted energy downward to the bottom. (100 RT 18880-18882.) This wave energy affected the movement of objects in the water. (100 RT 18878; 101 RT 18891.) Assembling all of this information—tides, tidal currents, winds, and waves—researchers were able to predict the movement of water in San Francisco Bay and, accordingly, the movement of objects in the water, with a certain degree of accuracy. (101 RT 18891.) Researchers could predict astronomical tides and tidal currents using a validated numerical model founded upon the aforementioned scientific principle that the magnitude of the tidal current was generally proportional to water depth. (101 RT 18891.)

With regard to this case, Dr. Cheng recounted that the Modesto Police Department contacted him in February 2003 with respect to helping authorities locate Laci's body by explaining how things moved through the waters in the Bay. (101 RT 18891-18892, 18922.) Dr. Cheng directed the jurors' attention to the presentation slide that summarized the waves and tidal conditions near the Richmond area for the time period beginning on

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[127] The exhibit can be found in Volume number 12 of the Supplemental Clerk's Exhibits Transcript at pages 2734 through 2759.

December 23, 2002 through December 25, 2002. (101 RT 18892; People's Exh. No. 283; 12 Supp. CT Exhs. 2755.) He explained that around noon on December 24 the wind was very weak on the Bay, which was a typical winter pattern. At the time, the tide was rising bringing ocean water flowing into the Bay. (101 RT 18893-18894; People's Exh. No. 283; 12 Supp. CT Exhs. 2756.) Dr. Cheng noted that his chart was based on data from the Bay Air Quality Management District, which collected such data continuously. (101 RT 18892, 18893.)

Dr. Cheng's next slide documented the tides and winds near Richmond for the time period when Laci's and Conner's bodies washed ashore in mid-April 2003. Specifically, the chart showed data for the time period beginning on April 11 and continuing through April 13. (People's Exh. No. 283; 12 Supp. CT Exhs. 2757.) Dr. Cheng described how, in spring, water levels went to extremes: low tides were exceedingly low and high tides were exceedingly high. (101 RT 18895.) He pointed out that, during this time, it was very windy with winds exceeding 40 knots and sustained winds averaging around 20 knots. (101 RT 18896.) And, shortly after noon on April 12, there was also the occurrence of a very low tide. (101 RT 18896.) The wind, which Dr. Cheng opined was of "quite a magnitude," produced a significant amount of energy in the water. (101 RT 18896, 18897.) The wind energy permeated the shallower areas of the Bay stirring up the sediment at the bottom. (101 RT 18898.) The areas along the shore where Laci's and Conner's bodies were recovered were "very, very shallow." (101 RT 18902.) In Dr. Cheng's opinion, this weather event would have produced enough energy in the more shallow portions of the Bay to move a body. (101 RT 18906.)

Dr. Cheng clarified that in trying to assist authorities in February 2003—before Laci's and Conner's bodies were recovered—he was working with some degree of uncertainty as to the specific location where

Laci's body started its travel in the Bay. (101 RT 18900.) Nonetheless, Dr. Cheng was able to reconstruct the tides and currents in the Bay "within a reasonable degree of accuracy." (101 RT 18900.) However, because the initial position of Laci's body was not precise, Dr. Cheng could not predict the path that Laci's body would have traveled in the Bay. (101 RT 18900.)

After Laci's and Conner's bodies were discovered, authorities returned to Dr. Cheng to see if he could work backward from the location where the bodies washed ashore to trace where Laci's body may have been deposited in the Bay. With that information, authorities could concentrate their search for additional evidence such as weights or limbs. (101 RT 18900-18901, 18907, 18940.) Dr. Cheng explained that while the information available to him had "improved," such calculations still involved some uncertainty. (101 RT 18901.) He then detailed how he created a "Progressive Vector Diagram" to narrow down the area. (101 RT 18904-18905; People's Exh. No. 284; 12 Supp. CT Exhs. 2760.) Dr. Cheng charted hour-to-hour movement based on a wind-drift estimation mathematical formula. (101 RT 18909-18910.) The formula utilized data from the U.S. Army Corps of Engineers Coastal Engineering Handbook. (101 RT 18910.) Dr. Cheng acknowledged that, while he was able to narrow down the area where the bodies may have started their travel in the Bay, he could not refine it to a matter of inches or even feet. (101 RT 18912.) His task was complicated by the fact that two bodies of different mass were recovered, which meant that, when they drifted in the Bay, they may have behaved differently. (101 RT 18913.)

Dr. Cheng was able to determine a probable track for Conner's body, but not Laci's. (101 RT 18925, 18942, 18944.) This was owing to several circumstances including the investigative assumption that Laci's body was likely weighted down by anchors initially, which would have caused her body to behave differently in the water than Conner's. (101 RT 18942.)

Also, being heavier than Conner's body, Laci's body could have been resting on the bottom of the Bay. (101 RT 18925.)

Based on Dr. Cheng's calculations, the larger area he identified was approximately a quarter-mile by one and three-quarters mile. He broke this area down into smaller quarter-mile sections or grids, with one particular grid being the target area. (101 RT 18912; People's Exh. No. 284.) Dr. Cheng described this area as "lying right in the middle distance between Berkeley Marina and Brooks Island, roughly." (101 RT 18915.) He qualified: "It's not a deterministic prediction, but it's a highest probability" (101 RT 18914) based on "assumptions and scientific data" (101 RT 18920). The map containing Dr. Cheng's conclusions corresponded to the area of the Bay depicted in People's Exhibit number 215. (101 RT 18908.) Additionally, Dr. Cheng's research and calculations revealed that, had Laci's body had been placed into deeper waters in the Bay, it would not have migrated to the Berkeley Flat area. (101 RT 18917.)

Although Dr. Cheng acknowledged that his research did not include the specific study of the movement of human bodies in the Bay, he had studied the movement of "drifters" in the Bay. Drifters were floating devices that could be weighted to assess the action of currents at varying depths. (101 RT 18926, 18938.) Typically, the drifters were weighted at zero so that they were of neutral density in the water. (101 RT 18945.)

Dr. Cheng explained that he was quite familiar with the principles of fluid mechanics as they involved the movement of objects through air and that these same principles were generally applicable to movement of objects in water. (101 RT 18938 ["a law of similitudes"].)[128]

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[128] For example, principles of fluid mechanics can be applied to the movement of a soccer ball through the air. (Conner W., The Wall Street Journal, *The Zidane of Fluid Dynamics Tries to Explain Why a Ball Curves*, (continued...)

D. A *Kelly* Hearing Was Unnecessary Because There Was Nothing New or Novel About Dr. Cheng's Application of Fluid Dynamics in a Hydrological Context

As a preliminary matter, we point out that appellant's chief complaint concerns that portion of Dr. Cheng's testimony that addressed the location from which Conner's body migrated to the shoreline. (AOB 281.) As we contend below, there was nothing scientifically new or novel inherent in Dr. Cheng's testimony about the movement of Conner's body in the water. Further, there was nothing scientifically new or novel about the operation of the tides, currents, and wind, as they occurred in San Francisco Bay at the relevant time periods. Consequently, the trial court was correct in finding a *Kelly* hearing was unnecessary.

Although we briefly discussed *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*) in section VI., *ante*, in relation to the admissibility of the dog trailing evidence, we set out the applicable legal principles more fully here. "The *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. [Citation.] In most other instances, the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them. [Citations.]" (*People v. Venegas* (1998) 18 Cal.4th 47, 80.) "[A]bsent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly* . . . ." (*People v. Stoll* (1989) 49

(...continued)
<<http://blogs.wsj.com/dailyfix/2014/07/03/the-zidane-of-fluid-dynamics-tries-to-explain-why-a-ball-curves>>[as of August 29, 2014].) Likewise, principles of fluid mechanics help Olympic swimmers understand how to move their bodies through the water more efficiently. (Johnson C., EE Times, *Fluid Mechanics used to improve U.S. Olympic swimmers*<<http://www.eetimes.com/document.asp?doc_id=1169100>>[as of August 29, 2014].)

Cal.3d 1136, 1157.) *Kelly* "only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law." (*People v. Stoll, supra*, 49 Cal.3d at p. 1156.)

The expert testimony at issue in this case is akin to applications that are not considered new or novel scientific techniques. (See, e.g., *People v. DePriest* (2007) 42 Cal.4th 1, 40 [*Kelly* inapplicable to overlay technique to compare shoe prints]; *People v. Webb* (1993) 6 Cal.4th 494, 524 [chemical and laser process for photographing fingerprints not subject to *Kelly*]; *People v. Clark* (1993) 5 Cal.4th 950, 1018 [*Kelly* inapplicable to blood spatter expert testimony], overruled on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Rowland* (1992) 4 Cal.4th 238 [*Kelly* inapplicable to expert medical testimony on sexual assault]; *People v. McDonald* (1984) 37 Cal.3d 351, 376 [*Kelly* inapplicable to expert testimony on psychological factors affecting eyewitness identification], overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914 .)

Appellant's reliance on *People v. Leahy* (1994) 8 Cal.4th 587 (AOB 281-282), is unpersuasive. In *Leahy*, the Court held that, "[i]n determining whether a scientific technique is 'new' for *Kelly* purposes, long-standing use by police officers seems less significant a factor than repeated use, study, testing and confirmation by scientists or trained technicians." (*People v. Leahy, supra*, 8 Cal.4th at p. 605.) By its very nature, however, application of the more sophisticated principles of hydrology and fluid mechanics typically requires the involvement of scientists and trained technicians, not law enforcement. And, insofar, as appellant intimates that Dr. Cheng's credentials were the functional equivalent of a sailor's (AOB 282), he is clearly mistaken.

As Dr. Cheng explained, application of fluid mechanics in a hydrological context was no different than the application of fluid mechanics as it related to how objects moved through the air. (101 RT 18938.) *People v. Roehler* (1985) 167 Cal.App.3d 353 (*Roehler*), supports the application of fluid mechanics in the context in which it was utilized in this case. In *Roehler*, the defendant was charged with the murders of his wife and young stepson. (*Roehler*, *supra*, 167 Cal.App.3d at p. 359.) The defendant contended the victims died in an accidental drowning when the small boat they were in capsized on the ocean. (*Id.* at p. 365.) After presenting evidence that the victims suffered severe blunt force trauma to the head just prior to their deaths by drowning, the prosecution called Dr. Scott Hickman who was a professor of mechanical and environmental engineering at the University of California at Santa Barbara and whose specialty was fluid mechanics. (*Id.* at p. 369.) Besides supervising the testing of the boat's stability and offering an opinion on the force needed to overturn the boat, Dr. Hickman tested the velocity at which a boy of the stepson's weight and height would have risen through the waters after immersion. (*Ibid.*) So, appellant's contention that Dr. Cheng's testimony was a new and novel scientific application because it involved the physics of the movement of objects in water (AOB 283), is unfounded.

Therefore, if *Kelly* is inapplicable, "[a] trial court's determination to admit expert evidence will not be disturbed on appeal absent a showing that the [trial] court abused its discretion in a manner that resulted in a miscarriage of justice. [Citations.]" (*People v. Robinson* (2005) 37 Cal.4th 592, 630.)

Here, there were no concerns that the jurors would be blindsided by Dr. Cheng's expert testimony or otherwise give it uncritical acceptance. Truly, the gravamen of Dr. Cheng's testimony was to explain to the jury how the waters in San Francisco Bay acted and how the weather influenced

the movement of waters in the Bay. Intending no disrespect to Dr. Cheng, as the trial court accurately assessed, "[t]hey've been charting tides since Sir Francis Drake went up the coast." (100 RT 18853.) Yet, Dr. Cheng's testimony did provide the jurors with a credible explanation, based on scientific data, for how it was that Conner's and Laci's bodies came ashore when and where they did. This testimony was based on the operation of Bay tidal currents and the particular weather conditions attending appellant's visit to the Bay on Christmas Eve 2002, and the time period in mid-April 2003 when the bodies came ashore. (101 RT 18892-18898; People's Exh. No. 283; 12 Supp. CT Exhs. 2756, 2757.)

Dr. Cheng's testimony suggested that when appellant deposited Laci's body in the Bay in late December, in the more shallow area near Brooks Island (101 RT 18902), the winds were weak and the water was moving from the ocean into the Bay (101 RT 18893-18894). That would explain why Laci's body was not washed out to the Pacific and how it could have stayed in the Bay during the remainder of the winter months. Likewise, given Dr. Cheng's testimony, it was understandable that Laci's and Conner's bodies would be washed ashore in mid-April, given the exceedingly low tide in springtime along with the storm and high winds that immediately preceded the discovery of the bodies. (101 RT 18895-18896, 18906.) Therefore, this portion of the expert testimony while helpful to the jury's understanding of certain evidence, was not a novel application of existing scientific principles.

As for Dr. Cheng's research, which isolated the likely area from which Conner's body started its migration to shore, Dr. Cheng stated that he based his conclusions on mathematical formulas, scientific data, and certain assumptions. (101 RT 18909-18910, 18920.) In arriving at his projections, Dr. Cheng utilized resources published by the Bay Air Quality Management District and the U.S. Army Corps of Engineers. (101 RT

18892, 18893, 18910.) These are hardly fringe groups espousing novel scientific theories. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 140 [no *Kelly* hearing necessary as expert's calculations were based, in part, "on principles from textbooks and literature in her field"].)

Further, Dr. Cheng studied the movement of drifters in the Bay and he was well-versed in fluid dynamics to enable him to render an opinion about how the Bay waters would affect movement of an object in the Bay. (101 RT 18926, 18938.)

Besides, Dr. Cheng made clear that his conclusions were best viewed as highest probabilities, not certainties. (101 RT 18900-18901, 18914.) The lack of scientific certainty did not deprive his conclusions or opinions of their evidentiary value. (See *Travelers Ins. Co. v. Ind. Acc. Com.* (1949) 33 Cal.2d 685, 687; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1293-1294, overruled on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.) Dr. Cheng was likewise forthright about what information he was lacking that would have enhanced the predictive value of his projections as to Conner or enabled him to chart a path for Laci's body. (101 RT 18900-18901.) Therefore, the jurors were not somehow beguiled into thinking that this portion of Dr. Cheng's testimony was infallible. Appellant equates uncertainty with scientific unreliability, but they are not the same. Any uncertainty went to the weight to be accorded the challenged portion of Dr. Cheng's testimony, not its admissibility.

E. There Was a Proper Foundation for Admission of Dr. Cheng's Testimony under *Kelly*

Even if *Kelly* is applicable to that portion of Dr. Cheng's testimony that involved his plotting of the path of the migration of Conner's body to the shore, the requisite foundation was satisfied given Dr. Cheng's testimony.

Under *Kelly* certain foundational requirements must be met:

> Admissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) the reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. [Citations.] Additionally, [(3)] the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]

(*Kelly*, *supra*, 17 Cal.3d at pp. 30-32.) "Reliability," for *Kelly* admissibility purposes, means that a particular scientific technique "'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.'" (*Kelly*, *supra*, 17 Cal.3d at p. 30 (quoting *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014, italics omitted; see *People v. Venegas*, *supra*, 18 Cal.4th at p. 76.) *Kelly*'s first prong tests the "fundamental validity of a new scientific technology." (*People v. Cooper* (1991) 53 Cal.3d 771, 812-814; see *People v. Farmer* (1989) 47 Cal.3d 888, 913, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

"Whether a new scientific technique has gained general acceptance is a mixed question of law and fact. [Citation.] '[W]e review the trial court's determination with deference to any and all supportable findings of "historical" fact or credibility, and then decide as a matter of law, based on those assumptions, whether there has been general acceptance.' [Citation.]" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 447.) In resolving questions of general acceptance previously, this Court has surveyed relevant authorities that include national reports, legal commentary, scientific publications, and appellate court decisions in California and other state and federal jurisdictions, in addition to reviewing the trial court record. (See, e.g., *People v. Venegas*, *supra*, 18 Cal.4th at p. 89.) This process of considering secondary authorities is in keeping with *Kelly*'s paradigm of determining

validity by considering the scope of the technique's use in the field, rather than conducting an original assessment of the science in the courtroom:

> *Kelly* does not demand that the court decide whether the procedure is reliable as a matter of scientific fact: the court merely determines from the professional literature and expert testimony whether or not the new scientific technique is accepted as reliable in the relevant scientific community and whether scientists significant either in number or expertise publicly oppose [a technique] as unreliable. . . . General acceptance under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community.

(*People v. Soto* (1999) 21 Cal.4th 512, 519, internal quotation marks and citations omitted.)

Here, as Dr. Cheng explained, his testimony involved the specialty of fluid mechanics or hydraulics (movement of fluids), as applied in a hydrological context (movement of water). (101 RT 18938.) These disciplines have been acknowledged in court decisions. (See e.g., *People v. Cox* (2003) 30 Cal.4th 916, 932 [soil hydrology], overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; *Lagunitas Water Co. v. Marin Water Co.* (1912) 163 Cal. 332, 334 [hydraulics related to creek and its tributaries]; *People v. Roehler*, *supra*, 167 Cal.App.3d 353, 368-369 [fluid mechanics as applied to boat stability and movement of body through water]; *Weck v. Los Angeles County Flood Control Dist.* (1947) 80 Cal.App.2d 182, 205 [recognizing foundation for expert testimony in area of hydraulic and hydrological engineering]; *United States v. Hubenka* (10th Cir. 2006) 438 F.3d 1026, 1030 [river hydrology].) These authorities, being of some vintage, support the proposition that the scientific disciplines at issue here are not new or novel in the first instance. Regardless, the fact that these disciplines are time-tested is corroborative of their reliability.

In *Oakland v. Williams* (1940) 15 Cal.2d 542, this Court offered its own opinion on how the movement of the waters in San Francisco Bay would affect the matter at issue:

> Preliminarily, it is well to state that while it may not be wholly impossible for each of the several named cities to separately solve its sewage disposal problem, yet by reason of their geographical location and the topography of the area, with which this court is quite familiar and of which it may take judicial knowledge, any independent action of one or more of said cities looking to the solution of the problem would, *because of the action of the tides and currents of San Francisco Bay*, still leave unabated the obnoxious nuisance and health menace resulting from sewage deposited on the common shores by the neighboring cities continuing to discharge their sewage into the bay.

(*Oakland v. Williams*, *supra*, 15 Cal.2d at p. 546, emphasis added.) With all due respect, if the Court—composed as it were of jurists most expert in the law—could opine as to the effects of the tides and currents of San Francisco Bay in moving refuse (i.e., discarded objects) in and about the Bay, then Dr. Cheng, with his expert background in fluid mechanics and hydrology, could properly offer his opinion about how the tides and currents of the Bay affected the movement of the bodies that appellant treated as refuse and unceremoniously discarded into the Bay. In short, issues of reliability related to the relevant scientific disciplines were satisfied under *Kelly*'s first prong.

As for the second prong, Dr. Cheng had the requisite qualifications to render an opinion about the migration of Conner's body to the shore, as well as the other matters to which he testified. His credentials were unimpeachable. (100 RT 18858-18863.) Appellant acknowledges as much. (AOB 295 [referring to Dr. Cheng's credentials as "impressive"].) The fact that Dr. Cheng was never previously called upon to offer an expert opinion in a court of law is irrelevant because, in and of itself, the lack of previous

qualification in court does not prove a lack of sufficient expertise to qualify as an expert. To be sure, every expert has to qualify as an expert for the first time. As such, appellant's protestations to the contrary (AOB 283-284), are unavailing.

Further, beyond his in-depth knowledge and experience related to fluid mechanics and hydrology, Dr. Cheng's research involved the use of drifters to monitor the workings of the tides and currents in the Bay. (101 RT 18926, 18938.) While it is true that these floating objects were typically weighted in a manner to be density-neutral (101 RT 18945), that does not preclude Dr. Cheng's ability to offer an opinion on the movement of an infant's body that, based on all accounts, was certainly of limited weight and density. Contrary to appellant's assertion, Dr. Cheng did not reconstruct the movement of "large objects" in bays and estuaries. (AOB 281.)

As for the third prong in *Kelly*, there was no evidence adduced to suggest that the procedures by which Dr. Cheng created the progressive vector diagram showing the path of Conner's body to the shore were incorrect or otherwise suspect. The same holds true for the other matters that he addressed. Dr. Cheng explained how he charted hour-to-hour movement based on a wind-drift estimation mathematical formula supplied by the U.S. Army Corps of Engineers Coastal Engineering Handbook. (101 RT 18909-18910.) He pointed out that tidal currents in the Bay—being weak—were not a factor in the calculation. (101 RT 18910-18911.) That meant that in Dr. Cheng's view there was one primary variable and that was the wind. While he acknowledged that weight of the bodies was a factor, Dr. Cheng described its significance as merely "[t]o some degree." (101 RT 18914.) On the diagram that is People's Exhibit number 284, Dr. Cheng plotted numerous data points based on the mathematical calculations

of wind-drift derived from the handbook. His conclusions were based on "actual observation of the wind and scientific judgment." (101 RT 18914.)

As for appellant's contention that admission of this evidence violated his rights under federal law—specifically, the Eighth Amendment (AOB 284-285)—we contend, as we did with respect to the dog trailing evidence in section VI.E., *ante*, that this claim has been forfeited. In any event, admission of the challenged evidence did not fail to meet the requirement of heightened reliability under the Eighth Amendment. (See *People v. Eubanks*, *supra*, 53 Cal.4th at p. 146.)

F. Any Error Was Harmless

Finally, any error in failing to conduct a *Kelly* hearing in this case was harmless. The *Watson* standard of prejudice applies to the erroneous admission of scientifically unreliable evidence. (*Kelly*, *supra*, 17 Cal.3d at p. 40; accord *Mitchell*, *supra*, 110 Cal.App.4th at 795 [applying *Watson* standard to improper admission of dog scent identification evidence under *Kelly*].)

It is not reasonably probable appellant would have been acquitted if Dr. Cheng's testimony had not been admitted. Appellant could not have suffered prejudice from the admission Dr. Cheng's testimony because appellant was in a boat on San Francisco Bay on the day his wife and unborn child disappeared and a few months later the bodies of his wife and child were found along the shoreline not far from appellant's known location on the Bay. Therefore, Dr. Cheng's testimony concerning the path Conner's body took to shore was merely corroborative of a highly inculpatory fact otherwise proven, along with a plethora of other incriminating evidence. Indeed, appellant seems to acknowledge that the location where the bodies were discovered in relation to where appellant was on the Bay connected him to the murders. (AOB 269 ["Apart from the

general proximity of Brooks Island and the points where the bodies washed ashore . . . ."].) That fact is, indeed, a part of the inculpatory evidence.

As argued above, Dr. Cheng's testimony was helpful in explaining how Conner's and Laci's bodies would have remained in the Bay for several winter months and then come ashore during a springtime weather event with strong winds. Yet, this portion of Dr. Cheng's testimony was largely inconsequential in terms of its inculpatory effect. Therefore, it carried little, if any, potential for prejudice.

Further, the defense worked to negate any value Dr. Cheng's testimony may have had for the prosecution. During cross-examination and argument, defense counsel honed in on the fact that searchers found no evidence, such as anchors or body parts, in the area identified by Dr. Cheng. (66 RT 12809-12819; 110 RT 20484-20485.) To be sure, appellant sounds this refrain in recounting the fruitless Bay search efforts. (AOB 270-273.)

In all, defense counsel devoted a paltry 44 words in closing argument to the specifics of Dr. Cheng's testimony: "They brought in Doctor Cheng, the U.S.G.S. expert, to tell you from where these bodies were, this is where you should have found the evidence. And they didn't find one iota of evidence that was related to this case." (110 RT 20484.) Therefore, at the urging of the defense, the jury may well have determined that this portion of Dr. Cheng's testimony should be accorded little, if any, weight.

And, appellant is mistaken when he suggests that Dr. Cheng's testimony was of profound importance in establishing appellant's guilt, as evidenced by 10 words taken from the prosecutor's opening argument. (AOB 267.) Putting those words into context, it is clear that the prosecutor was dispelling the notion, advanced by the defense, that appellant was framed. First, the prosecutor referred to Dr. Galloway's (the forensic anthropologist) testimony that the bodies had been in the Bay between three and six months, which corresponded with the timing of appellant's visit to

the Bay in late December. (109 RT 20277-20278.) The prosecutor argued that if someone wanted to frame appellant, the bodies would have been left on the shore in close proximity to the time appellant was there. (109 RT 20279.) The prosecutor stated, including the verbiage appellant references:

> The only reason those bodies were found is remember what Dr. Cheng testified to. There was an extremely low tide on [April[129]] 12th. And there was a very violent storm on [April] 12th. That combination broke [] Laci Peterson free and sent her floating towards the shore. That's the only reason that those bodies were found at all. Not because of some magical frame-up job, or for any other reason. [¶] And if that's the fact, and that's the evidence that was before you in this case, then that man's a murderer. It's as simple as that. [¶] Again, like I said, there's no mysteries in this case.

(109 RT 20279-20280.)

This passage puts the prosecutor's remarks about Dr. Cheng's testimony in the proper perspective and refutes appellant's claim that Dr. Cheng's testimony was the only link in the evidentiary chain between the location of Laci's and Conner's bodies and appellant's "fishing trip." (AOB 266, 267.) Clearly, Dr. Galloway's testimony about the length of time the bodies were in the Bay was an important piece of evidence connecting appellant's visit to the Bay the timing and location of the discovery of Laci's and Conner's bodies.

Last, we agree with appellant that under either standard—*Watson* or *Chapman*—the outcome is the same. (AOB 286.) However, we disagree about the outcome. Under either standard, any error was harmless. Even without Dr. Cheng's testimony, given the surfeit of evidence proving appellant's guilt, admission of the testimony, if error, was harmless beyond a reasonable doubt.

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[129] The prosecutor misspoke and stated the month was February.

Appellant spills much ink discussing the purported variables at issue in Dr. Cheng's testimony. (AOB 287-294.) But, as we explained above, given certain unknown factors, Dr. Cheng did not attempt to offer a trajectory for the movement of Laci's body to the shore. And, insofar, as Dr. Cheng made the calculations as to the movement of Conner's body, it was based on one variable, which was wind-drift. So, when appellant states that Bay currents were "important under Cheng's thesis" (AOB 293), he is simply wrong.

In appellant's view, Dr. Cheng essentially licked his index finger and pointed it to the wind. But, the record demonstrates otherwise. Isolating the one variable that mattered, Dr. Cheng used data collected by reputable agencies to arrive at his mathematical calculations pertaining to the trajectory of Conner's body. As for any unknown factors, Dr. Cheng made clear that his conclusion in this regard was best interpreted as a high probability, not a scientific certainty. Again, this was an issue of weight to be accorded the findings, not whether the testimony was admissible in the first place.

