SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DAVID A. WESTERFIELD, Defendant and Appellant.	)	CAPITAL CASE S112691 San Diego No. SCD165805

Appeal From the Judgment of the Superior Court,

State of California, County of San Diego

The Hon. William D. Mudd, Judge

APPELLANT'S REPLY BRIEF

SUPREME COURT
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Frank A. McGuire Clerk
Deputy

Mark David Greenberg
Attorney at Law
SBN 99726
484 Lake Park Avenue, No. 429
Oakland, CA 94610
510 452 3126

Attorney for Appellant
David A. Westerfield

DEATH PENALTY

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* Appellant, through inadvertence in the opening brief had repeated XXI as the numeration of this argument in the opening brief. Respondent has made the correction his brief (RB, p. 249), and appellant is following the corrected numeration in this brief.

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Mark David Greenberg
Attorney at Law
SBN No. 99726
484 Lake Park Ave., No. 429
Oakland, CA 94610
510-452-3126

Attorney for Appellant

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vs.	)	
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	)	**SCD165805**
Defendant and Appellant.	)	
	)	
	)	

APPELLANT'S REPLY BRIEF

GUILT PHASE ISSUES

I.
REPLY CONCERNING FOURTH AMENDMENT VIOLATION AND SUPPRESSION OF EVIDENCE

The first claim presented in the opening brief (AOB, pp. 60 *et seq.*) was that the evidence seized pursuant to the five warrants should have been suppressed on Fourth Amendment grounds. The claim was predicated on the lack of probable cause to support the first warrant, which provided the keystone for the validity of all the subsequent warrants in this case. The concomitant absence of a good-faith exception, and Judge Mudd's erroneous finding of a redeeming consent by Mr.

Westerfield, completed the claim for relief from this error. Respondent, as one would expect, takes the opposite position: there was "ample" probable cause to support the first warrant; the police acted in good faith reliance on that warrant; and Mr. Westerfield, in any event, consented to the search. (RB, pp. 31-32 *et seq.*)

A.
Polygraph Evidence

The threshold question in regard to probable cause was the competence of polygraph evidence for purposes of obtaining a warrant. In the opening brief and in a supplemental opening brief, appellant demonstrated that the use of such evidence was barred by Evidence Code section 351.1 and, independently, by the Fourth Amendment itself. Evidence Code section 351.1, which prohibits the use of polygraph evidence in any "court proceeding" applies to proceedings pursuant to Penal Code section 1526 to obtain a search or arrest warrant from a magistrate. (See *People* v. *Silverbrand* (1990) 220 Cal.App.3rd 1621; see also Supplemental AOB, pp. 2-8.) Beyond the statutory prohibition, the Fourth Amendment itself requires that evidence adduced to obtain a search or arrest warrant must be reliable (*Alabama* v. *White* (1990) 496 U.S. 325, 330), and, as the argument in the opening brief demonstrated (AOB, pp. 73-89), polygraph evidence does not meet this requirement.

1. Evidence Code section 351.1

The argument that Evidence Code section 351.1 precludes polygraph evidence in proceedings to obtain a warrant is based on *People* v. *Silverbrand*, *supra*, 220 Cal.App.3rd 1621, which held that the term "criminal proceeding" included warrant proceedings under Penal Code section 1526 for purposes of the special circumstance defined in Penal Code section 190.2(a)(10). This section provides for the possibility of a capital penalty when

> "The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony *in any criminal* or juvenile *proceeding*, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in *any criminal* or juvenile *proceeding*. As used in this paragraph, 'juvenile proceeding' means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code." (Emphasis added.)

Evidence Code section 351.1(a) provides:

> "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence *in any criminal proceeding, including pretrial* and post conviction motions and *hearings*, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results." (Emphasis added.)

As discussed in the supplemental opening brief, Evidence Code section 351.1 was intended to be as comprehensive in its sphere as Penal Code section 190.2(a)(10) was intended to be in its sphere, and the reasons adduced in *Silverbrand* for applying the term "criminal proceeding" to a warrant hearing dictated the same conclusion in regard to the use of the term in Evidence Code section 351.1. (See SAOB, pp. 3-7.)

Respondent, in his supplemental brief, asserts that reliance on *Silverbrand* "is misplaced," and "involves the meaning of 'criminal proceeding' in a context completely unrelated to, and distinguishable from, the search warrant context at issue here." (RSB, p. 3.) It seems, in respondent's view, that the Penal Code provision involves punishing the crime of murder, and "it is difficult to imagine that the special circumstance" would not cover the retaliatory killing such as

occurred in *Silverbrand* to a witness who testified before a magistrate at a warrant hearing. (RSB, pp. 4-5.) By contrast, in the case of Evidence Code section 351.1, "the meaning of 'criminal proceeding' must be defined for purposes of whether the polygraph test may be considered by a magistrate in issuing a search warrant." In an *ex parte* investigatory proceeding, there is little or no risk, respondent argues, that polygraph evidence will mislead or be misused (RSB, p. 5) – the implication being that in the case of 190.2(a)(10) there would be an intolerable risk of someone escaping appropriate punishment for murder.

Respondent's argument amounts to little more than the unedifying observation that murder is more serious than the use *vel non* of polygraph evidence. But as serious as murder is, a person is punished or not in accord with a *definition*, and if one resorts to imagination, it will also be "difficult to imagine" why murdering a witness in a divorce case or civil suit or the like is not subject to a capital charge as well. Are we to interpret "criminal proceeding" in section 190.2(a)(10) as including civil proceedings? As unserious a subject matter as the use of polygraph evidence may seem to respondent, the definitional limitation on its use is still the term "criminal proceeding," and the mere assertion that the relative unimportance of the subject changes the meaning of the term "criminal proceeding" is simply a way to beg the question of what the meaning of "criminal proceeding" is. The key here is that in section 190.2(a)(10), the term "criminal proceeding" is a limitation whose meaning was analyzed in *Silverbrand* in a *general* legal context; that *general* legal context applies equally to the use of the identical term in Evidence Code section 351.1(a). Murder versus polygraph makes a difference only in respondent's "imagination."

But apart from *Silverbrand*, which respondent does not convincingly distinguish, he nonetheless insists that a "criminal proceeding" as used in Evidence Code section 351.1 refers to "evidentiary" hearings and not to proceedings that have only an "investigatory purpose." (RSB, p. 1.) This, according to respondent, is apparent from the plain language of the statute, which

"specifically permits use of polygraph evidence where the parties stipulate to its admission." (RSB, p. 5.) This is proof positive, urges respondent, that Evidence Code section 351.1 does not apply to *ex parte* investigative proceedings that are non-adversarial. (RSB, pp. 5-6.)

Is respondent prepared then to assert that polygraph evidence is admissible at grand jury proceedings, which are also *ex parte* investigative proceedings? (*People* v. *Brown* (1999) 75 Cal.App.4th 916, 931.) Further, if the provision for the admission of polygraph evidence upon the stipulation of the parties was intended to be the defining limit of the term "criminal proceeding," then polygraph evidence should also be admissible for such *ex parte* determinations as whether or not to order disclosure of the identity of a confidential informant (*People* v. *Acevedo* (2012) 209 Cal.app.4th 1040, 1053; Evid. Code § 1042(d))), or whether or not to relieve defense counsel in a criminal case for ineffective assistance. (*People* v. *Barnett* (1998) 17 Cal.4th 1004, 1094 ["As courts have recognized, *Marsden* hearings are held outside the presence of the prosecutor . . . ."].) Indeed, by respondent's reasoning, polygraph evidence is admissible before the magistrate in a 1526 proceeding because the magistrate knows how to handle it, but *not* admissible before the judge in adversarial proceedings to controvert the warrant. (See *People* v. *Chapman* (1971) 17 Cal.App.3rd 865, 869.) Clearly the language to which respondent adverts does not represent a limitation on the term "criminal proceeding"; rather it defines the occasion when the use of polygraph evidence is possible, *viz.*, when there is a stipulation by the parties in those "criminal proceedings" that are adversarial.[1]

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[1] In his original respondent's brief, respondent took the position that "Evidence Code section 351.1 applies to criminal *proceedings*, not events that proceed [*sic*] criminal proceedings such as an investigation." (RB, p. 40.) But what about a preliminary hearing? Does it come within section 351.1 because it is a post-filing proceeding, or is it outside the terms of 351.1 because, like a warrant proceeding, it an investigatory determination of whether or not probable cause exists. (*Galindo*

Respondent attempts to buttress his crumbling argument with the observation that even "as Westerfield recognizes (Supp. AOB at 6-7), other sections of the Evidence Code do not apply to search warrant proceedings for the very reason that the proceedings serve as an investigatory purpose only." At Supp. AOB, 6-7, however, "Westerfield" made no such recognition. Rather, the argument was that the *assumption* that the Evidence Code did not apply to warrant proceedings was *false*. As pointed out on those very pages, Evidence Code section 300, which announces the scope of the Evidence Code's applicability, applies also by its plain terms *to* a warrant proceeding. Furthermore, even if the Fourth Amendment is indifferent to whether or not hearsay is used to obtain a warrant, under California law hearsay is in fact inadmissible in a warrant proceeding – a hindrance obviated by a special hearsay exception set forth in Penal Code sections 1525, 1527, and 1528, and also by the fact that most of the extrajudicial statements proffered in a warrant proceedings are admitted for a non-hearsay purpose. (*People* v. *Magana* (1979) 95 Cal.App.3rd 453, 460-461.)

Finally, respondent's persistent incantation that warrant proceedings are strictly "investigatory" is overstated. The police investigate. The information is brought to a judicial officer who then determines whether or not there is justification to arrest a person or intrude on his privacy. It is, in other words, a judicial act; it is a judicial act in a "criminal proceeding"; and Evidence Code section 351.1 bars the use of polygraph evidence for purposes of making this determination.

2. Inherent reliability under the Fourth Amendment

Regardless of the statutory status of polygraph evidence for warrant proceedings, there is still the question of the Fourth Amendment. Respondent makes his counterargument to appellant's contention regarding the inherent

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v. *Superior Court* (2010) 50 Cal.4th 1, 8; Pen. Code, § 872.) Respondent fishes hither and thither for rationales and is not catching anything.

unreliability of polygraph evidence by merely quoting one case, *Bennett* v. *Grand Prairie* (5th Cir. 1989) 883 F.2nd 400, and citing other cases that express toleration of polygraph evidence for probable cause determinations. (RB, pp. 42-43.) Appellant's argument already noted these cases, and had even quoted the very same passage from *Bennett* in order to present the most extended argument in favor of the People's position. (AOB, pp. 75-76, 77 *et seq.*) Respondent does not advance the argument beyond what appellant himself set forth on his behalf in the opening brief, although respondent does do appellant the courtesy of acknowledging the Illinois cases that hold polygraph evidence to be inadmissible without any exception for warrant proceedings. (*Cervantes* v. *Jones* (7th Cir. 1999) 188 F.3rd 805, 813, fn. 9; *People* v. *McClellan* (Ill.App. 1992) 600 N.E.2nd 407, 415; *People* v. *Booker* (Ill.App. 1991) 568 N.E.2nd 211, 218; *People* v. *Haymer* (Ill.App. 1987) 506 N.W. 2nd 1378, 1384.)

In any event, the scattering of jurisdictions allowing, or partially allowing, polygraph evidence for purposes of obtaining a warrant hardly constitutes a ponderable consensus where the overwhelming consensus holds polygraph evidence to be unreliable. The fact that warrant and probable cause proceedings have not been differentiated very often has more undoubtedly to do with the fact that the issue does not come up, that law enforcement and the judicial system have an instinctive distrust of its use for any purpose related to a criminal prosecution, and that magistrates are rarely presented with it. It is clearly *not* because everyone takes it for granted that polygraph evidence is perfectly acceptable for purposes of obtaining search or arrest warrants.

But more importantly, respondent does not attempt to answer the detailed criticisms appellant adduced against the cases that accept polygraph evidence for probable cause. One need not repeat the analysis in detail, but a summary that emphasizes certain points may help dispel whatever specious plausibility envelops the contention that polygraph evidence has *some* degree of reliability.

The survey of jurisdictions that bar polygraph evidence as unreliable for purposes of trial and other criminal proceedings (AOB, pp. 73-75) impresses by its near unanimity.[2] It is not as though the matter has not been carefully considered, analyzed, and studied. The proponents of polygraph evidence have been given, for the past ninety years, a fair opportunity to establish its credentials for use in court, beginning with *Frye* v. *United States* (D.C. Cir.1923) 293 F. 1013, the first of a virtually unbroken string of failures. The change in federal court from the *Frye* to the *Daubert* (*Daubert* v. *Merrill Dow Pharmaceuticals* (1993) 509 U.S. 579) standard, has given polygraph evidence a second chance, but it has fared no better (*United States* v. *Cordoba* (9th Cir. 1997) 104 F.3rd 225, 228); and States where the *Daubert* test for scientific evidence has been adopted have nonetheless reinstated per se bans on polygraph evidence. (See *State* v. *Porter* (Conn. 1997) 698 A.2nd 738; see also *Rathe Salvage, Inc.* v. *R. Brown & Sons, Inc.*, *supra*, 46 A.3rd 891, 897-901.)

This fair hearing given to polygraph evidence has indeed been a forbearance, since such evidence runs against the grain of all the accumulated wisdom and experience of our system of justice:

> . . . . A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States* v. *Scheffer* (1998) 523 U.S. 303, 313.)

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[2] Since the filing of the opening brief, Vermont has become the forty-seventh state to impose a per se bar on polygraph evidence. (*Rathe Salvage, Inc.* v. *R. Brown & Sons, Inc.* (Vt. 2012) 46 A.3rd 891, 897-901.)

There is nothing extravagant in the assertion that there is a legal consensus that polygraph evidence is unreliable.

Noting this consensus, appellant in the opening brief made the logical point: something deemed unreliable does not admit of any degree of reliability. (AOB, pp. 78-79.) How then do cases like *Bennett,* which, again, respondent also quotes, maintain that polygraph evidence may not be reliable for purposes of trial, but that its *degree* of reliability is sufficient for purposes of probable cause? (See *Bennett* v. *Grand Prairie*, *supra*, 883 F.2nd 400, 405.) Such cases are misled by mere language insofar as the term "unreliable" is often used in a relative sense and will sometimes mean "less reliable." Thus, for example, if one's watch is two minutes slow, it is "reliable" for the most part, but "unreliable", i.e., less reliable, where the demands of punctuality are rigorous. But the logical proposition, in which the "unreliable" and the "reliable" are mutually precluding opposites, is grounded in this reality: *we do not know* whether polygraph evidence has *any* degree of reliability, and, after close and patient consideration, *we do not expect* the question to be resolved through mechanistic or experimental science. Formulations underlying the position taken in cases like *Bennett* are only a semantic screen that obscures this reality. Whether this limitation of our knowledge is ignorance, or whether the recognition of our own ignorance is in fact wisdom, no magistrate, no judge, no human of whatever background will be able formulate any criterion by which one may know *when and when not* to credit polygraph evidence. Thus, the notion that a magistrate or judicial officer has a special competence to guard against the "lesser reliability" of polygraph evidence is a fallacy.

Finally, guided by *State* v. *Porter*, *supra*, 698 A.2nd 738 – a detailed and comprehensive examination conducted by the Connecticut Supreme Court on the science of polygraph -- appellant was able to demonstrate why polygraph evidence, based on its own premises, is unable to provide the needed criterion: 1) the correlation between physiological reaction and honesty *vel non* is not a matter

of mechanical science; 2) attempts to circumvent this problem by a convoluted strategy of "control" questions circumvents it *only* in theory, and a theory that still presupposes some regular and measurable correlation between physiology and moral traits; and 3) any testing of the polygraph result can only be had through a trial process in which the question of the subject's credibility is resolved in the traditional manner – by cross-examination and judgment, -- which of course is the method that is supposed to be rendered more "scientifically" secure by the use of the polygraph in the first place. (AOB, pp. 80-89.)

Again, respondent does not answer any of this, which brings us now to respondent's last point: this Court , according to respondent, has resolved the matter in *People* v. *Lara* (1974) 12 Cal.3rd 903 against appellant's position. (RB, p. 41.) Respondent takes exception to appellant's characterizing the pronouncement in *Lara* as casual dictum, and appellant is not inclined to repeat his analysis of *Lara* (see AOB, pp. 76-77), except to say that even if *Lara*'s statements are a holding and not dictum, it is clear that this court did not invest its pronouncements in *Lara* with the ponderable weight of a close and comprehensive consideration or analysis. Further, even if one were inclined to give *stare decisis* effect to *Lara*, the problem still remains of the superseding legislation of Evidence Code section 351.1, which was enacted in 1983, almost ten years after *Lara* was decided.

But respondent, having ignored appellant's substantive analysis and criticism of polygraph evidence, defends the substance of the *Lara* holding: "[T]his Court's reasoning [in *Lara*] is sound in that there is no reason to preclude law enforcement officers from using polygraph examinations as an investigative tool in determining who might be a suspect in a crime and, for that matter, who might not." (RB, p. 41.) Nothing in the law, or in appellant's position as to what the law is, bars the police from the use of polygraph examinations -- or even Zodiac charts for that matter. The question is not what investigative tool is used; the question is what evidence is presented to a magistrate, judge, or jury, and that

evidence must be competent and reliable, which precludes the use of polygraph evidence.

B.
Probable Cause Without Polygraph Evidence

After disposing of the question of polygraph evidence, the argument advanced to an examination of whether there was, without this evidence, probable cause to support the first search warrant. As appellant demonstrated in his opening brief (AOB, pp. 89-94), the collocation of facts, speculations, and vague suspicions that constituted Detective Allredge's affidavit added up to, at most, a reasonable suspicion that Westerfield had committed a crime against Danielle Van Dam – a standard distinctly less than that of probable cause. (*Alabama* v. *White*, *supra*, 496 U.S. 325, 331; *People* v. *Wells* (2006) 38 Cal.4th 1078, 1083.)

Respondent characterizes appellant's argument as adducing "a lengthy series of coincidences" (RB, p. 44), implying that the very length of the list, which comprehends the "totality of circumstances," belies the conclusion that the affidavit failed to establish probable cause. (RB, p. 44.) Indeed, according to respondent, "[a]lthough a reviewing court should resolve even doubtful or marginal cases in favor of the law's preference for warrants [citation], Westerfield's was not a doubtful or marginal case." (RB, p. 43.) Respondent then goes through list of numerous facts listed by Detective Alldredge (RB, pp. 44-45) and then sums up his conclusion from this as follows:

> "The foregoing demonstrates that the affidavit before Judge Bashant provided ample probable cause to support the belief that Westerfield was involved in Danielle's abduction and that evidence of the crime would be in his home and vehicles. The affidavit set for strong evidence showing Westerfield's proximity to the Van Dam home, his belief that Danielle's parents were out of the home and that she was being watched by a babysitter, his evasive and bizarre behavior spanning many miles for a claimed 'weekend getaway,' his

> overly cooperative behavior, and his 'slip' in which he revealed he was not alone. One did not need the results of a polygraph examination to doubt the credibility of Westerfield's self-serving explanation for where he had been the weekend Danielle disappeared. Thus, even without his complete failure of the polygraph examination the totality of the circumstances supported Judge Bashant's probable cause finding and issuance of the search warrant." (RB, pp. 45-46.)

Before addressing respondent's substantive points, some remarks regarding the standard of review are in order. Whether or not there is a substantial basis in the affidavit to support a finding of probable cause is a question of law, subject to independent review. (*People* v. *Camarella* (1991) 54 Cal.3rd 592, 601.) Although deference is owed to the magistrate in "doubtful or marginal" cases (*United States* v. *Leon* (1984) 468 U.S. 897, 914, internal quotation marks omitted), review of a magistrate's determination must not devolve into a mere "rubber stamp." (*People* v. *Hulland* (2003) 110 Cal.App.4th 1646, 1651, internal quotation marks omitted.)