In support of his argument that Dr. Cheng's testimony was prejudicially unreliable, appellant cites *People v. Dellinger* (1984) 163 Cal.App.3d 284. (AOB 292-293.) However, the facts of *Dellinger* bear scant resemblance to this case. In *Dellinger*, the expert testimony at issue was founded upon an experiment that consisted of a police officer dropping an anthropomorphic dummy down a flight of stairs from different positions, without any accompanying trajectory analysis done by the expert. (*Dellinger*, *supra*, 163 Cal.App.3d. at pp. 292, 295.) The Court of Appeal characterized the experiment as "the cavalier throwing of anthropomorphic dummy down a flight of stairs . . . ." (*Id.* at p. 296, fn. 2.) Among the numerous *Kelly*-related infirmities the Court of Appeal found with the evidence, the *Dellinger* court noted that the expert "neglected to consider

several important factors," including measurements that were available to the expert, but which she did not use. (*Id.* at p. 295.) In finding prejudice, the Court of Appeal observed that the coroner based his findings on the expert's conclusions and the coroner testified that if the expert's conclusions were erroneous, he would have classified the child's death as an accident. (*Id.* at p. 296.) Additionally, the *Dellinger* court found that the prosecution's case "rested on 'the aura of certainty' enveloping [the expert's] scientific findings." (*Ibid.*)

Here, there was no "cavalier" attempt at an experiment that was scientifically unsound. Nor did Dr. Cheng ignore data available to him in reaching his conclusions. Further, that portion of Dr. Cheng's testimony that appellant finds most objectionable, at best, was merely corroborative evidence; it was not the foundation for a finding of a cause of death. Finally, there was no false "'aura of certainty'" concerning Dr. Cheng's testimony as it related to the path of Conner's body in the Bay. As we have stated, Dr. Cheng credibly positioned his finding in this regard as one involving probability, not certainty. And, the prosecution's case did not rest on Dr. Cheng's testimony.

X. THE TRIAL COURT'S RULINGS ON ISSUES PERTAINING TO THE STABILITY OF APPELLANT'S BOAT WERE PROPER

Appellant argues the trial court committed prejudicial error in: 1) excluding the defense's proffered videotaped boat experiment; 2) requiring the prosecution to be present for a second experiment; and 3) denying a defense motion for a mistrial based on the conduct of certain of the jurors.

We disagree. Each of the trial court's rulings was a proper exercise of its discretion. First, the defense's videotaped experiment was properly excluded because it was not substantially similar to the actual events. Second, the trial court offered the defense the opportunity to conduct a new experiment using appellant's boat. The court's requirement that a

representative from the prosecution be present at the experiment properly balanced the interests of the parties. This is especially true in light of the infirmities with the first defense experiment. Third, the jurors' conduct in examining and manipulating the boat was "within the lines of offered evidence" and, therefore, the trial court properly denied appellant's motion for a mistrial.

A. The Videotaped Boat Experiment Was Properly Excluded

Appellant contends that the trial court's exclusion of the boat stability experiment conducted by the defense violated his rights under state and federal law. (AOB 308-320.)

Appellant's contention lacks merit. Because the experiment was not substantially similar to the events in question, the trial court properly excluded the evidence.

1. *Procedural background*

On October 19, 2004, during the course of the defense case, the court held a 402 hearing on the proffered defense boat demonstration. First, the court and parties watched the video recording of the demonstration. (104 RT 19371, 19401; Defense Exh. No. D9E [as marked].)

Afterward, the prosecution objected for the following reasons: 1) the make and model of the boat were unknown to the prosecution because any identifying marks on the boat, including registration information, were covered over with tape; 2) the boat in the demonstration had a different engine than that on appellant's boat; 3) the seats were mounted on pieces of wood, which raised the center of gravity of the boat; 4) the weight of the object being thrown overboard was unknown; 5) ropes could be seen trailing the back of the boat and it was unclear if they were attached to anything; 6) Raffi Naljian, who worked for defense counsel's firm, wore a weight belt, which would have impeded his movement; 7) Naljian's

manipulation of the weighted object occurred in the rear of the boat while Naljian was standing on the boat's gunwale (top edge of the side of the boat), which was surely intended to sink the boat;[130] 8) the prosecution had received no information on who was present during the demonstration or where it took place; 9) it was unknown how long the experiment took to recreate; 10) the weather conditions on the unknown body of water were likewise unknown, including winds, tides, and currents; 11) it was unknown why the boat was already sinking before the experiment was conducted; 12) the gas tank was on wrong side compared to its position on appellant's boat; 13) the boat's batteries were also in a different location; and, 14) the dummy, being apparently made of sand, started to take on weight when wet. (104 RT 19402-19404.)

The defense responded: 1) the dummy was made of rock and weighed 150 pounds before and after the experiment; 2) Naljian wore a weight belt to add 20 pounds of weight, presumably to approximate appellant's December 2002 weight of nearly 200 pounds; 3) the boat used was the "[e]xact same boat" as appellant's; 4) the location was San Francisco Bay "[r]ight off of Brooks [I]sland at 12:30 or 1:00"; 5) the demonstration was filmed by another lawyer from defense counsel's firm; 6) the rope attached to the boat had no effect on the experiment; it was a safety measure; 7) the dummy was placed in one of three positions which corresponded to prosecution evidence concerning the possible positions of Laci's body in the boat; 8) a weight was placed in the boat which

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[130] In the video, Naljian can be seen with his right foot firmly planted on the gunwale, while his body is positioned in the stern or rear of the boat and on the starboard or right side. The bulk of the weight in the boat appears to be concentrated at the stern, including Naljian, the dummy, and the motor. Approximately 350 pounds of weight (Naljian and the dummy) was concentrated in the right rear quadrant of the boat.

corresponded to the location of the battery on appellant's boat; 9) there were also weights placed in the boat to approximate the four anchors the prosecution theorized were in appellant's boat; and, 10) the water conditions were calmer during the experiment than they had been on Christmas Eve. (104 RT 19404-19405.) Defense counsel argued that the prosecution's concerns went to the weight of the experiment, not its admissibility. (104 RT 19406.)

Addressing defense counsel's observation that the prosecution considered doing an experiment and then decided against it, the prosecutor explained that under California law such an experiment must have been substantially similar to the actual events. (104 RT 19406.) Yet, there were no eyewitnesses to what exactly transpired on the Bay. And, insofar as the prosecution called witnesses to talk about certain aspects of appellant's trip to the Bay, no witness testified that appellant stood on the gunwale of the boat. (104 RT 19406-19407.) The prosecutor also reiterated his concerns about the effect of the plywood in the boat pointing out that, at the end of the videotape, there was no longer any plywood in the base of the boat (or seats mounted on top of the plywood). This led the prosecutor to the conclusion that the addition of the plywood was intended to adversely affect the stability of the boat because it raised the center of gravity. (104 RT 19407.)

With presumably unintended irony, defense counsel responded that the issue of plywood in the boat went to weight, not admissibility. (104 RT 19407.) However, the court disagreed:

> No, I think it goes to the admissibility. I'm going to rule under [Evidence Code section] 352 that it's not admissible, because that's a point well taken. Because it has to be substantially similar. We don't know what [] the situation was there. There is no testimony []as to how this body may have been disposed of from a boat. We don't know that.

(104 RT 19407.)

Defense counsel argued that the experiment was needed to test the prosecution's theory that appellant took Laci's body on his boat and disposed of it in the Bay. (104 RT 19407.) When counsel asked the court how the defense could otherwise counter the prosecution's theory, the court suggested using appellant's boat, having someone not affiliated with counsel's law firm do the experiment, and doing it under wave and tidal conditions similar to those on Christmas Eve 2002. (104 RT 19408.) The court noted that the defense had not presented any specifics about the conditions during the experiment, characterizing that portion of the experiment as "speculation and conjecture." (104 RT 19408.) The court also pointed out that when the prosecution placed a pregnant woman in appellant's boat to demonstrate that Laci's body could be hidden in the boat, the model's weight was similar to Laci's. (104 RT 19409.) When defense counsel countered that the model was an employee of the District Attorney, the court responded that all the woman did was lay in the boat; she did not attempt to throw something in the water from the boat. (104 RT 19409.)

Defense counsel called the court's ruling "an outrage" and "absurd." (104 RT 19409.) He then demanded that appellant's boat be turned over to the defense. (104 RT 19409.) When the court tried to explain the distinction between the defense's proffer and what the prosecution did with appellant's boat, defense counsel interrupted and again demanded the court order the boat to the defense. (104 RT 19410.) The court tried once again to explain the distinction to counsel, but counsel cut the court off a second time. (104 RT 19410.) After the court managed to eke out a few words, defense counsel interrupted a third time. (104 RT 19410.) Out of apparent frustration, the court said, "I don't have to explain my damn rulings. I made my rulings. I made this ruling, and that's the ruling, period." (104 RT 19410.) And, the court told counsel that it was not going to give him

appellant's boat. (104 RT 19410.) The court explained its reasoning for excluding the defense taped experiment:

> I'm not persuaded that particular demonstration is accurate enough to be sent to this jury for the reasons I have stated on the record. It's not the same boat. [] You don't know what the wave action was. We don't know [] if it was windy. We don't know anything about - - we don't know where by Brooks Island. [¶] If this is what happened, I don't know what happened out there. I wasn't there. I don't know where in Brooks [I]sland this body could have been thrown in the water. I don't know. They could have been [thrown] in the shallow part for all I know.

(104 RT 19410-19411.)

After addressing defense counsel's further argument, the court stated: "I'm not satisfied that that's a close enough representation of what happened. That's it." (104 RT 19411.)

A short while later, the court told the parties it wanted to revisit the issue. As the court was speaking, defense counsel interrupted again and said, "Well, I don't want to get hot - - I don't want to - - I know I have got a boiling point." (104 RT 19413.) At last, defense counsel permitted the court to explain, "I'd be willing to [] turn the boat over to you if you want to conduct the experiment. I think you should have representatives of the [P]eople there to observe what happens." (104 RT 19413.) Responding to defense counsel's protestations, the court explained it was to avoid the problems that were encountered with the videotaped experiment. (104 RT 19413.) After further brief discussion with the court, counsel stated the defense would consider the court's suggestion. (104 RT 19414.)

The court elaborated on what other things might ensure the admissibility of a defense experiment, including the suggestion that the boat be placed in the area of the Bay identified by Dr. Cheng and that the boat's position be identified in relation to Brooks Island. (104 RT 19414.) The court explained that the prosecution would be in another boat and

could observe the experiment. (104 RT 19414.) Under those circumstances, the court was also willing to have Mr. Naljian conduct the experiment again. (104 RT 19415.) While it might be difficult to recreate the exact same situation with tides, winds, and currents, the court expressed its willingness to revisit the issue. (104 RT 19414-19415.) But, the court advised that the weather conditions should be as similar as possible to those on the Bay on December 24, 2002. (104 RT 19416.) The court also pointed out that using appellant's boat obviated the plywood issue that was a problem with the videotaped demonstration. (104 RT 19418.)

The court reiterated its willingness to reconsider its ruling and explained that, if a representative of the prosecution was permitted to observe the experiment, that witness could testify to what they observed. (104 RT 19418.) Under those circumstances, the observations would be germane to the weight to be accorded the experiment, not its admissibility. (104 RT 19418.) Defense counsel thanked the court and stated that he would talk with appellant and look into weather conditions on the Bay for the upcoming weekend. (104 RT 19415, 19416.)[131] As appellant acknowledges (AOB 304), the defense elected not to conduct a boat demonstration using appellant's boat on the Bay and, therefore, declined to take the trial court up on its offer to reconsider its ruling excluding the videotaped demonstration.

At the start of the penalty phase on November 30, 2004, the subject of the excluded experiment came up again. Referring to Mr. Naljian's position on the gunwale of the boat, the court observed that "nobody stands on the gunwales of a boat, puts his feet on the gunwales of a boat and tries

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[131] During the course of the discussion, the court also apologized for losing its patience earlier (104 RT 19414), with defense counsel's numerous interruptions.

to dump a body in water." (113 RT 20959.) The court also mentioned its concerns about the plywood in the boat (113 RT 20960) and the "issue as to the conditions of the bay at that time" (113 RT 20961). The court reiterated its view that there was a lack of foundation for admissibility of the experiment because "it was not reliable." (113 RT 20959.)

Further, the court reminded defense counsel that it gave the defense an opportunity to conduct a new experiment using appellant's boat. (113 RT 20960.) Defense counsel responded that requiring the presence of the prosecution during such an experiment was a violation of appellant's Fifth and Sixth Amendment rights. (113 RT 20960.) With respect to the videotaped experiment, counsel stated that the plywood was in the boat to make it easier to stand in the boat. (113 RT 20961.) Defense counsel contended the boat was in "identical condition" to appellant's boat. (113 RT 20961.) Counsel also stated that the boat was located in the same area of the Bay identified by Dr. Cheng during his testimony. (113 RT 20961.)

2. *The videotaped experiment was not substantially similar to what was known about appellant's boat trip on the Bay*

A defendant's right to present evidence is not absolute. (*Perry v. Rushen* (9th Cir. 1983) 713 F.2d 1447, 1450.) "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.)

A trial court has broad discretion in determining relevancy, but it cannot admit evidence that is irrelevant or inadmissible under constitutional or state law. (*People v. Blacksher* (2011) 52 Cal.4th 769, 819.)

> "A party who seeks to introduce experimental evidence must show as foundational facts that the experiment was relevant, that it was conducted under conditions the same as or substantially

> similar to those of the actual occurrence, and that it 'will not consume undue time, confuse the issues, or mislead the jury [citation].' [Citation.] The party need not, however, show that the conditions were absolutely identical. [Citations.] Under Evidence Code section 352, the trial court has wide discretion to admit or reject experimental evidence. We reverse decisions to admit or exclude such evidence only when the trial court has clearly abused its discretion." [Citation.]

(*People v. Jones* (2011) 51 Cal.4th 346, 375-376.) "'The proponent of experimental evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation.' [Citation.]" (*People v. Turner* (1994) 8 Cal.4th 137, 198.)

In this case, the trial court properly excluded the videotaped demonstration because the defense failed to show that its boat stability experiment was conducted under conditions that were substantially similar to those involving appellant's boat trip on San Francisco Bay on December 24. In that regard, it would have misled the jury.

First, the boat the defense used was very different from appellant's boat. The demonstration boat contained plywood boards on top of which seats were mounted—the one in the stern raised quite high. The boat also contained plywood in the hull. (Defense Exh. No. D9E [as marked].) Appellant's boat was not outfitted with plywood boards with mounted seats or plywood in the hull. (People's Exhs. Nos. 106G, 106I.) Therefore, defense counsel's assurance that it was the "[e]xact same boat" (104 RT 19404) was clearly inaccurate. Appellant makes the same mistake when he states, "The trial court accurately noted that although the defense used the same model boat . . . ." (AOB 311.) The trial court did not make a finding that it was, in fact, the same model as appellant's boat. (104 RT 19408.) In fact, as the prosecutor pointed out (104 RT 19402), and as can be seen in the video, the boat's markings and registration information were covered with tape so it was unclear if the boat used in the experiment was, in fact,

the same model as appellant's boat. The prosecution was not permitted the opportunity to view the boat. (104 RT 19402.) Even if it was the same model, the demonstration boat had been significantly modified.

Further, as the prosecutor argued, raising the center of gravity made it more likely the demonstration boat was susceptible to capsizing. (104 RT 19402, 19407.) Watching the demonstration, including Mr. Naljian putting the weight of his right leg onto the gunwale of the boat, it seems the experiment was designed to sink the boat, as the prosecutor reasonably contended. (104 RT 19402, 19407.) It was also unclear what effect the weight of the boat's engine may have had during the experiment. The prosecutor noted that the boat in the experiment was outfitted with a different engine than that on appellant's boat. (104 RT 19402.)

Referencing the videotape, the prosecutor pointed out that the experiment was conducted from the back of the boat (104 RT 19402), and that, combined with a higher center of gravity and Mr. Naljian's weight on the gunwale, affected the reliability of the experiment. Indeed, as the prosecutor observed, the boat was already sinking before the experiment began. (104 RT 19403; Defense Exh. No. D9E.)

Additionally, no evidence had been presented to the jury that appellant deposited Laci's body into the Bay from the rear of the boat, while standing with his right leg on the gunwale.

Moreover, during the pendency of the trial court's consideration of the issue, the defense proffered no credible testimony as to the exact location on the Bay where the experiment was conducted or whether the wind and wave action was comparable to the conditions on December 24, 2002, as testified to by Dr. Cheng (101 RT 18893-18894; People's Exh. No. 283). The only information the trial court received in this regard was defense counsel's personal assurance that the Bay conditions were calmer during the experiment than they had been on December 24 (104 RT 19405) and

Mr. Naljian's statement that the experiment was conducted "[r]ight off of Brooks [I]sland" (104 RT 19404).[132] These unsubstantiated statements compounded the foundational problems with the experiment.

In *People v. Roehler*, *supra*, 167 Cal.App.3d 353, which we discussed for its relevance to the issues in section IX, *ante*, the Court of Appeal found a sufficient foundation had been laid for prosecution experiments involving the stability of the boat involved in the murders. On the day in question, the defendant, his wife, eight-year-old stepson, and the family's dog set out on the ocean in a dory—"a small craft propelled by oars." (*Roehler*, at p. 365.) The group started rowing out to Bird Rock, a jagged rock rising out of the ocean and inhabited by numerous sea birds. (*Ibid.*) Testimony was taken that the weather conditions were "relatively calm" that day in early January. (*Ibid.*) According to the defendant, at one point the dog, enticed by the birds, attempted to jump out of the boat. The defendant reached for the dog suddenly, which caused the boat to upend quickly and send everyone overboard. (*Ibid.*)

The prosecution presented evidence that contradicted appellant's contention that the drownings were accidental, including experiments that addressed the boat's stability. The testing took place in July, approximately six months after the incident. (*Roehler*, *supra*, 167 Cal.App.3d at p. 369.) The actual boat was used and the testing took place at Bird Rock, where the incident occurred. (*Ibid.*) Three individuals who approximated the size and weight of the victims participated. They were also dressed as the defendant and his victims had been at the time of the incident. (*Ibid.*) A

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[132] After the guilt phase was concluded, defense counsel belatedly told the trial court that the experiment was conducted in the area of the Bay identified by Dr. Cheng during his testimony. (113 RT 20961.) And, counsel continued to maintain that the boat in the experiment was "identical" to appellant's boat. (113 RT 20961.) Clearly, it was not.

police detective was used in place of appellant and a female employee of the sheriff's department took the place of the defendant's wife. A young boy stood in as the defendant's stepson. (*Ibid.*) Evidence was adduced that the seas were rougher in July than they had been in January. (*Ibid.*)

In *Roehler*, the prosecution conducted eight separate tests. During the first three tests, the participants moved their bodies about the small craft in an attempt to cause it to overturn. However, while the boat took on water, it righted itself. (*Roehler*, *supra*, 167 Cal.App.3d at p. 369.) In the next three tests, the participants managed to overturn the boat utilizing their shifting body weight, compounded by the "considerable wind and choppy seas." But, the boat turned over very slowly. (*Ibid.*) The seventh test did not overturn the boat. During the eighth test the boat did overturn, but again, it happened very slowly. (*Ibid.*) An experienced naval architect later testified that dories are manufactured so that they are very difficult to capsize. (*Ibid.*)

The defendant contended the trial court erred in admitting evidence of the experiments. (*Roehler*, *supra*, 167 Cal.App.3d at p. 385.) The *Roehler* court disagreed and upheld the trial court's determination that the testing was conducted under substantially similar conditions. (*Ibid.*) Although the trial court misinstructed on one aspect of the testing conditions—the weather—the Court of Appeal found it unlikely the jury was misled because "ample evidence was presented to them concerning the actual weather conditions extant both on January 2, 1981 and during the July 1981 testing." (*Id.* at p. 388.) The appellate court also noted that the trial court had determined the seas were no rougher at the time of the incident than they had been during the experiments. If anything, the conditions were worse in July, when the testing was conducted. (*Ibid.*) In upholding the trial court's ruling, the Court of Appeal also looked favorably upon the fact that the same boat was used for the experiments. (*Ibid.*)

Conversely, in *People v. Gonzalez* (2006) 38 Cal.4th 932, the defendant sought to admit a videotape of the crime scene which purportedly showed the lighting conditions at the time of the shooting. The trial court found there were "'too many differences'" between the tape and the actual crime scene conditions, including the lighting conditions, and excluded the tape for fear of the jury being misled. (*Gonzalez*, *supra*, 38 Cal.4th at p. 952.) The Court upheld the trial court's decision as a proper exercise of its discretion. (*Gonzalez*, at pp. 952-953; see also *People v. Jones*, *supra*, 51 Cal.4th at p. 376.)

Likewise, here, there were too many differences between the defense's videotaped demonstration and what evidence had been adduced about appellant's boat trip on Christmas Eve. The defense's edited taped experiment contained none of the hallmarks of similarity to known circumstances surrounding the murders, which serves to distinguish it from the experiments admitted into evidence in *Roehler*. Further, the defense demonstration assumed facts not in evidence, such as where appellant was positioned in the boat when he pushed Laci's body overboard. For these reasons, if there was any probative value to the defense's experiment, it was far outweighed by the potential to mislead the jurors.

Insofar as appellant contends his Fifth and Sixth Amendment rights were compromised by the trial court's evidentiary ruling (AOB 315-318), the argument fails.

> "As a general matter, the '[a]pplication of the ordinary rules of evidence ... does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.]

(*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

Here, the trial court did not impede appellant's ability to mount a defense. Instead, the court properly excluded highly unreliable and irrelevant evidence the defense put forward concerning the stability of appellant's boat. Because the defense experiment was not substantially similar to the events in question, the videotape was irrelevant to the issue of the boat's stability. (See Evid. Code, § 210 ; see also *id.*, § 350.)

Further, the trial court agreed to reconsider its ruling if the defense opted to conduct a new experiment using appellant's boat in the area of the Bay identified by Dr. Cheng, and in Bay conditions similar to those on December 24, 2002. Not wanting the prosecution to observe any such experiment, as the trial court required, the defense declined the court's offer. Nor did the trial court preclude the defense from calling witnesses—experts or otherwise—on the issue of the boat's stability. For these reasons, appellant's "attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive" (*Boyette, supra*, 29 Cal.4th at p. 427).

Even if the trial court's ruling excluding the videotaped experiment was error, it is not reasonably probable appellant would have been acquitted in the absence of any error. (See *Boyette, supra*, 29 Cal.4th at p. 428 [applying *Watson* standard of review].) Credible evidence strongly supported the prosecution's position that appellant's boat was inherently stable. First, David Weber, the Vice President of Engineering for the company that manufactured appellant's boat, testified that the boat's capacity was four people or 500 pounds. Adding in a 15-horsepower motor and any gear, the maximum weight capacity for the boat was 680 pounds.

(71 RT 13849-13850; People's Exh. No. 132.)[133] These capacities were in accord with the United States Coast Guard's guidelines. (71 RT 13849-13850.) Weber detailed the numerous flotation and stability tests that were necessary to certify the boat as seaworthy according to the National Marine Manufacturers Association's standards. (71 RT 13850-13851.) Again, these standards mirrored those of the Coast Guard. (71 RT 13851.) Appellant's boat passed the test parameters and recertification approximately 15 times. (71 RT 13851-13852, 13877.) Weber also mentioned that the 14-foot Gamefisher boat was designed to cut through rough water. (71 RT 13852-13853.) That model had been manufactured for at least 30 years. (71 RT 13878.) In Weber's opinion, it was "a safe boat." (71 RT 13878.)

As for the effects, if any, of weight distribution on appellant's boat, Bruce Peterson—the man who sold the boat to appellant—testified that he and his wife used the boat to go fishing together. (62 RT 12153.) Peterson explained that while the boat was on the water, he and his wife could stand up and move around in the boat. (62 RT 12154.). On many occasions, Peterson and his wife would be on the same side of the boat as one of them reeled in the fish while the other prepared to net the fish. (62 RT 12155.)

Additionally, expert fisherman Angelo Cuanang explained that he could get a 150-pound fish out of a 13-foot boat by himself while the boat was drifting or anchored. (71 RT 13794-13796.)

Had the defense been permitted to introduce the videotaped experiment, it is safe to say the prosecution would have readily exposed the numerous infirmities associated with the experiment. Contrasted with the

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[133] This information was posted on the boat itself. (People's Exh. No. 132.) Similar information for the defense's demonstration boat was not presented. Nor does it appear to be visible in the videotape.

credible testimony concerning the stability of appellant's boat presented during the prosecution's case, the jurors would have accorded little, if any, weight to the defense experiment.

B. That Portion of the Trial Court's Ruling Permitting the Prosecution to Observe a New Defense Experiment Was a Reasonable Order Designed to Protect the Interests of Both Parties While Advancing the Search for the Truth

Appellant next contends the trial court's offer to reconsider its ruling if the defense conducted a new experiment with appellant's boat, under similar conditions, and with the prosecution present to observe, violated his Sixth Amendment right to the effective assistance of counsel (AOB 321-326) and right to due process under the Fifth and Fourteenth Amendments (AOB 326-327).

Appellant's claim is without merit. The court's requirement that a representative from the prosecution be present at the experiment properly balanced the interests of the parties while ensuring the jury received evidence that was probative on the issue of the boat's stability and not misleading. This is especially true in light of the infirmities with the first defense experiment.

1. *Procedural problems: a justiciable claim is lacking but otherwise the claim was waived*

As a threshold matter, we contend the issue is not ripe for this Court's consideration because appellant's constitutional rights were not implicated, given the procedural posture in the court below. Had the trial court actually permitted the prosecution to present inculpatory evidence derived from a second defense stability experiment, when the defense opted not to present evidence of the second experiment, there could be a justiciable issue, perhaps. But, that is not what happened here. The defense elected not to do a second experiment. Therefore, the facts never gave rise to a potential

constitutional violation. Simply put, there is no justiciable issue. "[T]he ripeness requirement prevents courts from issuing purely advisory opinions, or considering a hypothetical state of facts in order to give general guidance rather than to resolve a specific legal dispute. [Citation.]" (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 998.)

Indeed, appellant's argument—as evidenced by the cases he cites in support—amounts to nothing more than a hypothetical: His constitutional rights *might have* been abridged had the prosecution witnessed a second defense experiment that *may have* produced inculpatory results, which results the trial court *might have* permitted the prosecution to present, even though the defense *may have* presented no evidence associated with the experiment.

Alternatively, given the propriety of the trial court's ruling, which we argue below, appellant has waived the issue by declining to avail himself of the opportunity to test appellant's boat. In choosing to forego conducting a new experiment, he has forfeited his right to complain that he had no means to rebut the prosecution's evidence on the subject. (See *People v. Velez* (1983) 144 Cal.App.3d 558, 569 [where prosecutor argued erroneous instruction during closing argument defendant waived error by declining trial court's offer to reopen closing argument]; see also *People v. Newlun* (1991) 227 Cal.App.3d 1590, 1604-1605 [lack of notice claim waived by failure to object or request continuance to prepare response to new evidence]; 6 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Reversible Error, § 3289, pp. 4068-4069 ["A defendant may be precluded from raising an error as a ground of appeal where, by conduct amounting to acquiescence in the action taken, he waives the right to attack it."].)

In any event, appellant's argument is without merit.