Respondent's claim that appellant's argument rests on long list of coincidences is something of a distortion. Appellant uses the word "coincidence" only to describe the fact that Westerfield was not at home when Danielle Van Dam disappeared, and that he was at Dad's the same time as Brenda Van Dam was there the night, or night before, Danielle disappeared. (AOB, pp. 89-90.) The word "coincidence" was used in its neutral sense of "the fact or condition of coinciding" (Webster's New World Dictionary (1965, 2nd ed.), "coincidence", def. 1), which is to say of "occur[ing] at the same time." (*Id.*, "coincide", def. 2.) It was not used in its pregnant sense of "an accidental and *remarkable* occurrence of related or identical events, ideas, etc. at the same time with no apparent causal relationship." (*Id.*, "coincidence", def. 2, emphasis added.) That a resident of Danielle Van Dam's neighborhood should be out of town on Super Bowl weekend was a "coincidence" much more in the first sense than in the second; that a resident of Danielle Van Dam's neighborhood should be at a popular

neighborhood bar on a Friday night, at the same time Brenda Van Dam was there was also a coincidence more in the first sense than in the second; finally, the two neutral coincidences in the first sense do not add up to a coincidence in the second sense.

This lexical analysis finds its reflection in the law. A reasonable suspicion, which, under the Fourth Amendment, will warrant a detention for investigative purposes – but not a search or arrest – exists when circumstances are as consistent with innocent activity as they are with criminal activity. (*People* v. *Souza* (1994) 9 Cal.4th 224, 233; *People* v. *Daughterty* (1996) 50 Cal.App.4th 275, 287.) Thus, in a given case, a police officer might, for purposes of an investigative detention, be acting reasonably in taking what might otherwise be a neutral coincidence as a remarkable coincidence. But this would not be the case in where probable cause is required, and frankly, the neutral coincidences at issue here cannot in any event be reasonably interpreted as remarkable coincidences, at least taken in themselves.

But then there is the erratic nature of the Mr. Westerfield's driving trip, his belief that the parents were not home on Friday evening, Westerfield's overly cooperative behavior, and the verbal "'slip' in which he revealed he was not alone." (RB, p. 46.) Appellant examined all of this in the opening brief, and the best that can be said for admixture of these elements is that they render the coincidences more remarkable, but do not exceed the level of reasonable suspicion, which, again, is insufficient.

Thus, for respondent to call Mr. Westerfield's trip "evasive" presupposes a consciousness of guilt that informed Mr. Westerfield's movements and can therefore be characterized as an "evasive." But, as stated in the opening brief, there are bad vacations where things go wrong that do not require an inference of criminal activity. Moreover, the restless dissatisfaction of a lonely man traveling by himself, and doing so on a quasi-holiday weekend, also does not betoken criminality. If one takes away respondent's description of the trip as "evasive,"

what is left is his description of the trip as "bizarre" (RB, p. 46), which is a word that associates itself much more easily with suspicion than with probable cause.

As to Westerfield's belief that the parents would not be home that evening, one might note that the method by which Westerfield discovered this was pursuant to a conversation he had with Brenda Van Dam, *who came to his house* to sell him girl scout cookies. He did not go to any extraordinary lengths, beyond the making of small-talk, to obtain this information. And if he thought that only a babysitter would be there why would that signal to a mind bent on the kidnapping of Danielle Van Dam a significant decrease in the girl's security, or increase in her vulnerability, let alone a significant increase to the susceptibility of the house to surreptitious entry?

Westerfield's "over-cooperation" bobs up its head in respondent's list of choice facts in support of probable cause. (RB, p. 46.) But this ranks with the unfurled hose for facts that lack ponderable significance. A young girl is reported missing on Saturday, and by Sunday the San Diego Police Department has devoted a substantial portion of its resources and personnel to looking for her. The media attention was already becoming intense. By what *reasonable* baseline, under these emotionally heightened circumstances, does one measure what is just the correct amount of co-operation beyond which no innocent person would go? Add to this the fact that this person was greeted by seven or eight San Diego police officers as he went outside to get his morning newspaper.

As to the slip of the tongue, how significant is it? Westerfield in describing his route, said "we drove back to Silverstrand." If a child under the impatient questioning of his mother asking where he had been answers, "We just went to the store," would his clarification that he meant only himself be deemed a sure sign of mendacity? However patient and understanding Redden showed himself to be, Westerfield was still being questioned on his whereabouts by a police officer at the police station in connection with the disappearance of his neighbor, whose possible abduction was roiling the entire city. There is here no probable cause in

the use of "we" over "I", but again, if anything, it adds only to the quantum of suspicion that falls short of probable cause.

Without the polygraph evidence, the affidavit in this case was inadequate. Respondent can use terms such as "evasive" or "self-serving" all he wants, but the totality of circumstances adduced in support of the issuance of the warrant in this case obviously rose no higher than the level of suspicion, and unless the good faith exception applies, or unless Judge Mudd's finding of consent is tenable, then the evidence seized pursuant to the five warrants should have been suppressed.

C.
Good Faith Exception

As appellant argued in his opening brief, the good faith exception to the exclusionary rule (*United States* v. *Leon* (1984) 468 U.S. 897) does not here save Judge Mudd's ruling. Proving the exception was not a burden the prosecution carried in the trial court because of the court's finding of probable cause to support the warrant, and it is therefore a burden the People must carry here. The record in this case shows that the deficiency in the warrant was so patent that it could not be relied upon despite the approval by a magistrate. Indeed, in Sergeant Holmes's testimony, it was shown that the police, at the very time they were seeking a warrant, *did not believe they had probable cause*, even with the polygraph evidence (5D RT 1705-1706), which they generally understood was unreliable for purposes of probable cause or arrest. (5A RT 1180-1181; 48 CT 11144-11145.) (AOB, pp. 95-102.)

Respondent faults the argument in the opening brief for taking "isolated" comments of law enforcement officers to concoct an "official position," that is, respondent seems to argue, irrelevant to the question of the good faith exception. (RB, p. 47.) According to respondent, what is relevant is whether " 'the affidavit was so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable.' (*Leon*, *supra*, 468 U.S. at p. 923.)" (RB, p. 47.)

That indeed is the brunt of appellant's argument. The testimony of the officers, which in fact appellant went to great lengths to put in context, was adduced only for the circumstantial corroboration of appellant's position that the warrant was so seriously deficient that *Leon* does not apply. Sergeant Holmes was especially important in this regard. He was the head of the homicide unit and part of the upper echelon of the investigation, which included a deputy district attorney. For Sergeant Holmes to assert that there was, in the early morning hours of February 5, no probable cause to arrest Westerfield is a strong testimonial to appellant's argument as to the deficiency of the warrant – a deficiency that in any event appears as a matter of law.

Respondent, after clarifying what is and is not relevant in assessing the application of the good-faith exception to the exclusionary rule, then proceeds to address in detail what he has already denominated as irrelevant. He expends pages refuting the suggestion that the police had a policy of not using polygraph for purposes of probable cause. (RB, pp. 48-51.) However, whether or not "policy" is the appropriate word, it is safe to say from the evidence that the "practice" was not to use polygraph results for purposes of probable cause. It is also safe to say that the police, as represented by individual officers, were (reasonably) well aware that the law deems polygraph evidence to be unreliable and inadmissible in any "court proceeding" (Evid. Code, § 351.1) including a proceeding to obtain a search warrant. A magistrate's certification of polygraph evidence is not to be, as an objective matter, relied upon.

In regard to Sergeant Holmes, respondent, not content to rest on the principle of irrelevance, feels the need to address his pronouncement that at the very time the police were seeking a search warrant based on probable cause, there was no probable cause to arrest Westerfield. Respondent begins with the abstract assertion that although "probable cause" is a unitary concept, its application can rest on different considerations in the arrest context than in the search context. (RB, p. 51-52.) From this abstraction, he proceeds to the conclusion

that therefore Sergeant Holmes's statement that there was no probable cause to arrest "was not inconsistent" with the existence of probable cause to search. (RB, p. 50.)

Respondent nowhere tells us specifically how *in this case* probable cause to arrest and probable cause to search varies. The affidavit in support of the first search warrant seeks to establish the premise that there was probable cause to search Westerfield's house and vehicles because there was probable cause to believe he had kidnapped Danielle Van Dam, and to do so, he probably had to use his house and vehicles. Thus, if in this case there was no probable cause to arrest Westerfield, then there was no probable cause to search his house and vehicles.

Respondent, then, has staked his position on the existence of probable cause *ab initio*, for he does not meet his burden here of establishing the exception to the exclusionary rule. But not only was there not probable cause to justify the first warrant in this case, but the absence of probable cause was so patent that no reasonable officer could have relied on the magistrate's endorsement of the affidavit and issuance of the warrant.

D.
Consent

A consent to search obtained through "express or implied" coercion is not voluntary and does not supersede the Fourth Amendment warrant requirement. (*Schneckloth* v. *Bustamonte* (1973) 412 U.S. 218, 227.) Judge Mudd, in his ruling granting the defense motion to suppress his statements to Ott and Keyser as involuntary, announced: "When Detective Ott and Keyser come along, they know he's not free to leave. They give lip service to it, but that's all it is. Why do we know that? Number one he can't go in his house. Number two, he can't stay in his car, 'cause it's the subject of the warrant. He can't use his motor home. He can't use his trailer." (5E RT 1888; see AOB, p. 102.) Judge Mudd is here also

describing the time period when Ott and Keyser obtained from Westerfield his consent to search.

This is the nodal point for appellant's argument that the consent was not voluntary but the product of an implied coercion that inhered not only in Ott and Keyser's imposition on Westerfield. It was an implied coercion whose force accumulated over the course of an entire day, and which culminated in the final step taken by Ott and Keyser. The course of this day was traced in detail in the opening brief. (AOB, pp. 103-114.) Westerfield, after the polygraph examination, saw himself accused of committing a crime. When Detective Thrasher was dispatched to guard, according to her, the polygraph equipment, she did not announce that she was there only to guard the equipment. When a parade of detectives came into the room to ask him accusatory questions after the supposed failure of a polygraph examination, they left an equivocal impression as to the state of the case against him so as to keep him talking. When he finally was released to go home after 11 p.m. that night, he was greeted by Detective Mahler, who told him that the police were securing a warrant and he could not go into his house. He sat in his car and waited. This was when Ott and Keyser "come along," and, in an atmosphere that a reasonable person would understand to be custody, obtain a consent to search that is grudgingly given.

Respondent fails to find even a hint of coercion in any of this. He concedes the almost continual contact with the police on February 4, "but," he adds, "the record shows nothing other than an absolutely willing and voluntary agreement on his part to search his home and vehicles." (RB, 54.) The record is before all who wish to examine it, and it should not be hard to obtain at least near unanimity that "absolutely" is an overstatement. No one is asserting that the time at the station was custodial as a matter of law; one is contending that there were unmistakably coercive elements in Westerfield's contact with the police, all of which contributed to the improper custodial pressure exerted by Ott and Keyser – a pressure that *was* custodial as a matter of law and which vitiated the supposed

voluntariness of Westerfield's consent. Judge Mudd's finding of voluntary consent is not supported by the evidence, and cannot be upheld.

II.
REPLY CONCERNING THE COURT'S DENIAL OF THE DEFENSE REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES

In the second claim of the opening brief, it was contended that the denial of the defense request for additional peremptory challenges resulted in a denial of due process under the circumstances of this case. Much of the argument (AOB, pp. 121-146) was devoted to a detailed analysis of the record in the instant case in order to demonstrate that this case meets the standard for this claim of error: that without the additional peremptory challenges, defendant was "reasonably likely to receive an unfair trial before a partial jury." (*People* v. *Bonin* (1988) 46 Cal.3rd 659, 679.) Respondent denies that the record in this case was such as to undermine the assurances of those eventually chosen to sit as jurors that they could be fair and impartial, takes appellant's argument to task for inferences drawn from the voir dire of those not chosen to sit, and concludes that appellant's argument cannot demonstrate any actual prejudice. (RB, pp. 64-66, 69-81.) But while squarely engaging the substance of the issue, respondent first begins with a claim of procedural default. (RB, pp. 67-69.) This of course pushes itself to the foreground, and must be addressed before one embarks on any substantive reply to respondent's other contentions.

A.
Procedural Default

As respondent reasons: Neither Mr. Feldman nor Mr. Boyce stated that pretrial publicity was the reason for the requests for additional peremptory challenges. Mr. Feldman's request "was based upon the number of prospective jurors who failed to appear in response to their summonses, thus lessening the size of the potential venire. (5 RT 2144.)" (RB, p. 67.) Mr. Boyce's request for additional peremptories was based on specified denials of defense challenges for cause aimed at prospective jurors, who, in any event, had indicated that they could

ignore pretrial publicity and could be fair and impartial. (RB, pp. 67-68.) If appellant *now* claims that additional peremptories were necessary to offset the effects of pretrial publicity (RB, p. 67), he did not say so in the trial court, and his silence "deprived" Judge Mudd "of the opportunity to rule on these grounds" and obviate possible error in the trial. (RB, p. 69.)

If the reasoning is elegant, the claim of procedural default is spurious. From March 28, 2002, when Judge Mudd was first assigned to the case, through May 30, 2002, when jury selection ended, everyone – the defense, Mr. Dusek, Judge Mudd – was acutely aware of the problem of pretrial publicity. It is not an exaggerated metaphor to say they were immersed in the problem, living it day-to-day; and its overwhelmingly apparent pressure was the background for each and every discussion regarding jury selection procedures. Even a casual acquaintance with the record should reveal this, and any claim of procedural default here founders on the principle that an issue is sufficiently preserved for appeal if the motion or objection "fairly apprises the trial court of the issue it is being called upon to decide" and "if, despite inadequate phrasing, the record shows that the court understood the issue presented." (*People* v. *Scott* (1978) 21 Cal.3rd 284, 290; see also *People* v. *Clark* (2011) 52 Cal.4th 856, 966.)

Thus if one takes first Mr. Feldman's request for additional peremptory challenges, he stated that the "[r]eason for the request is to entitle and insure that Mr. Westerfield under the Fifth, Sixth, and Fourteenth Amendments, and Eighth Amendment, obtains a fair representative cross-section of the community and a jury of his peers." (5 RT 2143.) Judge Mudd denied the request, noting that even with the large number of prospective jurors defying their summonses, "we're going to have a sufficient jury pool that will be indicative of the community." Mr. Feldman's express concern, stated in painfully stilted lawyer language designed, ironically, to make the record crystal clear, was the right to a jury obtained from a fair cross-section of the community. Judge Mudd understood this as reflected by

the language of the ruling. But was a fair cross-section of the community the goal in itself?

There are certain truths that we as Americans hold to be a fixed part of our civic culture, and one of them is that a fair and impartial jury is the cornerstone of our system of justice.[3] The legal community derives from this its own concomitant truths: that voir dire serves the primary purpose of obtaining a fair and impartial jury[4]; that that purpose substantively informs the procedural device of peremptory challenges, whether such are required or not by the constitution[5]; and that the constitutional requirement of a fair-cross section of the community, like voir dire, is both a support and protection for the ideal of a fair and impartial jury.[6] Judge Mudd, the defense attorneys, and the prosecutor Mr. Dusek, were of course members of the American community and of the legal community, and a fair jury trial, as well as the technical procedures for procuring it, was the ethos which informed their actions and the idiom in which they spoke.

What, in the instant case, was the salient threat to the ability to obtain a fair and impartial jury? It was pretrial publicity. Judge Mudd's personal introduction to the case was quoted in the opening brief and bears repetition here:

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[3] U.S. Const., Amend. 6; Cal. Const., art. I, § 16. See *Pointer* v. *United States* (1894) 151 U.S. 396; *Lewis* v. *United States* (1892) 146 U.S. 370; *Dennis* v. *United States* (1951) 341 U.S. 494; *Irvin* v. *Dowd* (1961) 366 U.S. 717; *Swain* v. *Alabama* (1965) 380 U.S. 202; *Witherspoon* v. *Illinois* (1968) 391 U.S. 510; *Peters* v. *Kiff* (1972) 407 U.S. 493.

[4] *Press Enterprise Co.* v. *Superior Court* (1984) 464 U.S. 501, 510, fn. 9; *McDonough Power Equip.* v. *Greenwood* (1984) 464 U.S. 548, 554; *Morgan* v. *Illinois* (1992) 504 U.S. 719, 729; *Kelly* v. *Trans Globe Travel Bureau, Inc.* (1976) 60 Cal.App.3rd 195, 203.

[5] *Holland* v. *Illinois* (1990) 493 U.S. 474, 482.

[6] *Holland* v. *Illinois*, *supra*, 493 U.S. 474, 480; *Ross* v *Oklahoma* (1988) 487 U.S. 71; *Duren* v. *Missouri* (1979) 439 U.S. 357, 359; *Berghuis* v. *Smith* (2010) 130 S.Ct. 1382, 1387; *People* v. *Crittenden* (1994) 9 Cal.4th 83, 119-120.

" . . . I have to admit that I have had what is probably the most unpleasant experience this Court has ever had with media on the day I was assigned this case. I was in trial. I had a jury and alternates; I had a witness on the stand. I was called off the bench to be advised that I was being assigned this case, and my marching orders were basically when the lawyers came down, please recess your trial, do your scheduling work and go back.

"I took the bench. Within ten minutes the floor was shaking. Bodies were coming down here. A news network placed a reporter under my shingle and turned on a light and I am assuming filmed a talking head. The witness on the stand stopped testifying and wondered what was going on out there. That jury, when I took that break, was inundated with human bodies. That is unacceptable.

"There will be no television cameras in the hallway at the north end of the building. None. Unless they are filming a case other than the Westerfield matter. Eventually, I'm going to have twelve jurors and probably six or more alternate jurors who are going to have to go in and out of this courtroom, and they will not be exposed to that kind of activity." (4 RT 710; see AOB, pp. 127-128.)

In ruling that the sealing of all motions was appropriate, Judge Mudd commented:

"Based on the extensive -- and on this I'm going to draw on my own experience. I've been practicing law, criminal law, in this community since 1970 and I've never experienced a case like this. I've handled numerous death penalty and other high profile cases, and nowhere have I ever seen what I have experienced thus far both on radio, on television, and in the print media. So it is my conclusion that there's a substantial probability that the overriding interest will be prejudiced if the motions are not sealed until the start of the hearing." (4 RT 702-703; see AOB, p. 127.)

Early in his assignment to the case, Judge Mudd recognized that one of his main concerns was that nothing happen "to pollute the venire . . . ." (4 RT 614-615), and is there any doubt that the potential source of such "pollution" was pretrial publicity in this case? When he ordered proceedings closed and motions sealed, he did it because "[b]oth sides are entitled to a fair trial, an unbiased jury, and an untainted pool" and because "[t]hey're entitled to have this trial conducted in this community." (4 RT 701-702; see also 4 RT 707-708.) Is there any doubt that he was referring to the problem of pretrial publicity?

When it comes to jury selection issues themselves, there was a good deal of *express* discussion regarding the problem of pretrial publicity. The first jury issue as such arose in the defense motion requesting sequestration of jury "in lieu of [a] motion for a change of venue." (3 CT 581.) In that motion, the defense stated: "Given the unrelenting media coverage and public comments concerning this case, a sequestered jury is required to ensure Mr. Westerfield's constitutional right to a trial by impartial jury free from outside influences." (3 CT 385.)

In early May, as the summons date of May 17 approached, the discussions about jury selection procedure became more pressing. In the course of one of these, Mr. Dusek, requested (unsuccessfully) *Hovey* voir dire, i.e., individualized, sequestered questioning of prospective jurors, which used to be a requirement for jury selection in all capital cases (*Hovey* v. *Superior Court* (1980) 28 Cal.3rd 1, 80-81), but was abrogated statutorily by the time of this trial, except for some limited discretion allowed to the trial court. (Civ. Proc. Code, § 223 ["Voir dire of any prospective juror shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases."].) Mr. Dusek's argument was as follows:

> " . . . . I think in this case there are several factors that call for individual questioning, and the primary factor is the publicity in this case. *The massive amount of publicity that has been generated*

in this community on the talk shows, on the T.V.'s, on the chat rooms, that I would venture to say most anybody coming into this courtroom is going to have an opinion about this case and about the participants and about the witnesses.

"I think for us to get that opinion from those individuals it would be enhanced if we have them individually in court. We would reduce the possibility, the very real possibility, I think, that whatever any one individual says would contaminate or influence what the other jurors say. That in conjunction with the death penalty attitudes I think at last from our standpoint we would request the court to have individual *Hovey*." (5 RT 2061-2062, emphasis added.)

Mr. Feldman agreed that "there's been so much of an inundation of publicity" that, if there was not *Hovey* voir dire, then Judge Mudd should at least allow more time for live, *viva voce* voir dire. (5 RT 2062.) More time would allow for an adequate "opportunity to inquire into the publicity, because this case is so overwhelming from a publicity standpoint. I think that's really where at least from the defense's standpoint our concerns lie." (5 RT 2063.)

Mr. Dusek, during another discussion of jury selection procedures, suggested that the venire, when it first showed up in the jury room in response to the summons, should be admonished there even before anyone was sent to the courtroom. He had contacted the prosecutor in the Polly Klaas case where there had been a change of venue. That prosecutor's experience was that the jury pool became contaminated when the potential jurors arrived in the jury room and began discussing the case, "causing all sorts of problems, which then resulted in a change of venue." (5 RT 2120.)[7] Mr. Dusek believed it to be prudent that someone admonish the prospective jurors not to talk about this case. He suggested that they be told: "We're sure you're smart enough to figure out why you're here. It's

[7] See *People* v. *Davis* (2009) 46 Cal.4th 539, 569.

going to be all over the news tonight and has been. But they should be told not to discuss the case even while they are waiting for us to arrive." (5 RT 2120-2121.)

What then, on April 30, was Mr. Feldman worried about when he said that " . . . I'm a little concerned about our ability to find twelve" from a pool of only 300 veniremen, and what did Judge Mudd understand when he assured Mr. Feldman that additional summonses were going out and that there would actually be "in the neighborhood of four hundred individuals showing up"? (4I RT 872-873.) What was the underlying problem when Mr. Feldman repeated this very concern on May 2 over the expected size of the venire? (4J RT 916-918.) Obviously, as everyone, including Judge Mudd, understood, it was the ongoing intensity of publicity surrounding this case as it might affect the ability to obtain a fair and impartial jury.

What then on May 15 and 16 was truly at issue when Mr. Boyce requested that the Commissioner *not* be allowed to pre-screen hardship excuses, but rather that the prospective jurors claim these in open court in front of the judge and all parties for review? (5 RT 2101-2105, 2109-2111.) It was not a pedantic desire to make a clear record of hardship excuses merely for the sake of a clear record; rather, in the defense's view, it was to assure that "a representative jury . . ." could be obtained. And again, what in this case did "a representative jury" mean? A fair and impartial one untainted by the pretrial publicity surrounding this case.

This brings one full circle to May 17 when the actual pool turned out to be less than 300 veniremen and Mr. Feldman made the first request for additional peremptory challenges in order to obtain "a fair representative cross-section of the community and a jury of his peers." (5 RT 2143.) What did he mean by this? There is no need to keep repeating the obvious answer to these questions.

As for Mr. Boyce's request, these were made after the exhaustion of the prescribed twenty peremptory challenges. The only reason stated by Mr. Boyce was "because of the challenges for cause that were denied." (8 RT 2951.) This, and the absence of any concession from the jurors in question that they were

influenced irredeemably by pretrial publicity, constitutes a forfeiture of the appellate issue raised, according to respondent. (RB, pp. 68-69.) But is there any doubt that virtually every challenge for cause issued in this case was related either directly or indirectly to the atmosphere of pretrial publicity? Does respondent contend that when Mr. Boyce singled out jurors and prospective jurors who asserted that they could be fair and impartial despite the publicity that he thought their disqualification had nothing to do with pretrial publicity? Did Judge Mudd, when he denied the challenges for cause, believe that pretrial publicity was not involved in his assessment of the jurors' claims to impartiality? Again, there is no need to keep stating obvious answers.

In *People* v. *Clark*, *supra*, 52 Cal.4th 856, the defendant contended on appeal that the trial court erroneously denied his request to impanel a new jury for the sanity and penalty phases of his capital trial because of the problem of undue publicity. (*Id.* at p. 964.) The trial court denied the motion, expressing sympathy with trial counsel's concern over some of the publicity generated by the case, characterizing it as " 'macabre.'" Nonetheless, the court saw no evidence that the jury could not be impartial. (*Id.*, at p. 965.) Trial counsel then requested, in the alternative, that the court " 'poll'" the jurors " 'to see if anyone has already decided what he verdict is going to be in the other two phases.'" The trial court also denied this motion. (*Ibid.*) In regard to this latter issue, this Court stated:

> "As a preliminary matter, we disagree with respondent that defendant's challenge to the court's refusal to question the jurors is not preserved for appeal. The defense moved for a new jury to decide sanity and penalty on the ground that defendant could not receive a fair trial given the media-fueled anticrime climate that pervaded the community during the guilt phase. After the court denied that motion, counsel immediately asked the court to question the jurors to determine whether they had predetermined views on sanity and penalty. Counsel described the requested inquiry as whether 'anyone has already decided' the penalty verdict. But there

> can be no question that counsel's doubts regarding the jury's impartiality arose from the same concerns underlying the motion for a new jury, that is, the possibility that the jury had been influenced by frequent media accounts of murder cases that bore similarities to defendant's case and coverage of the push for passage of Three Strikes. On this record, we conclude the court understood that the defense motion to question the jurors included a request to inquire into their exposure to such coverage. [Citing *People* v. *Scott*, *supra*, 21 Cal.3rd 284, 290.]." (*Clark*, *id.*, at p. 966.)

Although the relevant context in *Clark* was more tightly knit in time than the context here, the problem of publicity in this case was more pervasive and its suffusion was broader over a larger multiplicity of issues in the conduct of the case. But there is no essential difference between this case and that of *Clark*.

Human communication is often elliptical and imprecise, and depends on context even when it strives for the most punctilious precision. When attorneys and judges are speaking to each other, and not to an appellate court that is not present or even yet concerned with the case at all, any later review must attend to the same context that was apparent and obvious to the parties. This respondent does not do, and his claim of forfeiture and default is entirely without merit.

B.

Is This or is This Not an Extraordinary Case that Requires a Presumption Of Prejudice in the Face of Juror Attestation to the Contrary?

1. Respondent's Argument

Respondent begins his argument on the merits by quoting this Court's opinion in *People* v. *Prince* (2007) 40 Cal.4th 1179:

> "In exceptional cases, 'adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.' . . . [Citation.]. 'The category of cases where prejudice has been presumed in the face of juror attestation to the contrary is extremely narrow. Indeed, the few cases in which the [U.S. Supreme] Court

> has presumed prejudice can only be termed extraordinary . . ., and it is well-settled that pretrial publicity itself – even pervasive, adverse publicity – does not inevitably lead to an unfair trial . . . .' [Citation.] This prejudice is presumed only in extraordinary cases – not in every case in which pervasive publicity has reached most members of the venire. We do not believe the present case falls within the limited class of cases in which prejudice would be presumed under the United States Constitution." (*Id.* at pp. 1216-1217; see RB, p. 69.)

Appellant has requoted this passage to underscore the irony of respondent's next quotation, which is from the record, and which appellant need only paraphrase here since he quoted it in his opening brief (AOB, p. 127) and in this reply brief in the previous section of this argument. (See above, p. 23.) It is Judge Mudd's pronouncement that in his legal experience in San Diego County, which went back to 1970, and which included, as a lawyer and judge, "numerous death penalty cases and other high-profile cases," the media intensity in this case was unprecedented. (4 RT 703; RB, p. 70.) "Nonetheless," respondent assures us, "this case does not fall 'within the limited class of cases in which prejudice would be presumed under the United States Constitution.'" (RB, p. 70.)

This was so, according to respondent, "particularly in light of the significant measures the trial court took to protect against the impact of pretrial publicity." (RB, p. 70.) Respondent then ticks these off swiftly (RB, pp. 70-71): February 27, 2002, Judge Bashant ordered the warrant affidavits sealed (see AOB, p. 122); March 8, Judge Domnitz issued a pre-preliminary-hearing gag order (see AOB, p. 125); April 18, Judge Mudd, assigned to the case on March 28, ordered Judge Domnitz's gag order to continue and even expanded the persons subject to it (see AOB, pp. 125-126); that same day, Judge Mudd ordered all pretrial motions to be sealed and all motion hearings to be closed to the public and media (see AOB, p. 126); and May 15, Judge Mudd ordered that while jury selection would

be public, the proceedings would not be televised or photographed, and all prospective jurors would remain anonymous (see AOB, pp. 129-130).

The list of measures taken to protect the jury pool from the taint of publicity highlights, in respondent's view, the implausibility of Westerfield's implied claim that *only* additional peremptory challenges would have protected him from the negative impact of pretrial publicity. (RB, p. 71.) Further, respondent argues, there were other ways to protect against the threat of this publicity, and Mr. Westerfield chose *not* to avail himself of them. He could have waived his right to a speedy trial and let the impact of the publicity fade. Instead he chose to press this right, which was his prerogative, but that prerogative did not include an avoidance of the consequences for doing so. It was Mr. Westerfield's choice as to how to "balance [his] options . . . but the fact that he did not request a continuance or to change the venue are relevant considerations in determining whether local publicity was so persuasive [*sic*] that unfairness to his proceedings should be presumed." (RB, pp. 71-72; see AOB, p. 130, fn. 70.)

Respondent concedes that nearly every prospective juror in the venire was aware of the crime. (RB, p. 72; AOB, p. 131.) Respondent also "does not disagree with Westerfield's description of the seated jurors' and alternates' responses, indicating they had seen on the news the basic facts of the case, had seen Westerfield, and many of them discussed it with friends and family." (RB, p. 72; AOB, pp. 131-133.) What respondent does not concede is that Westerfield has "demonstrate[d] that the jurors' basic knowledge of the case had tainted their impression of him or of the evidence such that he could not receive a fair trial without a grant of additional peremptory challenges." (RB, p. 72.)

Respondent then goes through the voir dire of each of the sitting jurors and alternates, as did appellant, and finds that at best, all the record can establish is that they knew about the case, not that this knowledge affected their impartiality irretrievably. Again, according to respondent, the controlling legal principle is that complete and absolute freedom from knowledge about the case or even from

preconceived notions of innocence and guilt is not required for a fair and impartial jury. Rather, the key is the juror's ability to place these influences aside and render a fair and impartial verdict, and a juror's assurance that he or she could do this, in the absence of some reason to believe otherwise, is sufficient. (RB, pp. 73-74, citing and quoting *People* v. *Davis* (2009) 46 Cal.4th 539, 575.)

In respondent's view Westerfield's resort to an analysis of the voir dire of non-sitting jurors (AOB, pp. 133-146) was illegitimate to the extent that these jurors were dismissed, thereby providing some indication that the jury selection process was working. Nonetheless, according to respondent, "Westerfield can only point to seven who had indicated they had formed unyielding opinions about his guilt" – a very low number that indicated that a fair trial could be had in San Diego County. (RB, pp. 74-75.) Another eight prospective jurors, designated by Westerfield as "closer calls" expressed problems that had nothing to do with pretrial publicity, which, in respondent's view, included Venireman No. 109, who after he was called as a prospective juror sought out Brenda Van Dam and made a memorial contribution for Danielle. (RB, pp. 75-76; see AOB, pp. 145-146.)

Finally, respondent denigrates what he sees as appellant's attempt to elevate the status of this case against other such high profile cases as *Bonin* (*People* v. *Bonin* (1988) 46 Cal.3rd 659) and *Skilling* (*Skilling* v. *United States* (2010) 130 S.Ct. 2896). (AOB, pp. 147-153.) *Bonin* was worse, according to respondent, because there were already convictions out of Los Angeles County, and this was a greater source of taint than in the instant case where Mr. Westerfield's guilt was still, at least judicially, an open question. If the time-lag between the publicity and the later Orange County trial distinguishes *Bonin*, the lack of a time-lag in the instant case was Mr. Westerfield's choosing. (RB, pp. 76-77.) If the facts of the instant case were more inflammatory than the admittedly inflammatory facts of *Bonin*, this would be so whether or not there was pretrial publicity. Thus, "Westerfield's comparison of his trial to that in *Bonin* does not," concludes respondent, "advance his position." (RB, p. 78.)

As for *Skilling*, respondent concedes that the nature of the crimes in *Skilling* and in the instant case are not commensurable. (RB, p. 78.) But this disproportion is not legally significant, according to respondent. "*Skilling* stands for the proposition that even in the face of pervasive media coverage, a fair trial by an impartial jury can be had where the voir dire process, both written and oral, 'successfully secure[s] jurors who were largely untouched by' pretrial publicity." (RB, p. 78.) Here, respondent argues, such jurors were chosen. (RB, p. 78.)

2. Appellant's Reply

Before addressing respondent's argument, it will be helpful to bring to expression an implied point of agreement between the parties. From the manner in which respondent discusses the factual record, without invoking Judge Mudd's discretion to justify any specific factual or legal finding, one may infer that respondent accedes to the principle that the question presented is subject to *de novo* review. (See *People* v. *Prince*, *supra*, 40 Cal.4th 1179, 1213; *People* v. *Ramirez* (2006) 39 Cal.4th 398, 433; *Maine* v. *Superior Court* (1968) 68 Cal.2nd 375, 382; see also *Sheppard* v. *Maxwell* (1966) 384 U.S. 333, 362-363.) This does not mean, of course, one should discount Judge Mudd's own characterization of the publicity surrounding this case as unprecedented in his experience. Indeed, respondent himself quotes it even while maintaining that this unprecedented publicity was still not exceptional or extraordinary. (See above, p. 23.) But irony arises not only from this juxtaposition of the legal. To use the *Prince* case, as respondent does (RB, p. 70), to carry the legal standard is also striking, since *Prince* was a high-profile capital case out of San Diego County in the late 1980's and early 1990's (*People* v. *Prince*, *supra.*, 40 Cal.4th at p. 1213), and falls well within Judge Mudd's own experience, as does, for that matter, the case of Robert Alton Harris – another San Diego capital murder of at least state-wide notoriety in the late 1970's and early 1980's. (*People* v. *Harris* (1981) 28 Cal.3rd 935; see *People* v. *Cooper* (1991) 53 Cal.3rd 771, 806.) Judge Mudd

indeed would have seen several cases of intense, city-wide publicity in his own backyard, which was metropolitan San Diego.

From the quoting of Judge Mudd, respondent, as noted, proceeded to the measures taken by Judge Mudd to offset the threat of this unprecedented publicity. The implied premise of respondent's listing of these measures was that the effects of publicity were not incorrigible and sufficient measures were taken to offset the risk. This was to rebut what respondent saw as implied in appellant's position : "Implicit in Westerfield's argument is the premise that the *only* way to have protected against any negative impact from pretrial publicity was by granting additional peremptory challenges." (RB, p. 71, emphasis in original.) But appellant's argument was not that additional peremptory challenges were the only remedy against the risks of publicity or that the measures taken by Judge Mudd were not necessary; appellant's argument was that, on this record, these measures were not enough, that they did not go to the core of the problem, and that a fair and impartial jury could not be obtained *at least* without additional peremptory challenges as requested by the defense.

One must also keep in mind that additional peremptory challenges are not a negligible measure by any means. Mr. Feldman's request in advance of voir dire was for four or five additional challenges based on the proportion of unexcused no-shows (see AOB, pp. 117-118), while Mr. Boyce's request was for an additional five based on the number of actual jurors the defense would have rejected. (See AOB, p. 118.) Not only did Mr. Feldman's advance statistical projection match remarkably well with Mr. Boyce's actual number, but an additional five peremptory challenges, a 25 percent increase in the statutory number allowed, is a substantial increase in the type of protection provided by peremptory challenges. If they had been granted would appellant still be complaining about pretrial publicity? That would of course depend on whether he was even convicted, and if so, on what the new and different record on appeal revealed.

But also, if the list of measures taken to offset the effect of pretrial publicity appears impressive, it distracts from the real question: what was the substance of that publicity and its marked effects on the proceedings as shown by the record?. Respondent's listing of these measures does not constitute a commentary on, or argument against, appellant's detailed account of this publicity. (AOB, pp. 121-130.) Respondent makes no mention of the publicity that began right when Danielle Van Dam disappeared or the metropolitan-wide interest and involvement in the search for her. (See AOB, p. 121.) While respondent notes that Judge Bashant ordered the warrant affidavits sealed, he takes no note that she was on the verge of releasing them to the public for the "community therapeutic value." (AOB, p. 122.) What sort of case engenders the need for *community therapy* and sways the emotions of even a *judge* if not one in which the publicity was so extraordinary in its intensity that its disconcerting effect forged into a single "community" requiring "therapy" so large and diverse an area as San Diego?

Respondent takes note that gag orders were imposed, but notes nothing as to *why* they were imposed. Government functionaries were incapable of discretion in this atmosphere and were ready to contribute to "community therapy." The police felt no restraint in commenting on how Westerfield's alibi made no sense and was full of "glaring" inconsistencies, and how Westerfield failed a lie detector test. (AOB, p. 124.) "Prosecutors" told the newspapers about how Westerfield had "another side that none of his neighbors knew about" and this was his child pornography. (AOB, pp. 124-125.) And police or sheriff's deputies were ever ready to assure the public that Westerfield was already consigned to the untouchable pedophiles in the jailhouse caste system, and that after his conviction he would be securely lodged in the lowest depths of prison purgatory where his life would be threatened by the better class of prison inmate. (AOB, pp. 123-124.)

Respondent takes no note that the preliminary hearing in this case was televised. (AOB, p. 125.) Respondent takes no note of Judge Mudd's description of the floors in the courthouse shaking as the media herd ran down to his

courtroom, where a trial was in session, on the news that he had been assigned to the Westerfield case. (AOB, pp. 127-128.) Respondent takes no note that it was *Mr. Dusek* who initiated proceedings for the sealing of all motions because "the media has just been going ballistic." (AOB, pp. 125-126.) Respondent takes no note that the Van Dams were actively talking about the case and beyond the reach of any gag order. (AOB, p. 128.) Respondent takes no note that despite the gag orders and the sealing of motions, confidential matters such as the prosecution's motion to prevent the defense from introducing "lifestyle" evidence was blared all over the newspapers and television. (AOB, p. 129.)

Why does respondent find his faint, generalized concession that the publicity was bad, but not *that* bad, sufficient to address the question that must hinge on its *specific* quality and quantity? The question of juror bias is *sui generis* (*United States* v. *Sun Myung Moon* (2nd Cir.1983) 718 F.2nd 1210, 1234; *Delisle* v. *Rivers* (6th Cir. 1998) 161 F.3rd 370, 383), and whether the circumstances are sufficient to warrant a presumption of bias must surely depend on the specific quality and quantity of the publicity in a given case. By contrast, appellant has given this account, and it represents a *large* step toward establishing that this case falls within that narrow range of cases warranting such a presumption.

The final margin is traversed in resisting respondent's facile assertion characterizing the situation merely as one of universal knowledge about the case. As noted above, respondent relies on the settled legal truism that knowledge about a case does not translate into an inability to be fair and impartial. (*People* v. *Davis*, *supra*, 46 Cal.4th 539, 575.) But the Van Dam case was not an instance merely of universal knowledge; this was a case that demonstrably engaged the emotions and interests of those who knew, which was nearly everyone. Not so much near-universal knowledge, but near-universal engagement was apparent in the survey of the voir dire of the sitting jurors and alternates alone even without the survey of the non-sitting prospective jurors. This was clearly a case where

intense publicity found a reciprocation in intense public interest, and it was not, as respondent characterizes the matter, merely a problem of pervasive knowledge.