2. *The Court's ruling did not violate appellant's Sixth Amendment right to the effective assistance of counsel or his right to due process under the Fifth and Fourteenth Amendments*

In light of the substantial problems with the defense's first take at a boat stability experiment, the trial court offered to reconsider its ruling excluding such testing if the new experiment was done under substantially similar conditions and with the prosecution present. (104 RT 19413.) The boat was, after all, prosecution evidence. (People's Exh. No. 299.) The defense could choose to accept the condition of the prosecution's presence or not.

> The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. [Citation.] Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

(*McGautha v. California* (1971) 402 U.S. 183, 213, vacated in part on other grounds sub nom. in *Crampton v. Ohio* (1972) 408 U.S. 941; see also *People v. Cooper* (1991) 53 Cal.3d 771, 816 (*Cooper*).)

Appellant's claim under the Sixth Amendment is without merit. "The Sixth Amendment does not confer the right to present testimony free from legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." (*United States v. Nobles* (1975) 422 U.S. 225, 241.) And, that is precisely what was at risk here. The purpose of the trial court's order was to allow the prosecution the opportunity to observe what occurred on the scene, to ascertain for themselves whether new evidence was taken, whether existing evidence was altered or destroyed, and to otherwise witness the occurrence of any other irregularities.

Had the trial court permitted the defense to propound a second experiment—conducted in secrecy and with the ability to edit out portions of the experiment—the prosecution would have been at a distinct disadvantage to meaningfully rebut such "evidence" because important details could have been effectively altered or destroyed. The jury would have, thus, been left to consider a half-truth.

In *Cooper*, this Court observed:

> "When defense counsel alters or removes physical evidence, he necessarily deprives the prosecution of the opportunity to observe that evidence in its original condition .... [T]o bar admission of testimony concerning the original condition and location of the evidence in such a case permits the defense in effect to 'destroy' critical information ....' [Citation.]"

(*Cooper*, *supra*, 53 Cal.3d at p. 815, quoting *People v. Meredith* (1981) 29 Cal.3d 682.)

By way of analogy, in *People v. Bolden* (2002) 29 Cal.4th 515 (*Bolden*), the trial court permitted the prosecution to call the defense expert as a percipient witness for purposes of a *Kelly* hearing involving DNA evidence. (*Bolden*, *supra*, 29 Cal.4th at p. 552.) The trial court determined the prosecution needed the ability to corroborate its own expert after the defense challenged the prosecution's expert. To this end, the trial court permitted the prosecution to call the defense expert—the only other witness to the testing. (*Ibid.*) This Court found no violation of the defendant's rights to federal and state due process or his right to the effective assistance of counsel. (*Ibid.*)

Unlike *Bolden*, where there was an insufficient quantity of DNA material for testing, in *Prince v. Superior Court* (1992) 8 Cal.App.4th 1176 (*Prince*), there existed multiple pieces of evidence to permit testing by both parties. The trial court allowed the parties' experts to be present at the testing and all reports were made available to each party. (*Prince*, *supra*, 8

Cal.App.4th at p. 1179.) Given that the evidence would not be consumed by defense testing and, thus, the prosecution not put at a disadvantage, the appellate court held the defense investigation and findings were not discoverable and the defendant's Sixth Amendment right to effective assistance of counsel was, therefore, infringed upon. (*Id.* at pp. 1179-1180.)

In *People v. Varghese* (2008) 162 Cal.App.4th 1084 (*Varghese*), the same appellate court that decided *Prince* was faced with "a situation somewhere along the spectrum" because there were two samples of DNA, but each could only be tested once and the prosecution had already used up one sample. (*Id.* at p. 1095.) The trial court had fashioned a compromise remedy whereby "the remaining sample could be tested by an independent expert or an expert of defendant's choice but requiring defendant to reveal the bottom-line result of the test, that is, whether the testing identified defendant or not." (*Ibid.*) The appellate court reviewed the relevant authorities, observing that "[t]he opportunity for the prosecution to adequately meet a defendant's challenge to its expert and the expert's findings is an important component of the choice to be made. Indeed, that component appears to underlie all of the cases, including our decision in *Prince*." (*Ibid.*) The *Varghese* court found the trial court's remedy "protected the interests of both parties and advanced the interest of determining the truth. It reflected an acceptable exercise of discretion." (*Id.* at p. 1096.)

Varghese eventually made its way to the Ninth Circuit Court of Appeals on habeas review. (*Varghese v. Uribe* (2013) 736 F.3d 817.) In affirming the district court's decision in favor of the state court judgment, the Ninth Circuit recognized that "the state, which has to prove its case beyond a reasonable doubt, has an interest in bulletproofing its

evidence . . . ." (*Id.* at p. 826.) Evaluating Varghese's Sixth Amendment claim, similar to that advanced by appellant here, the Court of Appeals observed that "[a] reasonable jurist might well conclude that disclosure of an expert's test results is less of an intrusion on the attorney-client relationship than disclosure of the expert's subjective impressions or mental processes would be." (*Id.* at p. 827.)

Here, if the defense elected to conduct the experiment, a representative from the prosecution would have been in a different boat merely observing the experiment and the conditions under which the experiment was conducted. (104 RT 19414.) Under those circumstances, there would have been no intrusion into confidential communications, subjective impressions, or mental processes of any member of the defense team.[134]

Further, viewed in the context of the consumption-of-evidence cases discussed above, the prosecution's presence ensured that the defense would not be able to alter or destroy evidence pertaining to the stability of appellant's boat by virtue of the manner in which the experiment was conducted or in the subsequent editing of the videotape of the experiment. Indeed, the prosecution's presence insulated the defense from the very infirmities that sank the excluded defense experiment. In other words, the

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[134] Relatedly, this Court has held that reciprocal discovery under Penal Code section 1054 does not limit a defendant's right to the effective assistance of counsel by chilling trial preparation or requiring the discovery of attorney work product. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 379-382.) Although attorney work product is generally nondiscoverable under state statutory provisions, the work product of an attorney can be discovered if "the court determines that the denial of discovery will unfairly prejudice the party seeking discovery or will result in an injustice." (*Izazaga*, *supra*, at p. 381; Code Civ. Proc., former § 2018, subd. (b).)

prosecution's presence enhanced the likelihood the experiment would be admitted.

The opinions upon which appellant relies, such as *State v. Mingo* (1978) 77 N.J. 576 [392 A.2d 590], are readily distinguishable from the order at issue here. Those cases stand for the proposition that the Sixth Amendment right to the effective assistance of counsel prohibits the prosecution from discovering the identities and reports of non-testifying experts retained by the defense and is likewise prohibited from calling such experts to testify at trial. The *Mingo* court made clear that its opinion was "confined to reports of opinions of expert witnesses and is not intended in any way to bear upon the question of discovery or utilization at trial of information of any other nature assembled by the defense." (*Mingo*, *supra*, 77 N.J. at p. 585.)

In this case, the court's order did not make any provision for the prosecution to discover the reports of a defense expert or to call a non-testifying defense expert as a witness. Further, the court's order did not impede defense counsel's retention of an expert or an expert's testing. Thus, there was no imposition on appellant's right to the effective assistance of counsel in the preparation of appellant's defense. Instead, the trial court's order was properly geared toward advancing the truth-seeking function of the trial.

Appellant relies on *Ake v. Oklahoma* (1985) 470 U.S. 68, 76 (*Ake*), for his argument that the court's order deprived him of a fair opportunity to present a defense under the Fifth and Fourteenth Amendments.[135] (AOB 326-327.) But, *Ake* does not compel the result that appellant seeks here.

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[135] The Fifth Amendment Due Process Clause applies only to the federal government, not the states. (See *Public Utilities Comm'n v. Pollak* (1952) 343 U.S. 451, 461 [strictures of Fifth Amendment due process apply (continued...)

Ake held that the Constitution requires that a state provide access to a psychiatrist's assistance if the defendant cannot otherwise afford one. (*Ake v. Oklahoma*, *supra*, 470 U.S. at pp. 76-83.) Denying psychiatric assistance

> leads inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the crossexamination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.

(*Ake*, *supra*, 470 U.S. at p. 82.)

Quite distinct from what occurred in *Ake*, appellant was never deprived of any expert assistance in the preparation of his defense. He was simply not allowed to take the prosecution's evidence—appellant's boat—and divest the prosecution of the ability to observe the experiment in real time. Otherwise, the prosecution would be relegated to having to rebut a heavily edited videotape and a host of unknown variables, as occurred with the excluded experiment.

Appellant's suggestion that the prosecution could have conducted its own experiment (AOB 327), misses the point. Having already viewed one deficient defense experiment, the trial court wanted to ensure that any new experimental evidence put before the jury was substantially similar to

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(...continued)
only to actions of federal government]; *Moose Lodge No. 107 v. Irvis* (1973) 407 U.S. 163, 172-173 [Fifth Amendment Due Process Clause applies to the federal government, while the Fourteenth Amendment Due Process Clause applies to the states].) Therefore, to the extent that appellant argues a Fifth Amendment due process violation (see, e.g., AOB 326, 333, fn. 53), he fails to state a proper ground for relief.

known events (i.e., that it was relevant) and that the party against whom that evidence was introduced—the prosecution—be permitted a meaningful opportunity to cross-examine any defense witnesses or otherwise rebut the manner in which the experiment was conducted, as well as the results. The trial court's order, balancing the interests of the parties while advancing the search for the truth, was an acceptable exercise of discretion.

3. *Appellant has not demonstrated prejudice under Watson, Strickland, or Chapman*

Appellant must demonstrate prejudice to be entitled to reversal on the basis of evidentiary error or ineffective assistance of counsel. In both instances, the applicable test is whether there is a reasonable probability of a more favorable verdict in the absence of the complained of error or omission. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).)

Appellant relies on *Strickland* as support for his argument that prejudice should be presumed in this case because the government—in this case, the trial court—induced counsel's ineffectiveness in not conducting the second stability experiment. (AOB 328-333.) However, because the facts here do not constitute governmental interference with appellant's right to effective assistance, as we contend below, he must demonstrate prejudice. As the high court explained:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel *altogether* is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronic*, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 658, 104 S.Ct., at 2046. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

(*Strickland, supra*, 466 U.S. at p. 692, emphasis added.)

In considering the issue of presumptive prejudice in this context, in *People v. Hernandez* (2012) 53 Cal.4th 1095, this Court, citing *Bell v. Cone* (2002) 535 U.S. 685, clarified:

> A defendant claiming counsel failed or was unable to subject the prosecution's case to meaningful adversarial testing is relieved from the burden of showing prejudice only if " 'counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.' " (*Bell v. Cone*, *supra*, 535 U.S. at p. 696, italics added, quoting [*United States v.*] *Cronic* [1984], *supra*, 466 U.S. [648] at p. 659.)

(*People v. Hernandez*, *supra*, 53 Cal.4th at p. 1106.)

In *Hernandez*, the Court listed examples of Supreme Court cases where the government's interference with counsel warranted a presumption of prejudice. (*Id.* at p. 1104, citing *Cronic*, *supra*, 466 U.S. at p. 659, fn. 25.) These cases included the denial of counsel at a preliminary hearing, a bar on an attorney-client consultation during an overnight recess, denial of counsel at arraignment, and a bar on counsel's ability to give a closing argument at a bench trial (see AOB 330-331, citing *Herring v. New York* (1975) 422 U.S. 853). (*Ibid.*)

Given these authorities, *Strickland* does not impose a "prejudice presumed" standard in a matter, such as this, where a state court ruling has permitted the defense to conduct testing of prosecution evidence (as requested), but with the condition that the prosecution be permitted to observe the experiment. *Strickland* was concerned about those cases where a defendant is deprived of the right to counsel *altogether* and prejudice is impossible to assess. (*Strickland,* 466 U.S. at p. 692.) Here, appellant was not deprived of the right to counsel. Indeed, he was not even deprived of the right to do the very testing he was seeking to do. Furthermore, this was not the type of scenario that renders prejudice "so likely that case-by-case inquiry into prejudice is not worth the cost." (*Strickland,* 466 U.S. at p.

692.) Therefore, appellant's attempt to avoid the obligation of proving prejudice is unavailing.

Appellant cannot demonstrate that it is reasonably probable he would have achieved a more favorable result had he been allowed to conduct confidential testing of the prosecution's evidence. (*Strickland*, *supra*, 466 U.S. at p. 694.) On the contrary, appellant's argument suggests the Court speculate that if he had been permitted to test the boat in clandestine fashion, the results would have been exculpatory. We cannot know that because the defense elected not to test the boat under substantially similar conditions absent the veil of secrecy and the potential benefits of editing.

All in all, appellant cannot establish prejudice due to the overwhelming amount of irrefutable incriminating evidence against him, detailed in section VI.D., *ante*. Further, the defense would be hard-pressed to also overcome the credible evidence derived from unbiased sources (e.g., the boat's manufacturer, the boat's former owner, and an expert angler) establishing the inherent stability of appellant's boat.

Last, the outcome is no different if the trial court's ruling constituted a violation of appellant's Fifth and Fourteenth Amendment rights and is subjected to harmless error analysis under *Chapman v. California*. Insofar, as appellant argues to the contrary (AOB 333, fn. 53), we point out that his reliance on the taped experiment as being indicative of the instability of appellant's boat is—like that experiment itself—unfounded.

C. The Trial Court's Ruling Denying the Defense Motion for a Mistrial Based on the Jurors' Examination of Evidence Was a Proper Exercise of Discretion

The last sub-part to this claim is appellant's challenge to the trial court's denial of the defense motion for a mistrial. (AOB 333-342.) The motion was based on the jurors' actions during the second viewing of

appellant's boat. Appellant alleges prejudicial misconduct on the part of the jurors. Therefore, in appellant's view, the trial court's denial of the motion was an abuse of its discretion.

Not so. We contend the trial court got it right: The jury committed no misconduct. What the jurors did was well within the bounds of permissible examination of appellant's boat as an item of evidence and in the context of evidence adduced concerning the stability of the boat. Even if the jurors committed misconduct, it was not prejudicial, given the court's admonition. Therefore, denial of the defense motion for a mistrial was a proper exercise of the court's discretion.

1. *Procedural background*

In late July 2004, during the course of the prosecution's case, the court and parties permitted the jury an opportunity to view appellant's boat. (See 71 RT 13730-13731, 13835-13843.)

A few months later, on November 8, during deliberations, the jury made a request for certain exhibits and asked to see appellant's boat and trailer again. (111 RT 20640; People's Exhs. Nos. 299, 300.) The court and parties, including appellant, were present for the second viewing, as they were for the first. (111 RT 20642.) As defense counsel recounted for the record, some jurors asked if they could get into the boat, which the trial court permitted. Once in the boat, a couple of jurors tried rocking the boat back and forth. (111 RT 20643, 20644.) Defense counsel objected at that point. (111 RT 20644.) At the end of the viewing, the trial court admonished the jurors that the boat's stability on the trailer was not the same as stability on the water. (111 RT 20644-20645.) Defense counsel characterized the jurors' actions as the taking of evidence and asked to reopen so the defense could show the videotaped demonstration. (111 RT 20643, 20645.)

The court explained:

> I did advise the jury that they should bear in mind that this boat was not in the water as they stood in the boat. And I also advised them that the boat appeared -- also that the boat was secured to a trailer. [¶] The reason why the Court permitted the jury to get into the boat initially -- I didn't know they were going to jump up and down on the boat -- was the fact that the District Attorney had presented an experiment where they had -- a representative of the District Attorney's Office had actually laid down flat in the boat. And I thought it was important for the jury to take a look, see if there was enough room for somebody to sit -- lay down flat in the boat. [¶] That was not, in my opinion, taking additional evidence because it was already set forth on the record.

In response to defense counsel's argument, the prosecutor countered that the boat and trailer were exhibits admitted into evidence and, as such, the jurors were free to examine them thoroughly. (111 RT 20646.) She explained in more detail what occurred during the second viewing:

> Two jurors who got into the boat were not jumping up and down. One had a foot a little bit on one side, one foot on the other. The other stood up and walked towards the end and stood. There wasn't a lot of actual manipulation, standing in it, walking in it. And other jurors looking inside of it. So we don't believe, by any stretch, this is an experiment or demonstration or anything similar.

(111 RT 20646.)

Defense counsel augmented this description stating that the two jurors inside the boat shifted their body weight back and forth. (111 RT 20646.) Defense counsel reiterated his request to reopen the taking of evidence or, in the alternative, he moved for a mistrial. (111 RT 20647.)

The trial court cited case authority for the proposition that close observation or even physical manipulation of evidentiary exhibits during deliberations is not prohibited. (111 RT 20647.) Given this, the court felt a cautionary instruction was sufficient to address defense counsel's concerns. (111 RT 20647.) The court also observed that the jurors' actions in the

boat could work to the benefit of the prosecution or the defense; it was impossible to predict. (111 RT 20647-20648.) As the court stated:

> They carefully sized the boat, they looked at the underneath part of the boat. They could certainly come to [the] conclusion that this boat would have been unstable in attempting to throw somebody over the side. So I think this works both ways. It works -- could work for the prosecution; but it could work for the defense benefit, depending on how the jury interpreted the evidence. So the request is denied.

(111 RT 20648.) The following day, the court clarified that it had denied both the defense request to reopen and the motion for a mistrial. (112 RT 20713.)

On November 30, 2004, at the start of the penalty phase, the court and parties briefly revisited the issue. The court first noted that testimony was taken from a representative of the manufacturer of appellant's boat about the boat's stability. (113 RT 20961.) The previous owner of the boat also testified to the boat's stability. (113 RT 20961.) And, the prosecution presented evidence as to how a pregnant woman would fit into the boat. (113 RT 20961-20962.) The court disagreed that the jurors conducted an experiment in the boat. The court also stated that it had given the jurors an admonition about the boat being on a trailer as opposed to on the water. (113 RT 20963.)

2. *Applicable legal principles*

> A trial court should grant a motion for mistrial "only when ' "a party's chances of receiving a fair trial have been irreparably damaged" ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 282 []), that is, if it is "apprised of prejudice that it judges incurable by admonition or instruction" (*People v. Haskett* (1982) 30 Cal.3d 841, 854 []). "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*Ibid.*) Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion. (See *People v. Valdez* (2004) 32 Cal.4th 73, 128 [].)

(*People v. Avila* (2006) 38 Cal. 4th 491, 573.) Here, of course, the propriety of the trial court's denial of the motion turns on whether the court's assessment of the jurors' conduct was correct.

In *People v. Collins* (2010) 49 Cal.4th 175 (*Collins*), this Court traced a century's worth of jurisprudential history attending a claim of jury misconduct based on experimentation. The Court began its review noting "the venerable authority of *Higgins v. L.A. Gas & Electric Co.* (1911) 159 Cal. 651 (*Higgins*)] and its progeny." (*Collins*, *supra*, 49 Cal.4th at p. 249.) In *Higgins, supra*, 159 Cal. at pages 656 through 657, the Court rejected claims of jury misconduct that were based upon the jury's examination of and possible experimentation with an admitted exhibit—a flashlight. In that context, the Court set out the following framework:

> It is a fundamental rule that all evidence shall be taken in open court and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him. It is this fundamental rule which is to govern the use of such exhibits by the jury. They may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. They may carry out experiments within the lines of offered evidence, but if their experiments shall invade new fields and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain.

(*Higgins, supra*, at pp. 656-657.)

From *Higgins* and subsequent authorities, the Court in *Collins* distilled these principles:

> Not every jury experiment constitutes misconduct. Improper experiments are those that allow the jury to discover *new* evidence by delving into areas not examined during trial. The distinction between proper and improper jury conduct turns on this difference. The jury may weigh and evaluate the evidence it

> has received. It is entitled to scrutinize that evidence, subjecting it to careful consideration by testing all reasonable inferences. It may reexamine the evidence in a slightly different context as long as that evaluation is within the ' "scope and purview of the evidence." ' [Citation.] What the jury cannot do is conduct a new investigation going beyond the evidence admitted."

(*Collins, supra*, 49 Cal.4th at p. 249; original emphasis.)

In *Collins*, the victim was killed by a bullet which entered the right rear of the head and exited through the right forehead. (*Collins, supra*, 49 Cal.4th at p. 184.) The coroner's testimony established this was consistent with the victim kneeling and the shooter standing, and with the victim's head tilting backward. (*Id.* at pp. 235-236.) During penalty phase deliberations, Juror G.B. worked out height patterns on his computer and determined "'that anyone standing six feet away from another person would have to just about be standing on a stool two and a half feet high to get a downward trajectory through the back of the skull of an individual ....'" (*Id.* at p. 237.)

The following day, Juror G.B. conducted a demonstration of his conclusions to fellow jurors. (*Collins, supra*, 49 Cal.4th at p. 238.) He did not tell them about using his computer, "but relied on it 'to back up the statements that were made in the deliberation room about an execution instead of a murder.'" (*Ibid.*) Juror G.B. used a protractor, some string, and the help of another juror to demonstrate his theory to the jury. (*Ibid.*) Since the medical evidence gave no specific angle of trajectory other than it was at a slightly downward angle, Juror G.B. placed the protractor at about five to 10 degrees. (*Ibid.*) The string was positioned at the center of the protractor and held six feet away because the nearest footprints to the body were found six feet away. (*Ibid.*) The Court concluded the jurors' action was not improper because the conduct "did not go beyond the record in its attempt to evaluate the trial evidence." (*Collins, supra*, 49 Cal.4th at p.

251.) "None of the variables relied upon by the jury were outside the scope of the evidence." (*Id* at p. 251.) The jury's demonstration in the deliberation room was simply a "more critical examination" of the evidence admitted. (*Id.* at p. 256, citing *Higgins, supra*, 159 Cal. at p. 659.)

In *People v. Cooper* (1979) 95 Cal.App.3d 844, the defendant argued the jury committed misconduct after a juror indicated that during deliberations, the jurors "reenacted" the defendant's throwing of a plastic bag and based upon that reenactment, they confirmed the police officers' testimony and an in-court demonstration of the throwing incident. The Court of Appeal disagreed:

> The experiment in the present case did not result in the generation of new evidence. [Citation.] During the trial, Officer Rowe had demonstrated the manner in which defendant had thrown the contraband. The jurors simply repeated the officer's reenactment. Nothing requires that the jury's deliberations be entirely verbal, and we would expect a conscientious jury to closely examine the testimony of the witnesses, no less so when that testimony takes the form of a physical act. There was no error in denying the motion for new trial on this ground.

(*Id.* at p. 854.)

One of the cases relied cited by the trial court here was *People v. Turner* (1971) 22 Cal.App.3d 174. (111 RT 20647.) In that case, jurors used a magnifying glass during deliberations to assist them in comparing two photographs. (*Id.* at p. 179.) That conduct did not constitute either new evidence or an impermissible experiment. (*Id.* at pp. 182-183 [""[T]he mere making of a more critical examination of an exhibit than was made during the trial is not objectionable."""].)

And, in *People v. Bogle* (1995) 41 Cal.App.4th 770, another case cited by the trial court here (111 RT 20647), the defendant's set of keys and the victims' safe were admitted into evidence. The defendant testified to what each key unlocked, but he never made mention that any of the keys

were related to the victims' safe. During deliberations, the jurors used one of the keys to unlock the safe. The Court of Appeal agreed with the trial court's determination that the jurors' conduct was proper because it tested the defendant's veracity and any relationship the defendant may have had to the safe. (*Id.* at pp. 780-781.) "Palpation of the safe and the keys was 'within the lines of offered evidence.' [Citation.]" (*Id.* at p. 779.) The *Bogle* court also observed that a jury can reexamine "the evidence in a slightly different context" than was presented at trial, to assist it in reaching a verdict. (*Id.* at p. 781.)

Conversely, an example of impermissible jury experimentation that resulted in the acquisition of new evidence is found in *People v. Conkling* (1896) 111 Cal. 616. In that case, two jurors sitting on a murder case conducted out-of-court experiments to ascertain at what distance powder marks upon clothing would be caused by the firing of a rifle. They fired a different, but similar, rifle at cotton drilling in an attempt to make that determination. (*Id.* at p. 627.) Describing the conduct as "too zealous" in "getting at the truth of the matter," the Court found the jurors' experiment to be prejudicial misconduct. (*Id.* at pp. 627-628.)

And, in *People v. Castro* (1986) 184 Cal.App.3d 849, a juror "'went home and used binoculars to see if a witness could have possibly seen what he . . . said he did,'" and then took the information back to jury deliberations the next day. (*Id.* at p. 852.) The Court of Appeal found this conduct exceeded the record properly before the jury. (*Id.* at p. 853.)

Having undertaken the extensive review of authorities on the subject in *Collins*, this Court reiterated: "'To prohibit jurors from analyzing exhibits in light of proffered testimony would obviate any reason for sending physical evidence into the jury room in the first instance.' [Citation.] An evaluation of a misconduct claim 'must necessarily focus on

whether the experiments were based on evidence received in court.'" (*Collins, supra*, 49 Cal.4th at p. 246.)

Applying the principles outlined in *Collins*, we contend the jury here did not go beyond the record in its attempt to evaluate the evidence. In that regard, the facts in this case are most closely aligned with those in *Collins*, *Cooper*, *Turner*, and *Bogle*. As the trial court correctly pointed out, close observation or physical manipulation of appellant's boat was not prohibited. (111 RT 20647.) The fact that two jurors shifted their weight back and forth in the boat (111 RT 20646 [defense counsel's description of the conduct]) did not constitute the taking of new evidence. During trial, evidence was taken as to whether someone of Laci's size could be secreted in the boat (62 RT 12185-12189, 12191; People's Exhs. Nos. 106F, 106H, 106J), along with evidence about the boat's stability, as we discussed above. Thus, the jurors' actions were simply a "more critical examination" of the evidence admitted; the jury did not receive extrinsic evidence. (*Collins, supra*, 49 Cal.4th at p. 256.) Accordingly, the trial court acted well within its considerable discretion in denying appellant's motion for a mistrial.

Inasmuch as appellant contends the jurors' actions violated his Sixth Amendment right to an impartial jury and to a verdict based on evidence subjected to confrontation and assistance of counsel (see *Turner v. Louisiana* (1965) 379 U.S. 466, 471-473) (AOB 337), that argument is likewise without merit for the reasons we outlined above.

Additionally, in *Henry v. Ryan* (9th Cir. 2013) 720 F.3d 1073, the Ninth Circuit considered the situation where two jurors performed an experiment to test the defendant's assertion that while he was riding in the camper portion of a truck, he could hear his acquaintance arguing with the victim in the cab of the truck prior to the victim's murder. The jurors' experiment consisted of driving a similar vehicle on a gravel road. (*Id.* at p. 1085.) From this, the jurors concluded the defendant could not have heard

a purported argument taking place in the cab of the truck. (*Ibid.*) The Court of Appeals found the extraneous information was not inherently inflammatory, contrasting the jurors' actions with cases where juries considered information that had been excluded from the trial. (*Id.* at p. 1086.) The court also noted the extraneous information was less likely to be prejudicial because it merely confirmed what the jurors already knew as a matter of common knowledge. (*Ibid.*) Further, the extraneous information was cumulative because the defendant had been "thoroughly impeached" at trial. (*Ibid.*) And, last, evidence supporting the defendant's guilt was "substantial." (*Id.* at p. 1087.)