One might usefully contrast this situation with that presented in *Skilling* v. *United States* (2010) 130 S.Ct. 2896 where the United States Supreme Court refused to extend the presumption of bias in the Enron case. The Court describes the voir dire of the sitting jurors as follows:

> "Inspection of the questionnaires and voir dire of the individuals who actually served as jurors satisfies us that, notwithstanding the flaws Skilling lists, the selection process successfully secured jurors who were largely untouched by Enron's collapse.[fn. omitted.] Eleven of the seated jurors and alternates reported no connection at all to Enron, while all other jurors reported at most an insubstantial link. See, e.g., Supp. App. 101sa (Juror 63) ('I once met a guy who worked for Enron. I cannot remember his name.') [fn. omitted.] As for pretrial publicity, 14 jurors and alternates specifically stated that they had paid scant attention to Enron-related news. See, e.g., App. 859a-860a (Juror 13) (would '[b]asicially' start out knowing nothing about the case because 'I just . . . didn't follow [it] a whole lot'); id., at 969a (Juror 78) ('[Enron] wasn't anything that I was interested in reading [about] in detail . . . . I don't really know much about it.') [fn. omitted.] The remaining two jurors indicated that nothing in the news influenced their opinions about Skilling.[fn. omitted.]." (*Skilling*, *id.*, at pp. 2919-2920.)

Whatever one may say about the jurors, alternates, and prospective jurors in the instant case, disinterest in the case does not characterize *anyone*'s voir dire. Even if there was not here, as in the Enron case, the problem of a direct connection with the Van Dams and Danielle, *everyone* made an emotional connection with her and many with her parents through the publicity that both incited and fed on this emotion. Respondent's argument is thus illegitimately reductive, refuting appellant on grounds that he, respondent, has artificially narrowed. Again, it is not

knowledge at issue, it is *interested* and *participatory* knowledge, which we might otherwise call emotion and passion.

Respondent further tries to weaken the strength of appellant's argument by casting an aspersion on his use of the voir dire of prospective jurors who were not chosen. He quotes from a footnote in *Skilling* that takes Justice Sotomayor to task for using in her dissent the voir dire of non-jurors to make the case for a presumptive bias in the community. " 'Statements by nonjurors,'" respondent quotes (RB, p. 74), " 'do not themselves call into question the adequacy of the jury-selection process; elimination of these veniremembers is indeed one indicator that the process fulfilled its function.' (*United States* v. *Skilling*[, *supra*, 130 S.Ct. at p. 2920, fn. 24 . . . .].)"

Appellant does not disagree that the voir dire of non-jurors *may* in a given case tend to indicate that voir dire worked as it was supposed to.
But *Skilling*'s footnote does not criticize Justice Sotomayor for a mistake of law; it criticizes her for a mistake of factual judgment. As the Court stated, the voir dire of nonjurors "do not *themselves* call into question the adequacy of the jury-selection process . . . ." If, as in *Skilling*, the jurors in the instant case had expressed indifference and uninterest in the Westerfield case; if, as in *Skilling*, the publicity was merely factual; and if, as in *Skilling*, there was nothing inherently provocative in the relatively esoteric and technical crimes at issue in that case, then one might well conclude that the voir dire of non-jurors was an indicator of a successful voir dire. But every case must be judged on the totality of case-specific evidence (*People* v. *Jennings* (1991) 53 Cal.3rd 334, 363; *Murphy* v. *Florida* (1975) 421 U.S. 794, 799), and here there is more than ample justification for using the voir dire of non-jurors as *one* of the sources of recreating the public atmosphere surrounding this trial.

Respondent's failure to engage a major portion of appellant's discussion of the record is a serious omission in his argument. He dodges the task, leaving nothing really to reply to. The analysis of the voir dire in the opening brief was

abundant in detail, and the use of evidence to support the argument of presumptive bias was justified not only at each step of the way, but by the overall result of the analysis, which is that the public intensity surrounding this case was such that the assurances of the prospective jurors, including those eventually chosen to sit, were not reliable. (See AOB, pp. 131-146.) There is no need to repeat the details of this analysis, but a re-emphasis of two instances might help cast a paradigmatic light on the controversy and help refute respondent's contention that the record here shows that there was a valid and effective voir dire.

The examples are venireman number 98 and venireman number 109. Ninety-eight, the wife of a prominent man, averred that she thought pornography was disgusting, that whoever had it was sick, that she could put these prejudices aside, and that it would nonetheless be hard to return a not guilty verdict, even if the evidence warranted, "considering public pressure." (24 CT 5997-6000.) A challenge for cause issued against her by the defense was denied by Judge Mudd, who was satisfied she could be fair and impartial. (8 RT 2929.) She was adduced in the opening brief as illustrative of the public atmosphere surrounding this case, because she attested expressly to the existence of "public pressure" against appellant, and attested, at least by example, to its effect on her. (AOB, pp. 144-145.) But, considering the totality of circumstances, can she really be adduced as an indicator of the effectiveness of voir dire in this case? She was still in the venire when the defense had exhausted its peremptory challenges, but was released by stipulation of the parties before the selection of alternates commenced. (8 RT 2956-2957.) Her avoidance was therefore *not* a testament to the effectiveness of voir dire as such, since voir dire might have allowed her onto the jury.[8]

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[8] For a further reflection of her qualification to be a juror in this case, one might consider that after her release, Number 98 complained inaccurately to her prominent husband about Judge Mudd's handling of the jury selection, whereupon

Even more so did venireman number 109 elude voir dire, which showed him to be a model of fairness, equity, and moderation in all his answers to the questions. His disqualification was revealed later when he encountered Brenda Van Dam at an ice skating rink and then sent her a check in his own name for Danielle's memorial fund. (AOB, pp. 145-146.) There was no reason to doubt the sincerity of his protestation that his acts were not inconsistent with impartiality and fairness, and that they did not violate the court's admonition (8 RT 3031), but this sincerity only makes him even more disturbingly paradigmatic of the distorting effect of publicity and public attention in this case. It was pure, fortuitous serendipity, *not* voir dire that exposed him, and he most certainly does not illustrate the effectiveness of voir dire in this case.

Again, 98 and 109 are only examples, but ones whose consistency with the totality of evidence already presented in the opening brief make them significant examples of a public atmosphere, the re-creation of which, a decade later, can never completely capture the live force of the actual experience. Nonetheless, the record is sufficient to inspire a lack of confidence that all the prospective jurors who *needed* exposing were truly tested by the voir dire in this case. The nature and quality of the pretrial publicity, the pervasive knowledge of the case, the demonstrably active interest of a substantial portion of the jury pool -- all of these lead to the conclusion that appellant, absent at least the additional peremptory challenges, was "reasonably likely to receive an unfair trial before a partial panel." (*People* v. *Bonin*, *supra*, 46 Cal.3rd 659, 679.)

There is one final, and perhaps anticlimactic, point that must be addressed before this section of the argument is brought to a close. Respondent at more than one point in his argument suggests that Mr. Westerfield's assertion of his speedy trial rights and his eschewal of a continuance and/or a change of venue must be construed against his argument. It is not quite clear whether respondent is

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her husband called the court and various other agencies to demand correction and redress. (See 11A RT 3324-3327.)

suggesting that the penalty on appellant entail imputing to him an implied concession that the publicity was not so bad (RB, pp. 71-72); or whether respondent is suggesting that appellant should be barred, through a vague sort of estoppel, from invoking the short span of time between publicity and trial as a distinctive mark in favor of the argument for additional peremptory challenges. (RB, p. 77.) Appellant anticipated something like this in the opening brief, where he asserted the principle that one is *not* required to surrender one constitutional right in order to vindicate another. (AOB, p. 130, fn. 70, citing *Simmons* v. *United States* (1968) 390 U.S. 377, 393-394, and *McGautha* v. *California* (1971) 402 U.S. 183, 213.) Nonetheless, the argument now rears its head with a citation by respondent to *People* v. *Frye* (1998) 18 Cal.4th 894 for the principle that some constitutional rights "are mutually exclusive . . ., and hard choices are not unconstitutional." (*Id.* at p. 940; see RB, p. 71.) If appellant may be permitted a more pungent paraphrase on respondent's behalf: appellant made his bed, and now must lie in it.

But *Frye* in fact stands only for the proposition that the defendant must make a choice between constitutional rights when the two rights conflict in such a way that they cannot each be accommodated, i.e., when the exercise of the two rights are "mutually exclusive." For example, the right to testify and the right against self-incrimination, *viz*., the right *not* to testify, are obviously mutually exclusive. In *Frye*, there was a mutual exclusivity on the record between the right to a speedy trial and the right to effective assistance of counsel insofar as it was impossible for counsel to prepare in the short time required to vindicate the speedy trial right (*People* v. *Frye*, *supra*, 18 Cal.4th at pp. 938-940.) Here, respondent himself makes the centerpiece of his argument the proposition that reasonable measures already taken by Judge Mudd had in fact reconciled on this record the Sixth Amendment's mandate that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." If appellant then

argues that additional peremptory challenges were necessary on this record in order to truly reconcile all of appellant's Sixth Amendment rights, how can he be estopped from arguing that the locality and the time period is a factor to consider in assessing the possibility *vel non* of a fair and impartial jury?.

Nor, in asking for additional peremptories, did appellant below or here concede that the publicity was not so bad. At best, one may infer that the defense believed that they could obtain a fair and impartial jury in San Diego in May 2002 *if* they had additional peremptory challenges, and *if* they had the possibility later of sequestration, which indeed the defense saw as a solution that could provide it with the same protection as a change of venue. (3 CT 581.) Drawing any factual inference beyond that from the decision *vel non* to waive the right to a speedy trial or to a trial in the same district as the crime does not involve an inference at all but a speculation. (See *People* v. *Mincey* (1992) 2 Cal.4th 408, 441 [An inference of guilt based on a witness's exercise of his Fifth Amendment privilege is a speculation and not an inference based on evidence.].)

Mr. Westerfield, then, had a right to a speedy trial in San Diego before a fair and impartial jury. He was not required to surrender any one of these rights in order to vindicate the other (*Simmons* v. *United States*, *supra*, 390 U.S. 377, 393-394; *McGautha* v. *California*, *supra*, 402 U.S. 183, 213) – at least in the absence of impossible co-existence and mutual preclusion. (*People* v. *Frye*, *supra*, 18 Cal.4th at pp. 938-940.) The denial of his request for additional peremptory challenges in fact means that Mr. Westerfield *did not* make his own bed, and respondent has no basis for telling him that he ought to lie in it. His assertion of his unified Sixth Amendment right is neither a legal penalty against him nor a factual concession against his position, and whatever respondent is arguing in this regard should be rejected.

C.
Federal Constitutional Error and Prejudice

In his opening brief, appellant argued that the issue of additional peremptory challenges was elevated to the level of a federal constitutional question because of the extraordinary intensity of pretrial publicity. Despite its oft-repeated status as dispensable and subordinate, the lowly peremptory is persistent and ubiquitous, and its claim to a higher status difficult to resist. (See *Holland* v. *Illinois* (1990) 493 U.S .474, 482 ["One could plausibly argue . . . that the requirement of an 'impartial jury' impliedly compels peremptory challenges."].) That is why the law does not rise to the level of a closed dogma, and if the improper denial of a peremptory challenge in itself is not a violation of the Sixth Amendment, the improper denial of a peremptory challenge, aggravated by other circumstances in the case, can be. (*Rivera* v. *Illinois* (2009) 556 U.S. 148, 158 ["[T]he mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution."]; see AOB, pp. 129-130.) The additional circumstances in this case, again as shown in the opening brief and in this the reply brief, is the publicity and public attention drawn to this case with unprecedented intensity --- to use Judge Mudd's description.

These points are re-emphasized in this section of the reply regarding prejudice, because respondent makes his opposing view central to his claim that there was no prejudice. There is no independent, let alone constitutional, scope for an error in a denial of peremptory challenges except insofar as none were available to correct the trial court's error in *not* granting a challenge for cause and thereby forcing the retention of an unqualified juror on the panel. (RB, pp. 81-82.) By this measure, the denial of a peremptory challenge is not, in effect, ever a possible error, but only a required element for prejudice from the true error, which is the erroneous denial of a challenge for cause. However, the prima facie crack in this reasoning is simply this Court's own cases that treat the denial of a request for additional peremptory challenges as an *independent* error. (*People* v. *Lewis*

(2008) 43 Cal.4th 415, 490, 496; *People* v. *DePriest* (2007) 42 Cal.4th 1, 23-24; *People* v. *Bonin*, *supra*, 46 Cal.3rd 659, 679.)

When, then, is it an independent error? At least when, as here, it rises to the level of federal constitutional error. How does it rise to that level here? Again, it does so because the denial of the request for additional peremptory challenges is one of the proximate nodal points at which pretrial publicity directly converged on the conduct of this case. In this regard, *United States* v. *Harbin* (7th Cir. 2001) 250 F.3rd 532, cited and discussed by appellant in his opening brief (AOB, pp. 153-155), and parsed and distinguished by respondent (RB, p. 79), is to the point, if not on point.

In *Harbin*, the trial court exercised its discretion to grant the prosecution an additional peremptory challenge, which it did not grant to the defense, thereby unequalizing the number of such challenges for both sides. The Court in *Harbin* found this to be a federal constitutional error and applied a standard of reversal per se because of the nature of the error in vitiating the structural right to a fair and impartial trier of fact. (*Harbin*, *id.*, at pp. 548-549.) According to respondent, *Harbin* is confined to its occasion in which the system of peremptory challenges had been "skewed towards the prosecution" and had destroyed "the balance needed for a fair trial." (*Id.*, at p. 540; RB, p. 79.) "No such skewing occurred here," respondent asserts. "Westerfield was entitled to 20 peremptory challenges by statute as was the prosecution. He used them. The result was a jury of twelve unbiased jurors as revealed by their voir dire responses." (RB, p. 79.)

But respondent's reading of *Harbin* is overly restrictive. A closer look at that opinion shows that it in fact conforms to appellant's position that the issue of peremptory challenges becomes constitutionalized when there is "something more." The "something more" in *Harbin* was the unequal number of challenges afforded to the prosecution and the defense. Here, again, is what the Court in *Harbin* states:

> " . . . . The Supreme Court has stated that 'if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.' [Citations.] Here, however, *the error calls into question the impartiality of the jury because it cripples the device designed to ensure an impartial jury by giving each party an opportunity to weed out the extremes of partiality. Therefore the presumption is inapplicable.*" (*Id.*, at p. 548, emphasis added.)

The "crippled device" in *Harbin* is the unequal number of challenges; the "crippled device" in the instant case is the limit of 20 peremptory challenges when the extraordinary amount and quality of pretrial publicity warranted the addition of more, once the twenty had been exhausted. Indeed, the publicity and public attention in this case was the cause of a disequilibrium that left the prosecution still holding peremptory challenges when the defense had run out.

Is this analogy strained? Not at all. If the *Harbin* court had reviewed the voir dire of the sitting jurors for fairness and impartiality in the way that respondent does in the instant case, that Court might well have found that despite the unequal number of challenges, there was actually a fair and impartial jury. So here, respondent purports to find that there was actually a fair and impartial jury despite the exhaustion by the defense of all twenty peremptory challenges. But the *Harbin* court does not assess the record in that case as respondent does in this one, and respondent does not explain why this is so except by claiming that his distinction between the two cases actually makes a difference. *Harbin* of course invokes per se reversal, and its reasons all apply to the instant case: the issue presented was extraordinary; no system of peremptory challenges existing now or in the past was ever unequal; and the prejudice that might arise from this extraordinary situation is not easily assessed merely by extroverted indications in the record. All of this applies to the instant case. The publicity and public pressure on the jury was extraordinary; the number of peremptory challenges

allowed has a large degree of arbitrariness in it; and the prejudice from a failure to adjust the number in accord with the urgent circumstances of the case has an immeasurable effect.

One is left in the end with the fundamental dispute between appellant and respondent. In respondent's view, the circumstances surrounding this case were such that there was no basis to doubt the assurance of the sitting jurors that they could be, and were, fair and impartial. (RB, p. 80.) In appellant's view, the totality of evidence established an ample basis for discounting these assurances. From this flows the error in denying additional peremptory challenges as well as the prejudice from this error. Resolution of this question requires this Court to make a sincere and careful assessment of the totality of evidence, and appellant is confident that such an assessment will vindicate his argument and require a reversal of his convictions.

III.
REPLY CONCERNING ERRONEOUS DENIAL OF CHALLENGES FOR CAUSE

An issue related to the claim of an erroneous denial of additional peremptory challenges is the erroneous denial of challenges for cause to Venireman Number 19, which left Venireman Number 34 on the jury as Juror Number 4, who was herself unqualified due to lack of impartiality. (AOB, pp. 158-179.) Respondent again begins with a claim of procedural default, asserting that there is here a forfeiture of the issue because defense counsel never timely expressed his dissatisfaction with the jury that was to be sworn. (RB, p. 90.)

There of course is no dispute that expression of such dissatisfaction is required to preserve the issue. Indeed, appellant acknowledged as much in the opening brief and asserted that such dissatisfaction had been expressed. (AOB, p. 158.) He was referring to the following statement by Mr. Boyce after the defense had exhausted its peremptory challenges and was faced by the very jury that was *about to be sworn in* to try the case:

> "You honor, our motion is for additional peremptory challenges because of the challenges for cause that were denied. We think specifically the one that we filed a motion on, Juror Number Nineteen, that we are entitled to an additional challenge for her and also the other challenges for cause that were made that were denied." (8 RT 2951.)

Respondent appears to be under the impression that this was not an expression of dissatisfaction with the jury. Was Mr. Boyce's expression somehow inadequate? Respondent does not explain, and he cites to cases where defense counsel in fact said *nothing* about the final jury. (RB, p. 90, citing *People* v. *Virgil* (2011) 51 Cal.4th 1210, 1239-1240, and *People* v. *Carasi* (2008) 44 Cal.4th 1263, 1290.)

If a legal measure for the expression of dissatisfaction in this context is needed, there are cases that provide it:

> "As stated, in order to constitute legal basis for assignment of prejudicial error [in the denial of a challenge for cause], it must appear that an objectionable juror was forced upon the defendant; that is to say, it must appear that he has not only exhausted all of his peremptory challenges, but that he has *in some appropriate manner* manifested his dissatisfaction with the jury as completed." (*Darcy* v. *Moore* (1942) 49 Cal.App.2nd 694, 700, emphasis added; *People* v. *Hall* (1979) 95 Cal.App.3rd 299, 307-308; *People* v. *Rambaud* (1926) 78 Cal.App. 685, 689.)

Was Mr. Boyce's expression of dissatisfaction made in an *in*appropriate manner? The statement was made in open court, on the record, within the hearing of the judge and prosecutor, and its content was a request for the more peremptory challenges in order to clear from the jury those disqualified to serve because of a lack of impartiality and presence of bias. If that is not an expression of dissatisfaction with that jury, then respondent must help us discern the true meaning of Mr. Boyce's expressions. He does not, except perhaps by an implication.

Respondent's implication seems to be that the expression of dissatisfaction must take the form of identifying specifically which jurors left on the panel were unsatisfactory. This assumption of respondent's meaning derives from the fact that respondent cites only to Mr. Boyce's statement made the next day, after the jury was sworn, where he did, out of an excess of caution, specify which jurors were not satisfactory to the defense. (9 RT 3106.) "His attempt," respondent asserts, "to state dissatisfaction with the jury as sworn the following day . . . did not preserve the issue as it came too late." (RB, p. 90.) If this is respondent's argument, the answer is: if Mr. Boyce's statement after the jurors were sworn

came too late, it also came superfluously, since the issue had been properly preserved the day before, before the jurors were sworn.

But what if respondent's implication is correct? What if the unsatisfactory jurors must be specifically named? There is here still no forfeiture. The record of Mr. Boyce's belated specification of jurors was as follows:

> "MR. BOYCE: There's one other matter, and I apologize. I keep supplementing my request for additional peremptory challenges, but I failed to make clear I think for the record that the reason we requested peremptory challenges was that we were dissatisfied with the panel as it was presently constituted and that if we had had those peremptory challenges, we would be challenging Jurors 2, 4, 6, 10 – I'm sorry – 6, 11, and 12.
>
> "THE COURT: Duly noted for the record. But if that's another application for additional peremptory challenges, number one, the panel's already sworn. Number two, *it would have been denied had you made it before the panel was sworn.* So for the record, it's denied." (9 RT 3106, emphasis added.)

The italicized statement of Judge Mudd clearly indicates that a timely specification of the jurors to be challenged with the additional peremptories requested would have made no difference in the ruling made the day before. Forfeiture does not occur if the record shows that an objection or request would have been futile. (*People* v. *Welch* (1993) 5 Cal.4th 228, 237-238; *People* v. *Abbaszadeh* (2003) 106 Cal.App.4th 642, 648; *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033; see Civ. Proc. Code, § 3532 ["The law neither does nor requires idle acts."].) Thus, even if the rule of forfeiture is in this context as respondent implies it to be, there is still no forfeiture here, and the issue is preserved for review.

On the substance of the claim, respondent begins his assault with the assertion that the challenge for cause to Venireman Number 19 was properly

denied. Appellant's attempt, respondent argues, to liken Number 19 to Juror Staggs in *People* v. *Bittaker* (1989) 48 Cal.3rd 1046 fails. If Staggs and 19, because of their respective vocational dedication -- Staggs as a rape trauma counselor, 19 as an elementary school principal --, expressed prejudice against the respective defendants, Staggs, according to respondent, never gave an unqualified assurance that she could place these feelings aside to be fair and impartial, while 19 did give such an assurance. (RB, pp. 90-92.) Thus, according to respondent, this case falls into the orbit of those instances in which the reviewing court must defer the judge's factual assessment of the juror's qualification. (RB, pp. 92-93.) A proper response to this might begin with a reprise of 19's voir dire to see precisely what Number 19 said.

In her questionnaire, 19 made the following emphatic affirmations: "I cannot serve on a case where the victim was a child" (18 CT 4383); "I cannot abide crimes against children" (18 CT 4383); "Children have been my life for 37 years. I do not think I could be fair and impartial in this instance" (18 CT 4383). The first affirmation was in response to the question of whether or not she wanted to serve on this case; the second was in response to the question of whether or not she had biases and prejudices that would affect the way she would decide this case; the third was in response to whether or not she would be able to view gruesome photographs of the deceased in decomposition. (18 CT 4383.)

In this group of affirmations, there was only one equivocation of sorts, and it was attached to the second affirmation: "This might color my objectivity, although I consider myself fair." (18 CT 4383.) Thus, in this sentence, 19 demoted her bias and prejudice to a "coloring influence" of her otherwise fundamentally immoveable character for fairness and justice. But this is not so much an equivocation as a mild, unpersuasive contradiction, given the emphatic, unequivocal nature of the affirmations to begin with. She apparently reconciled this contradiction in her statement by the notion that she could still put aside her opinions and render a fair judgment in this case. (18 CT 4392.) In other words,

she merely acknowledged the mechanics of a fair decision in a specific dispute, whose genre nonetheless disgusted her and violated all the instincts of her life's devotion.

In live voir dire by Mr. Feldman, she reaffirmed her unqualified statements in the questionnaire and stated, again unqualifiedly, "I believe I would not be fair and impartial." (6 RT 2331.) When the question was pressed again, she again demoted the negation of fairness and impartiality to a "coloring influence": "Q. So are you telling us that in this case, and I appreciate you honesty, you could not be fair and impartial because the crime involves an allegation of murder of a child? A. I would – that would color my feelings." (6 RT 2331.) When asked to explain "color" she responded:

> "I spend a great deal of my time protecting children. I have gone to the authorities about abuse for children. The rights of children are uppermost in my mind and I – we have a hard time looking at a defendant in a child – a case where a child has been a victim." (6 RT 2332.)

With Mr. Dusek's questioning, 19 explained how she listens to disputes between children and assesses the truth impartially even if one of the protagonists in the schoolhouse dispute is a favorite of hers. (6 RT 2333-2334.) The live voir dire ended with Judge Mudd defining for her the "conflicting messages" she was giving the court. Asking her to put her character on the line (i.e., "[k]nowing everything you know about yourself"), he wanted her honest self-appraisal of her ability to try this case fairly and impartially, to which she responded, "I honestly believe I am fair and impartial in this particular case. I'm not sure that my beliefs wouldn't color the case." (6 RT 2334-2335.) If this last *appears* to be an unqualified asseveration, one should recall that Number 19 had explained "color" by the fact that the rights of children were "uppermost in her mind" and that she

had a "hard time" viewing with any equanimity "a defendant in a child – a case where a child has been a victim." (6 RT 2332.)

Thus, respondent's assertion that Number 19 somewhere in all of this made an unqualified assertion that she could be fair and impartial is not borne out. Number 19 made no such assertion; rather she made *qualified* assertions that *she might not be unfair and partial*. The two are not the same thing, and juror Staggs herself made such a qualified assertion as reported in *Bittaker*, when she said she could " '*try*'" to listen to the evidence, but that her " '*tendency*'" would be to discount it. (*People* v. *Bittaker*, *supra*, 48 Cal.3rd at p. 1090, italics added.)

Again, Number 19 and Juror Skaggs are not identical, and it would be difficult to find the voir dire of two jurors from different cases to be identical, but some measure of the proper and improper might be obtained by invoking a third example.

In *People* v. *Vitelle* (1923) 61 Cal.App. 695 the prospective jurors were informed that the defendant was a member of the Ku Klux Klan, and that the charged assault at issue was a Klan activity. (*Id.*, at p. 696.) A prospective juror, McAdam, on voir dire asserted he was biased and prejudiced against the Klan, did not think he could be fair and impartial in this case, would not want to be tried by jurors like himself if he were defendant, and that his bias and prejudice would influence his evaluation of the evidence and defendant's testimony. (*Id.* at pp. 696-698.) Nonetheless, McAdam assured the court that he would follow jury instructions and would vote to acquit if there was reasonable doubt. (*Id.* at pp. 698-699.) But he added, " 'It would take evidence to remove my bias against the Klan.'" (*Id.* at p. 699.)

The court in *Vitelle* found error in the denial of a defense challenge for cause to McAdam. The court found "no escape from the conclusion that there existed in the mind of McAdam a state of mind . . .which necessarily prevented him from acting with entire impartiality and without prejudice." (*Id.*, at p. 700.) How is this conclusion escapable in the case of Venireman Number 19?

McAdam's aversion to the Klan was parallel to Number 19's aversion to crimes against children; the expression of the bias and prejudice arising from this aversion was unequivocal; and both qualified their aversions with statement indicating that they could be fair in judging the particular case.

If challenges-for-cause are reviewable at all, the McAdam-Staggs-19 complex reveals that the features of an improper denial of a challenge for cause arise when unequivocal assertions of bias and prejudice are qualified only by weak assertions of the possibility of fairness and impartiality. The challenge for cause issue to Venireman Number 19 in this case was improperly denied.

In his opening brief, appellant made the argument that his burden to show prejudicial error consisted in establishing no more than an error in denying the challenge for cause to Number 19 in conjunction with the exhaustion of peremptory challenges. There was no need to show further that an unqualified juror was seated and sworn because of the denial of the challenge for cause. (AOB, pp. 176 *et seq.*) The possibility for such an argument rested on the extant inconsistency between *People* v. *Yeoman* (2003) 31 Cal.4th 93, on the one hand, and *People* v. *Bittaker*, *supra*, 48 Cal.3rd 1046 and *People* v. *Crittenden* (1994) 9 Cal.4th 83, on the other. (See *People* v. *Baldwin* (2010) 189 Cal.App.4th 991, 999-1000 [noting an unexplained inconsistency in this Court's jurisprudence on prejudice from erroneous denials of challenges for cause].) Appellant urged that based on the California Constitution, the *Bittaker/Crittenden* position was the proper one. (AOB, pp. 178-179.)

Respondent urges this Court to follow *Yeoman* as having impliedly disapproved of *Bittaker* and *Crittenden.* (*Id.*, at pp. 97-98.) Although such an argument might be of greater weight in a subordinate court endeavoring to rule in accord with this Court's direction (see *Baldwin*, *supra*, at p. 1000), it should have no weight here whence direction issues to subordinate courts. This Court is of course free to address the issue and to take into account the strictures of the California Constitution, which respondent does not address in his argument.

Again, appellant set forth the state constitutional argument in his opening brief, and needs not to repeat it here, except to note summarily that the California Constitution was intended to preserve the common law features of a criminal jury, which included peremptory challenges; and that the language of Article I section 16 of the California Constitution denominates this common law right as "inviolate" – an emphatic term suggesting a strict rigidity that is not in the Sixth Amendment. (See AOB, pp. 176, fn. 99, and pp. 178-179.)

But if *Yeoman* represents existing law, one must proceed to address the question of Juror Number 4. Appellant will not reprise in detail his argument concerning Juror Number 4. The crux is that her contradictory assertion that she *could* be fair and impartial arose during Judge Mudd's intimidating voir dire in which he expressed open exasperation with her contradictions. (See AOB, pp. 168-175.) According to respondent, "the record does not indicate that Juror No. 4 answered any question out of intimidation." (RB, p. 95.) No record can in any absolute sense do so, which is why one must make inferences based on probabilities.

First, there are the transcribed statements of Judge Mudd, which are accusatory in form. (8 RT 2936-2937 ["What changed overnight?" "I want to know what overnight changed you . . . . Please explain that to me." "You know what fairness is though, don't you?"].) Second, there is Judge Mudd's culminating statement which, in form, pressed Juror Number 4 for a definitive explanation of her stark contradiction. (8 RT 2938-2939 ["Now what is it Ma'am? Can you be fair and objective to both sides or not?"].) Third, there is evidence of the tone of these statements in Mr. Feldman's unchallenged statement on the record that "the Court's tone of voice with regard to the juror may have been construed as intimidating . . . ." (8 RT 2940.) Fourth, there is Mr. Dusek's implied confirmation of Judge Mudd's tone when Dusek answered Feldman's suggestion that Number 4 was intimidated by the judge. Dusek said, "She told me

without even the pressuring as to whether or not she could be fair, and she volunteered that." (8 RT 2940, emphasis added.)

There is then on this record a high probability that Judge Mudd appeared to Juror No. 4 as intimidating, and when she answered his demand for an answer to whether or not she could be fair and impartial, she said, "I don't see why I can't be, but I am thoroughly confused at this point." (8 RT 2939.) Respondent chooses to interpret the record to mean *only* that she was confused, and not that she was flustered in the face of the judge's intimidating tone and questions. As stated in the opening brief, the record here requires a good deal less deference to Judge Mudd's estimation than would normally be the case since Judge Mudd's questioning itself was an integral and substantial part of the dispute that has to be assessed.

The denial of a challenge for cause to Juror Number 4 was therefore error. The lack of any means to remove Number 4 by a peremptory challenge was due to the improper denial of a challenge for cause to Venireman Number 19. Appellant's right to a fair and impartial jury as guaranteed by the Sixth Amendment was denied, and his convictions must be reversed.

IV.
REPLY CONCERNING JUDGE MUDD'S REFUSAL TO SEQUESTER THE JURY

The fourth issue raised in the opening brief consisted of the contention that Judge Mudd erred in not sequestering the jury after the first stalking incident occurred in the tenth week of trial, or at least no later than the beginning of deliberations about two weeks later, especially when Juror Number 12 himself was asking to be sequestered. (AOB, pp. 183-184.) The error is established whether or not one judges the matter by an abuse-of-discretion standard or through de novo review. Respondent denies that the standard is de novo review, and that there was any abuse of discretion. (RB, pp. 98-101.) Since historical facts pertinent to the question of sequestration is almost the same in appellant's and respondent's versions (AOB, pp. 191-222; RB, pp. 101-115), the variance in legal conclusion seems to have much to do with the standard of review applied.

In the opening brief, appellant relied on *Sheppard* v. *Maxwell* (1966) 384 U.S. 333 for the claim that the standard of review on the sequestration issue presented by this case calls for the application of independent review. In *Sheppard*, the United States Supreme Court stated unequivocally that in cases where pervasive publicity threatens the ability to conduct a fundamentally fair trial "free from outside influences," then not only does the trial court have the obligation to take "strong measures to insure the balance is never weighed against the accused", but also "appellate tribunals have the duty to make an independent evaluation of the circumstances." (*Id.*, at p. 362.) Among the "strong measures" possible in such a situation, the court listed continuances, changes of venue, and sequestration of the jury. (*Id.*, at p. 363.) On the other hand, Penal Code section 1121 provides in relevant part that "[t]he jurors sworn to try an action may, in the discretion, of the trial court, be permitted to separate or be kept in charge of a proper officer." This of course implies a standard of review on appeal of abuse of discretion.

The apparent conflict was reconciled by appellant by the invocation of a threshold at which point due process concerns trigger an independent standard of review. If the extraneous influences that potentially affect a case are pervasive and intense in a degree similar to that of *Sheppard* then the range of discretion in the trial court diminishes, and the independence of appellate review increases. (AOB, pp. 188-189.) As far as respondent is concerned, the statutory formulation controls, and there is no dichotomy that requires reconciliation:

> "The statement regarding independent review in *Sheppard* is dicta, and appears to stand as an admonition to ensure that the trial courts take the necessary precautions to protect against undue publicity. But Westerfield further suggests that because the standard for review for the denial of a change-of-venue motion is *de novo*, the same standard should apply to the denial of a request to sequester a jury. (AOB, 187-188.) There are other contexts that are seemingly 'mixed' questions of law and fact in which rulings regarding the effect of pretrial publicity warrant deferential review. The denial of a motion for mistrial is one such area. A mistrial should be granted based on inflammatory publicity only where a party's opportunity to receive a fair trial has been irreparably damaged. [Citations.] The question of whether mistrial or sequestration are appropriate are both based on factual and circumstantial criteria, of which the trial court stands in the best position to evaluate. (*People* v. *Ruiz* (1988) 44 Cal.3rd 589, 616.) A change-of-venue motion requires a legal determination of whether a defendant can receive a fair trial with fair jurors at all in a particular location. Sequestration is a tool the trial court possesses, after the selection of a fair and impartial jury, to ensure that public pressures do not tamper with that fair and impartial jury. Sequestration places a significant burden on the lives of jurors. The trial judge is best suited to know the jurors and the risks involved in a particular case in determining whether such a measure is warranted. (*People* v. *Ruiz*[, *supra*] 44 Cal.3rd 589, 616.)" (RB, pp. 100-101.)

It might be noted for the forgetful reader that appellant in the opening brief made as good, if not better argument, as to why, in certain instances where

sequestration is at issue, a discretionary standard is appropriate. (See AOB, p. 186, quoting from *United States* v. *Childress* (D.C. Cir. 1995) 58 F.3rd 693, 702-703.) But to characterize the enjoinder in *Sheppard* as aimed only trial courts is patently contrary to the literal text in which "independent evaluation" is expressly denominated a "duty" of "appellate tribunals." Furthermore, to dismiss the passage as dicta is glib. For the passage in *Sheppard* is far from a casual observation on a marginal point; it is, as respondent himself impliedly concedes, a serious admonition to courts governed by the United States Constitution. Moreover, if it is strictly speaking dictum, it has become "sticktum" (*People* v. *Snyder* (1989) 208 Cal.App.3rd 1141, 1144) in several jurisdictions[9], including California. (*People* v. *Sirhan* (1972) 7 Cal.3rd 710, 730-731, overruled on o.g. in *Hawkins* v. *Superior Court* (1978) 22 Cal.3rd 584, 593.)[10]

To say that the threshold arises in *Sheppard*-like circumstances is perhaps unhelpfully descriptive, and the standard should be cast in a more normative

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[9] *United States* v. *Armone* (2nd Cir. 1966) 363 F.2nd 385, 394; *Govt. of Virgin Islands* v. *Hernandez* (3rd Cir. 1975) 508 F2nd 712, 718; *Bronstein* v. *Wainwright* (5th Cir. 1981) 646 F.2nd 1048, 1051-1052; *Rollins* v. *Wyrick* (8th Cir. 1978) 574 F.2nd 420, 422; *Gawne* v. *United States* (9th Cir. 1969) 409 F.2nd 1399, 1401; *State* v. *Reynolds* (Conn. 2003) 836 A.2nd 224, 367; *Knight* v. *State* (Fla. 2005) 923 So.2nd 387, 401; *State* v. *Keliiholokai* (Haw. 1977) 569 P.2nd 891, 895; *Lloyd* v. *District Court* (Ia. 1972) 201 N.W.2nd 720, 721-722; *State* v. *Wilson* (La. 1985) 467 So.2nd 503, 512; *Commonwealth* v. *Vitello* (Mass. 1975) 327 N.E.2nd 819, 828; *State* v. *Harris* (N.J. 1998) 716 A.2nd 458, 463; *State* v. *Voeller* (N.D. 1984) 356 N.W.2nd 115, 118; *State* v. *Stiltner* (Wash. 1971) 491 P.2nd 1043, 1047-1048.

[10] *Sirhan* treats *Sheppard* as formulating the constitutionally required standard of review in due process claims arising in the context of pervasive pretrial publicity. (*Id.*, at pp. 730-731.) By contrast, the *blanket* application of the rule of independent review for change-of-venue motions across the board was adopted by this Court from the *Sheppard* case not as a constitutional imperative, but as a rule of judicial administration. (*People* v. *O'Brien* (1969) 71 Cal.2nd 394, 400, fn. 3.) It will of course be noted that appellant is not urging a blanket rule of independent review for all denials of a request to sequester, but only those that reach a certain threshold of due process risk – a matter that will be elaborated further in this argument.

formulation. The first step in this process is to identify in broad terms the line between what constitutes due process and what constitutes its denial. In *Estes* v. *Texas* (1965) 381 U.S. 532, the Court quoted the following from *Tumey* v. *Ohio* (1927) 273 U.S. 510, 532: " 'Every procedure which would offer a *possible* temptation to the average man to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.'" (*Estes*, *id.*, at p. 543 emphasis in original quotation from *Tumey*.) In *Estes*, this broad principle was set forth in reference to the "procedure" of televising the trial, and one need only substitute "every procedure" with "every extrajudicial influence" in order to modify the formulation appropriately for the problem of all forms of publicity and public interest that offers "a *possible*" temptation to the trier of fact to abandon impartiality. From this, one can narrow the principle to render a more normative formulation of the proper threshold definition when extrajudicial influences become a problem of due process: "Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable safeguards . . ." such as change of venue, continuance, or sequestration. (*Pamplin* v. *Mason* (5th Cir. 1966) 364 F.2nd 1, 5-6.)

Were there outside influences in this case that offered a possible temptation to the jurors to abandon impartiality? Undoubtedly. Did these outside influences have the potential to affect "the community's climate of opinion"? Undoubtedly. Were they therefore "inherently suspect"? Necessarily. Is this Court obligated to apply an independent standard of review to the question of sequestration? Yes, it is indeed this Court's "duty" to apply independent review. (*Sheppard* v. *Maxwell*, *supra*, 384 U.S. at p. 362.)

This disposes of respondent's other points. His attempt to distinguish venue from sequestration is perhaps clever, but beside the point in determining when an independent standard of review applies for sequestration questions. It has

already been explained that this Court has sanctioned *Sheppard* as the due process standard generally when there are issues of pervasive publicity, or, in the refined formulation, issues of inherently suspect outside influences that might affect the community's climate of opinion. (*People* v. *Sirhan*, *supra*, 7 Cal.3rd at pp. 731-732.) It has also been explained that in the context of venue, this Court has appropriated from *Sheppard* a *blanket* rule of independent review, not as constitutionally compelled, but as a matter of judicial administration. (*People* v. *O'Brien*, *supra*, 71 Cal.2nd 394, 400, fn. 3; see above p. 57, fn. 10.) There are conceivably change-of-venue motions predicated on problems that do not rise to the due process level as formulated here, but there may nevertheless be valid reasons for a blanket rule of independent review because of the nature of the issue. Whether or not that is the case, appellant is not urging a blanket rule of independent review for all issues of sequestration, but when a sequestration issue arises on the *Sheppard* side of the due process threshold, it is subject to independent review. Below that threshold, it is a question of the trial court's discretion.