Here, adopting the Ninth Circuit's analysis in *Henry v. Ryan*, the jurors' actions in shifting their weight in the boat would not be extraneous information in the first instance. Moreover, even if moving around in the boat was the equivalent of securing extraneous information, it was, at worst, cumulative to testimony already taken about the boat's inherent stability.

In any event, if the jurors' actions constituted misconduct, no prejudice resulted. (See *People v. Pierce* (1979) 24 Cal.3d 199, 207 [presumption of prejudice can be rebutted by showing no prejudice resulted].) First, as the trial court pointed out, moving about the boat to explore the boat's stability could have worked to the defense's benefit. (111 RT 20648.) In that regard, the jurors may have determined that the boat was not as stable as the prosecution's evidence suggested. No matter, the trial court's admonition to the jurors in which the court cautioned that stability of the boat on a trailer was a much different situation than stability of the boat on the water (111 RT 20644-20645), headed off any prejudice.

Also, under federal standards, there was no prejudice because the jurors' actions were cumulative to evidence already adduced and there was substantial evidence establishing appellant's guilt. (See *Henry v. Ryan*, *supra*, 720 F.3d 1073.)

In support of his prejudice argument, appellant sounds a now familiar refrain contending the prosecution did not answer the how, where, and when questions, thereby suggesting the evidence underlying appellant's convictions was inadequate. (AOB 340-341.) As we have explained, the only question the prosecution needed to answer was the *who* question: Who murdered Laci and Conner Peterson? The prosecution's evidence answered that question loud and clear. If that were not the case, appellant would certainly have advanced a claim of insufficiency of the evidence. The absence of such a claim in this appeal is, therefore, noteworthy given appellant's intimation that the evidence supporting his convictions was in some way deficient.

XI. THE PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT CONCERNING THE STABILITY OF APPELLANT'S BOAT WERE PROPER

Appellant contends the prosecutor committed prejudicial misconduct in arguing the absence of defense evidence on the issue of the stability of appellant's boat in light of the prosecution's successful objection to the defense's videotaped demonstration. Accordingly, appellant argues the purported misconduct violated his right to due process. (AOB 343-350.)

We disagree and maintain the prosecutor's argument was fair comment on the state of the evidence. Because the challenged remarks were predicated on the trial court's proper ruling excluding the defense experiment, there was no error. Even if the remarks constituted error, appellant was not prejudiced.

A. Factual Background

1. *Defense cross-examination*

During the prosecution's case, defense counsel conducted a searching cross-examination of witnesses in an attempt to leave the jurors with the impression that appellant's boat was unstable and, therefore, it was unlikely

that appellant could have deposited Laci's body in the Bay without capsizing the boat. For example, with regard to expert angler Angelo Cuanang, defense counsel asked if he "had any experience trying to take a fish that weighed approximately a hundred and 50 pounds and having four anchors attached to it and sliding that out of the boat?" To which the witness replied, "No. No." (71 RT 13793-13794.)

Defense counsel asked David Weber, the boat manufacturer's representative, whether testing of the boat included side stability tests using 400 pounds (presumably, appellant's weight and Laci's weight, including four anchors). Counsel asked numerous follow-up questions along these same lines. The answer to each question was generally no. (71 RT 13859-13860, 13868-13869, 13880.) A fair reading of this cross-examination suggested that defense counsel's hypotheticals were somewhat modeled on the excluded defense experiment. Counsel's questioning also elicited the fact that the tests were not conducted in salt water or on a bay subject to wind and waves. (71 RT 13867.)

2. *Prosecutor's closing remarks*

During the prosecutor's opening argument, he addressed the issue of the boat's stability:

> Let's talk about the boat. The 14 foot aluminum fishing boat. You know, and these kind of boats have been around for years. And, you know, I know there was a lot of talk that -- I don't know if 'talk' is the right word. Maybe insinuation is the right word; that, you know, somehow these are unstable and, you know, they're ready to tip over at the drop of a hat and boy, there's no way that, you know, you could dump a body out of the boat and that's impossible because, you know, it's going to go over and the defendant would have gone in the water, and the whole bit.
>
> Of course, there's no evidence that would have done that. In fact, the guy from the company that makes these boats, remember what he said. He brought the, you know, the pictures to show

the tests they do. They fill the boat completely full with water. Completely submerged and it still floats. They put weights on one side, completely submerged, it still floats. They put -- I think they put weights in the -- let me take a look here.

Yeah, they do side stability tests with the boat full of water. They do level flotation with the boat full of water. They do all these calculations.

And, you know, the things [*sic*] is these aluminum fishing boats, they've been around for years. I can't remember exactly what the guy testified to, I think it was at least 20 years. It was probably more. And don't you think, if these boats were tipping over every time a couple of guys leaned on one side to net a fish, that there -- that there would be -- we wouldn't have these boats or they would fix them or they would do something?

Remember Bruce Peterson? We brought in the guy who sold the boat to the defendant. Remember what he said? Did you ever use that boat? Heck, yeah, I used it all the time. Well, what did you use it for. For fishing. Well, where at? And, you know, he told us a bunch of different places. Who went with you? My wife. Well, were you and your wife ever on the same side of the boat? Yeah. Yeah, if she caught a fish, I'd go over there. Did you ever have any problems? No. Could you get up and walk around? Yeah. Was there any problems? No.

You know, it's a ridiculous argument to say you can't do this. I mean, look, you've got Laci Peterson in the boat, you sit on the middle of the seat; you know, I'm not saying take Laci Peterson and sit up on the gunwale of the boat, you know, the rim. That's not how you do this. It's easy. Sit on the middle of the seat, pull her up so you kind of counterbalance it, and push her over. That's it. It's done in probably a minute, or less.

You know, you want to see some other pictures, take a look at this exhibit. Remember what the fisherman said? Here's a guy – here's three adults, full sized adults, fishing in a 13 foot aluminum boat. This one is actually smaller than the defendant's. Three adults in the Bay, standing up in the boat on the same side while they're about to land -- I think he said this is a 60 to 70 pound sturgeon.

> I said Did you have any problem doing that? He said no. And I think -- I can't remember if I asked him or the defense did, but somebody asked him Well, could you pull a big sturgeon in and out of that boat? Yeah. Yeah, he said no problem. Well, you couldn't do it by yourself, could you? He said Yeah, sure I could. He said it just like I said it, you sit on the seat, you pull it in, you know, you put one end up on the side and slide it over. It wouldn't be any problem at all.
>
> There's no evidence to contradict that whatsoever.

(109 RT 20292-20294.)

Later, the prosecutor mentioned that Dr. Cheng testified that the winds on the Bay were calm on Christmas Eve, which, in the prosecutor's view, likewise countered the

defense's suggestion that the boat would have overturned had appellant tried to push Laci's body overboard. (109 RT 20310-20311.)

3. *Defense counsel's closing remarks*

During closing argument, defense counsel took the prosecution to task for not conducting a demonstration to test the stability of appellant's boat, even though investigators considered the idea at one point. (110 RT 20369-20370.) Defense counsel argued the prosecution "didn't believe their own theory" about how appellant deposited Laci's body in the Bay. (110 RT 20369-20370.) Defense counsel argued:

> They discussed it but they never did it?
>
> You know why they never did it? Under the rules of law in this state and in the United States, if they do a demonstration, they must turn it over to the defense. It's called Brady material. So if they do that demonstration and it doesn't work, case over. They know that.
>
> And that's why they made the decision. That's why the detectives were saying Let's try it, and they discuss it with the DA's office and the DA's office says no. Because they know, if they do it and it doesn't work, case over. Or, what they've done in this case is just come up with a new theory. Maybe it wasn't

Scott on the boat, maybe it was something else. That's a real significant problem for them.

(110 RT 20372.)

As for the prosecution's evidence concerning the stability of appellant's boat, defense counsel had this to say:

> Remember they brought this guy in Weber? We kept you guys cooling your heels for about 15 minutes when we brought him out from Tennessee while I talked to him, because it was a witness they brought in. This guy was a guy who has -- the manufacturer of the boat. And specifically I asked him: If you go to the side of the boat, and the side of the boat, that's not the center of gravity, correct? When you go to the side and put 400 pounds on the side, have you ever done that? No, sir. Would you expect that that would probably turn turtle? I can't honestly answer that.
>
> You're going to convict somebody beyond a reasonable doubt on a theory that the manufacturer of the boat can't answer, on a theory that the lead detective had his doubts about, on a theory that doesn't make any sense whatsoever? How could you possibly do that? And based upon that it couldn't be carried out by one person?
>
> I'll tell you, turn turtle is when they talked about that boat flipping, and yesterday [the prosecutor] got up here and told you Well, we asked Cuanang about it, we asked Cuanang about it, Cuanang the fisherman.
>
> Well, Cuanang the fisherman, take a look at the book, I don't have it handy here, but there's three guys standing in the middle of the boat like this. They're not standing on the side -- you can look at it – they're not leaning over, they're not trying to dump something out, they're not trying to push it over the side on an ocean, or a bay, while the boat is out there with his 200 and some-odd pounds on top of it, with the weights attached to it. Try to push that out.

(110 RT 20371-20372.) Counsel briefly revisited this argument later in his presentation. (110 RT 20406.)

B. The Claim Is Forfeited

As appellant correctly anticipates (AOB 349-350), we contend he has forfeited the claim for failing to object to the challenged remarks at the time they were made and request a curative admonishment. "A defendant's failure to object and to request an admonition is excused only when 'an objection would have been futile or an admonition ineffective.' [Citation.]" (*People v. Fuiava* (2014) 53 Cal.4th 622, 679.) Appellant does not contend an objection would have been futile or an admonition ineffective. Most likely that is because appellant is aware that defense counsel exhibited no hesitation in interposing objections during the course of the trial, with the trial court sustaining a fair number of them. (See *People v. Friend* (2009) 47 Cal.4th 1, 29-30 [forfeiture exception inapplicable because record demonstrated "the trial court kept a firm hand on the actions of the attorneys and maintained a fair proceeding"].) Therefore, since appellant did not act to preserve his claim, it is forfeited.

Appellant's preemptive response to the forfeiture issue is that appellant's trial counsel had no tactical reason for failing to object or request a curative admonition. In other words, trial counsel rendered ineffective assistance in this regard. (AOB 350.)

We disagree. Given the propriety of the prosecutor's argument, in light of the trial court's correct ruling excluding the defense's taped experiment (see sections IX, X, *ante*), defense counsel correctly recognized he had no basis for objecting to the prosecutor's remarks.

Appellant's claim fails on its merits regardless, as we argue below.

C. The Prosecutor Did Not Err[136]

In this case, the challenged remarks constituted fair comment in light of the trial court's proper evidentiary ruling excluding the proffered defense boat experiment. "Prosecutors must have reasonable latitude to fashion closing argument, and thus can argue reasonable inferences based on the evidence." (*United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1276.)

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair." (*People v. Blacksher* (2011) 52 Cal.4th 769, 828, fn. 35, internal quotation marks and citations omitted.)

Here, the prosecutor's challenged remarks were within the bounds of appropriate argument, under state and federal due process principles, as they were directly responsive to the defense position—elicited through defense counsel's cross-examination—that the prosecution had not proved that appellant's boat was stable when significant weight was concentrated on the side of the boat. Appropriately, the prosecutor responded to this in

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[136] Because there is no evidence the prosecutor intentionally or knowingly committed misconduct, appellant's claim should be characterized as one of prosecutorial "error" rather than "misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 ["We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error"]; see also ABA House of Delegates, Resolution 100B (August 9-10, 2010) [adopting resolution urging appellate courts to distinguish between prosecutorial "error" and "misconduct"].)

his argument. It was likewise proper for the prosecutor to point out that there was no evidence establishing that the boat was unstable. A prosecutor may comment on a defendant's failure to produce material evidence or to call logical witnesses. (*United States v. Robinson* (1988) 485 U.S. 25, 26-34; *United States v. Garcia-Guizar* (9th Cir. 1998) 160 F.3d 511, 521-522; *United States v. Lopez-Alveraz* (9th Cir. 1992) 970 F.2d 583, 595-596 ["a prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, as long as it is not phrased to call attention to defendant's own failure to testify," citations omitted].)

The fact that the prosecutor was aware that the defense had attempted to counter the prosecution's evidence on boat stability with its taped experiment does not change this calculus. This Court held in *People v. Lawley* (2002) 27 Cal.4th 102 (*Lawley*), that a prosecutor does not commit misconduct when he or she comments on the state of the evidence as defined by proper evidentiary rulings despite knowledge of additional and even contradictory information excluded by the trial court. (*Lawley*, *supra*, 27 Cal.4th at p. 156.) In *Lawley*, the prosecutor argued in closing that "nobody else in this case had a reason to kill [the victim]," notwithstanding information proffered by the defense but properly excluded by the trial court that a third party had been induced by the Aryan Brotherhood gang to kill the victim. (*Id.* at pp. 151-152, 156.) The situation in this case is precisely the same. As we argued in sections IX and X, *ante*, the trial court's ruling excluding the defense experiment was correct. Therefore, the prosecutor committed no error in pointing out the absence of evidence supporting defense counsel's argument that appellant's boat was too unstable to permit appellant to deposit Laci's body in the Bay without also capsizing the boat.

Further, the trial court instructed the jurors that anything the attorneys stated in their arguments that may have conflicted with the court's

instructions was to be disregarded and that the statements of the attorneys were not evidence. (111 RT 20544, 20545.) In determining whether a due process violation occurred, "arguments of counsel generally carry less weight with a jury than do instructions from the court." (*Boyde v. California* (1990) 494 U.S. 370, 384; accord *Ortiz-Sandoval v. Gomez* (9th Cir. 1996) 81 F.3d 891, 898 ["The arguments of counsel are generally accorded less weight by the jury than the court's instructions and must be judged in the context of the entire argument and the instructions."].)

Appellant cites a number of cases in support of his argument, among them are *People v. Daggett* (1990) 225 Cal.App.3d 751 and *People v. Varona* (1983) 143 Cal.App.3d 566. However, those cases are inapplicable because they "each involved erroneous evidentiary rulings on which the prosecutor improperly capitalized during his closing argument." (*Lawley, supra*, 27 Cal.4th at p. 156.) As we maintain above, the trial court's ruling excluding the proffered defense experiment was correct and, therefore, the challenged remarks were appropriate argument, contrary to the situations in *Daggett* and *Varona*.

Likewise, *Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, is readily distinguishable. There, the prosecutor was aware that the former district attorney dismissed the first prosecution brought against the defendant because the defendant passed a polygraph test. (*Id.* at p. 1216.) Yet, during his closing remarks, the prosecutor "invited the jury to speculate" about the reasons the case was dismissed, including the suggestion that the defendant's daughter may have been afraid to testify against her father. In that regard, the Court of Appeals found the prosecutor's argument deceitful. (*Ibid.*) The prosecutor misrepresented the reason for the absence of facts before the jury as to why the first prosecution was dismissed. (*Id.* at p. 1217.) Here, there is no such deceit; the prosecutor merely argued the state of the evidence.

D. If Error, it Was Harmless

Even if the prosecutor erred, it did not result in prejudice. Indeed, even in a case where the prosecutor concededly gave an improper summation of the kind that prosecutors had been repeatedly warned not to make, the Supreme Court held that a reversal of conviction was unwarranted because the error was harmless. (*United States v. Hasting* (1988) 461 U.S. 499, 507 [observing that "the interest preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching"].)

Under any standard of harmless error analysis, if there was error here by the prosecutor, it was harmless beyond all question. First, the challenged comments were brief and the remarks represented a very minor portion of an otherwise extensive closing argument.

Further, defense counsel countered the prosecutor's remarks during his own closing argument. In fact, even though there was no evidence adduced that the prosecution declined to conduct a stability experiment with appellant's boat for fear of being compelled to discover such results to the defense, defense counsel ascribed such a motive to the prosecution in the absence of such evidence. (110 RT 20372.)

In any event, the state of the evidence regarding the boat's stability was such that no one, except for appellant, knew exactly how he positioned Laci's body in the boat, where he was in the boat, and how he maneuvered Laci's body into the Bay. Contrary to appellant's suggestion, those circumstances mattered very little. What mattered was that, in the midst of his clandestine affair with another woman, appellant drove about three hours and 180 miles round-trip from Modesto to go "fishing" for about 45 minutes to an hour on San Francisco Bay on Christmas Eve—in a recently purchased boat that he told no one about—on the day his pregnant wife went missing (who appellant claimed was "fine" with him having an affair),

with fishing gear that an expert angler opined was inappropriate for the type of fish that appellant said he was trying to catch that day, in a location that was much less than ideal for catching that type of fish. Additionally, investigators discovered hair that was microscopically consistent with Laci's hair clamped in a pair of pliers that were in located in appellant's boat and multiple cement voids on the boat's trailer, which were consistent with an anchor found in appellant's boat. That "anchor" had no rope attached to it. And, Laci's disarticulated body, and the body of their son, came ashore a few months later not far from where appellant had been on the Bay "fishing." Truly, the only fish implicated by appellant's claim is a red herring. From this evidence, along with other evidence, the reasonable inference was that appellant was able to successfully get Laci's body into the Bay from his boat. Whether it was from the center, side, front, or rear of the boat was of little moment.

XII. THE TRIAL COURT'S REMOVAL OF JUROR NO. 5 WAS A PROPER AND NECESSARY EXERCISE OF ITS DISCRETION BECAUSE THE JUROR'S PATTERN OF MISCONDUCT RENDERED HIM INCAPABLE OF PERFORMING HIS DUTIES

Characterizing Juror No. 5's repeated disregard for the trial court's instruction not to discuss the case as merely "technical" and "innocuous" violations (AOB 370, 375), appellant contends the trial court abused its discretion when it discharged this juror while refusing to dismiss two other jurors and two alternate jurors for the same purported conduct. (AOB 370-385.) Accordingly, appellant maintains that the trial court's actions violated state and federal law warranting reversal. (AOB 372.)

Appellant's claim lacks merit. As the record amply supports, Juror No. 5 was much more interested in his Warholian 15 minutes of fame than he was in performing his duties as a juror in this case. Further, his repeated instances of willful and unapologetic misconduct presented a threat to the ability of other jurors to fulfill their duties. The trial court's decision to

discharge Juror No. 5 is supported by substantial evidence, as we maintain below. The same is true of the court's retention of the challenged jurors and alternates.

A. Procedural Background

On June 1, 2004, the jurors, including Juror No. 5, swore an oath to abide by the trial court's instructions. (43 RT 8412.) The court admonished the jurors that prior to deliberations: "You must not converse among yourselves or with anyone else on any subject connected with this trial . . . ." (43 RT 8415.)

On June 2, the prosecution began its presentation of evidence. (44 RT 8660.) The court repeated the admonition not to discuss the case. (See, e.g., 44 RT 8683 [June 2]; 45 RT 8894 [June 3]; 46 RT 9080 [June 7]; 47 RT 9337 [June 8]; 48 RT 9553 [June 9]; 49 RT 9779 [June 10]; 51 RT 10137 [June 15]; 52 RT 10332 [June 16]; 53 RT 10473 [June 17]; 54 RT 10664 [June 21]; 55 RT 10852 [June 22].)

1. *The trial court's inquiry into Juror No. 5's interaction with Brent Rocha reveals the juror's preoccupation with the attention he received from the media*

On June 21, the court conducted a hearing into the controversy surrounding Juror No. 5's interactions with Laci's brother Brent while he and Brent were going through security in the lobby of the courthouse a few days before. (54 RT 10474-10475.) The court first took sworn testimony from Brent in chambers. Brent explained that while he was waiting for his personal items to pass through the x-ray machine, Juror No. 5 approached from Brent's left and said something to the effect of, "I got in the way of your shot for the news today." (54 RT 10477.) Brent responded, "Well, at least they're not bugging you yet," referring to the media. (54 RT 10477.) There was no discussion of the case. (54 RT 10478.)

After Brent was excused, the court called Juror No. 5 into chambers. Immediately upon entering, Juror No. 5 said, "Hey. I'm a popular guy this week." (54 RT 10479.) Upon questioning from the court, Juror No. 5 recounted that Brent said "[g]ood morning" when they encountered each other at the security checkpoint. (54 RT 10481.) Seeing a television camera near Brent, Juror No. 5 said, "Ah, I'm ruining all your shots, I guess you're not going to be on the news tonight." (54 RT 10481.) Brent replied, "Good" and walked the other way. (54 RT 10481.)

After the court concluded its questioning, Juror No. 5 made a request of the court and parties: "[S]ince I'm here, and all the other jurors want me to say this, and I want one of y'all to get on the news to say I don't say Yo, yo, what's up, Peeps to anybody. Especially – that's the report." (54 RT 10482.) After brief comments by defense counsel and the court, Juror No. 5 continued: "My girlfriend wants to kick the crap out of the Court TV lady. She – apparently [said] I walked up to [appellant] in the courtroom and said Yo, yo, peace out." (54 RT 10483.) Defending Juror No. 5, defense counsel assured the court that did not happen. (54 RT 10483.) Counsel also explained that there was a news account that Juror No. 5 came up to him and whispered something to him at the podium. (54 RT 10484.) Juror No. 5 elaborated: "And put my arm or touched him or something. My girlfriend told me that." (54 RT 10484.) The juror also recounted some other interactions that he had with Brent and Amy Rocha and Juror No. 6. (54 RT 10484 ["there's actually a picture somewhere of me with Amy underneath my arm and Brent on this side of me, talking to Juror No. 6"].) Juror No. 5 explained that he had encountered Brent in the bathroom, in the elevator, and in the hallway prior to this incident. (54 RT 10484.)

The court asked Juror No. 5 if he had discussed the case with anybody. (54 RT 10484-10485.) Juror No. 5 said, "No. No, not at all." (54 RT 10485.) The court explained the importance of jurors maintaining their

distance to avoid getting caught in these situations. (54 RT 10485-10486.) During the course of its admonition to Juror No. 5, the court asked the juror again whether he had discussed the case with anyone. Juror No. 5 said no. (54 RT 10485.) The court assured Juror No. 5 that he had done nothing wrong. Juror No. 5 responded, "Mm-hmm. But of one of y'all got to get out there, I don't say Yo, yo Peeps. That's just –" (54 RT 10486.)

During the hearing, Juror No. 5 also revealed that he was aware that his family had heard about the incident with Brent Rocha. (54 RT 10486.) The juror explained, "Well, the -- what it was, too, was apparently, like, when they showed it nationally, they fuzzed my face out." (54 RT 10487.) Juror No. 5 continued: "But when – if you continue watching, they follow him, and then you see me walk behind him and I'm not fuzzed out . . . . The Court TV lady is apparently the bad one. She's really ripping into me good . . . ." (54 RT 10487.) When defense counsel asked Juror No. 5 if he was able to cut off discussion of the case with his family, the juror responded: "Yeah. I spent the whole weekend going Shut up, you know, Don't worry about it, and in the end it will all come out. But I've enjoyed listening to the stories." (54 RT 10488.)

After further discussion, the court told Juror No. 5 that he was free to rejoin the other jurors. (54 RT 10489.) Before he left, Juror No. 5 had another question for the court: "Can I address the media when I walk in there?" (54 RT 10489.) The court told the juror that he could not and admonished him again that he was not to talk with anyone about the case. (54 RT 10489.)

2. *The court investigates a report from jurors that Juror No. 5 is discussing the case*

On June 23, two days after the hearing on Juror No. 5's interaction with Brent Rocha, Jurors Nos. 3 and 8, and a third juror, reported to one of the court's bailiffs that Juror No. 5 had been watching news accounts of the

trial and that he made comments to other jurors about the anchor and the prosecution's presentation of evidence. (56 RT 10853-10854.) The court stated its intention to bring Juror No. 5 in first and then speak to the other jurors and alternate jurors. (56 RT 10854.) The prosecutor reminded the court that they had just learned two days prior that Juror No. 5 had discussions about case-related matters with his family. (56 RT 10854.) And, the court observed that Juror No. 5 spoke with his girlfriend, too. (56 RT 10855.) If the jurors' allegations were verified, the court explained that it was grounds for misconduct sufficient to support the discharge of Juror No. 5. (56 RT 10854.)

a. *Juror No. 5*

After Juror No. 5 entered chambers and was sworn, he asked, "What'd I do now?" (56 RT 10858.) The court explained that it was investigating allegations reported by other jurors. (56 RT 10858.) Juror No. 5 denied watching television news accounts of the trial. (56 RT 10858.) When asked whether he discussed the anchor with other jurors, Juror No. 5 said, "Well, it was – an anchor was mentioned." (56 RT 10858.) But, he insisted that he and other jurors were talking about Hawaii. (56 RT 10858-10859.) The court then confronted Juror No. 5 with a written communication from another juror, later identified as Juror No. 8 (56 RT 10866), in which the juror stated that Juror No. 5 "'constantly speaks about the facts and issues in this case.'" (56 RT 10859.) The court related the specific allegations: 1) Juror No. 5 felt that Detective Brocchini's testimony was lacking; 2) Juror No. 5 made comments about Laci's weight during pregnancy the day her medical records were admitted into

evidence;[137] 3) he commented on inconsistencies in Modesto Police Department reports in the context of Juror No. 5's own experience preparing reports as an airport screener; 4) Juror No. 5 made comments about the deficiencies of the prosecutors in presenting their case; 5) he talked about the attention he received from Court TV, as it was related to him by his girlfriend; and, 6) Juror No. 5 made comments suggesting he took pride in being "a loose cannon" and very gregarious. (56 RT 10859.) In the letter, Juror No. 8 went on to say, "'If juror number 5 is going [to] prejudice himself by exposing his beliefs, other jurors may be persuaded to prejudice themselves regarding the rest of this trial.'" (56 RT 10860.)

In response to these allegations, Juror No. 5 said, "Wow." (56 RT 10860.) He went on to characterize the discussions as "general conversations." Directing his remarks to the court, he said, "[Y]ou can sit there and you can skew them any way you want." (56 RT 10860.) Juror No. 5 continued, "Well, you know what, if you sit there and, you know, you pick them apart, I guess, yeah, you say it supposedly does have to do with the case." (56 RT 10860-10861.) When the court asked Juror No. 5 if he was denying that he made comments about Detective Brocchini's testimony, Juror No. 5 responded, "I – I don't think I did." (56 RT 10862.) As for his alleged comments about Laci's weight during pregnancy, Juror No. 5 said: "You know what, I know comments were made . . . But I don't think I made them. I may have responded or said something during that conversation, but I don't think I'm the one that made it." (56 RT 10862.) Juror No. 5 denied saying anything about the prosecutors. (56 RT 10863.) As for how Juror No. 5 was aware that Court TV's coverage mentioned him,

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[137] This most likely occurred on June 15, 2004, during prosecution witness Lisa Martin's testimony. (51 RT 10103; People's Exh. No. 56 [sealed].)

he said that his friends called him and told him about it, but he and his friends did not discuss details of the case. (56 RT 10863.) And, when the court asked if it was true that Juror No. 5 took pride in being called "a loose cannon," the juror responded: "Well, that's a big joke downstairs. And loose cannon is not the only name I've been called. And I don't know if I said I took pride in it, but I said Hey, you know, keep them coming. [¶] I think it was mentioned today, too. You know, somebody said Blame juror number 5 because he's the moron. Somebody called me a moron, I guess, and they're down there telling me I'm a moron." (56 RT 10863-10864.)