This indeed explains the *Ruiz* case cited by respondent – a sequestration case applying the abuse of discretion standard and insisting on it. There is nothing in *Ruiz* to indicate anything extraordinary about the publicity at issue or any other outside influence. (*People* v. *Ruiz*, *supra*, 44 Cal.3rd at p. 616.) This indeed explains the *Santamaria* case, in which, as demonstrated painstakingly in the opening brief, the Court in fact *did* apply independent, *de novo* review while calling it an abuse-of-discretion standard. (*People* v. *Santamaria* (1991) 229 Cal.App.3rd 629; see AOB, pp. 189-190.)[11]

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[11] There is nothing paradoxical in substance in *Santamaria*'s equivocation. The range of judicial discretion varies in accord with the legal context in which it is exercised and is always delimited by some legal standard, the departure from which is denominated an "abuse." (*People* v. *Whitaker* (2013) 213 Cal.App.4th 999, 1007.) The range of discretion can also be circumscribed by the paramount imperative of a constitutional right. (See *People* v. *Babbitt* (1988) 45 Cal.3rd 660,

Was there then a reasonable likelihood that, absent the more rigorous procedure of sequestration, Mr. Westerfield did not receive a fair and impartial hearing on his guilt or innocence? The problem of pretrial publicity and public passion became a contemporaneous problem that was even more intense if for no other reason than that the trial proceedings were now televised. Judge Mudd instituted a regimen of self-policing in regard to media reports either about the case or about topics related to issues in the case. These measures are indeed the focus of respondent's claim that Judge Mudd had done enough, and had done it in a thoughtful and careful manner. "Due to precautionary measures, constant admonishments, obvious indications that jurors took their role seriously, and lack of any evidence that the jury had been negatively impacted by the media accounts surrounding this trial, Westerfield's case does not remotely compare to the lynch mob carnival, or circus atmosphere" described in such cases as *Sheppard.* (RB, p. 117.) But what respondent tends to ignore and does not properly address is the circuslike carnival atmosphere pervasive outside the courthouse in the metropolitan community. Further, the undisputed record shows that the din and pressure of this constantly kept encroaching on the courtroom itself, could not be kept out completely, *and could not be kept out at all when the jurors were released to go outside the courthouse.* In short, respondent forgets the issue is sequestering the jury away from the *outside* atmosphere in its totality and not merely from information about the case.

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684 ["Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense."]; see also *People* v. *Brindao* (2012) 210 Cal.App.4th 568, 573, fn. 1 [A trial court in imposing probation conditions has "a degree of discretion when constitutional considerations arise, but one that is more confined than the usual abuse-of-discretion standard under state law, which is often referred to as a trial court determination that 'falls outside the bounds of reason.'"].) In regard to the sequestration issue in the instant case, the structural importance of a fair and impartial tribunal reduces the range of discretion, and therefore deference to the exercise of discretion, within very narrow limits.

Extraneous information from media reports was not the focus of appellant's argument in his opening brief. If it were merely a matter of exposure to such information, then Judge Mudd's policy of self-policing without sequestration appears from the record to have been sufficient and adequate. But the problem here was not merely potential exposure to information, but exposure *of* the jurors *in* the community, where they would be, and were, subject to the influence of communal passions and prejudices. (See *Estes* v. *Texas*, *supra*, 381 U.S. 531, 544-545; see also *People* v. *Dixon* (2007) 148 Cal.App.4th 414, 431-432.) No amount of self-policing can fend off this problem; the problem must be, as it were, sequestered.

The record has been summarized and recounted in great detail in the opening brief and there is no need to repeat all the details. The least problematical element of the publicity surrounding this case was informational reports in the media. But the record is replete with instances that show or suggest that the problem was the pressure of "the community's climate of opinion." And this pressure was intense, and self-policing inadequate, especially considering that the pressure could not be avoided completely even in the courtroom and not at all in the immediate vicinity of the courthouse. (See AOB, pp. 191-195.) This pressure was unrelenting, and at the very mid-point of trial the jurors were completely at large in the community for an entire twelve days, shortly after which, on their return, the first stalking incident occurred. (See AOB, pp. 195-206.) The guilt trial headed toward its completion in this same atmosphere, and when deliberations began, not only was there a second stalking incident, but also Juror 12 *requested* that the jurors be sequestered because of pressure he was feeling at work. (AOB, pp. 207-222.)

Is this circus-like enough? It is indeed something more malevolent than a circus; it is an atmosphere of public passion that not only threatened the jurors through peer pressure, such as that identified by Venireman 98, when she said it would be difficult to acquit in this case even if there was reasonable doubt, but it

was an atmosphere that threatened the jurors' emotional and indeed their very physical security. This case is clearly in the category of those for which de novo review *and* a reasonable-likelihood standard are the measure of error due to the inherent nature of the "climate of opinion" surrounding the case. (*Sheppard* v. *Maxwell*, *supra*, 384 U.S. 333, 362-363; *Pamplin* v. *Mason*, *supra*, 364 F.2nd 1, 5-6.) One cannot look at the aggregation of so many serious events with the potential for upsetting the balance of a fair trial without coming to the conclusion that there was here a reasonable likelihood that such a balance was upset.

Thus, Judge Mudd's regimen of self-policing was not a procedure proportionate to the task at hand. Sequestration was, but on the question of sequestration, the record was equally clear that Judge Mudd abdicated *his* duty imposed on him by *Sheppard* to make the determination himself. (*Sheppard*, *supra*, at pp. 362-363.) Instead, he submitted it to the jurors for their own choice, even impliedly submitting it to a majority vote insofar as he discounted the individual preference of Juror 12. Thus, if the constitutional standard leaves any room for discretion in this case, Judge Mudd abused it. (*People* v. *Sandoval* (2007) 41 Cal.4th 825, 847-848; *In re James R.* (2007) 153 Cal.App.4th 413, 434-435.) The failure to sequester the jurors, at the very least for deliberations, constituted an error that resulted in violation of the Due Process Clause of the Fourteenth Amendment. Mr. Westerfield's convictions must be reversed.

V.
REPLY CONCERNING JOINDER AND SEVERANCE

In his opening brief, appellant argued that there was improper statutory joinder of the child pornography charge to the charges of murder and kidnapping. But, as he argued in the alternative, if statutory joinder was proper, Judge Mudd nonetheless abused his discretion in not granting the request to sever the charges in any event. The key issue for statutory joinder in this case, as well the key issue of cross-admissibility in the context of discretionary severance, was the absence of a sufficiently strong and clear evidentiary link between the pornography evidence and the facts of the kidnap/murder. Without such a link, the common-element test for statutory joinder was not satisfied; or, at least, the factor of cross-admissibility for purposes of defeating discretionary severance was not satisfied (AOB, pp. 234-248); and in the absence of cross-admissibility, Judge Mudd's rejection of severance could not find a compensating justification in any other pertinent factor. (AOB, pp. 248-253.) Respondent finds the evidentiary links between the two sets of crimes sufficient for more or less the same reasons Judge Mudd found them so, although he elaborates even farther, arguing that these links satisfied the cross-admissibility test and were more than sufficient to defeat discretionary severance on the basis of cross-admissibility. (RB, pp. 124-136.)

A.

In the opening brief, appellant employed an Evidence Code section1101-like analysis of the corresponding features of the child pornography charge and the kidnap/murder charges for purposes of the common-element test for statutory joinder, since the two sets of charges were not otherwise connected in time, place, or in a single, continuous flow of events. The issue of cross-admissibility, by contrast, *was* an 1101 issue as such, albeit at a lower level of rigor and scrutiny than that required for the question of admissibility at a separate trial. (*Alcala* v.

Superior Court (2008) 43 Cal.4th 1205, 1222, fn. 11; *People* v. *Soper* (2009) 45 Cal.4th 759, 772-774.) But both common-element and cross-admissibility theories suffered from the same qualitative deficiency in this case: as noted in the introductory paragraph, the link between the two sets of crimes to be joined was insufficiently evidentiary and factual; the link was illegitimately between the *evidence* of child pornography and the prosecution's *speculative theory* that the kidnap/murder was sexually motivated. The guiding case adduced by appellant in the opening brief was *People* v. *Guerrero* (1976) 16 Cal.3rd 719, in which this Court found error in admitting evidence of a prior rape in order to prove that the charged murder was motivated by rape, where the evidence of the charged murder failed to even raise the factual question about a rape motive. (*Id.*, at p. 728.)

Respondent declares that appellant's reliance of *Guerrero* "is entirely misplaced." (RB, p. 127.) Respondent accurately recites the facts and holding of *Guerrero* and this Court's conclusion that " 'the People may not conjure up an attempted rape in this instance in order to introduce evidence of another rape' [citation]" (RB, p. 128); but then respondent proceeds with the following comparison of *Guerrero* with the instant case:

> "There was no such conjuring in this case. In *Guerrero*, the victim's body was examined and revealed the lack of evidence of a sexual motivation for the crime. Here, Danielle's body could not be examined to determine whether she had been sexually assaulted due to the state of decomposition and the fact that the genital area was missing, apparently due to animal activity. (12 RT 3712, 3752-3754.) That Westerfield was successful in concealing Danielle's whereabouts thus preventing any such examination does not merit his success in keeping from the jury his obvious sexual desire for young girls and that being his motive in committing this crime. Danielle was taken from the bed where she slept in her parents' home in the middle of the night in predatory fashion; she was in Westerfield's motor homes in a position permitting her to leave her fingerprint behind on a cabinet above his bed (20 RT 5598-5600); she was killed and dumped with no clothing on her body or near her

> body (12 RT 3713). Unlike *Guerrero*, the prosecution did not offer the child pornography evidence to prove that Westerfield kidnapped and murdered Danielle in the course of a sexual assault. He was not charged as such. Rather the child pornography helped to explain why this particular man would chose [*sic*] this particular victim – his sexual desire for young girls like Danielle motivated his criminal actions. This was not conjuring up a theory. Rather, this was using evidence that Westfield maintained a collection of child pornography in his own home to provide further support to a prosecution theory that was well supported by other evidence." (RB, p. 128.)

This lengthy paragraph is in fact a paradigm of conjuration, and the specious allure of its rhetoric might well hide it from the inattentive reader

Respondent starts with the fact that in *Guerrero* there was no evidence of sexual assault on the body of the victim. But respondent's intended contrast is with the inference that in *Guerrero* there *should* have been some such evidence if there had been a sexual assault, while in the instant case, the absence of such evidence was to be expected due to Mr. Westerfield's having concealed the body in order to hide such evidence: "That Westerfield was successful in concealing Danielle's whereabouts thus preventing any such examination does not merit his success in keeping from the jury his obvious sexual desire for young girls and that being his motive in committing this crime." Does anyone else detect a *petitio principii* here in begging the question whether or not there was sexual evidence for Westerfield "to conceal"? That he must have been concealing sexual evidence is to be concluded from the pornography evidence, which is then adduced in order to prove that there was sexual evidence to conceal. Is this not the *same* circularity this Court decried in *Guerrero*? (*People* v. *Guerrero*, *supra*, 16 Cal.3rd at p. 728.)

Further, before conferring any degree of evidentiary significance on respondent's point, one should be accurate about *Guerrero* itself. In *Guerrero*, there was in fact affirmative evidence of a sexual interest in the victim. There was evidence that defendant and another male were cruising in a car and picked up the

victim and a girlfriend, went looking for a party, bought liquor to drink in a parking lot, dropped off his friend and the victim's friend, and then left, saying he would drive the victim home. A few hours later, the victim's dead body was found by a passerby with her blouse hiked up above her brassiere. (*People* v. *Guerrero*, *supra*, 16 Cal.3rd 719, 723.) This evidence of a sexual focus by the defendant on the specific victim is completely absent from the instant case, and yet in *Guerrero* this Court found an insufficient foundation for introduction of other sex crimes.

Respondent continues: "Danielle was taken from the bed where she slept in her parents' home in the middle of the night in predatory fashion . . . ." Is the conjunction of "bed" in the same sentence with "predatory" meant to suggest a sexual motive? "Predatory" is little more than a near-tautological adjective inherent in the definition of kidnapping – like saying that the store was robbed or the house burgled "at night in a predatory fashion." Respondent's implication that the "fashion" of this "predation" was sexual is again the product of the type of circularity reprehended in *Guerrero*.

The word "position" in the next sentence, suggesting that the fingerprint was placed in Westerfield's motorhome when Danielle was in a sexually vulnerable position, like the word "predatory" in the previous sentence, draws its strength from the same *a priori* assumption that sexual intent was the motive of this kidnapping. A motorhome has a full range of domestic facilities and arrangements within a compact space that serves also as a compartment for passenger transport. Why is the fingerprint's position evidence of sexual assault rather than evidence of a seven-year-old child jumping up and down on a bed during a visit to the motorhome where the bed was openly accessible? Both are speculations insufficiently connected to the fact that prompts them.

The last in the list of evidentiary points in the above paragraph from respondent's brief is contained in respondent's statement that Danielle "was killed and dumped with no clothing on her body or near her body . . . ." But as

demonstrated in the opening brief, this Court again and again has rejected the proposition that a naked body, even in conjunction with other evidence is suggestive of sexual activity, or is enough to establish a murder as sexually motivated. (AOB, pp. 239-240, citing and describing *People* v. *Craig* (1957) 49 Cal.2nd 313, 318-319; *People* v. *Granados* (1957) 49 Cal.2nd 490, 497; *People* v. *Anderson* (1968) 70 Cal.2nd 15, 34-36; *People* v. *Johnson* (1993) 6 Cal.4th 1, 41-42; *People* v. *Holloway* (2004) 33 Cal.4th 96, 139.) Respondent attempts to circumvent the force of these cases on the ground that there was in this case *more* than just the lack of clothing. (RB, p. 129.) But if that "more" was the assumed concealment, the "predatory" kidnapping, and the suggestive position of the fingerprint, then it is an illusory "more" that reduces the lack of clothing to the level of evidentiary insignificance given it by the Court in the cited cases.

Respondent proceeds from his evidentiary points to a formal legal point that is supposed to augment the factual argument for statutory joinder and cross-admissibility. As respondent argues in the above-quoted paragraph, motive evidence in this case was not introduced to show that Westerfield had murdered Danielle in the course of a sexual assault, but rather "to explain why this particular man would chose [*sic*] this particular victim . . . ." This, according to respondent, further distinguishes the instant case from *Guerrero* .

One assumes that respondent is not implying that the defendant *Guerrero* was in fact formally charged with rape, because he appears to have been only charged with murder. (*People* v. *Guerrero*, *supra*, 16 Cal.3rd at pp. 722-723.) What respondent seems to mean is that in *Guerrero*, the theory of murder was felony-murder/rape, requiring the prosecution there to prove the commission of rape as an ultimate element of the crime of first-degree felony murder. By contrast, Westerfield was not prosecuted on a theory of felony-murder/rape or felony-murder/child-molestation. The pornography evidence was thus adduced only to prove the subsidiary fact of motive to commit kidnapping and murder. One can only ask: so what?

Material facts in a case consist either of ultimate facts or intermediate facts from which ultimate facts can be inferred. (*People* v. *Thompson* (1980) 27 Cal.3rd 303, 315.) When respondent asserts that "the child pornography helped to explain why this particular man would chose [*sic*] this particular victim", he is asserting that the child pornography was an intermediate fact from which it can be inferred that David Westerfield kidnapped and murdered Danielle Van Dam. The presence or absence of a formal charge makes no difference. What makes a difference is the absence of *further* intermediary links in the circumstantial chain that would establish an *evidentiary* inference in the place of prosecutorial speculation, which is all that there is here. If the intermediary links are the concealment of sexual acts, the "predatory" kidnapping, the position of the fingerprint, and the nakedness of the body, then, again, there is no link through evidence; there is only the link through speculative theory.[12]

B.

Again, without this link under an 1101-like analysis, there is no other way in which there was a common element between the child pornography charge and the kidnap/murder charges, and respondent adduces none. But if this Court somehow deems the standard so expansive as to satisfy statutory joinder in this case, one proceeds to the question of cross-admissibility, where the *Guerrero* still presents respondent with the same problem. Unless the child pornography was admissible to show character and disposition, which it clearly was not (Evid.

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[12] Respondent attempts to make the same formalistic distinction in regard to the naked-body cases. He distinguishes those cases from the instant one by the fact that in those cases the defendant was either formally charged with a sexual crime or prosecuted on a theory of felony-murder predicated on a sexual crime. Westerfield was not. (RB, p. 129.) Again, this makes no difference, and as a factual matter, in *People* v. *Craig*, *supra*, 49 Cal.2nd 313, the evidentiary deficiency related not only to murder on the theory of felony-murder rape, but also to first-degree premeditated murder (*id.* at pp. 318-319), where the evidence of sexual activity went to an intermediate, and not an ultimate, fact in the case.

Code, § 1101(a)), it had to have some ponderable point of evidentiary contact with the charged crimes whether the issue to be proved was motive or intent under Evidence Code section 1101(b). This indeed is the rule of *Guerrero*.

In the opening brief, appellant compared the instant case to that of *People* v. *Page* (2008) 44 Cal.4th 1, in which this Court at least strongly suggested that it was an abuse of discretion to admit the pornography evidence in that child-murder case. The only thing that seems to have restrained this from becoming a ruling was the lack of prejudice to the ultimate verdict. (*Id.*, at pp. 41-42.) In *Page*, the body was discovered the day after the child disappeared, and there was on her body abundant evidence of forcible sexual assault. In defendant's apartment in *Page* the police recovered "pseudo-child pornography," i.e., pornography imaging adults dressed and accoutered as children. (AOB, p. 245.) In a lengthy disquisition, this Court admonished that to be admissible under circumstances such as those presented in *Page*, there had to be some closer point of contact between the pornography and the charged crimes than a dead, sexually assaulted child on the one hand, and on the other, pornography that shows some sort of sexual interest in children or child-like partners. (AOB, pp. 245-246, quoting *Page*, *id.*, at pp. 40-41.)

Respondent tries to distinguish this from the instant case on the ground that Westerfield possessed *real* child pornography, and not the pseudo- variety. (RB, p. 136.) Unlike *Page*, the pornography and animé depicted rape and violent sexual assault in this case. And, unlike *Page*, Westerfield's collection included Danielle L., someone Westerfield actually knew, who was shown wearing a bikini. (RB, p. 136.)

In regard to the absence of violent pornography in *Page*, respondent overstates the point. In *Page*, some of the pornography contained images of women bound or collared, sometimes gagged, and some images showed them with mousetraps or c-clamps pinching their nipples. (*People* v. *Page*, *supra*, 44 Cal.4th at p. 13.) But if the pornography in *Page* was milder than the rape videos in the

instant case, the evidence of actual sexual assault in the charged crime was vastly greater, not only because in the instant case it was negligible to non-existent, but because it *Page* it was overwhelming. Thus the sexual violence apparent in the charged crime in *Page* more than balances the lesser violence in the pornography when one is comparing *Page* with the circumstances of the instant case.

Apart from this, one should also point out that it is by no means unequivocal that the actors portrayed in the violent video clips in the instant case are in fact children. (See Ex. .) It is clear that the photograph of Danielle L. was not at all pornographic. (See Ex. 146.) And further, the photograph of 16-year-old Danielle L., who was past puberty, was not even proffered *in limine* by the prosecution or considered by Judge Mudd on the issue of joinder and severance, but was admitted later during trial. (5E RT 1943-1948, 1953-1958; 23 RT 6361; 24 T 6397-6398; Ex. 146.)

It is because of the Danielle L. photograph that respondent claims that this case is more like *People* v. *Memro* (1995) 11 Cal.4th 786, where the defendant had a collection of nude photographs of young boys, which he had taken himself. (RB, p. 136.) But here not only did Westerfield *not* produce his own child pornography, in *Memro*, the *defendant himself confessed* that he sequestered the young male victim in order to obtain such a photograph of him, killed the boy when the boy expressed a desire to leave, and then had anal intercourse with the dead body. (*Id.*, at pp. 812-813.) How respondent finds *Memro* comparable, but *Page* incomparable, defies conjecture.

But respondent does not rest the argument solely on comparison to other cases, and he reformulates his characterization of the instant case for the cross-admissibility question:

> "As this Court observed in *Page*, the propriety of admitting evidence of a defendant's possession of child pornography will vary depending on the facts of the case. (*People* v. *Page*, *supra*, 44

> Cal.4th at p. 41, n. 17.) The facts of Westerfield's case made the admission of child pornography evidence entirely proper to prove his motive. The evidence demonstrated that he broke into the Van Dam home under the cover of darkness not to take property from their home, but their little girl, sleeping in her bed. Her naked decomposed body was found miles away many days later. Because of the condition of Danielle's body permitted no testing to assist in determining what Westerfield had done to her, the jury naturally would have been left with unanswered questions. The prosecution was entitled to address why Westerfield would abduct and kill Danielle and the evidence of his possession of child pornography tended to prove his motive and intent to sexually assault Danielle. Thus the evidence would have been cross-admissible in a separate trial as Evidence Code section 1101, subdivision (b) evidence of motive and intent. (See *People* v. *Davis* [(2009)] 46 Cal.4th [539,] 604 ['defendant's kidnapping of Polly, his failure to take items of significant value, the evidence of planning, and his use of the silky bindings and the intricately knotted ' "hood"' device raised but did not fully answer questions about defendant's motive'; thus the trial court properly admitted evidence of prior sex crimes s evidence of motive to sexually assault Polly]." (RB, pp. 135-136.)

Respondent's comments on the instant case in this paragraph for the most part recapitulate what he asserted in regard to statutory joinder, but with the added point regarding the jury's supposed demand for an explanation of absent motive evidence. There is something to say about this, but first one must note the passing reference, to the Polly Klaas case – a reference conjoined with a bracketed description of that case elaborated in such a way as to suggest that that case is indeed on point, despite the "see" cite that introduces it. It will be instructive for the instant case to examine the details of the *Davis* case.

In *Davis*, this Court did indeed hold that the facts of the charged crime raised the question of sexual motive, so that Davis's prior sexual crimes were admissible under Evidence Code section 1101(b) on the question of motive. But in *Davis*, the sexual question in the charged murder of Polly Klaas was not raised merely by planning evidence. In the Polly Klaas case, the police recovered from

her decomposed remains her panties. A stain on them fluoresced under an alternative light source, indicating the possible presence of semen. (*People* v. *Davis*, *supra*, 46 Cal.4th at p. 558.) Davis, in the meantime, in the course of confessing to strangling his victim to death, stated "he did not think that he had sex with Polly or that he tried to have sex with her." (*Ibid.*) In a subsequent interrogation, the following exchange is reported by this Court as having occurred:

> "On December 6, 1993, Petaluma Police Sergeant Meese and FBI Agent Taylor questioned defendant again and confronted him with evidence that he had sexually assaulted Polly before killing her. Sergeant Meese told defendant that they found semen during an examination on Polly's remains. When defendant asked where the semen was found, Sergeant Meese responded, 'on the body,' to which defendant replied, 'not in her though.' Defendant denied sexually assaulting Polly. When asked how semen could have wound up on Polly's body, defendant replied, 'Look I told you at least I didn't try to stick my dick in the fucking little girl.' When pressed again about the semen, defendant responded, 'that 's something that I'm going to have to live with and run through my mind over and over and over and over again.' He also claimed it was a 'load off' his mind and he was glad because he did not want that 'hanging over' him. Defendant expressed concern that he would be mistreated in prison if other inmates considered him a child killer and molestor. At the end of the interview, defendant said: 'I have to see what come out of forensic – hope nothing comes up. Hope nothing's in there.'" (*Id.*, at p. 559.)

Thus in *Davis*, there were, in addition to some physical evidence, substantial admissions by him that there was sexual activity in the course of the murder.

What about the prior acts in *Davis*? Only one was overtly sexual. Davis kidnapped a 22 year old woman from a BART station in Hayward, commandeering her car. He hit her to make her stop crying; when he eventually pulled over, he exposed his penis and pulled her head down toward his crotch. The woman at this point, however, managed to escape from the car. Davis later

told a court-appointed psychiatrist that he did this because he had heard a voice of woman wondering what it would be like to be raped; he also told the psychiatrist that the victim "wanted it." (*Id.*, at p. 560.) The other three prior acts all involved breaking into the homes of adult woman, committing or threatening violence against them, but involving no overt sexual act. (*Id.*, at pp. 560-561.) However, Davis later told a court-appointed psychiatrist that he masturbated twice daily while thinking of the female victims of his past crimes, and that he imagined tying them up. (*Id.*, at p. 561.) If Davis's prior acts did not involve children, they involved sexually motivated violence actually perpetrated by Davis, and this provided a clear evidentiary link to actual evidence in the charged murder. The *Davis* case is not comparable to the instant case, and does not support respondent's argument for cross-admissibility.

One may now return to respondent's argument that the pornography evidence was necessary to explain to the jury what would otherwise constitute a gap in the prosecution's evidence. In the context of the common-elements test, respondent characterized this same lacuna as Mr. Westerfield's successful evasion for which he should not be rewarded. (RB, p. 128.) There is no doubt that the prosecution can introduce *admissible* evidence to forestall an adverse conclusion from what might be perceived as a gap in the evidence. (See *People* v. *Brown* (1994) 8 Cal.4th 746, 748-749.) However, however much it may *seem* to be a hardship on the prosecution, who of course *does assume* the defendant's guilt, *inadmissible* evidence does not become admissible simply to explain a gap in the prosecution's case. Thus, in *Giles* v. *California* (2008) 554 U.S. 353, the United States Supreme Court reinforced the strict requirements of the hearsay rule and the Sixth Amendment by limiting the rule of forfeiture-by-wrongdoing to cases in which there is *evidentiary* proof that the defendant did not merely commit a crime that deprived the court of evidence, but that defendant *intended* by his crime to do this. (*Id.* at pp. 365-367.) The Supreme Court did not find the dissenting Justice's solicitude for the hardship that this might work in prosecuting domestic violence

cases a factor warranting the compromise of fundamental legal principles. (*Id.*, at pp. 405-406, Breyer, J. dissenting.)

There are paramount reasons for what might appear to be a harsh result, and they involve the integrity and accuracy of a factual determination that predicates a curtailment of a person's freedom and, in a capital case, his life. Thus, the following principle is a fundamental bulwark of our justice system: "A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established." (*Eramdjian* v. *Interstate Bakery Corp.* (1957) 153 Cal.App.2nd 590 602; accord *People* v. *Stein* (1979) 94 Cal.App.3rd 235, 239.) This is not controversial, and the concomitant principle is also not controversial: "If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary." (*Reese* v. *Smith* (1937) 9 Cal.2nd 324, 328; *People* v. *Tatge* (1963) 219 Cal.App.2nd 430, 436.) Is there any doubt that the burden was on the prosecution to establish the intermediate facts on which its allegation of David Westerfield's guilt for murder was based?

The absence then of cross-admissibility should have weighed very heavily in favor of a discretionary severance. Indeed, it probably should have been dispositive in this case, but, nonetheless, one may now turn to the other pertinent factors at least to show that they did not weigh heavily in the direction of joinder.

C.

In the opening brief, appellant demonstrated that the inflammatory nature of the pornography in question is not without weight even in this case where the evidence of the charged crime was provocative and gruesome. The pornography, especially the videos, carries the provocation a decisive step farther and indeed fills in, unfairly, but vividly, the gaps in the prosecution's evidence. Even respondent concedes that "without question evidence of child pornography has the potential to be particularly inflammatory" (RB, p. 137), but will not quite commit

himself to that conclusion here. (RB, PP. 137-138.) Whether appellant's characterization of the pornography, especially the video clips, is more legally accurate, or whether respondent's is, will be open for this Court to decide from viewing the evidence itself, which will be transferred to this Court at the time allowed by the rules. (Cal. Rules of Court, Rule 8.634(b).)

Regarding the final factor, the conjoining of a capital and non-capital charge, respondent criticizes appellant's argument regarding the punitive purpose of yoking a separable misdemeanor charge to a capital charge. "Westerfield's point ignores the policy decision the Legislature has made and the analysis that is relevant to his claim of error. The degree of punishment associated with the various charges is not relevant to reviewing the trial court's exercise of discretion in denying his severance motion." (RB, p. 140.)

On the contrary, appellant's argument was rooted squarely *in* "the policy decision the Legislature has made." The legislative policy underlying the presumption in favor of joinder is that of expeditiousness and efficiency. (*Alcala* v. *Superior Court*, *supra*, 43 Cal.4th 1205, 1220; *People* v. *Myles* (2012) 53 Cal.4th 1181, 1200.) The disparity in punishment between the misdemeanor charge and the capital charge, which would, by the conclusion of the capital case, have been served by pretrial jail time; the swift ease with which the misdemeanor charge could be proved in contrast to the elaborate and belabored process of proving the capital charge; and the factually discrete and separable character of the two sets of charges; all establish clearly and unequivocally that their joint trial brought little or no gain in expedition or efficiency in this case. (See AOB, pp. 248-249.)

Appellant, in regard to this factor, also adduced the confusion and undue prejudice that would arise at a prospective penalty phase in which the jurors might erroneously view the simulated rape videos as factor (b) evidence. (AOB, pp. 249-253.) Respondent counters by contending this would have been admissible in any event as factor (a) evidence – a circumstance of the charged crime. Respondent invokes this Court for what he believes is the dispositive rule in

regard to his factor (a) argument: "[T]his Court has explained that the circumstances of crime for purposes of factor (a) 'include guilt phase evidence relevant to he immediate temporal and spatial circumstances of the crime, as well as such additional evidence, like victim impact evidence that 'surrounds materially, morally, or logically, the crime.' (*People v. Tully* (2012) 54 Cal.4th 952, 1042, quoting *People* v. *Edwards* (1991) 54 Cal.3rd 787, 833.)" (RB, p. 141, some internal quotation marks omitted.)

Where in this standard is there a justification for treating all 1101(b) evidence as factor (a) evidence? Detachable 1101(b) evidence, that is not any way part of the *res gestae* of the charged crime or involved in "victim impact" evidence is simply not within this standard quoted by respondent. The matter has been correctly and properly analyzed in the opening brief (AOB, pp. 250-252), but one might add that if factor (a) is some broad repository for material, moral, and logical considerations surrounding the commission of the charged crime, then factor (a) becomes transformed into the prosecutor's analog of factor (k), whereby he may introduce *any* character evidence whatsoever and thereby circumvent the limitations that Penal Code section 190.3 place on aggravating evidence will be swamped by such an indefinitely conceived exception.[13]

Thus, two factors strongly favored severance in this case: the absence of cross-admissibility, and the prejudicial conjunction of a misleading misdemeanor offense with a capital offense without a compensating gain in expedition and efficiency. A third factor, while not as strong, was clearly not weak either: the provocative and inflammatory nature of the child pornography. On this record, the denial of defense request for discretionary severance was unreasonable and an abuse of discretion.

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[13] Respondent elaborates on this question in regard to claim XIX, which addresses the prejudice of improper joinder projected into the penalty phase of trial. Appellant's analysis of this question is more extensive and elaborate in his reply on claim XIX, and may be consulted here. (See below at pp. 141-146.)

D.

Respondent's characterization of appellant's argument on prejudice is noteworthy and should be quoted: "Westerfield contends that even if the trial court's denial of the severance motion was proper at the time he made the motion, the manner in which the evidence unfolded at trial supposedly created a doubt as to his guilt that only the child pornography evidence could have dispelled, and therefore the joinder resulted in a violation of his state and federal due process rights." (RB, p. 142.) This is a confused jumble, but not because of appellant's argument on prejudice.

Appellant's argument is that joinder here was erroneous, whether for statutory reasons or as an abuse of discretion. The prejudice flowed from this error and was not unforeseen; and this prejudice meets the standard for reversal under *People* v *Watson* (1956) 46 Cal.2nd 818. (AOB, pp. 253-260.) Appellant further argued that because of the egregiousness of the erroneous cross-admissibility, the state law error in joinder also constituted a violation of due process, reversible *a fortiori* under the standard of *Chapman* v. *California* (1967) 386 U.S. 18. (AOB, pp. 260-261.) Thus, appellant's argument on prejudice was not based on the alternative hypothesis that there was no error in the joinder itself. There is, of course, a settled rule that even if the trial court's ruling on joinder is correct based on what was before the court at the time the ruling was made, reversal may nonetheless be compelled if an otherwise correct joinder "resulted in 'gross unfairness' amounting to a denial of due process." (*People* v. *Homick* (2012) 55 Cal.4th 816, 848, some internal quotation marks omitted.) Appellant reserved this for the sixth argument of the brief, as one of the legal claims arising from Judge Mudd's grossly misconceived and unfair disposition of the balance of the pornography evidence in this case. (AOB, p. 265.)

Respondent's mischaracterization of appellant's endeavor in the fifth argument reaps for him the undue advantage of claiming a standard of review to

which he is not entitled. "Westerfield utterly fails," he tells us emphatically, "to establish the gross unfairness amounting to a due process violation that would warrant reversal." (RB, p. 143.)[14] But again there is no burden at this point on Westerfield to show a gross unfairness since the trial court's joinder of counts was erroneous at the time the joinder was ordered. But this is not the end of respondent's self-serving obfuscations of the law. Immediately after respondent imposes a burden of showing "gross unfairness," he proceeds to impose a strict causation standard of review when he incorrectly asserts that "Westerfield suggests that but for the child pornography evidence he would not have been convicted of Danielle's murder."

Thus before discussing respondent's substantive argument on prejudice, it will be salutary for this Court to keep in mind the actual standards of review applicable here. For state law error in regard to joinder, appellant has the burden of showing that if the child pornography charge had properly been severed from the murder and kidnapping charges, it was reasonably probable that Westerfield would not have been convicted of murder and kidnapping. (*People* v. *Watson*, *supra*, 46 Cal.2nd 818, 836-838.) As strict as this standard is, it is not nearly as strict as the "gross-unfairness" standard or the "but for" causation standard, which, as far as appellant is aware, is nowhere required as the standard of prejudice. Further, the "gross unfairness" standard and the "but for" causation standard are even farther removed from *Chapman*, by which *respondent* bears the burden of showing an error in joinder to be harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra*, 386 U.S. 18, 23-24.)

The crux of respondent's substantive argument on prejudice is that the entomology evidence was so negligible against the weight of the prosecution evidence, that it could not raise a reasonable doubt as to appellant's guilt. (RB,

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[14] Of course, if respondent is implying that an *erroneous* joinder is reversible per se, appellant is willing to join in this.

pp. 143-145.) His attempt to disparage the entomology evidence bears close scrutiny:

> " . . . The defense expert testimony attempting to show when Danielle's body could have been dumped in the dirt based on the insect activity at the time her body was discovered explained very little. First, none of the experts even agreed as to the window during which Danielle's body would have been available for insect activity. Faulkner gave a window of February 16 through the 18th as the earliest point (30 RT 7968-7968.) Haskell gave a window of February 14 through the 21st. (33 RT 8116-8117.) Hall gave a window of February 12 through the 23rd. (39 RT 9082-9083.) Add to that the prosecution's experts, Robert Hall [*sic*] who testified that the degree of decomposition suggested that Danielle had been deceased for four to six week (36 RT 8703-8704), and Dr. Goff who testified that the minimum date Danielle's body would have been available for insect activity was February 12, 2002. (38 RT 8968-8971.) Moreover, Dr. Goff explained that forensic entomology is useful in determining the minimum date that a body would have been available for insect activity *only*, and there is no way to determine the maximum date. (38 RT 8968-8971.) Westerfield's own expert, Faulkner, agree with this very point. (30 RT 8007-8009, 8024-8025.) Thus, as the bounds of science would not permit either party's experts to accurately determine the maximum date at which Danielle could have been dumped off of Dehesa Road, this testimony in on way made this a close case." (RB, pp. 143-144.)

One may begin an answer to this with a few modest factual corrections. First, Robert Hall was an entomologist who was hired by, and testified for, the defense. Respondent's "Robert Hall" who testified to a four to six week expanse of time was in fact William Rodriguez, a forensic anthropologist (not an entomologist) hired by the prosecution. David Faulkner, whom respondent characterizes as "Westerfield's expert" was indeed called as a witness by the defense, but he was a neutral expert, who worked for the county of San Diego, and who was not hired by the defense, as Dr. Goff, the prosecution's entomologist,

was hired by the prosecution. All this might be viewed as a kind of marginal carelessness, if it did not betoken a greater carelessness.

Respondent invokes David Faulkner as conceding the principle that entomology is incapable of determining the maximum amount of time a dead body would have been available for oviposition. But what respondent believes to be a fatal concession was little more than an acknowledgement of the obvious that there was always the possibility of error due to some unknown variable:

> "Q. I think you told us in your report and to earlier examination that the closest to the recovery time the bugs you found, the insects you found on the body could be – would be February 16 through 18th; is that correct?
>
> "A. Yes.
>
> "Q. That's the closest they could be to the recovery site?
>
> "A. Yes.
>
> "Q. You cannot tell us the furthest they could be from the time the body was recovered, can you?
>
> " . . . .
>
> "THE WITNESS: No.
>
> " . . . .
>
> "Q. There are simply too many variables that we've discussed here today?
>
> "A. *Well, there's variables but again, the things I'm looking for that would indicate a longer time were not present.*" (30 RT 8024-8025, emphasis added.)

Did Faulkner here concede that entomological analysis was insignificant and worthless? If that were so, what meaning did his avowal that the conditions presented by this case represented "the best opportunity and the best job" Faulkner had ever had to do a forensic evaluation. (30 RT 7979.)

What is thus remarkable is not the variance in dates given by all the entomological experts, but the consistency. Faulkner, the independent expert, had a range from February 16 to 18; Haskell was from February 14 to 21; Hall was from February 12 to 23; and even Goff, the prosecution expert, placed the dates at February 9 to 12 based on entomological evidence. Is the imprecision here of a few days more or a few days less so much more important than the imprecision of the four to six week estimate from the anthropologist Rodriguez? Danielle Van Dam was clearly alive at least up to February 1, 2002, and Rodriguez's estimate has her death occurring sometime between December 17 and December 31, 2001. If Goff, the prosecution's entomologist, thought it scientifically prudent to defer to Rodriguez, why did Cyril Wecht, the eminent pathologist, feel it scientifically prudent to defer to an entomologist for a more precise estimate than Wecht's four weeks? (36 RT 8742-8744.) (See AOB, pp. 254-255.)

The entomological evidence regarding the time of death was therefore substantial, and clearly ponderable enough to raise a reasonable doubt as to Westerfield's guilt. Indeed, it was substantial and ponderable enough to raise now on review a reasonable probability that the jury would have acquitted at least on reasonable doubt, unless the strength of the remainder of the prosecution's case was so overwhelming as to consign the entomological evidence to relative insignificance. In an attempt to establish this, respondent goes through a long list of points that "entomology evidence could not explain." (RB, p. 144.) These consist of the points in the prosecution case that, in the opening brief, have been discussed in detail, and which have been shown either to be equivocal in their probative value or explicable in a manner consistent with the alibi established by the entomological evidence. (AOB, pp. 256-260.) There is no need to repeat the

discussion, since respondent does not engage that discussion. One need only point out that in light of the strength of what one might call the entomological alibi, it was the prosecution that had some explaining to do – an urgency that could easily be screened by the distraction of child pornography evidence in this case. The improper joinder of counts in this case was prejudicial and requires reversal of appellant's convictions. (*People* v. *Watson*, *supra*, 46 Cal.2nd at 836-838; *Chapman* v. *California*, *supra*, 386 U.S. at pp. 23-24.)