The court then asked Juror No. 5 if he had made other comments about the trial in front of other jurors. Juror No. 5 responded, "Not like in general. I mean maybe general." (56 RT 10864.) Juror No. 5 went on to explain that these general conversations inevitably occurred among the jurors, but that the jurors would "usually cancel the conversation." (56 RT 10865.) He explained that the comments attributed to him about the police reports occurred as a result of another juror asking Juror No. 5 about his own experiences in preparing reports. (56 RT 10865.) When defense counsel asked which jurors were involved in the discussion, Juror No. 5 said No. 6 was getting blamed, but "it wasn't even his thing." (56 RT 10865.) Juror No. 5 went on to detail the substance of the conversation. (56 RT 10866.)

Before the next juror was brought in, the prosecutor noted for the record that Juror No. 5 took "the longest pause I've ever seen when [the court] asked the juror the questions for what should have elicited a pretty quick denial." (56 RT 10867.)

b. *Juror No. 1*

Juror No. 1 said that he did not hear Juror No. 5 discuss the facts of the case, including the specific allegations recounted by the court. (56 RT 10869-10870.) However, this juror explained that because of a medical

condition, he went for frequent walks and was not always present in the jury room. (56 RT 10870.) Juror No. 1 recalled hearing Juror No. 5 comment that Juror No. 5's girlfriend told him he was in trouble judging from television news reports. (56 RT 10870.) The court asked Juror No. 1 if other jurors had confronted Juror No. 5 about not discussing the evidence:

> JUROR NO. 1: Once again, other – no. I haven't heard that, but I'm not –
>
> THE COURT: You're not in there.
>
> JUROR NO. 1: I'm trying to stay –
>
> THE COURT: Okay.
>
> JUROR NO. 1: I need to keep my head clear.

(56 RT 10871.) The juror stated that no one had discussed the facts of the case in his presence. (56 RT 10871.)

c. *Juror No. 2*

This juror tended to stay outside the courthouse when court was not in session. (56 RT 10872.) Juror No. 2 did not hear Juror No. 5 talk about Detective Brocchini's testimony, Laci's weight during pregnancy, or inconsistencies in police reports. (56 RT 10873.) As for comments about the prosecutors, Juror No. 2 heard something along those lines, but the juror did not "think specifically" that he heard it come from Juror No. 5. (56 RT 10873.) Yet, Juror No. 2 was unable to identify the juror who made the remark. (56 RT 10873-10874.) This juror recalled hearing that someone had called Juror No. 5 and told him that he was on television. (56 RT 10874.) Juror No. 2 verified that he and another juror ("a couple of us") told Juror No. 5 that he should not be discussing matters related to the case. Juror No. 5's response was to deny that the discussions involved evidence or details of the case. (56 RT 10874.) The matter at issue was "the camera incident." (56 RT 10875.)

d. *Juror No. 3*

This juror said she sometimes stayed in the jury room and other times she went outside. (56 RT 10876.) Juror No. 3 did not recall hearing Juror No. 5 say anything about the anchor, Detective Brocchini, or Laci's weight. However, Juror No. 3 did hear Juror No. 5 discuss the prosecution's deficiencies. (56 RT 10877.) Specifically, "[c]omments about ability to speak and presentation style." (56 RT 10878.) Juror No. 5 made these remarks to other jurors. (56 RT 10878.) Juror No. 3 recalled that on one occasion she cautioned a couple of jurors about a conversation that was leading into an area Juror No. 3 felt was inappropriate. (56 RT 10879.) Juror No. 3 also stated that Juror No. 5 commented on what the media was saying about him. (56 RT 10879.) Specifically, that he was a "loose cannon" and a "moron." (56 RT 10880.) Juror No. 3 denied that she was one of the jurors that advised the court's bailiff that Juror No. 5 was behaving inappropriately. (56 RT 10880-10881.)

e. *Juror No. 4*

Juror No. 4 recounted that one of the alternate jurors expressed an interest in seeing the anchor and knowing how much it weighed. (56 RT 10883.) Juror No. 4 said that "it could have been [Juror No.] 5," but Juror No. 4 was not certain who gave an opinion about the weight of the anchor. (56 RT 10883.) At that point, Juror No. 4 suggested to the two that they would have an opportunity to get the information later. (56 RT 10883.) Juror No. 4 also told the court that, on his way to lunch a couple of days before with Jurors Nos. 5, 6, and 7 and a couple of alternates, Juror No. 5 asked him if he got anything out of Detective Brocchini's testimony. (56 RT 10884.) Juror No. 4 did not recall hearing Juror No. 5 comment on Laci's weight or the police reports. (56 RT 10884.) However, Juror No. 4 heard commentary on the presentation of the prosecution's case, but he was

not sure if Juror No. 5 made the remarks. (56 RT 10884.) Juror No. 5 mentioned that his girlfriend contacted him about what was said on Court TV about his actions inside and outside the courtroom, including at the security checkpoint. (56 RT 10885.) Jurors Nos. 5 and 6 previously made comments about the media. (56 RT 10885.) Juror No. 4 was not privy to any admonishment of Juror No. 5 by Jurors Nos. 2 or 3. (56 RT 10885.)

f. *Juror No. 6*

When the court asked this juror what, if anything, he may have heard Juror No. 5 say about the anchor, Juror No. 6 responded: "They were just talking about an anchor and he went out boating and how it's amazing what underwater currents can do, or whatever, and pull a boat with an anchor." (56 RT 10887.) As far as Juror No. 6 could tell, the comment was not specific to the case. (56 RT 10887-10888.) Someone also made statements about Detective Brocchini "[g]etting a reaming" during his testimony the previous day. Juror No. 6 was not sure if it was Juror No. 5 who made the observation. (56 RT 10888.) While Juror No. 6 did not hear Juror No. 5 say anything about Laci's weight (56 RT 10888), he did hear Juror No. 5 make a comment about the police reports (56 RT 10889). The comments were in connection with Juror No. 5 apparently having a law enforcement background. (56 RT 10889.) Juror No. 5 made the observation that the prosecution seemed disorganized. (56 RT 10889.) As to whether Juror No. 5 had been watching news accounts of the case, Juror No. 6 stated that he had not heard Juror No. 5 "specifically [] say" that he watched television, but Juror No. 6 was "shocked" as to "what people know in there." (56 RT 10890.) Juror No. 6 speculated that a number of the jurors had people calling them. (56 RT 10890.)

The court asked Juror No. 6 about Juror No. 5's account of their mutual interaction with Brent and Amy Rocha. (56 RT 10891.) Juror No. 6 stated that he remembered the incident "very vividly" and explained what

occurred, which essentially tracked Juror No. 5's account. (56 RT 10892.) Additionally, Juror No. 6 recounted that Juror No. 5 told other jurors about his interaction with Brent at security and that his girlfriend called him to say that he was on television. (56 RT 10894.) Juror No. 6 told the court that a friend of his called the previous day to ask if he was Juror No. 5. The juror told his friend no. (56 RT 10894.)

g. *Juror No. 7*

Juror No. 7 recalled hearing a conversation in the jury room about the anchor and wishing that the jurors could handle it and see how heavy it was. (56 RT 10897.) Juror No. 7 could not recall which jurors were involved in that conversation. (56 RT 10897.) With respect to anything Juror No. 5 may have said about Detective Brocchini's testimony, Juror No. 7 said, "I might not have been paying attention, but I don't remember hearing that." (56 RT 10897.) The juror did not recall hearing Juror No. 5 make any comments about Laci's weight, the police reports, the manner in which the prosecution was conducting its case, or talking to his girlfriend about Court TV accounts. (56 RT 10898.) The only comments Juror No. 7 heard Juror No. 5 make were about the anchor. (56 RT 10898.) Occasionally, Juror No. 7 would hear comments being made, but then someone else would say "'Shh'" and people would stop talking. (56 RT 10898-10899.) Juror No. 7 did not know if Juror No. 5 was among those talking. (56 RT 10899.) In any event, the conversations did not involve conclusions or opinions about the case. (56 RT 10899.)

h. *Juror No. 8*

Juror No. 8 was the chief complainant regarding Juror No. 5's actions. (56 RT 10900.) He explained that when he stated in his letter that Juror No. 5 "'constantly'" spoke about issues and facts regarding the case, it was after the court had instructed the jury to avoid such conduct. (56 RT 10900.)

For example, the previous day, Juror No. 5 opined that the size of the anchor was too small to anchor appellant's boat in the Bay because the currents would drag the boat. (56 RT 10900-10901.) Juror No. 5 also said that he had a lot of questions about Detective Brocchini's testimony. (56 RT 10901.) As for Laci's pregnancy weight, Juror No. 5 said that her weight gain was significant going from 126 pounds to 153 and, because of that, Laci may have actually been more than eight months along in her pregnancy. (56 RT 10902.) Earlier in the case, while four or five of the jurors were in the hallway, Juror No. 5 said to Juror No. 6 that the Modesto Police Department should have done a better job with their reports. Juror No. 5 knew from his job as an airport screener that reports needed to be accurate. (56 RT 10902-10903.) On more than one occasion, Juror No. 5 said that the prosecution "doesn't come across gracefully" and "they don't hit the point as [defense counsel] does." (56 RT 10903.) The most recent observation along those lines occurred the previous day. (56 RT 10903.) As for the allegation concerning Court TV, Juror No. 8 stated that Juror No. 5's girlfriend and friends called him to tell him what the media was saying about him, including characterizing him as "a loose cannon." Juror No. 5's response to the description was, "'Well, I sort of pride myself on that.'" (56 RT 10904.)

Juror No. 8 stated that he confronted Juror No. 5 twice about discussing the case. However, he stopped because "it's not working. And [Juror No. 5] keeps saying if anybody has a problem with this, they should be man enough to come up to him." (56 RT 10904.) Juror No. 8 reported the first incident—Juror No. 5's comments about the police reports—to the bailiff. (56 RT 10904.) Juror No. 8 thought ("I think") that might have occurred during the first week of the trial. (56 RT 10904.) The second report to the bailiff was the previous day concerning Juror No. 5's

comments about the anchor, Detective Brocchini's testimony, and the prosecution "not hitting the points." (56 RT 10905.)

The court asked Juror No. 8 about other jurors discussing matters in the jury room. (56 RT 10905.) Juror No. 8 recalled that one of the alternates—a female with red hair, who the court identified as Alternate Juror No. 2—and Jurors Nos. 4 and 6 were involved in the conversation from the previous day. (56 RT 10905, 19007.) Juror No. 5's comment that if anybody had a problem they should approach him directly, was made "a second ago" during the course of the court's inquiry. Referring to Alternate Juror No. 2, Juror No. 8 indicated that she shared those sentiments. (56 RT 10907.) Juror No. 5 took issue with Juror No. 8's suggestion that he could help himself by not talking about the case. (56 RT 10908.)

In response to the court's question whether anything Juror No. 8 had heard would interfere with his ability to be a fair juror, the juror explained that he was not affected. However, the juror was concerned that the other jurors who were part of Juror No. 5's "clique" might be influenced by his views. (56 RT 10908.) Juror No. 8 felt that a couple of those jurors may "sort of cover for him." (56 RT 10909.) Juror No. 8 was referring to Juror No. 6 and Alternate Juror No. 2, in particular. (56 RT 10909.)

As a result of Juror No. 5's discussions about the case, the jury had divided into two groups: those that listened to Juror No. 5's running commentary about the case and those that "don't want to hear about it." The latter group would "alienate themselves to one side of the room." (56 RT 10909.) Juror No. 3 also told Juror No. 5 not to talk about the case. (56 RT 10910.) Juror No. 5 was "the leader of the clique" and was the one who usually started the conversations, along with Alternate Juror No. 2. (56 RT 10910.)

Juror No. 8 explained his motivation in coming forward: "Because I don't want to sit here – I wouldn't waste the court's time if this is all for

naught. I mean, you know, if it's a ballgame, we're only in about the third inning, right?" (56 RT 10910-10911.) "I mean, we've got a long ways to go. I've got to be fair to both sides. I mean, we haven't even heard, you know, the whole pack. I can't – there's no decision at this point." (56 RT 10911.)

i. *Juror No. 9*

Juror No. 9 reported that she heard general comments about an anchor in the context of fishing. (56 RT 10912-10913.) However, this juror was "[n]ot really" paying attention to the conversation. (56 RT 10913.) Juror No. 9 did not hear Juror No. 5 make comments about Detective Brocchini's testimony, Laci's pregnancy weight, the police reports, or the manner in which the prosecution was presenting its case. (56 RT 10913.) This juror "kind of" "sort of" heard Juror No. 5 talk about reports from his girlfriend about Court TV. (56 RT 10914.)

When the court asked Juror No. 9 whether, in the context of the court's inquiry, she heard Juror No. 5 make comments that day about approaching him directly if any juror had an issue with him, the juror said that a couple of people expressed that position. (56 RT 10914.) At that point, defense counsel interjected: "I don't think it was 5." (56 RT 10914.) This prompted the prosecutor to suggest allowing the juror to speak for herself. (56 RT 10914.) Juror No. 9 said, "We just decided that if we have something to say, we need to say it to each other." (56 RT 10914.)

Juror No. 9 had not heard either Juror No. 2 or No. 3 advise No. 5 not to talk about the case. (56 RT 10914-10915.) Nor did this juror hear Juror No. 5 say anything directly related to the case, but "[m]aybe about people in the courtroom." (56 RT 10915.) When the court followed up asking if Juror No. 5 talked about the case at all, Juror No. 9 said, "No, not really." (56 RT 10915.)

j. *Juror No. 10*

The juror explained that she was a smoker and did not typically inhabit the jury room. (56 RT 10916.) On those occasions when Juror No. 10 was in the jury room, she did not hear Juror No. 5 comment on evidence in the case. (56 RT 10917.) The juror did hear Juror No. 5 mention that he found out from his girlfriend that he was on television and the Court TV woman "was really slamming him." (56 RT 10918.) Juror No. 10 did not hear Juror No. 5 say anything that morning when Juror No. 5 returned from speaking with the court. (56 RT 10918-10919.) Juror No. 10 explained that, if she was not outside smoking, she would typically go for long walks at lunch by herself. (56 RT 10919.)

k. *Juror No. 11*

When the court asked Juror No. 11 if she had heard Juror No. 5 make comments about the evidence, the juror said, "Playfully, but not – playfully." (56 RT 10920.) However, the juror explained that she did not pay much attention because she was in the midst of dealing with an issue at her workplace. (56 RT 10920-10921.) Juror No. 11 did not hear Juror No. 5 make comments about the anchor, Detective Brocchini's testimony, Laci's weight, the police reports, or about the prosecution. (56 RT 10921.) Juror No. 11 did hear, however, some comments that were jokingly made about Juror No. 5 in connection with what transpired at the security screening area. (56 RT 10922.) Nonetheless, this juror explained that she would "kind of tune things out." (56 RT 10922.)

l. *Juror No. 12*

This juror did not hear Juror No. 5 make comments about the case. (56 RT 10924.) However, Juror No. 12 did hear Juror No. 5 remark that his girlfriend told him that the Court TV anchorperson was being disrespectful toward him. (56 RT 10925.) The juror did not hear Juror No. 5 refer to

himself as "a loose cannon," but Juror No. 12 was under the impression that this was how others perceived Juror No. 5. (56 RT 10925.) Juror No. 12 had not heard any juror tell Juror No. 5 not to discuss matters like that with other jurors. (56 RT 10926.) However, Juror No. 12 explained that she was typically "[o]n the sidelines" and did not "pay a lot of attention." (56 RT 10926.)

m. *Alternate Juror No. 1*

The juror did not hear Juror No. 5 make any of the remarks at issue other than about the Court TV matter. (56 RT 10927-10928.) In that regard, Alternate Juror No. 1 recalled Juror No. 5 told the group that his girlfriend was very upset with the Court TV reporter and that his girlfriend said she was going to kill the reporter. (56 RT 10928.) Juror No. 5 also said that his girlfriend was keeping a record. (56 RT 10928-10929.) Alternate Juror No. 1 did not hear any juror admonish Juror No. 5. (56 RT 10929.)

n. *Alternate Juror No. 2*

Alternate Juror No. 2 stated that she broached the subject of the anchor because she wanted to know how much it weighed. (56 RT 10931.) When the court asked Alternate Juror No. 2 what, if anything, Juror No. 5 said in response, she answered: "You know what, Judge, I really don't know because I brought it up, could we ask you to, you know, could we see that, and I don't really remember who said that, you know." (56 RT 10931-10932.) Alternate Juror No. 2 stated that she did not hear Juror No. 5 comment on any of the identified matters. (56 RT 10932.) But, she did hear him relay what his girlfriend told him about the characterization of him on Court TV. (56 RT 10933.) When the trial court asked Alternate Juror No. 2 if she heard any of the other jurors admonish Juror No. 5, the

juror said that one of the other alternates cautioned against discussing things in response to the conversation about the anchor. (56 RT 10933.)

o. *Alternate Juror No. 3*

This juror explained that he did not take breaks in the jury room. (56 RT 10935.) He usually went outside and walked around or got coffee. (56 RT 10936.) The only comments of Juror No. 5 that Alternate Juror No. 3 was privy to concerned the Court TV matter. (56 RT 10936-10937.) To this juror, the interesting part was that Juror No. 5's girlfriend was of the opinion that the Court TV reporter "was really a good reporter." (56 RT 10937.) Alternate Juror No. 3 did hear someone chastise Juror No. 5 "a long time ago" "very early in the trial" after Juror No. 5 made a comment. (56 RT 10937-10938.) Alternate Juror No. 3 could not recall what the comment concerned. (56 RT 10938.)

p. *Alternate Juror No. 4*

This alternate juror typically stayed inside during breaks. (56 RT 10941.) She did not recall hearing Juror No. 5 comment on the alleged matters. (56 RT 10941-10942.)

q. *Alternate Juror No. 5*

The previous day, Juror No. 5 was at the lunch table with this juror, however the alternate juror did not hear Juror No. 5 comment on the anchor; they talked about cars. (56 RT 10944.) Alternate Juror No. 5 left the lunch group to use the restroom and then left early to retrieve a sweater. (56 RT 10944.) She did not hear anyone talk about Detective Brocchini's testimony, police reports, or Laci's weight. (56 RT 10944-10945.) When she was asked if she recalled hearing any comment about the prosecution's presentation of evidence, Alternate Juror No. 5 responded, "Kind of." (56 RT 10945.) She did not "remember [Juror No. 5] saying anything," but recalled that "right after opening statements there was a comparison

contrast. And a response was, they have different roles." (56 RT 10945.) Alternate Juror No. 5 could not remember who made the comparison. (56 RT 10945.) However, she did remember that Juror No. 5 related that his girlfriend told him "the Court TV lady was a bitch." (56 RT 10946.) Alternate Juror No. 5 recalled hearing jurors admonish others to stop talking about certain things, but this juror could not think of anyone who had been singled out for the warning. (56 RT 10946.)

During the court's colloquy of this juror, defense counsel again interjected a comment which, reasonably construed, was a defense of Juror No. 5. (56 RT 10946.)

r. *Alternate Juror No. 6*

When asked if he spent most of his time in the jury room, this juror explained that he liked to "mix it up." (56 RT 10948.) In the morning, he typically would go out and get coffee, but be in the jury room in the afternoon. (56 RT 10949.) This juror stated that he heard Juror No. 5 comment that the anchor was smaller than he thought it would be and was too small to anchor a boat the size of appellant's. (56 RT 10949.) This juror and Juror No. 5 talked about fishing and Alternate Juror No. 6 asked Juror No. 5 if it was the kind of anchor that one would use in the Bay. Juror No. 5 replied that it probably was not. (56 RT 10949.) The juror did not hear Juror No. 5 comment on Detective Brocchini's testimony, Laci's weight, or police reports. (56 RT 10950-10951.) In response to the court's question about whether he heard Juror No. 5 comment about the prosecution, Alternate Juror No. 6 explained that there were "comments that have floated around the jury room" "about somebody doing something particularly well or . . . not." (56 RT 10951.) As the juror explained his reluctance to be more explicit, "I'm trying to be polite, since everybody is in the room." (56 RT 10951.) The juror did not hear Juror No. 5 recount a conversation with his girlfriend about Court TV, but the juror recalled Juror

No. 5 saying that he was "trashed by someone at Court TV." (56 RT 10952.)

3. *Argument and ruling*

Defense counsel blamed the problems encountered with Juror No. 5 on the media and the media's purported desire to see the juror removed. (56 RT 10956-10957 ["choosing off five"].) However, defense counsel conceded Juror No. 5 had a "boisterous" personality and an ego. (56 RT 10957.) Defense counsel also acknowledged that Juror No. 5 "bumped into the podium" while defense counsel was speaking to the prosecutor. (56 RT 10958.)

Defense counsel contended that if the court discharged Juror No. 5, it would also need to remove two alternates and another juror for engaging in similar conduct, which would result in a mistrial. (56 RT 10958, 10967.) Counsel told the court that all the court needed to do was give the jurors a "Come-to-Jesus talk" and that would be sufficient. (56 RT 10960, 10966.)

For his part, the prosecutor argued that the problem was Juror No. 5's actions, not the media fabricating lies about the juror. (56 RT 10964.) The prosecutor pointed out that even before the court received the letter from Juror No. 8, Juror No. 5 was already disseminating information from outside sources to other jurors. (56 RT 10965.) Additionally, Juror No. 5's demeanor during the court's questioning of him suggested there was truth to the allegations: The juror made "a very long pause" before answering and his denials were "very weak." (56 RT 10965.) There was also corroboration from other jurors that supported Juror No. 8's allegations about Juror No. 5, including that other jurors were telling Juror No. 5 to stop discussing the case, but he persisted despite the trial court's admonitions. (56 RT 10965-10966.) The prosecutor asked that Juror No. 5 be removed. (56 RT 10966.)

Defense counsel argued that Juror No. 5 merely responded to questions from Alternate Jurors Nos. 2 and 6. (56 RT 10966-10967.) Counsel repeated his opinion that the media was at fault for targeting Juror No. 5. (56 RT 10967-10968.)

The court pointed out that the allegations at issue came from another juror. (56 RT 10968.) And, that since the beginning of the case, according to the other jurors' testimony, they had warned Juror No. 5 not to talk about the facts. (56 RT 10968-10969.) In the court's view, Juror No. 5's conduct was not an isolated incident, but a pattern of conduct. (56 RT 10969.)

Given the jurors' answers, the court suspected that at least one of the jurors was intimidated by the prospect of reporting Juror No. 5's misconduct. (56 RT 10969.) Along those lines, the prosecutor observed that, according to some jurors, immediately after leaving the court's chambers, Juror No. 5 went back into the jury room and complained about the inquiry, saying that jurors needed to approach him directly if there was a problem. (56 RT 10970.)

The court stated its reasons for its decision to remove Juror No. 5: 1) the juror was, in fact, a loose cannon and prided himself on it (56 RT 10970); 2) he made comments earlier in the proceedings and after other jurors told him to refrain from doing so (56 RT 10970); 3) it was the second incident involving this juror, referring to the first at the security screening station (56 RT 10970); 4) Juror No. 8 was more credible than Juror No. 5 (56 RT 10971); 5) Juror No. 5 was not following the court's admonitions (56 RT 10972); 6) Juror No. 5's opinion about the anchor found in appellant's boat, as articulated to other jurors, was not favorable to the defense (56 RT 10972); and, 7) the court's views were supported by the demeanor of Juror No. 5, Juror No. 8, and other jurors who appeared "reluctant" to speak about Juror No. 5 (56 RT 10973).

Defense counsel moved for a mistrial, or in the alternative, to sequester the jury. The trial court denied the motions. (56 RT 10973.)

When the court called Juror No. 5 into chambers and told him he was being excused, Juror No. 5 observed that he was "going to get it" from the press. (56 RT 10974.) The court apologized, but explained that its obligation was to the trial. Juror No. 5 responded, "Yup." (56 RT 10974.)

B. General Legal Principles

An accused has a constitutional right to a trial by an impartial jury. An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence before it. (*Smith v. Phillips* (1982) 455 U.S. 209, 217; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hamilton* (1999) 20 Cal.4th 273, 294.)

Penal Code section 1089 provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged ...."

> "The ... ultimate decision whether to retain or discharge a juror ... rests within the sound discretion of the trial court. [Citation.] If any substantial evidence exists to support the trial court's exercise of its discretion pursuant to section 1089, the court's action will be upheld on appeal." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1351 [].) "The juror's inability to perform must appear as a 'demonstrable reality' and will not be presumed." (*People v. Lucas* [1995], *supra*, 12 Cal.4th [415] at p. 489.)

(*People v. Sattiewhite* (2014) 59 Cal.4th 446, 486.) A reviewing court "do[es] not independently reweigh the evidence or demand more

compelling proof than that which could satisfy a reasonable jurist. [Citation.]" (*People v. Duff* (2014) 58 Cal.4th 527, 559.)

Juror misconduct occurs when there is a direct violation of the oaths, duties, or admonitions imposed on jurors, such as when a juror conceals bias on voir dire, consciously receives outside information about the case, discusses the case with nonjurors, or shares improper information with other jurors. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 294.)

"In determining whether juror misconduct occurred, [w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1194, internal quotation marks omitted.)

C. Substantial Evidence Supports the Trial Court's Decision to Remove Juror No. 5 Owing to the Juror's Serious and Willful Misconduct that Proved to a Demonstrable Reality the Juror's Inability to Perform His Duties

As a preliminary matter, we note that appellant's claim is dependent on this Court adopting the view that Juror No. 5 was credible and Juror No. 8 was not, contrary to the trial court's credibility findings. This is a fundamental flaw in appellant's argument, as we maintain below.

1. *Juror No. 5 disregarded the court's instructions when he discussed matters connected to the case with his girlfriend and family members*

Juror No. 5's preoccupation with his time in the limelight took precedence over his duties as a juror, which resulted in his disregard of the court's instructions and violation of his oath to follow the court's instructions. This was misconduct.

On June 1, 2004, the jurors, including Juror No. 5, swore an oath to follow the court's instructions, including that they not converse among

themselves or with anyone else on any subject connected with this trial. (43 RT 8412, 8415.) The prosecution's case began the following day.

On June 21, during the course of the trial court's inquiry into Juror No. 5's interactions with Brent Rocha, Juror No. 5 revealed that his girlfriend was reporting to him how he was being portrayed in the media, mainly by Court TV anchors and reporters. (54 RT 10483-10484.) Juror No. 5 had conversations with his family members about the incident with Brent Rocha, as well. (54 RT 10486.) In fact, Juror No. 5 reported to the court that he "enjoyed listening to the stories." (54 RT 10489.)

Juror No. 5 violated his oath and disregarded the court's instructions by discussing matters connected to the case with his girlfriend and family members after the court had instructed the jurors not to engage in such discussions. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1309[misconduct to discuss the case with nonjurors during pendency of case], *In re Hitchings* (1993) 6 Cal.4th 97, 119 [same]; *People v. Nestler* (1997) 16 Cal.4th 561, 578-579 [misconduct to inadvertently receive information about a case from nonparty].)

Also, given Juror No. 5's detailed description of the televised clip of his interaction with Brent Rocha at the security checkpoint (54 RT 10487), it seems that Juror No. 5 actually watched that news segment. If true, this constituted a separate violation of the court's instructions. "It is settled that it is misconduct for a juror to read or listen to news accounts relating to the case in which he or she is serving. [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1048.)

2. *Juror No. 5 disregarded the court's instructions when he discussed the case with other jurors*

Contrary to appellant's contention, Juror No. 5's comments and opinions about the evidence were not trivial or technical breaches. (AOB 373-374.) Juror No. 5's conversations with other jurors demonstrated that

he had prejudged aspects of the case and, therefore, both parties were prejudiced. (See *People v. Wilson* (2008) 44 Cal.4th 758, 839.) Juror No. 5 was, therefore, incapable of rendering a fair and impartial verdict and unable to perform his duties as a juror.

Beyond Juror No. 5's inability to carry out his duties and prejudgment of the evidence, he also posed a potential threat to other jurors being able to perform their duties. Add to this, the fact that Juror No. 5 lied to the trial court and tried to intimidate other jurors before they were called to chambers to give their respective accounts. The court's decision to remove this juror was necessary and proper.

Based on Juror No. 8's report, as corroborated by the testimony of the other jurors, and the trial court's assessment of the jurors' demeanor and credibility, substantial evidence supports to a "demonstrable reality" that Juror No. 5 repeatedly violated his oath to follow the court's instructions by discussing the case. "A juror who refuses to follow the court's instructions is "unable to perform" the juror's duties within the meaning of Penal Code section 1089. (*People v. Wilson* (2008) 43 Cal.4th 1, 25.)

In *People v. Daniels* (1991) 52 Cal.3d 815, 865, the Court upheld the removal of a juror for misconduct: "[W]e believe the misconduct in the present case did indicate that [the juror] was unable to perform his duty. That duty includes the obligation to follow the instructions of the court, and a judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case or reading newspaper accounts of the trial cannot be counted on to follow instructions in the future."

We detail Juror No. 5's instances of misconduct below.

a. *Court TV and being "a loose cannon"*

Juror No. 5 discussed his new-found fame on Court TV with nearly every juror and alternate juror. (56 RT 10863, 10870, 10874, 10879, 10884, 10894, 10904, 10914, 10918, 10922, 10925, 10928-10929, 10933, 10936-

10937, 10946, 10952.) Some jurors also recalled hearing Juror No. 5 talk about his reputation for being "a loose cannon." (56 RT 10863-10864, 10880, 10904, 10918, 10925.) Juror No. 5's preoccupation with the media was a significant distraction from not only to his ability to fulfill his obligations as a juror, but it distracted the other jurors, as well. This was juror misconduct.

b. *Anchor in appellant's boat*

Juror No. 5 repeatedly assured the court during its first inquiry on June 21 that he had not discussed the case with anyone. (56 RT 10485.) On June 23, he modified his position and stated that he may have had "general" conversations with other jurors. (56 RT 10864.) When the court asked Juror No. 5 whether he talked about the anchor with other jurors, he lied and said an anchor was mentioned, but in connection with fishing in Hawaii. (56 RT 10858-10859 ["So it wasn't really – this one"].)

But, Juror No. 5's lie about the anchor was exposed by other jurors. Juror No. 4 explained to the court that the discussion was, in fact, about the anchor in appellant's boat, including speculation about how much it weighed. (56 RT 10883.) Juror No. 6 said that Juror No. 5 talked about how underwater currents could affect an anchor, including pulling a boat with an anchor. (56 RT 10887.) Juror No. 8, who brought the allegations to the court's attention,[138] explained that the discussion of the anchor took place the previous day, June 22. (56 RT 10900.) Juror No. 5 offered his opinion that the anchor was too small to secure appellant's boat in the Bay.

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[138] Defense counsel attempted to discredit Juror No. 8 by referring to the juror as a "provocateur" (56 RT 10876), "a head case" (56 RT 10971), and a "cancer" (56 RT 10973 [counsel responding to the court's characterization of Juror No. 5 in this way]). Counsel suggested that Juror No. 8's motivation in coming forward was because the juror was spurned by Juror No. 5's clique. (56 RT 10911.) Counsel even asked the court to "bounce eight." (56 RT 10973.)

(56 RT 10900-19001.) Juror No. 9 heard comments about an anchor in the context of fishing, but this juror said he was not really paying attention to the conversation. (56 RT 10912-10913.) Alternate Juror No. 2, who was somewhat protective of Juror No. 5, said she broached the subject of the anchor in appellant's boat because she was curious about its weight. (56 RT 10931.) When the court asked this juror what, if anything, Juror No. 5 said in response, the alternate juror could not recall who said what. (56 RT 10931-10932.) Alternate Juror No. 6 stated that Juror No. 5 opined that the anchor was smaller than he thought it would be and was too small to anchor appellant's boat. (56 RT 10949.) This was not a "general" comment about a "tangential" matter, as appellant suggests. (AOB 377.) It was misconduct on the part of Juror No. 5. "These statements 'require[] neither interpretation nor the drawing of inferences. [They are] flat, unadorned statement[s] that [the juror] prejudged the case long before deliberations began and while a great deal more evidence had yet to be admitted.' [Citation.]" (*People v. Weatherton* (2014) 59 Cal.4th 589, 599.)

Further, in light of Juror No. 5's comments and opinions about the anchor in appellant's boat, contrary to appellant's assertion (AOB 372 ["the record suggests the juror is critically viewing the state's case"]), Juror No. 5 was an impediment to *both* sides receiving a fair trial. The trial court recognized this and brought this to defense counsel's attention. (56 RT 10966 ["Aren't you concerned about the fact that he's making statements in there that the anchor was too small?"].) Although Juror No. 5's comments evinced a bias against the prosecution, as we maintain below, this Court has stated that "a court may exercise its discretion to remove a juror for serious and wilful misconduct, such as that shown by [the juror's] repeated violation of the court's instructions, even if this misconduct is 'neutral' as between the parties and does not suggest bias toward either side." (*People v. Daniels*, *supra*, 52 Cal.3d at pp. 863-864.)

c. *Detective Brocchini's testimony*

Juror No. 5 told the court that he did not think he discussed the detective's testimony with other jurors. (56 RT 10862.) This was not necessarily a denial. Further, Juror No. 4 reported that during lunch a couple of days before, Juror No. 5 asked Juror No. 4 if he got anything out of the detective's testimony. (56 RT 10884.) Juror No. 8 reported that Juror No. 5 remarked that he had a lot of questions about the testimony. (56 RT 10901.) This was misconduct.

d. *Expressing negative views of the prosecutors and the prosecution's case to other jurors*

Juror No. 5 denied saying anything about the prosecution team. (56 RT 10863.) However, Juror No. 3 refuted that and told the court that Juror No. 5 discussed what he believed to be the prosecutors' deficiencies as it concerned speaking ability and presentation style. (56 RT 10877-10878.) Juror No. 8 said that on more than one occasion, Juror No. 5 opined that the prosecution did not come across as favorably as the defense. The most recent comment occurred the preceding day. (56 RT 10903.) Alternate Juror No. 5 "kind of" recalled hearing comments about the prosecution's presentation of evidence. (56 RT 10945.) And, Alternate Juror No. 6 recalled hearing comments about the prosecution, but declined to elaborate because the prosecutors were in chambers and the juror did not wish to offend them. (56 RT 10951.) Juror No. 5's actions constituted misconduct.

e. *Police report inconsistencies*

Juror No. 5 acknowledged some discussion of the police reports. He contended that he was merely answering another juror's question by sharing his own experiences. (56 RT 10865.) Juror No. 8 reported that while four or five jurors were in the hallway Juror No. 5 shared his opinion that the Modesto Police Department should have done a better job with

their reports. This was based on Juror No. 5's own experiences with report writing in his job as an airport screener. (56 RT 10902-10903.) This was misconduct.

And, inasmuch as appellant would have the Court adopt his view that Juror No. 5's negative comments about Detective Brocchini's testimony, the prosecutors' abilities, and the police reports were inconsequential and innocuous (AOB 375), he is wrong. Considering these comments together, it was evident that Juror No. 5 harbored a decided bias against the prosecution. Therefore, removal of Juror No. 5 was also justified on the ground that he could not perform his duty to render a fair and impartial verdict.

f. *Laci's pregnancy weight*

Juror No. 5 acknowledged that comments were made about Laci's weight, but he did not think he made them. He said, "I may have responded or said something during that conversation, but I don't think I'm the one that made it." (56 RT 10862.) Again, this weak denial was hardly reassuring. Moreover, Juror No. 8 recounted that Juror No. 5 said that because Laci's weight went from 126 pounds to 153 pounds, she may have been further along in her pregnancy than eight months. (56 RT 10902.) This was misconduct.

Insofar as appellant suggests that Juror No. 5 did not comment about Laci's weight, Detective Brocchini's testimony, or the police reports because certain of the jurors did not report hearing such remarks (AOB 358-361), appellant ignores that a fair number of these jurors told the court they did not spend much, if any, time congregating with other jurors. (56 RT 10870 [Juror No. 1]; 10872 [Juror No. 2]; 10876 [Juror No. 3], 10916, 10919 [Juror No. 10]; 10935-10936 [Alternate Juror No. 3]; 10948 [Alternate Juror No. 6].) Other jurors told the court they ignored or avoided these conversations. (56 RT 10913 [Juror No. 9]; 10922 [Juror No.

11]; 10926 [Juror No. 12].) Therefore, it is unlikely these jurors were privy to all of Juror No. 5's ramblings. Also, to the extent that some jurors were equivocal or uncomfortable about reporting exactly who said what, this was likely due to Juror No. 5's intimidation tactics.

3. *Other jurors admonished Juror No. 5*

Juror No. 5 told the court that during the course of a "general" conversation about the case, jurors would "usually cancel the conversation." (56 RT 10865.) This explanation was less than forthcoming because what really happened when Juror No. 5 started talking about the case was that certain jurors told him to stop. Juror No. 2 verified that he and another juror told Juror No. 5 to stop talking about the case. (56 RT 10874.) Alternate Juror No. 3 recalled someone chastising Juror No. 5 early on in the trial after Juror No. 5 made a comment. (56 RT 10937-10938.) Alternate Juror No. 2 admitted that she heard one of the other alternate jurors caution against discussing the case in response to the conversation about the anchor. (56 RT 10933.) And, Juror No. 8 told Juror No. 5 that he could avoid putting himself in harm's way by not discussing the case. (56 RT 10908.) These juror admonitions demonstrate that Juror No. 5's conduct was highly problematic for the other jurors.

4. *Juror No. 5's behavior impacted other jurors*

Based on the testimony of the other jurors, it was evident that Juror No. 5 lied to the trial court when he repeatedly assured the court he had not discussed the case with the other jurors. (54 RT 10485 ["No. No, not at all."].) Juror No. 5's disrespect for the court and the court's instructions was evident not only by virtue of his conversations about the case with others, but also by what he said to the court in chambers: "You can sit there and you can skew them any way you want." "Well, you know what, if you sit there and, you know, you pick them apart, I guess, yeah, you say

it supposedly does have to do with the case." (56 RT 10860-10861.) As we explained above, Juror No. 5 carried this same recalcitrant attitude back into the jury room after he was questioned by the court.

During the course of the court's questioning of Juror No. 8, the juror explained that Juror No. 5 "was the leader" of a clique of two or three other jurors. (56 RT 10908, 10909.) Given Juror No. 5's incessant chattering about the case, most other jurors had walled themselves off from him. (56 RT 10909.) A separation had developed in the jury room as a result of Juror No. 5's misconduct. (56 RT 10909.)

On this record, the trial court's finding of good cause to dismiss Juror No. 5 is supported to a demonstrable reality. Accordingly, there was no violation of appellant's statutory or constitutional rights. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1410.)

D. The Trial Court's Implicit Refusal to Discharge Jurors Nos. 4 and 6 and Alternate Jurors Nos. 2 and 6 Is Supported by Substantial Evidence

During the June 23 hearing on Juror No. 5's alleged misconduct, defense counsel maintained that if Juror No. 5 was dismissed, then Jurors Nos. 6 and 8, along with Alternate Jurors Nos. 2 and 6 should also be dismissed.[139] (56 RT 10958, 10967.) Presumably, the defense motion for a mistrial was, in part, predicated on the grounds that the trial court did not discharge these jurors and alternate jurors. (56 RT 10973.) For the first time, on appeal, appellant adds Juror No. 4 to that list. (AOB 378-385.) That portion of appellant's claim concerning Juror No. 4 is forfeited. Failure to object to juror misconduct forfeits the claim on appeal. (*People v. Foster* (2010) 50 Cal.4th 1301, 1341.) In any event, the trial court's

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[139] We do not address Juror No. 8 here because appellant does not contend Juror No. 8 committed misconduct in connection with the discharge of Juror No. 5.

decision to retain these jurors and alternate jurors was proper and is supported by substantial evidence.

We disagree with appellant's contention that the challenged jurors committed "the exact same misconduct" as Juror No. 5 (AOB 379). As distinguished from the challenged jurors, Juror No. 5's unrepentant attitude and pattern of misconduct set his actions apart from any purported indiscretions committed by other jurors or alternate jurors. So, this is not so much about the goose and the gander (AOB 381), as it is about apples and oranges.

Appellant's allegations of misconduct on the part of other jurors and alternates centers on the conversation involving the anchor in appellant's boat. (AOB 380-381.) Alternate Juror No. 2 acknowledged that she said she wanted to find out how much the anchor weighed. (56 RT 10931.) As she explained to the court, she asked because she thought the jurors could write the court a note or otherwise ask for permission to hold the anchor to see how heavy it was. (56 RT 10931.) Therefore, the alternate juror broached the topic hoping to secure additional information from the court about an item of evidence. There is nothing in the record to suggest that Alternate Juror No. 2 intended that the discussion evolve into Juror No. 5 treating the jurors to his opinion about whether the anchor would moor appellant's boat in the Bay. On these facts, Alternate Juror No. 2 did not commit misconduct.

As for Alternate Juror No. 6's involvement in the anchor conversation, he told the court that he did not initiate the conversation. (56 RT 10949-10950.) He and Juror No. 5 had a discussion about anchors used for fishing. During which conversation, Alternate Juror No. 6 then asked Juror No. 5 if he would use the anchor in the Bay. (56 RT 10950.) There was nothing in the record to suggest that the alternate pursued the conversation beyond asking the question. At worst, this was an isolated indiscretion on the part

of the alternate juror, which is not the same as Juror No. 5's unabated pattern of misconduct.

With respect to Juror No. 4's participation in the anchor conversation, Juror No. 8 merely reported that Juror No. 4 "was involved" in the conversation. (56 RT 10906.) There is nothing in the record to suggest Juror No. 4's involvement was anything more than passive. Indeed, Juror No. 4 explained that he suggested to the jurors involved in the conversation that they would have an opportunity to get the necessary information. (56 RT 10883.)

Appellant also contends Juror No. 4 committed misconduct when Juror No. 5 asked him if he got anything out of Detective Brocchini's testimony and Juror No. 4 responded with the one-word answer, "Yes." (AOB 381.) Clearly, Juror No. 4 did not solicit the discussion and there is no evidence in the record to suggest that Juror No. 4 furthered the discussion. This was not misconduct.

With respect to Juror No. 6, appellant alleges this juror committed misconduct when he engaged in a conversation with Juror No. 5 about police reports. (AOB 381.) Citing this juror's statement to the court that he recalled Juror No. 5 talk about his law enforcement background (airport screener) in relation to the police reports, appellant alleges this to be misconduct. It was not. Again, there is nothing appellant points to in the record to suggest that this juror solicited and furthered any conversation about the reports.

E. Reversal is Unwarranted under State or Federal Law

Based on the trial court's inquiry, and the jurors' answers, there existed no lack of impartiality or actual bias on the part of the challenged jurors and alternate jurors, or any other juror for that matter. under either federal or state constitutional standards.

The trial court asked the jurors whether those comments they heard from Juror No. 5, or related conversations involving other jurors, affected their ability to be fair and impartial and listen to the evidence going forward. The jurors and alternates assured the court they could remain fair and impartial. (56 RT 10875 [Juror No. 2], 10881 [Juror No. 3], 10886 [Juror No. 4], 10895 [Juror No. 6], 10899 [Juror No. 7], 10909 [Juror No. 8], 10915 [Juror No. 9], 10919 [Juror No. 10], 10922 [Juror No. 11], 10926 [Juror No. 12], 10929 [Alternate Juror No. 1], 10933 [Alternate Juror No. 2], [Alternate Juror No. 3], 10942 [Alternate Juror No. 4], 10947 [Alternate Juror No. 5], 10952 [Alternate Juror No. 6].)[140] Because there was no "biased adjudicator" (*People v. Nestler*, *supra*, 16 Cal.4th at p. 579), on appellant's jury, reversal is unwarranted.

Further, apart from coming within the ambit of Juror No. 5's misconduct, there was nothing else about the conduct of the challenged jurors or alternates that resulted in the substantial likelihood that one or more the jurors that tried appellant was actually biased against him. (See *In re Hamilton*, *supra*, 20 Cal.4th at p. 296.) As did the others, Jurors Nos. 4 and 6, along with Alternate Jurors Nos. 2 and 6, assured the court that they had not accessed media accounts of the trial or otherwise discussed news accounts with other jurors. (10955 [Juror No. 4], 10894-10895 [Juror No. 6], 10930 [Alternate Juror No. 2], 10948 [Alternate Juror No. 6].) Moreover, Alternate Juror No. 6 did not substitute in as a juror and render a verdict. Therefore, appellant has failed to demonstrate that the trial court's retention of the challenged jurors and alternates was prejudicial error.

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[140] The trial court explained that it did not question Juror No. 1 about his impartiality because his exposure to Juror No. 5's misconduct was minimal. (56 RT 10875.) Appellant does not contend that Juror No. 1, or any juror for that matter, was anything other than fair and impartial.

As for applicable federal constitutional principles, the Ninth Circuit Court of Appeals has upheld the constitutionality of Penal Code section 1089, determining that it "preserved the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments." (*Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 995, amended by 768 F.2d 1090 (9th Cir. 1985) (citing *Williams v. Florida* (1970) 399 U.S. 78, 100; *Henderson v. Lane* (7th Cir. 1980) 613 F.2d 175, 177, cert. denied, 466 U.S. 986). Thus, the trial court's removal of Juror No. 5 and its retention of the challenged jurors, as proper exercises of the trial court's discretion under section 1089, comported with relevant federal constitutional principles.

XIII. THE TRIAL COURT'S INQUIRY INTO THE HEARSAY ALLEGATIONS OF PREJUDICIAL JUROR MISCONDUCT WAS ADEQUATELY TAILORED TO THE CIRCUMSTANCES

Appellant argues the trial court failed to conduct an adequate hearing into hearsay allegations of prejudicial juror misconduct purportedly involving Juror No. 8's discussion of the case with a non-juror. (AOB 386-397.)

Not so. First, appellant has forfeited the claim because appellant's trial counsel did not object to the scope of the trial court's inquiry on the same grounds appellant raises on appeal. Moreover, the defense provided input to the trial court that helped shape the manner in which the inquiry was conducted. Therefore, appellant cannot be heard to complain now that the hearing was inadequate.

In any event, the defense proffer of prejudicial juror misconduct was insufficient to justify a hearing. However, in an abundance of caution, the trial court pursued an inquiry into the allegations, which was adequately tailored to the circumstances.

A. Procedural Background

On November 16, 2004, prior to the start of the penalty phase, defense attorney Paula Canny called San Mateo County District Attorney Office Inspector Bill Cody, and relayed certain information to him that she described as "'multiple hearsay.'" This information was purportedly relayed to Ms. Canny by a person named Gino Gonzales. (Court Exh. No. 36.) Ms. Canny told Inspector Cody that Juror No. 8 frequently discussed the case with Gonzales, the jurors kept secret notebooks, the jurors were happy that Juror No. 5 was discharged, and the jury had already decided to impose the death penalty. (Court Exh. No. 36.) Ms. Canny told Cody that she believed appellant's trial counsel was in possession of the same information. (Court Exh. No. 36.)

At the trial court's instruction, on November 17, 2004, Inspectors Cody and Billingsley interviewed Gonzales. (Court Exh. No. 36.) When Inspector Cody read relayed Ms. Canny's information about Juror No. 8's purported statements about the case, Gonzales responded, "'That's ridiculous and not true in any sense.'" (Court Exh. No. 36.)

In his report to the trial court, Inspector Cody stated the following about the interview with Gonzales:

> Mr. Gonzales began by saying the first time he recalls ever meeting Juror #8, whom he only knows as "John", was when Juror #8 told Mr. Gonzales at the Sharp Park Golf Course restaurant that he was called for jury duty on a "high profile case." A short time later, Juror #8 told Mr. Gonzales he was "picked for the jury." As of today's date, Juror #8 has never told Mr. Gonzales he is a juror on the Scott Peterson homicide case. Mr. Gonzales told us he *assumed* that, but Juror #8 has *never confirmed it.*
>
> Mr. Gonzales went on to explain that he considers Juror #8 a "regular" at the Sharp Park Golf Course restaurant since he sees him once or twice a week. Mr. Gonzales said the "talk" at the restaurant is that Juror #8 is on the Scott Peterson case.

> However, Mr. Gonzales said, "The regulars are very respectful of him and never discuss that case with him." Furthermore, Mr. Gonzales said he has never heard Juror #8 discuss the case with anyone and has never been told by any patrons or regulars at the restaurant, or other friends that Juror #8 has discussed the case.
>
> Mr. Gonzales told Inspector Billingsley and I that he cannot begin to understand the pressure Juror #8 feels. Mr. Gonzales said, "I just really respect him for the integrity he's shown."
>
> I asked Mr. Gonzales if he had any other information to offer regarding these allegations. Mr. Gonzales thought for a moment and then said he recalls his last conversation with Juror #8, which was about a month ago. Mr. Gonzales said he saw Juror #8 at the restaurant and said, "Hey when all this is finished we need to talk." Mr. Gonzales said Juror #8 looked at him, smiled, and said nothing else.
>
> Just prior to leaving, Mr. Gonzales asked if we could make a request of the court to keep his personal information, including his name, confidential. Mr. Gonzales said he has no desire to speak with anyone about this case and is very concerned about being targeted by the press due to media coverage on the case.

(Court Exh. No. 36, original emphasis.)

On November 30, 2004, the first day of the penalty phase, the trial court conducted a hearing into the matter.

1. *Questioning of Ms. Canny*

Ms. Canny had been working as a criminal defense attorney in San Mateo County for 20 years. (113 RT 20878 ["I have been on the Private Defender Program since 1984"].) Ms. Canny previously worked as a deputy district attorney in San Mateo and Ventura counties (113 RT 20878); the record does not disclose the length of her service with either office. Ms. Canny was also a media commentator on this trial. (113 RT 20879, 20889.) She explained that she pursued her role as a legal commentator and was not being paid for her services. (113 RT 20889.) Ms. Canny's legal

commentary included matters involving the replacement of jurors in the case. (113 RT 20890.)

Ms. Canny explained that she and Gino Gonzales lived in the same condominium complex in the city of Pacifica in San Mateo County. (113 RT 20878.) She had known Gonzales for "a long time." (113 RT 20879.) He always attended Ms. Canny's parties. (113 RT 20884.)

On Saturday, November 13, the day after the jury returned its guilt phase verdicts, Ms. Canny was standing outside talking on her cell phone when Gonzales drove up to her. (113 RT 20879.) She acknowledged Gonzales but indicated to him that she was busy at that moment. (113 RT 20880.) After her phone call ended, Ms. Canny went over to Gonzales and said, "Yo, Gino whassup?" (113 RT 20881.) Gonzales told her how much he and his family were enjoying watching her on television. (113 RT 20881.) They talked about the trial and Gonzales told Ms. Canny that Juror No. 8 was a friend. (113 RT 20881.) Gonzales said that he and Juror No. 8 were going to meet and celebrate at the "dive bar," which was down the street from the apartment complex. (113 RT 20882.) Gonzales was a bartender there. (113 RT 20893.) Canny recounted what Gonzales told her about his conversations with Juror No. 8 about the case:

> Juror No. 8 hated Juror No. 5. He said he was a geek. And that he learned a lot by doing this trial. Because he didn't take a lot of notes, like five just took notes. Eight learned to really get his mind going again by watching the witnesses. And every day at the end he would go home and write all the things that he thought were important in his notebook.
>
> And then he said that they are so happy that they got Scott. They are really happy that they got Scott. And then he said, you know, and they are going to get Scott in the next phase, or something like that.
>
> And then he says, "All this is attorney-client privilege."
>
> And I said, "No, Gino, it's not attorney-client privilege."

(113 RT 20882.) Ms. Canny explained that she became upset and employed the use of some profanity with Gonzales at that point. (113 RT 20882, 20883.)

The following day, Gonzalez went to Ms. Canny's residence to pick up a ticket he had purchased from her. (113 RT 20883-20884.) She told Gonzales that she was still unsettled by their conversation from the previous day. (113 RT 20883.) According to Ms. Canny, Gonzales told her that Juror No. 8 was "a great guy" and had "integrity." (113 RT 20884.) Gonzales also said that sometimes Juror No. 8 would meet him at a bar after Juror No. 8 got off work from his midnight shift as a parking attendant. The juror would have a beer or two, eat breakfast, and then go to the courthouse. (113 RT 20884, 20893-20894.) Gonzales and Juror No. 8 talked about some of the media personalities who attended the trial. (113 RT 20884.)

According to Ms. Canny, Gonzalez recounted that "the bar guys" talked about how "a guilty vote was worth at least a hundred thousand dollars" because that was the going price for a media interview with one of the jurors. (113 RT 20893.) Ms. Canny stated that she was under the impression that while Juror No. 8 may have been present during this talk, he did not participate in the conversation. (113 RT 20893.)

Ms. Canny acknowledged that she was conveying multiple levels of hearsay. (113 RT 20885.) Candidly, she said, "I don't know what's true, your Honor." (113 RT 20885.) She repeated this observation twice more, later in her testimony. (113 RT 20892 ["I don't know what's true, you know, or not true."].) Elaborating, Ms. Canny explained that Gonzales's girlfriend was a bartender at the bar where Gonzales said he met Juror No. 8. (113 RT 20885.) Ms. Canny said, "I think maybe the girlfriend talked to Gino, maybe nobody talked to Gino. Maybe Gino was just trying to pick himself up . . . ." (113 RT 20885.)

After Ms. Canny reported the matter to the district attorney investigator, Gonzales called her that night; "he was kind of upset." (113 RT 20885.) Then, on Thanksgiving morning, he called Ms. Canny and said the he had been served with a subpoena from the defense the preceding day. (113 RT 20886.) Her advice to him was to tell the truth and get a lawyer. (113 RT 20886-20887.) Gonzales asked Ms. Canny why the defense did not just "go get eight's notebook and see." (113 RT 20891.)

The court asked Ms. Canny if she was aware that Gonzales denied that he had such conversations with her. She said, "No. I mean, look, you don't know this. I feel terrible that I talked to him. But I would – you can ask anybody here. I'm not in the business of making stuff up." (113 RT 20886.) Ms. Canny felt that she was in a difficult position, but needed to come forward with the information. (113 RT 20891.)

Although there were two other people with Ms. Canny when she first spoke to Gonzales on November 13, neither of her companions actually heard the conversation. One of the individuals, a Sherpa friend, had recently left the country to return to Nepal. (113 RT 20883, 20887, 20888.)

Ms. Canny explained that the first person she told about her conversations with Gonzales was John Mannis, an individual she described as a former police officer. (113 RT 20890.) She also talked to appellant's trial counsel about the matter. (113 RT 20890.)

2. *Gino Gonzales*

After Ms. Canny was excused, the court asked Gino Gonzales's lawyer, Ian Loveseth, whether Gonzales was prepared to testify to the matters raised by Ms. Canny's testimony. Mr. Loveseth advised the court that Gonzales intended to assert his Fifth Amendment privilege against self-incrimination and would not testify without a grant of immunity. (113 RT 20895-20896.) The trial court referred the issue of immunity to the Honorable Mark Forcum, the presiding judge of the San Mateo County

Superior Court. (113 RT 20896-20898.) The court stated its intention to question Juror No. 8 after it heard from Gonzales. (113 RT 20899.)

While the issue of Gonzales's testimony was pending, the trial court considered defense counsel's suggestion to question all of the jurors. (113 RT 20902.) However, the prosecution argued that the defense had not made an adequate showing to warrant expanding the scope of the inquiry. (113 RT 20903, 20905.) While the court generally agreed with the prosecutor's assessment, the court maintained that the allegation that the jury had already decided to impose the death penalty needed to be addressed. (113 RT 20903.)

To that end, the court asked Mr. Loveseth if Gonzales would be willing to answer a single question: whether Gonzales ever had a conversation with Juror No. 8 about the trial. (113 RT 20907.) Mr. Loveseth said his client would and that it was his understanding that Gonzales would testify in accord with what he reported to Investigator Cody. (113 RT 20909.) Specifically, Gonzales asked Juror No. 8 what was going on with him. Juror No. 8 told Gonzales that he was a potential juror in a high-profile case. (113 RT 20909.) Gonzales suggested to Juror No. 8 that maybe they could talk when the case was over, but Juror No. 8 offered no response. (113 RT 20909.)

During the course of the discussion about Gonzales, the court and prosecutors learned that a defense investigator named Mike Hartman interviewed Gonzales. (113 RT 20898, 20900.) However, the defense did not provide any discovery to the prosecution about the interview because the defense investigator "[d]id it all oral." (113 RT 20899-20900.)

Defense counsel disagreed with the court's plan to limit the questioning of Gonzales on the grounds that it would deny appellant his rights under the Sixth Amendment. Implicitly crediting the assertion, the court opted not to question Gonzales. (113 RT 20909-20910.) Instead, the

court adopted defense counsel's suggestion and stated its intention to question each juror about the hearsay allegations that the jury had discussed and decided the issue of appellant's penalty. (113 RT 20911, 20194.)

The court gave the parties an opportunity to provide input on how the inquiry of the jurors would be conducted. (113 RT 20911-20912.) The court agreed to defense counsel's request that the court specifically ask if any discussion of penalty took place during the guilt phase. (113 RT 20911.) The court reiterated its plan to also question Juror No. 8 about those allegations that related to him. (113 RT 20902.)

3. *Questioning of the jurors and alternates*

With each juror, the court explained that there had been allegations that the jury had already discussed and decided the issue of penalty. (See, e.g., 113 RT 20914.) The court asked the jurors individually whether the allegations were true or false (See, e.g., 113 RT 20914) and whether there had been any discussion of penalty during the guilt phase (see, e.g., 113 RT 20915). The court instructed each juror not to discuss the court's inquiry with the other jurors. (See, e.g., 113 RT 20915.) During the course of the inquiry, the court modified its questioning based on defense counsel's suggestion. (113 RT 20917, 20918.)

The jurors and alternates assured the court that they had not discussed or decided the issue of penalty. (113 RT 20916 [Juror No. 1], 20917 [Juror No. 2], 20918 [Juror No. 3], 20919 [Juror No. 4], 20920 [Juror No. 5], 20915 [Juror No. 6], 20921 [Juror No. 7], 20922 [Juror No. 8], 20924 [Juror No. 9], 20925 [Juror No. 10], 20926 [Juror No. 11], 20927 [Juror No. 12], 20928-20929 [Alternate Juror No. 2], 20929-20930 [Alternate Juror No. 3], 20928 [Alternate Juror No. 4].)

When Juror No. 8 was questioned, the court also explained that there was an allegation that the juror drank alcohol after getting off the nightshift before he came to court. The court asked whether the allegation was true.

(113 RT 20922.) Juror No. 8 said no, it was not. (113 RT 20922.) The court next asked Juror No. 8 whether he had a conversation with Gino Gonzales about the case. (113 RT 20922-20923.) First, Juror No. 8 clarified that the court was referring to Gino the bartender. (113 RT 20923.) Juror No. 8 explained that he had been to the bar a couple of times, but never discussed the case with anyone there. (113 RT 20923.) The court asked Juror No. 8 if he told anyone that members of the jury kept secret notebooks about the case. The juror said no. (113 RT 20923.)

Defense counsel interposed no objection during the course of the court's inquiry of Juror No. 8. Nor, did defense counsel ask the court to bring Juror No. 8 back for additional questioning.

4. *Argument and ruling*

Only after the court concluded its inquiry did defense counsel object to one aspect of the court's inquiry of Juror No. 8. (113 RT 20930.) Citing the juror's demeanor, defense counsel suggested that the juror was not telling the truth about not drinking before coming to court. (113 RT 20930.) Counsel argued the court should have questioned Juror No. 8 further on the matter. (113 RT 20930.) In support of his argument that Juror No. 8 was untruthful, counsel suggested there was a connection between the hearsay allegation of drinking before court with Juror No. 8 closing his eyes during the trial. (113 RT 20930.) The court disagreed, citing the fact that the juror worked nights. (113 RT 20930.) Also, the court explained that, in the past, it had spoken with jurors who sometimes closed their eyes during trial. These jurors reported that they were not asleep, but merely resting their eyes while still listening to the proceedings. (113 RT 20931.) Moreover, the court pointed out, there was no evidence that Juror No. 8 was ever intoxicated. (113 RT 20931.) The prosecutor noted that he never saw anything to indicate that Juror No. 8 was asleep during the trial. (113 RT 20931.)

The trial court denied the defense motion for a mistrial. (113 RT 20932.) The court found that its inquiry of the jurors had disclosed that the allegation the jury had already decided on the penalty was "[c]ompletely false." (113 RT 20932.) And, that the members of the jury did not keep secret notebooks. (113 RT 20932.)

B. Appellant Has Forfeited the Claim

As an initial matter, there are two procedural problems with appellant's claim: 1) the defense helped craft the direction and scope of the court's inquiry into the alleged juror misconduct and, therefore, consented to the procedures and, 2) appellant's claim is predicated on different grounds than those upon which appellant's trial counsel asserted error in the court below.

First, the record suggests that defense counsel recognized that, even if Gino Gonzales was granted immunity, Gonzales would have, at best, merely stated that he lied to Ms. Canny. (113 RT 20904.) Therefore, the better course, according to defense counsel, was to bring in all of the jurors for questioning (113 RT 20902, 20906), which the trial court did. The court fashioned its questioning of the jurors with input from defense counsel. (113 RT 20902, 20909-20912, 20917, 20918.)

A reasonable interpretation of this record is that defense counsel acquiesced in, if not outright encouraged, the trial court's decision to forego Gonzales's testimony in favor of going straight to the jurors, including Juror No. 8, with the allegations. Therefore, appellant either tacitly or expressly consented to the scope of the inquiry. "[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights." (*In re Seaton* (2004) 34 Cal.4th 193, 198.)

Trial counsel did, however, lodge one very specific objection to the trial court's inquiry, the substance of which was that the trial court should have, in retrospect, asked more questions of Juror No. 8 about the allegation that he drank before coming to court. (113 RT 20930.) Beyond the belated nature of that objection, which was interposed after all of the jurors and alternates were questioned, this is a different basis than that which underlies appellant's claim on appeal. Appellant's claim is founded upon the assertion that the trial court should have pursued Gonzales's testimony. (AOB 397 ["without hearing from Gonzales himself . . . ."].) The objection in the trial court must be "on the same ground" as that asserted on appeal. (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) In short, trial counsel wanted the court to ask more questions of Juror No. 8 about his purported drinking before court, while on appeal, appellant claims the trial court should have obtained Gonzales's testimony. They are not the same grounds and, thus, the claim is forfeited.

Even if the claim has been preserved, it is not meritorious.

C. Applicable Legal Principles

A defendant is not entitled to an evidentiary hearing as a matter of right; rather, a trial court has discretion to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 810.) The defense evidence must demonstrate a "strong possibility that prejudicial misconduct has occurred." (*People v. Schmeck* (2005) 37 Cal.4th 240, 295.) It is ordinarily not an abuse of discretion to decline to conduct an evidentiary hearing when evidence supporting a claim is hearsay. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 810.)

"The trial judge is afforded broad discretion in deciding whether and how to conduct an inquiry to determine whether a juror should be discharged. [Citations]. Our assessment of the adequacy of a court's

inquiry into juror misconduct is deferential: We have long recognized that, except when bias is apparent from the record, the trial judge is in the best position to assess the juror's state of mind during questioning. [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 971.)

This Court has observed that a trial court which has become aware of possible juror misconduct, including that which may have occurred during jury deliberations, "is placed on a course that is fraught with the risk of reversible error at each fork in the road." (*People v. Fuiava* (2012) 53 Cal.4th 622, 710.) The court's inquiry into the possibility of misconduct cannot be "too cursory," nor can it be "overly intrusive," or "intrude too deeply into the jury's deliberative process . . . ." (*Ibid.*) In making decisions on how best to conduct an adequate inquiry, "a trial court might at times be placed between a rock and a hard place; . . . ." (*Ibid.*)

D. The Trial Court Conducted an Adequate Inquiry into the Hearsay Allegations of Juror Misconduct

The trial court was under no obligation to conduct a hearing in the first instance because the defense proffer did not demonstrate a "strong possibility that prejudicial misconduct occurred." (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 295.) Even Ms. Canny was forced to repeatedly concede that she did not know which, if any, of the allegations or statements were truthful. (113 RT 20885, 20892.) Nor could she identify the source of the allegations: it may have been Gonzales's girlfriend or it could have been Gonzales. (113 RT 20885.) She likewise acknowledged that her testimony was founded upon multiple levels of hearsay. (113 RT 20885.) Under these circumstances, it would have been a proper exercise of the court's discretion to stop the inquiry in its tracks at that point. (See *People v. Dykes*, *supra*, 46 Cal.4th at p. 810 [ordinarily no abuse of discretion when evidence of misconduct is based on hearsay].) Yet, out of an abundance of caution, the trial court pursued the allegations.

During its inquiry, the court implicitly recognized that pursuing Gonzales's testimony would have been a fruitless course. If Gonzales testified, the court acknowledged that the defense would have the right to question Gonzales, as would the prosecutor. (113 RT 20910.) Defense counsel opined that, in that event, it was likely Gonzales would merely testify that he made the comments to Ms. Canny, but they were lies. (113 RT 20904.) On the other hand, Gonzales's attorney told the court that his client's testimony would be in accord with his statement to Inspector Cody, which was that Gonzales did not make the comments ascribed to him by Ms. Canny. (113 RT 20903, 20909; Court Exh. No. 36.) If the latter, it would become a he-said-she-said. So, even had the court pursued Gonzales's testimony, the truth would have remained obscured and the issue would have unduly consumed more of the court's time and resources while the jury was left to wait.

The better course, as suggested by defense counsel (113 RT 20906), was to question each of the jurors to find out if the hearsay-layered allegations—that the jury was out to get appellant and, therefore, had already discussed and decided the matter of penalty—were true. The court fashioned the scope of the inquiry, with input from the parties (113 RT 20911-20914), in a manner that was minimally intrusive to the jury's deliberations. Ultimately, the court determined the jurors did not prematurely discuss or decide the issue of penalty.

Further, during the course of the inquiry, the court questioned Juror No. 8 about the specific allegations that related to him. The court, having the opportunity to gauge the juror's demeanor and credibility, credited the juror's responses in determining the allegations were false. (113 RT 20922-20923.) The trial court's assessment is supported by Inspector Cody's report of his interview of Gonzales, which repeatedly emphasized that Juror No. 8 conducted himself in accord with his oath and the court's

instructions. (Court Exh. No. 36.) The trial court's determination is entitled to deference since it was in the best position to assess Juror No. 8's state of mind. (See *People v. Clark*, *supra*, 52 Cal.4th at p. 971.) Appellant credits the court for its inquiry of this juror. (AOB 395.)

The record, therefore, demonstrates that the trial court adequately addressed the hearsay allegations of juror misconduct, including those aimed at Juror No. 8—the defense's least favorite juror. (See section XII, *ante*.) Appellant fails to show that attempting to secure additional statements from Gino Gonzales would have facilitated the court's search for the truth. To be sure, given the fact that the defense investigator who interviewed Gonzales, and thus was a potential witness, was not in the courtroom at the time of the hearing (113 RT 20900), it can be reasonably assumed that Gonzales did not provide the defense investigator with any statement which the defense felt supported its ardent quest to have Juror No. 8 removed. (See section XII.C.2.b., *ante*; 56 RT 10973 [unfounded defense request to "bounce eight"].)

In support of his argument that Gonzales's denials to Inspector Cody were false, appellant tries to persuade the Court that Ms. Canny's testimony was unimpeachable because she was an unbiased and unwitting participant in these matters and that she had no horse in this race. (AOB 396.) Indeed, appellant tacitly suggests that, if Ms. Canny had a bias, it would have inured to the prosecution's benefit, given appellant's repeated referral to Ms. Canny's previous employment as a deputy district attorney. (AOB 386, 388 ["a former district attorney"], 395 ["[f]ormer district attorney Paula Canny"], 395 ["[a]s a former prosecutor"], 396 ["Canny was a former prosecutor"].) However, nowhere in his argument does appellant mention the fact that Ms. Canny had been working as criminal defense lawyer for 20 years. (113 RT 20878.) Also, the record does not reveal the length of Ms. Canny's employment as a deputy district attorney. Further, at the time of

her testimony, Ms. Canny was offering legal commentary on the case in the media, including on juror-related issues. Therefore, the trial court may have reasonably determined that the issue of witness bias and credibility was not as uncomplicated and straightforward as appellant suggests here.

Appellant posits that Ms. Canny's credibility was also bolstered by the fact that she was aware that Juror No. 8 worked as a parking attendant and the only way she would have known that was through a conversation with Gonzales since the jurors' questionnaires, which contained employment information, were not public record. (AOB 390, fn. 60.) However, Ms. Canny testified that she had a discussion with appellant's trial counsel about the matter involving Gonzales's purported conversation with Juror No. 8. (113 RT 20890.) Ms. Canny was not asked about the details of her conversation with defense counsel. Her statement to Inspector Cody also disclosed that appellant's trial counsel was aware of the information (Court Exh. No. 36), which supports her acknowledgement that she discussed the matter with defense counsel.

In short, given the infirmities associated with the defense proffer of prejudicial juror misconduct, the trial court went beyond its obligations under the law in conducting an inquiry into the allegations. Yet, once undertaken, the inquiry was not "too cursory" or "overly intrusive." (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 710.) It was adequate under the circumstances.

Further, even if the trial court's inquiry was somehow lacking, the record does not establish to a demonstrable reality that Juror No. 8 was unable to perform his duties as a juror. (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 715.)

XIV. THE TRIAL COURT PROPERLY REFUSED TO DISMISS THE PENALTY PHASE OF THE TRIAL OR, IN THE ALTERNATIVE, TO SEAT A NEW PENALTY JURY

Appellant next demands reversal of the death judgment, claiming that the trial court erroneously denied his motion to dismiss the penalty phase or, in the alternative, to seat a new penalty jury. He claims this purported error violated his state and federal constitutional rights against cruel and unusual punishment, as well as his rights to due process, to a fair trial, and to a reliable individualized sentencing determination. (AOB 398-409.)

We disagree. Appellant has failed to show to a demonstrable reality that this jury could not render a fair and impartial penalty verdict. Accordingly, the trial court did not abuse its discretion in denying appellant's motion; i.e., it did not rule beyond the bounds of reason, all the circumstances before the court considered.

A. Procedural Background

On November 17, 2004, after the jury rendered its verdicts in the guilt phase, the defense moved to discharge the jury and dismiss the penalty phase or, in the alternative, impanel a new penalty phase jury and change venue. The motion was based largely on the court's decision to discontinue sequestering of the jury after it rendered its guilt phase verdicts but before the penalty phase began. According to the defense, the jury was tainted by exposure to the public's highly favorable reaction to the guilty verdicts. (17 CT 5343-5393; 112 RT 20836.) The prosecution opposed the motion, disputing a number of factual assertions underlying the defense motion. (17 CT 5450-5455.)

On November 22, the trial court conducted a hearing on the motion. After hearing argument (112 RT 20838-20851), the court denied the defense motion. (112 RT 20858.)

On the issue of sequestering of the jury, the trial court stated:

> First the issue of sequestering or non-sequestering the jury or excusing the jury after they arrived at a verdict. That's within the sound discretion of the trial court. [] I unsequestered the jury and gave them the admonition that the law requires. If I didn't unsequester this jury, they would still be sitting at this hotel now, wondering when we're going to start up this penalty phase. Now, my understanding is it's not going to start, if we get there, until next week. So they would be sitting there for two weeks not knowing what is happening.
>
> And this is within the sound discretion of the trial court, as long as I follow what the law requires, which I did. I don't consider this to be error.

(112 RT 20851-20852.)

With respect to media coverage of the case and the defense request for a second change of venue to a third county, the court explained, in part:

> Where would this case be sent? I've already [] talked about Mars. But [] where could I send this case in the State of California that hasn't been inundated with the media coverage?
>
> You mentioned Los Angeles, [Defense Counsel]. There – [] you have Michael Jackson is in the media every day, every night. This case would be no exception. [] [T]hey're struggling to impanel a jury in the Robert Blake case. That's got a lot of wall to wall coverage. I don't think it's risen to the amount -- the amount of coverage that this case has engendered, for whatever reason.
>
> But there's not [] a county in the State of California, [] let alone in -- I get letters from Mississippi, I get letters from Florida; everybody knows about this case. The only thing we can do is try -- you know, if we could all hide in a closet somewhere for the next three or four months and try this case all -- where nobody gets out...

(112 RT 20852-20853.)

As concerned the jurors and the process by which they were selected, the court found:

> The only comfort that the court has is that we spent about two months selecting this jury here. [] I felt I was very, very careful

in weeding out those jurors that I felt could not be fair and impartial jurors in this case. Both as to the guilt phase and as to the penalty phase.

As the district attorney pointed out, [Defense Counsel], you did not use all your challenges [] when we selected the jury, so that issue on appeal is sort of waived, because you didn't use -- you didn't use up all your challenges. [] I have to only come to the conclusion that you were satisfied with the twelve jurors that we selected and the alternates. So that's the way it is.

Probably we're better off with this jury than trying to start this thing all over again, because at least we've gone through all these folks, they've heard the evidence, they've come to certain conclusion[s], they've [] resolved certain issues in this case, and have been through this jury selection process. And we've kept them sequestered during the deliberations. I've admonished them at every recess. I can only assume what the law says, that they follow the court's instructions in that regard. So we're going to have to go with this jury.

Now, they were told [] at the beginning about the media coverage of this case. They were certainly aware of that fact. That was exhausted in voir dire. They were instructed -- again, they were given the jury instructions with respect to the guilt phase that they were not to be influenced by public opinion or public feeling. I can only assume that they followed the court's instructions. I don't have anything before me now that tells me that they did not do that.

(112 RT 20853-20855.)

Returning to the issue of press coverage and public sentiment about the case, the court explained, in part:

We all know that people have hard opinions about this. [] I get letters, that I'm going to file and make part of the record, saying [] ["][W]hy is the jury taking so long?["] And I get letters from other people saying that, you know, ["]This is a miscarriage of justice, this man is innocent.["]

These are people just following this in the media and putting in [] their two bits in to the court. And those will all be filed and

made part of the record. So people have strong feelings about this case one way or another.

[] [T]his is still a free country and I can't go out and stop people from expressing their views and doing what they went to do to get all this stuff off their chest. There's nothing I can do about that. All I can do is talk to this jury, and when they get reinstructed again, they're going to be told again that they're not to consider public opinion or public feeling in arriving at a verdict in this case.

(112 RT 20856-20857.)

In response to the court's ruling, defense counsel announced his intention to file a writ petition with the Court of Appeal and, if necessary, with this Court. (112 RT 20859.)

On November 23, the Court of Appeal denied the defense petition for a writ of mandate and request to stay the penalty phase proceedings. (113 RT 20941; Court Exh. No. 40; Case No. A108405.)

On November 29, this Court, sitting en banc, denied appellant's petition for review of the Court of Appeal's decision and the related application for a stay of the penalty phase. (113 RT 20941; Court Exh. No. 41; Court Case No. S129466.)

B. Applicable Legal Principles

Penal Code section 190.4, subdivision (c) provides, in relevant part:

If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider . . . the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn . . . .

The Legislature has, thus, clearly articulated its preference for a single jury to decide both guilt and penalty. (*People v. Fauber* (1992) 2 Cal. 4th 792, 845.)

"The preference for a single jury is by no means a one-sided matter; such a procedure may provide distinct benefits for both

> the prosecution and the defense. From the prosecution's point of view, the use of a single jury to determine both guilt and penalty may make it less likely that a juror's belief as to the inappropriateness of the death penalty will improperly skew the determination of guilt or innocence . . . . *From defendant's perspective, the use of a single jury may help insure that the ultimate decision-maker in capital cases acts with full recognition of the gravity of its responsibility throughout both phases of the trial and will also guarantee that the penalty phase jury is aware of lingering doubts that may have survived the guilt phase deliberations*." [Citations.]

(*People v. Nicolaus* (1991) 54 Cal.3d 551, 572, emphasis added.)

"Good cause to discharge the guilt phase jury and to impanel a new one must be based on facts that appear in the record as a demonstrable reality showing the jury's inability to perform its function." (*People v. Clark* (2011) 52 Cal.4th 856, 966, internal citations and quotation marks omitted.) The trial court's ruling is reviewed for abuse of discretion. (*Ibid.*)

C. Appellant Has Failed to Show to a Demonstrable Reality that the Jury Could Not Perform its Function to Fairly Decide the Issue of Penalty

Appellant's claim fails because he has not shown to a demonstrable reality that the jury who decided his guilt was incapable of fairly deciding his penalty. On the contrary, the trial court found there was no evidence to suggest the jurors would not abide by their oath to render a fair and impartial penalty verdict. (112 RT 20854-20855.) Therefore, the court's denial of the defense motion was a proper exercise of its discretion.

As a threshold matter, appellant contends that when the Court uses the term "demonstrable reality," it really means "a very *substantial likelihood*." (AOB 404, original emphasis.) First, even crediting appellant's view of this Court's jurisprudence, it is noteworthy that he did not italicize the word "very." We also observe that appellant dropped the word "very" altogether

when he asserts on the following page of his brief that: "A substantial likelihood is all that is required." (AOB 405.)

In any event, if this Court agrees with appellant that "demonstrable reality" and "very substantial likelihood" are synonymous concepts and applicable here, it still does not help appellant prevail on his claim because the record does not show a "very substantial likelihood" that any member of the jury could not render a fair and impartial penalty verdict. Instead, appellant supports his claim with mere speculation.

Beyond its finding that there was no evidence to suggest any of the jurors became biased against appellant as a result of exposure to the public reaction to the verdicts, prior to the start of the penalty phase the court instructed the jurors that they "must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the people and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." (113 RT 20945.) The court repeated this instruction immediately before the jury retired to deliberate on the matter of penalty. (120 RT 21688.) The jurors are presumed to have followed the court's instructions. (*People v. Montes* (2014) 58 Cal.4th 809, 888.)

Likewise, the trial court twice instructed the jury on the concept of lingering doubt:

> You may also consider any lingering or residual doubt as to the defendant's guilt or intent as a factor in mitigation. Lingering or residual doubt is defined as a state of mind between reasonable doubt and beyond all possible doubt. You may not relitigate or reconsider matters resolved in the guilt phase, but you may consider lingering doubt as a factor in mitigation.

(113 RT 20948; see also 120 RT 21694.) As the Court observed in *People v. Nicolaus*, *supra*, 54 Cal.3d at p. 572, maintaining a single jury in this

case helped to ensure that the jury that determined the matter of appellant's guilt acted "with full recognition of the gravity of its responsibility" and guaranteed that, during the penalty phase, the jury was "aware of lingering doubts that may have survived the guilt phase deliberations."

In *People v. Clark*, *supra*, 52 Cal.4th 856, the Court found no abuse of discretion where the trial court denied a request to impanel a second jury based on midtrial publicity because there was no cause for concern and the defendant's effort to show otherwise rested on speculation. (*Id.* at p. 966.) The Court found:

> [T]he court's admonitions at the outset of the guilt phase adequately conveyed to the jurors that they were not to read or be influenced by media coverage. The court was even more explicit in this regard when admonishing the jury subsequent to its guilty verdicts. There is nothing in the record to suggest that any juror disregarded the court's directive and no facts establishing good cause to impanel a new jury or question the existing jurors.

(*Id.* at p. 966.)

In *People v. Craig* (1978) 86 Cal.App.3d 905, a case cited by the prosecution in the lower court, the Court of Appeal affirmed the trial court's denial of a mistrial motion that was based on the presence of picketers inside the courthouse. (*Id.* at p. 919.) The appellate court credited the trial court's assessment that the ability of the jury to render a fair and impartial verdict remained undisturbed. (*Id.* at p. 920.) The Court of Appeal's decision upholding the denial of the mistrial motion was further supported by the trial court's admonition to the jury to disregard outside influences. Last, the appellate court found there was no showing of prejudice; only speculation by defense counsel. (*Ibid.*)

In the capital case of *People v. Lucero* (1988) 44 Cal.3d 1006, the court addressed the analogous issue of the influence of spectator misconduct on the jury prior to the start of deliberations. The defendant

was accused of the brutal murders of two young girls, 7 and 10 years of age. (*Id.* at p. 1011.) Following guilt-phase closing arguments, as the jury was leaving the courtroom to start its deliberations, the distraught mother of one of the victims "cried out":

> "There was screaming from the ball park. They couldn't hear the girls because there was screaming from the ball park. That's why they couldn't hear it. The girls were screaming -- screaming from the ball park, screaming, screaming, screaming. That wasn't in the case. Screaming, screaming from the ball park. Why wasn't that brought up? Why, why, why?"

(*Id.* at p. 1022.) As the mother was escorted from the courtroom, she could still be heard "'screaming'" in the corridor. (*Ibid.*) The trial court gave the jurors "a cursory admonition" about the outburst and excused the jury to begin their deliberations. (*Ibid.*) The trial court denied the defense motion for a mistrial. (*Ibid.*)

On appeal, the defendant argued the outburst was prejudicial because it occurred just prior to the start of the deliberations, the outburst informed the jury of facts not in evidence, and the outburst occurred during a capital prosecution. (*People v. Lucero*, *supra*, 44 Cal.3d at pp. 1022-1023.) The Court rejected these contentions finding that the isolated outburst was followed by a prompt, although somewhat underwhelming, admonition. (*Id.* at p. 1024; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1282 [capital murder defendant not entitled to new jury for penalty phase, even though jury had heard at guilt phase evidence of numerous charged burglaries and attempted burglaries that were unconnected to the murders].)

Further, here, appellant's claim does not particularly demonstrate how he was prejudiced. A second jury would have learned of the heinous circumstances underlying the murder charges of which appellant had been convicted and would have come to its own conclusions about the aggravated nature of appellant's crimes juxtaposed with mitigation

evidence demonstrating that he came from a loving family and enjoyed a privileged upbringing: in other words, the conclusion that the death penalty was warranted.

D. Impaneling a Unitary Jury for the Guilt and Penalty Phases Did Not Violate Appellant's Federal Constitutional Rights to Due Process, a Fair Trial, or a Reliable Penalty Determination

Appellant contends the trial court's ruling resulted in a degree of risk that was incompatible with his federal constitutional rights to due process, a fair trial, and a reliable penalty determination. (AOB 407-409.)

Not so. Generally speaking, a capital defendant is not denied due process or the right to an impartial jury, under either the state or federal constitution, by impaneling a single jury to determine both guilt and penalty verdicts. (*Lockhart v. McCree* (1986) 476 U.S. 162, 182-183; see also *People v. Davis* (2009) 46 Cal.4th 539, 626 [use of a single jury to determine guilt and penalty does not constitute a denial of due process or violate a defendant's right to a fair trial and a reliable guilt and penalty determination].)

To support his argument on due process grounds, in particular, again appellant likens his case to that of *Rideau v. Louisiana*, *supra*, 373 U.S. 723. (AOB 407-408.) However, as we argued in section V.B., *ante*, the trial proceedings in this case bore no resemblance to the "[t]he kangaroo court proceedings" in *Rideau*, which followed soon after the defendant's widely televised confession. (*Rideau v. Louisiana*, *supra*, 373 U.S. at pp. 726-727.) Indeed, this case is readily distinguishable from cases in which the Supreme Court has found that public opinion created a "circus atmosphere" that was "entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." (*Murphy v. Florida* (1975) 421 U.S. 794, 799.)

Further, insofar as appellant invokes the concept of "risk" as grounds for invalidating the penalty judgment, we again note that the trial court inoculated the jury against any such risk infecting its deliberations when the court instructed the jurors at the beginning and the end of the penalty phase that they "must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings . . . ." (113 RT 20945; 120 RT 21688.) And, the last instruction the jury heard before the penalty phase commenced was on lingering doubt. The jurors are presumed to have followed these instructions. (*CSX Transp., Inc. v. Hensley* (2009) 556 U.S. 838, 841 ["The jury system is premised on the idea that rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions . . . in all cases, juries are presumed to follow the court's instructions."].)

Given the absence of evidence of juror bias against appellant, combined with the trial court's prophylactic measures to ensure the jurors' impartiality during the penalty phase of the trial, reversal of the penalty judgment is unwarranted.

XV. THE TRIAL COURT PROPERLY EXCLUDED INFORMATION ABOUT OTHER CAPITAL MURDERS BECAUSE IT WAS NOT RELEVANT AS MITIGATION EVIDENCE

Appellant contends the trial court erred in excluding, as mitigation evidence, information concerning crimes perpetrated by other capital defendants. (AOB 410-423.)

We disagree. The trial court properly excluded the evidence because it had no relevance to appellant's character, prior record, or the circumstances of the murders he committed. If error, it was harmless.

A. Procedural Background

On December 1, 2004, prior to the start of the defense penalty phase evidence, the court conducted a hearing into the admissibility of proffered

mitigation evidence. Defense counsel explained that he wanted to call a retired Orange County Superior Court judge who had presided over 15 death penalty cases and sentenced 9 men to death row, including a serial killer. (114 RT 21020.) The judge would offer his opinion that, based on the nature and circumstances of the crime, and the fact that appellant had no criminal history, appellant was not deserving of the death penalty because he was not among "the worst of the worst." (114 RT 21020-21021.)

The prosecution objected on the grounds that the judge's opinion invaded the province of the jury's determination on the ultimate question and that it involved intercase review, which was likewise inapplicable. (114 RT 21021-21022.)

The court ruled that the judge's opinion was irrelevant. (114 RT 21022.) However, defense counsel could argue that appellant was not among the "worst of the worst" or "a serial killer." (114 RT 21022.)

Defense counsel acknowledged having seen case authority for the trial court's suggestion that the point could be argued. (114 RT 21023.) But, counsel told the court that he wanted to call the judge as a witness so the judge could tell the jury about the facts of a case involving a serial killer, for example, as compared to the facts here. (114 RT 21023, 21024.)

The court, again, ruled that such information was irrelevant. (114 RT 21023, 21024.) To illustrate what evidence was admissible as mitigation, the court explained that the evidence should come from people who knew appellant and could speak to his character. (114 RT 21023.)

B. Applicable Legal Principles

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 317 [defendant's intellectual disability

and childhood abuse]; *Mills v. Maryland* (1988) 486 U.S. 367, 375; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397-399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5 [defendant's good behavior in jail]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-114 [evidence of 16-year-old defendant's troubled family history and emotional disturbance]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *People v. Mickey* (1991) 54 Cal.3d 612, 693; *People v. Hunter* (1989) 49 Cal.3d 957, 980.)

Nonetheless, there are limits on the admission of mitigation evidence:

> While the range of constitutionally pertinent mitigation is quite broad [citation omitted], it is not unlimited. Both the United States Supreme Court and [California Supreme Court] have made clear that the trial court retains authority to exclude as irrelevant, evidence that has no logical bearing on the defendant's character, prior record, or the circumstances of the capital offense.

(*People v. Carasi* (2008) 44 Cal.4th 1263, 1313, citing *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, fn. 12; see also *People v. Thornton* (2007) 41 Cal.4th 391. 454 [the right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence].)

> "'The fact that a different jury under different evidence, found that a different defendant should not be put to death is no more relevant than a finding that such a defendant should be sentenced to death. Such evidence provides nothing more than incomplete, extraneous, and confusing information to a jury, which is then left to speculate: Why did that jury do that? What was different in that case? What did that jury know that we do not know? [Fn. omitted.]' Any attempt to answer these questions is further stymied by the normative nature of a jury's penalty decision under California law."

(*People v. Moore* (2011) 51 Cal.4th 1104, 1141-1142, quoting *People v. Dyer* (1988) 45 Cal.3d 26, 70; see also *People v. Hamilton* (1989) 48 Cal.3d 1142, 1187 ["the California Constitution (art. I, § 17) prohibits imposition of a punishment disproportionate to the defendant's *individual*

culpability ... [but] [i]n view of defendant's calculated murder of his pregnant wife by shotgun, for reasons of personal gain, his sentence cannot be deemed disproportionate by any applicable standard...."] (original emphasis); *People v. Crew* (1991) 1 Cal.App.4th 1591, 1602-1604 [in granting section 190.4 motion to modify the jury's verdict of death, trial court erroneously considered facts of other capital cases].)

C. The Trial Court Properly Excluded the Other-Crimes Information Because it Was Not Relevant

The proffered information here—that there were arguably worse murderers out there than appellant—was properly excluded because it had no relevance to appellant's character, record, or the circumstances of his crimes.

In support of his argument, appellant contends the United States Supreme Court's decisions in *Tennard v. Dretke* (2004) 542 U.S. 274 (*Tennard*) and *Smith v. Texas* (2004) 543 U.S. 37 (*Smith*) stand for the proposition that any information can be admitted as mitigation evidence, even if the information does not specifically pertain to a defendant's character or record or any of the circumstances of the offense. (AOB 413-414.)

First, *Tennard* and *Smith* do not constitute a departure from the high court's earlier holdings on the scope of mitigation evidence. Instead, these cases concern the Supreme Court's rejection of a causal-connection litmus test linking proffered mitigation evidence to the crime before a jury is permitted to consider such evidence. (*Tennard*, *supra*, 542 U.S. at p. 287 ["[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime."]; *Smith*, *supra*, 543 U.S. at p. 45 [high court "unequivocally rejected" any test requiring a causal nexus between

mitigation evidence and the crime].) Appellant does not contend the trial court applied such a nexus test here.

Further, the mitigation evidence at issue in *Tennard* and *Smith* demonstrates that the Supreme Court has not abandoned the requirement that such evidence must pertain to a defendant's character, record, or to the circumstances surrounding the crime. In *Tennard*, the mitigation evidence pertained to the defendant's low IQ of 67, which the Supreme Court recognized as "inherently mitigating." (*Tennard*, *supra*, 542 U.S. at p. 287.) A defendant's low mental acuity certainly falls within the ambit of the defendant's character or record. *Smith* is similar as the evidence in mitigation there concerned the defendant's learning disabilities and speech handicaps when young, his low IQ, the fact that the defendant's father was a drug addict who stole from the family to support his addiction, and the fact that the defendant was only 19 years old when he committed the crime. (*Smith*, *supra*, 543 U.S. at p. 41.) Likewise, this evidence pertained to the defendant's character and background.

Since *Tennard* and *Smith*, this Court has reaffirmed the principle that there are limitations on the admission of mitigation evidence. In *People v. Gonzales* (2013) 54 Cal.4th 1234, this Court addressed the relevance standard set forth in *Tennard* in the context of certain information proffered as mitigation evidence, which the Court held was properly excluded by the trial court as irrelevant. While acknowledging a defendant's right to present relevant evidence in mitigation, the Court stated: "With that proposition, of course, we have no quarrel. But as we have often explained, the high court has never held that a defendant's right to present mitigating evidence overrides the usual rules of evidence. [Citations.]" (*Id.* at pp. 1286-1287.) To be sure, the Court quoted *Tennard*:

> "[T]he 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing

> proceeding' than in any other context .... ' "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." ' " (*Tennard, supra*, 542 U.S. at p. 284, quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440 [108 L. Ed. 2d 369, 110 S. Ct. 1227].)

(*Id.* at p. 1287.)

Appellant's citation to *Kimbrough v. United States* (2007) 552 U.S. 85, is equally unavailing because it concerns the federal sentencing guidelines and sentencing disparities between crack cocaine and powder cocaine.

Following appellant's argument to its logical conclusion—that any factual evidence which might serve as a basis for a sentence less than death is admissible as mitigation—means that, during the penalty phase, capital defendants could offer financial statistics on the relative cost of the death penalty as compared to a life sentence or, perhaps, call as witnesses family members of other capital murder victims who did not want their loved one's murderer to receive the death penalty. In short, capital sentencing would be transformed from an individualized assessment into a referendum on the efficacy of the death penalty in California. Appellant points to nothing in this Court's jurisprudence, or that of the United States Supreme Court, that supports such a gambit.

Appellant acknowledges that there is no constitutional requirement that a intercase proportionality review be conducted in a capital case. (See, e.g., *Pulley v. Harris* (1984) 465 U.S. 37, 43 [comparative proportionality review not required if system adequately ensures consistent and rational results].) However, appellant argues that, while such authority does not mandate intercase review on appeal, it says nothing about whether the sentencer can consider such information. (AOB 417-418.) Indeed, he suggests that since *Pulley* "says nothing at all about whether such evidence

is admissible if offered at trial" that must mean it is admissible. (AOB 418.) In other words, the absence of something proves its existence. The argument lacks merit.

Further, among the out-of-state authority to which appellant cites in support of his argument (AOB 415), the Nebraska statute, in particular, does not permit a jury to undertake proportionality review; such review is limited to a panel of judges. (Neb. Rev. Stat. § 29-2522; see also *State v. Gales* (2003) 265 Neb. 598, 618 [658 N.W.2d 604].) In Delaware, as with other cited states, it is the state's supreme court that undertakes such review. (See, e.g., *State v. Wakefield* (2007) 190 N.J. 397, 517 [921 A.2d 954]; *Red Dog v. State* (1992) 616 A.2d 298, 311 [1992 Del. LEXIS 409].)

In all, appellant cites to the laws of a handful of other states as a reason that this Court should upend the constitutionally sound death penalty statutory framework of California. That is not a persuasive justification.

As we have argued, such other-case information is irrelevant as a mitigation factor. And, even if such information might have some relevance, such evidence, including that proffered by appellant, is likely to confuse and mislead the jury. Ironically, it could result in arbitrary outcomes that capital defendants would likely challenge under the Eighth Amendment.

D. Any Error Was Harmless Beyond a Reasonable Doubt

If the court erred in excluding intercase comparative evidence in mitigation, it was harmless beyond a reasonable doubt.

The United States Supreme Court has never specifically addressed whether the erroneous exclusion of mitigating evidence can ever be harmless. (Cf. *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-99 [granting habeas relief, after noting government made no attempt to argue that sentencer's improper refusal to consider nonstatutory mitigating factors was harmless error]; but see *Skipper v. South Carolina*, *supra*, 476 U.S. at pp. 7-

8 [refusing to deem erroneously excluded mitigating evidence as only cumulative and its exclusion harmless].)

However, this Court has held that such error does not automatically require reversal, but is instead subject to the standard of review set forth in *Chapman v. California*, *supra*, 386 U.S. 18, which is, the error is reversible unless it is harmless beyond a reasonable doubt. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117-1118; see also *Coleman v. McCormick* (9th Cir. 1989) 874 F.2d 1280, 1303 [applying harmless error analysis].) Appellant acknowledges this state of the law. (AOB 421.)

Yet, in arguing the purported error was not harmless beyond a reasonable doubt, appellant states that this case involved but "a single count of first degree murder, along with a second count of non-premeditated, second degree murder." (AOB 422.) In other words, had the jury been permitted to compare appellant's two murders to those of more "heinous" crimes, the jury would have voted that appellant receive life without parole. We could not disagree with appellant more.

The United States Supreme Court has observed:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable *than defendants who have no such excuse*." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

(*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 319, emphasis added.)

Appellant had no such excuse. He was raised by a loving family and enjoyed a life of privilege: bigger houses and nicer vacations than his older siblings, along with plenty of playing time on the links. Appellant also had access to a first-rate education. When he became bored with a school or a job and wanted to make a change, appellant's parents were there to make

things right for him and help him transition to a different school, find work in the family's business, or even help him to start his own business. Appellant's parents relocated so that they would be closer to him. His parents bought him a country club membership and gave him money for a down payment on the couple's first home. Rightly, the trial court observed that appellant "was a product of a loving, caring family . . . ." (121 RT 21799.) These facts alone set appellant apart from capital defendants who come from severely disadvantaged or abusive backgrounds such that a jury might view certain of these defendants as deserving of leniency.

Despite all he was given, it was not enough for appellant. He wanted the one thing his parents could not give him: his freedom from marriage and impending fatherhood. So, in a supreme act of unmitigated selfishness, appellant, while in the midst of an extramarital affair, murdered his pregnant wife Laci and their child Conner who was mere weeks away from being born. The trial court reflected that Conner "wasn't even permitted to take a breath of air on this earth." (121 RT 21798.)

The jury heard evidence about the circumstances of the murders that made plain that appellant was not a murderer who was, in retrospect, conflicted about his actions or who exhibited any remorse after disposing of his wife's and son's bodies. Instead, he ordered pornography channels, sold Laci's car, looked into selling their house furnished, used Conner's nursery as a storage room and, perhaps most appalling, he allowed Laci's family to continue to search and to hope for her return when appellant knew Laci and Conner would not be coming back. His actions evinced a glaring absence of conscience.

Appellant is right about one thing, though: we will likely never know how he killed Laci. But, what the jurors *did* know from the evidence was that, on or about Christmas Eve 2002, as Laci's mother Sharon made preparations to host her daughter and son-in-law for the holiday, appellant

weighted down his wife's lifeless body and dumped her body in the Bay in the hope that the forces of nature would carry the evidence out to sea. Appellant did not care one whit for the wife who vowed to love him for a lifetime or for his child waiting to be born. He did not care that his actions robbed Laci's family of a beloved daughter and sister or that he deprived Laci's family, and his own family, of the chance to welcome Conner into their lives. As the trial court justly found, the circumstances surrounding appellant's murders were "cruel, uncaring, heartless and callous." (121 RT 21798.)

Given appellant's assertion that intercase proportionality review would have changed the penalty outcome, it is clear that he has blinded himself to the fact that he is, truly, among the worst of the worst. As the jurors concluded, appellant earned his penalty.

XVI. CALIFORNIA'S DEATH PENALTY LAW, AS INTERPRETED BY THIS COURT AND AS APPLIED AT APPELLANT'S TRIAL, COMPORTS WITH THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

Appellant argues that California's capital sentencing framework is unconstitutional in six respects. He acknowledges the Court has considered and rejected each of these claims. Nonetheless, appellant asks the Court to reconsider its prior holdings based on the same reasons advanced by the appellant in *People v. Schmeck* (2005) 37 Cal.4th 240 (*Schmeck*). (AOB 424-426.)

We set forth below the previous decisions of this Court, which rejected the same challenges to California's death penalty. In doing so, we maintain that, with respect to each claim, appellant has provided no persuasive reason for the Court to reexamine its previous holdings.

A. Age as a Sentencing Factor

Appellant contends the trial court's instructions impermissibly allowed the jury to rely on appellant's age as a factor in aggravation in violation of the Eighth Amendment. He also argues this sentencing factor was unconstitutionally vague and asks the Court to reconsider its decision in *People v. Ray* (1996) 13 Cal.4th 313, that holds otherwise. (AOB 425.)

First, the trial court did not instruct the jury that appellant's age was a factor in aggravation. The court instructed the jury with CALJIC No. 8.85 (Penalty Trial—Factors for Consideration; 120 RT 21692-21693), which did not delineate between sentencing factors in aggravation and mitigation—another claim of constitutional error by appellant, *post.*

Second, the Court has observed "that chronological age itself is neither aggravating nor mitigating, but the word 'age' as used in factor (i) is 'a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty' [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 201-202.) Although age can be a factor in aggravation (see *People v. Castaneda* (2011) 51 Cal.4th 1292, 1349, fn. 25), appellant's contention that age was necessarily a factor in aggravation is not well-founded.

In any event, Penal Code section 190.3, factor (i), defendant's age at the time of the crime, is not unconstitutionally vague. (*Tuilaepa v. California* (1994) 512 U.S. 967, 977; *People v. Ray*, *supra*, 13 Cal.4th at p. 358; *People v. Sanders* (1995) 11 Cal.4th 475, 563-564.)

B. Narrowing Function

Appellant contends that California's death penalty framework, as interpreted by this Court, and as applied, violates the Eighth Amendment because it fails to provide meaningful guidance for the sentencer to

distinguish between defendants who are sentenced to death from those who are not. (AOB 425.)

The Court has repeatedly rejected this contention. (See *People v. Thomas* (2011) 51 Cal.4th 449, 506; *Schmeck, supra*, 37 Cal.4th at p. 304; *People v. Bolden* (2002) 29 Cal.4th 515, 566; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179; *People v. Arias* (1996) 13 Cal.4th 92, 187; *People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. Wader* (1993) 5 Cal.4th 610, 669.)

C. "Circumstances of the Crime" as a Sentencing Factor

Appellant contends that section 190.3, factor (a), which permits a jury to consider the "circumstances of the crime" as a sentencing factor, is applied in a manner that results in the arbitrary and capricious imposition of the death penalty. (AOB 425.)

The Court has rejected this claim. "Circumstances of the crime," as a sentencing factor, is not unconstitutionally vague and does not result in the arbitrary and capricious imposition of the death penalty. (Cf. *Tuilaepa v. California, supra*, 512 U.S. at pp. 975-980; *People v. Chism* (2014) 58 Cal.4th 1266, 1333; *People v. Valencia* (2008) 43 Cal.4th 268, 310; *Schmeck, supra*, 37 Cal.4th at p. 304; *People v. Crittenden* (1994) 9 Cal.4th 83, 156.)

D. Burden of Proof and the Weighing Process

Contrary to appellant's view (AOB 425), there is no constitutional requirement that aggravating factors be established beyond a reasonable doubt; that aggravating factors be found beyond a reasonable doubt to outweigh mitigating factors; or that the jury find, beyond a reasonable doubt, that death is the appropriate penalty.

The Court has rejected the claim that allocating a burden of proof is constitutionally required in penalty determinations. "'Because the

determination of penalty is essentially moral and normative [citation], and therefore different from the determination of guilt,' the federal Constitution does not require the prosecution to bear the burden of proof or burden of persuasion at the penalty phase." (*People v. Sapp* (2003) 31 Cal.4th 240, 317, citing *People v. Hayes* (1990) 52 Cal.3d 577, 643; *People v. Bemore* (2000) 22 Cal.4th 809, 859; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are not subject to burden of proof quantification because they are "'moral and normative, not factual'"].)

E. CALJIC No. 8.85

Appellant contends this instruction is constitutionally infirm in five respects such that singly, or taken together, these infirmities violate appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 425-426.) We address each in turn:

1. Deleting inapplicable factors

As noted, the trial court instructed the jury with the entirety of CALJIC No. 8.85, setting forth the section 190.3 (a)-(k) factors in aggravation and mitigation. (120 RT 21692-21693.) Appellant challenges the instruction on the ground that the trial court failed to delete inapplicable sentencing factors, although he does not specify which were inapplicable to him. (AOB 426.)

The Court has repeatedly held that it is apparent from the language of section 190.3 that it is for the jury to determine which of the listed factors are applicable or relevant to the particular case. Therefore, CALJIC No. 8.85 is not unconstitutional if the trial court fails to delete inapplicable factors. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1249; *People v. Watson* (2008) 43 Cal.4th 652, 701; *People v. Zamudio* (2008) 43 Cal.4th 327, 372; *People v. Perry* (2006) 38 Cal.4th 302, 319.)

2. *Differentiating between aggravating and mitigating factors*

Appellant contends the instruction is unconstitutional because it does not indicate which sentencing factors are aggravating and which are mitigating. (AOB 426.)

The Court has rejected this argument. CALJIC No. 8.85 is not unconstitutional for not labeling which sentencing factors are aggravating, which are mitigating, and which could be either aggravating or mitigating. (*People v. Edwards* (2013) 57 Cal.4th 658, 766; *People v. Burney* (2009) 47 Cal.4th 203, 264-265; *People v. Moon* (2005) 37 Cal.4th 1, 41, citing *People v. Williams* (1997) 16 Cal.4th 153, 268-269.)

3. *Defining sentencing factors*

Appellant argues the instruction fails to adequately define the sentencing factors and is, therefore, unconstitutionally vague. (AOB 426.)

The Court has previously rejected such a claim. The aggravating and mitigating factors, as set forth in section 190.3 and CALJIC No. 8.85, are not unconstitutionally vague or arbitrary nor do they render the sentencing process constitutionally unreliable under the Eighth and Fourteenth Amendments to the United States Constitution. (*People v. Williams* (2013) 56 Cal.4th 165, 201; *People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Moon*, *supra*, 37 Cal.4th at p. 42.)

4. *Use of qualifying adjectives for certain sentencing factors*

Appellant argues that the inclusion of qualifying adjectives such as "extreme" and "substantial" with respect to various sentencing factors renders the instruction unconstitutional. (AOB 426.)

The Court has previously rejected the claim. CALJIC No. 8.85 is not unconstitutional for using "restrictive adjectives" such as "extreme" and "substantial." (*People v. Perry*, *supra*, 38 Cal.4th at p. 319; *People v.*

Moon, *supra*, 37 Cal.4th at p. 42, citing *People v. Weaver* (2001) 26 Cal.4th 876, 993.)

5. *Burden of proof*

Appellant's final challenge to the instruction is that it does not specify a burden of proof. (AOB 426.)

The Court has rejected this argument previously. CALJIC No. 8.85 does not violate the Sixth, Eighth, or Fourteenth Amendments by omitting a burden of proof as to either mitigation or aggravation. (*People v. Williams*, *supra*, 56 Cal.4th at p. 201; *People v. Souza* (2012) 54 Cal.4th 90, 142; *Schmeck*, *supra*, 37 Cal.4th at p. 305.)

As the Court has previously rejected the merits of each of appellant's challenges to CALJIC No. 8.85, his claim with respect to the cumulative effect of the purported inadequacies must also be rejected. (See *Fuller v. Roe* (9th Cir. 1999) 182 F.3d 699, 704 ["where no single error is sufficiently prejudicial to warrant reversal, nothing can accumulate to the level of a constitutional violation"].)

6. *International law*

Appellant's last challenge to California's death penalty is that it violates international law, including the International Covenant of Civil and Political Rights. (AOB 426.)

The Court has repeatedly rejected this claim. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 489 [no prohibition against death sentence under international law when sentence is imposed in accordance with state and federal constitutional and statutory requirements]; *People v. Jones* (2013) 57 Cal.4th 899, 981; *People v. Mai* (2013) 57 Cal.4th 986, 1058; *People v. Rogers* (2013) 57 Cal.4th 296, 350; *People v. Homick* (2012) 55 Cal.4th 816, 904.)

CONCLUSION

For the foregoing reasons, the People respectfully request that the judgment be affirmed.

Dated: January 21, 2015

Respectfully submitted,

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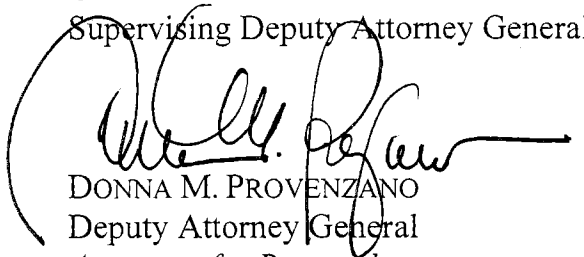

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SF2005XS0003

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 148,494 words.

Dated: January 21, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Scott Lee Peterson** No.: **S132449**

I declare:

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

On January 21, 2015, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 21, 2015, at San Francisco, California.

Nelly Guerrero
Declarant


Signature

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