VI.
THE ADMISSION OF THE ENTIRE PORNOGRAPHY COLLECTION SEIZED FROM APPELLANT'S COMPUTERS

In the sixth claim of the opening brief, appellant addressed Judge Mudd's ruling that Westerfield's entire pornography collection could be introduced into evidence as a remedy for Mr. Feldman's alleged misconduct in the cross-examination of James Watkins. (AOB, pp. 262 *et seq.*) This misconduct, if it can be called that, lay in giving the jury the impression that there were only 14 to 17 questionable images found on the computers, when in fact there were 85 questionable images – all out of a total collection of 8 to 10 thousand images of computer-downloadable pornography.

In order to restore the balance of accuracy and fairness from this departure from the truth, Judge Mudd allowed into evidence the entire collection consisting of: 1) all the thousands of images of adult pornography; 2) the additional 68 questionable images of possible child pornography; and 3) the images consisting of so-called animé cartoons depicting a violent rape in the most explicitly disgusting images and captions. (See AOB, pp. 263-265.) In addition, Judge Mudd allowed 4) the photograph of Danielle L. sunbathing on a chaise lounge, which he described as a "crotch shot" (see AOB, pp. 263, 281); and he allowed Watkins to testimonially describe the bestiality images and the pornographic versions of popular television cartoon shows. (AOB, pp. 283-284.)

As appellant argued in the opening brief, Mr. Feldman was engaged in a proper cross-examination in trying to place the motive evidence in perspective by establishing a proportion between the *number* of questionable images and the total *number* of pornographic images. (*People* v. *Page* (2008) 44 Cal.4th 1, 41, fn. 17; see AOB, p. 274.) The difference between a ratio of 17:8000 and 85:8000 questionable images to pornographic images – and again these are images that can be downloaded on a mass-scale from the Internet – is the difference between .002

percent and .01 percent, and to impute to Mr. Feldman a pernicious motive to create so minute a deception defies not only probability, but also the record.

Although appellant quoted the cross-examination extensively in the opening brief (AOB,pp. 269-272), the entire (pseudo)problem arose in this case from this small kernel:

> "Q. So there was a total of between eight- and 10,000 nudes, and that included the looks like about 17 still that the jury just saw; is that right?
>
> "A. Yes, sir.
>
> "Q. So apparently culled out of a hundred thousand you identified down eight – to 10,000 and then of the eight to 10,000 you spotted 14 or so that the jury just saw.
>
> "A. Yes, sir." (23 RT 6322-6323.)

It will be noted that while Mr. Feldman failed to make a proper distinction between the questionable images the jurors had been shown in open court from the total that were on the computers, Mr. Watkins affirmed the number, although he was the one that tallied up the 85. Why, as argued in the opening brief, was this not handled by means of redirect examination, or, if the matter were really as urgent as Judge Mudd, and now respondent, claim, by a bench conference, admonition, and immediate correction – a correction that would hardly change the defense's point in this line of questioning? How in fact does the entire pornographic collection, the photograph of Danielle L., and the descriptions of bestiality photographs and television cartoon pornography become admissible?

Respondent has an answer to all this, which we will address in due course; but it is first worth giving respondent credit for narrowing the issues in a way that frees them from the near-hysterical chaos that suffused the discussions below. First, respondent, unlike Judge Mudd, does not accuse Mr. Feldman of falsely

claiming that there were *100,000* pornographic images on the computer, of which only 13 were questionable. (23 RT 6356; 24A RT 6371-6372.) Respondent instead follows the record, which clearly shows that the denominator in Mr. Feldman's ratio was 8 to 10 thousand. Secondly, although respondent is capable of high dudgeon on this issue, he does not reach the heights Justice Mudd ascends in accusing Feldman of a "blatant falsehood" (24A RT 6369), and scales back his own expressions to "inaccurate impression" (RB, p. 152) or "false impression" (RB, p. 155). Finally, respondent abandons the position taken by his representative below, Mr. Dusek, that the "best-evidence rule" compelled admission of all the actual images in the pornography collection. This is important because there was of course no real dispute as to the contents of the thousands of adult pornographic images in this collection or any claim that the adult pornography was not *unequivocally* adult pornography as described by Watkins in the very cross-examination at issue here. Indeed, such a claim could not be made in good faith, as this Court will verify when it views the pertinent exhibits. Rather, Mr. Dusek's maneuver was not aimed at "the best evidence" within the meaning of the rule, but rather at exposing Mr. Westerfield in a provocative light most unfavorable to the defense case and beneficial to the prosecution's. (See AOB, pp. 276-277.)

What then is respondent's justification for the admission of the evidence in question?:

> " . . . . The defense improperly sought to strengthen its position that the number of child pornography images was such a small number of Westerfield's extensive pornography collection, that it could not possibly supply a motivation and intent that would then suggest he, in fact, committed these crimes. The possession of 85 such images is quite different than the possession of 17 such images. The volume of material, the fact that it was found in various places (different computers, different disks), is relevant to show that this was not simply a passing interest of Westerfield's or that the

> images' presence on his computers was the result of inadvertence. Westerfield possessed 85 images of children that were sexually oriented in nature. The ratio to the adult pornographic images is of no moment. While Westerfield now argues that the percentage of child pornography images was quite low out of the total number of images in Westerfield's collection – regardless of whether that number is based on 17 or 85 – however, that certainly was not the assessment when defense counsel endeavored to mischaracterize the number to the jury in his cross-examination of the prosecution's witness. The cross-examination was improper, and the prosecution was entitled to correct the false impression the defense created with the jury." (RB, pp. 154-155.)

There is more than one interesting aspect to this passage, the first of which is respondent's claim that the ratio was "of no moment." To the contrary, the absolute *number* was of no moment. If the *only* pornography on the computers had been the 13 questionable images, that would be worse for the defense because 100 percent of the pornography would have been incriminating and would have shown a greater intensity of motive. If the *only* pornography were the 85 questionable images, that 100 percent would show an even greater intensity of motive. The impeachment of the prosecution's evidence lay in showing the jurors a diluted intensity in this motive. The ratio is *everything*, and the *ratio* is simply not very much different whether the numerator is 17 or 85 – a fact that undoubtedly induces respondent to emphasize that the "ratio is of no moment."

Secondly, there is in the passage respondent's imputation that the defense was only interested in purveying to the jurors the false notion that there was only a small number of questionable images in the pornography collection. This goes back to the question of whether the absolute number or the ratio is the significant point. It is absurd to think that the defense was focused on conveying to the jurors that 13 to 17 images are insufficient to establish misdemeanor possession of child pornography, insufficient to provide an inference of a sexual interest in children,

and insufficient to produce the tears that some of the jurors actually shed on seeing the 13 to 17 images that were shown to them. (24 RT 6435-6436.)

Thirdly, respondent must explain why, even if "the ratio is of no moment," the actual additional 67 images, some of which are actually duplicates of the images already shown to the jurors (does this make 85 a "blatant falsehood"?), are now admissible. Whether in a ratio or as an absolute number, the jurors needed only to know that there were 85 questionable images. The images themselves were cumulative, and under the so-called "rule of necessity," cumulative evidence that creates a substantial danger of undue prejudice should be excluded. (*People* v. *Holt* (1984) 37 Cal.3rd 436, 462; *People* v. *Cardenas* (1982) 31 Cal.3rd 897, 905; *People* v. *Avitia* (2005) 127 Cal.App.4th 185, 194; *People* v. *Schader* (1969) 71 Cal.2nd 761, 774-775.) This is the rule that precluded this evidence initially, and nothing in the cross-examination of Watkins expanded the purview of relevant, probative evidence in this regard.

Fourthly, the above passage provides *no* justification for the admission of any of the adult pornography images into evidence. Indeed, nowhere in respondent's argument does he offer such a justification, and appellant would have listed this as a further narrowing *sub silentio* concession on respondent's part, except that respondent in his introduction makes the sweeping claim that "[o]nce defense counsel misled the jury as to the number of images of child pornography on Westerfield's computer, the prosecution was entitled to respond not only by correcting the number of images, but by correcting the jury's false impression as to the content of Westerfield's collection." (RB, p. 153.)

But there never was any false impression as to the *relevant* content of Westerfield's adult collection: the adult pornography was adult pornography and not child or pseudo-child pornography. What then is one to make of respondent's failure to specifically explain the admission of the adult pornographic images except as an inability to find such a justification. Although the gross number of adult pornographic images was relevant to place the questionable images in a

proper perspective, the adult images themselves were entirely without relevance as having no "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Finally, respondent makes no mention of Exhibit 147, which is the animé cartoon depicting a violent rape of a physically adult woman. A similar argument applies to Exhibit 147. Other than the video clips shown to the jurors as Exhibit 139, Exhibit 147, which, Judge Mudd had originally precluded (see AOB, pp. 228, 232), is among the most inflammatory and disgusting images in the collection (see AOB, pp. 263-264) as this Court will see for itself. What argument *could* respondent make for admissibility? For if these were admitted as a cure for the misleading variance of 17 versus 85 questionable images of child pornography, then the admission of this evidence was a clear abuse of discretion under Evidence Code section 352.

Respondent does mention at least the adult bestiality images, but he seems tentative in regard to these. (RB, p. 159 ["Even if the testimony was improperly admitted . . . .].) He gives only a single sentence justification for these: "As the trial court . . . noted the testimony [about bestiality images] was relevant to the context of the entirety of the images found on the computers." (RB, p. 159.) "Entirety" is an elegant abstraction, and if it explains relevance for the bestiality photographs it also explains the relevance of the adult pornographic images, of which the bestiality images are a subset, and the animé of Exhibit 147. But the "entirety" of anything does not define forensic relevance or probative value, which require rather a definition of *what* entirety is relevant to, and probative of, a material issue in a case. (Evid. Code, § 210.) The bestiality images were irrelevant because they constituted adult pornography. They claim a separate category in this discussion only because they are inflammatory and disgusting in a strikingly different way than the other pornographic images.

In regard to Danielle L.'s photograph, respondent argues as follows:

> "Westerfield contends that the photograph of Danielle L. should not have been admitted because it did not constitute child pornography, but rather the photograph simply captured her 'sunbathing.' (AOB 282.) Once the defense mischaracterized the number of photographs in Westerfield's collection, the 'crotch shot' of Danielle L. was then probative to refute the defense inference that this collection of child pornography was trivial. Although she was wearing a bikini, Westerfield possessed a photograph of Danielle L. on a lounge chair with her legs spread. (24 RT 6397 [describing Exhibit 146].) There is no mistaking the purpose of collecting such a picture of a juveniles – the purpose was Westerfield's sexual interest in young girls. And this picture was all the more relevant in that it was a girl that Westerfield knew, thus extending his sexual fantasy from strangers on the computer to young women in his life. This picture, as with the evidence of the 85 images depicting children in sexual manners on Westerfield's computers, was properly admitted to show his sexual attraction to young girls and his intent to act on that attraction with Danielle Van Dam." (RB, pp. 158-159.)

"Westerfield", of course, did more than merely assert that the photographs of Danielle L. were not child pornography. They are part of the record on appeal, and will be available for this Court's own examination of it. In the meantime, appellant tried to describe the photograph as it actually is. Danielle L. was not " '"sunbathing,"' she was clearly *sunbathing*. If she was on the lounge chair "with her legs spread," they were spread only to the narrow width of the lounge chair. If a photograph taken from a middle distance of a person lying on a chaise lounge includes the "crotch" it is difficult to see how it could be otherwise. If one wishes to pruriently denominate such a photograph as a "crotch shot," it is not because of the photograph but because of the viewer's tendentious purpose in imputing a certain kind of evidentiary significance to the photograph. (See AOB, p. 263.)

But quite apart from the actual visual nature of the photograph of Danielle L., respondent has still more to explain. Is he saying that the photograph of Danielle L. became admissible *only* when Mr. Feldman allegedly committed

misconduct, or is he saying that the photograph of Danielle L. was admissible to begin with, and by some quirk had not been part of the prosecution's original proffer of photographs? In either case, whether Danielle L.'s photograph should have augmented the original 17 images or (in respondent's scenario) the successive 85 images, the problem is the same. *One* photograph that, in itself, was only tenuously sexual if at all, provides little or no basis to conclude that Westerfield's sexual interest in children was in fact ever actualized beyond the passivity required for Internet pornography. The evidence was unduly prejudicial, of little probative value, and misleading and confusing to the jurors.

For each and every item of evidence or testimony admitted pursuant to Mr. Feldman's alleged misconduct, there was an abuse of discretion. This brings us full circle to the initial question: why was the cure for the inaccuracy in the number of questionable images on the computers not simply redirect examination, or, again, an immediate correction by Mr. Watkins under Mr. Feldman's very same cross-examination? In the opening brief, appellant attempted to fortify the point implied in this question by invoking the cases that establish that in California, there is no "open-door" policy to inadmissible evidence regardless of what the opposing party has done or allowed to be done. (See AOB, pp. 280-281.) According to respondent, the issue in those cases was the use of *inadmissible* evidence to rebut *inadmissible* evidence that could have been precluded initially by a proper objection. (RB, p. 157.) Here, the number of pornographic images was admissible, and the cross-examination thus "opened the door" only in the sense of expanding the parameters of material issues in the case. (RB, p. 157, citing *People* v. *Steele* (2002) 27 Cal.4th 1230, 1273.)

In one sense, there is no need to argue about this. The question is moot insofar as it has been demonstrated in this brief and in appellant's opening brief, that the evidence deemed by Judge Mudd to be responsive to Feldman's cross-examination of Watkins, simply was not, and was not therefore admissible as within the purview of any expanded parameter of relevance. The one exception to

this is the correction of the number 17 to the number 85, which, at least as a factual question, was a matter for the prosecution witness, Mr. Watkins, to correct. But there is another aspect to the open-door question that does still have application to these circumstances and reinforces the contention that redirect examination or some other form of factual correction was the *only* proper remedy available here. If Mr. *Watkins'* inaccuracy was attributable to Mr. Feldman's somewhat tangled and careless question, then the remedy for the "misconduct" was still not the admission of inadmissible evidence, but simply a lodging of an objection, an admonition by the judge, and a correction by Mr. Feldman. (See *People* v. *Bain* (1971) 5 Cal.3rd 839, 849; *People* v. *Kirkes* (1952) 39 Cal.2nd 719, 725-726.)

Thus, appellant has met the heavy burden he bears of demonstrating an abuse of discretion – a burden actually lightened by an unusual instance of a ruling so in excess of its reasons as to contain little or no reason at all. Respondent can do little more than invoke the word "discretion" (see RB, p. 153), and try to paint a rational face on all this lest he be forced to show its truly ridiculous face. The resulting legal errors here lay in the admission of inadmissible evidence, which at least augmented the prejudice arising from the joinder of counts seen itself as legal error. And even if the joinder was legally proper when ordered, these remarkable evidentiary rulings constitute the gross unfairness that requires reversal for a proper joinder turned bad. (See AOB, pp. 265-267.)

In regard to prejudice, Mr. Dusek's arguments were not adduced as prosecutorial misconduct, but as the prejudicial fruit of evidentiary error. (AOB, pp. 284-290.) Thus, respondent is technically correct when he reasons his way to the conclusion that "Westerfield's claim appears to be one of judicial error in admitting the evidence, and not one of improper argument by the prosecutor." (RB, p. 160.) But this obscures somewhat an overriding point. There was, in this judicial error, such an overwhelming flood of inadmissible, provocative, and inflammatory evidence that however technically Mr. Dusek may (or may not) have

kept within the bounds of Evidence Code section 1101(b), the jury could not but hear all this as 1101(a) evidence of character and propensity to prove that David Westerfield killed Danielle Van Dam.

The matter of prejudice is discussed in detail in the opening brief. The response jabs here and pettifogs there (RB, pp 162-163), but where in all this is there anything to indicate that Mr. Dusek's closing argument does *not* demonstrate the prosecution's strong reliance of on the pornography evidence, and especially on that portion that was improperly admitted through Mr. Feldman's alleged open door. As summed up in the opening brief (AOB, pp. 291-292), if joinder was proper in this case, Mr. Westerfield's convictions, under any standard of review, is reversible for the aggregation of evidentiary errors arising from a judicial act that was as close to actual arbitrariness and capriciousness as might ever actually occur in a court of law. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-838; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

VII.
THE ERRONEOUS ADMISSION OF CHARACTER EVIDENCE THROUGH SUSAN L.'S TESTIMONY

The seventh claim advanced in the opening brief was Judge Mudd's abuse of discretion in allowing Mr. Dusek to elicit from Susan L. the alleged stalking incident and her testimony regarding Mr. Westerfield's character for violence when he was under the influence of alcohol. (AOB, pp. 293 *et seq.*) Like the sixth claim, the admission of this evidence was the result of an intricate muddle of legal concepts, though this time one that arose more from bona fide confusion rather than emotional heat. The knot was untied in the opening brief, but a quick recapitulation might be most expeditiously accomplished in outline form, first for the stalking incident:

1. Susan L. gives percipient testimony favorable to the defense regarding the general accessibility of the motor home in the Sabre Springs neighborhood.

2. Mr. Dusek impeaches her on cross for bias, eliciting from her that she still cares for Mr. Westerfield. (30 RT 7892.)

3. Mr. Dusek then, over objection of defense counsel, impeaches his impeachment with the stalking incident, which is supposed to show not so much a stalking incident as that Susan L. (30 RT 7892-7895) – *did not* care for Westerfield as she in fact had initially claimed under Mr. Dusek's questioning.

4. When this impeachment of the impeachment did not turn out quite as Mr. Dusek had expected, he was then allowed to impeach the impeachment of the impeachment with a prior inconsistent statement by Susan L., which then straightened out and produced the impeachment of the impeachment that Mr. Dusek had expected to impeach the impeachment. (30 RT 7899-7901.)

As demonstrated in the opening brief, when this convolution is straightened out, it could be seen as a simple case of the prosecution obtaining admission of character evidence against Westerfield on the absurd pretext that the stalking

incident was relevant credibility evidence against? for? Susan L. (AOB, pp. 294-299.)

The outline for the alcohol evidence is shorter and more straightforward:

1. The prosecution evidence established that on Friday night, February 1, Mr. Westerfield was at Dad's and was drinking.

2. Over objection of defense counsel, Susan L. was allowed to testify that she had seen Westerfield drink on occasion, and when he drank he became quiet, sometimes upset, and sometimes depressed, and overall different. (30 RT 7914-7915.)

3. Unable to obtain what he wanted through open-ended questions, Mr. Dusek asked the leading question of whether, on alcohol, Westerfield would become "forceful," to which Susan L. answered, "I remember an occasion that he did." (30 RT 7922.)

Here the evidence was clearly character evidence whose admission violated Evidence Code section 1101(a). Judge Mudd's implied suggestion that when character distributes itself through the hazy prism of alcohol it becomes somehow a physical rather than a moral matter is a subtlety that defies the common-sense bar of section 1101(a). (AOB, pp. 299-305.)

Respondent invokes that magic elixir called "discretion," which has the power to turn a mortal judge into "Sir Oracle," who, when he "ope[s his] lips, let no dog bark." (Shakes. *Merchant of Venice*, Act i, sc. i.) Or, as respondent asserts more prosaically and earnestly: "A trial court possesses broad discretion in determining the relevance of evidence, and its rulings are subject to the deferential abuse-of-discretion standard on appeal." (RB, p. 165.) Since, according to respondent, the subtext of Susan L.'s testimony for the defense "was to demonstrate her relationship with Westerfield and the fact that she trusted him to take her family on these excursions," Judge Mudd was well within his broad discretion to allow evidence "to discredit Susan L.'s testimony which suggested that she was perfectly content in the relationship." (RB, pp. 170-171.)

Respondent's theory is about the best that can be done with all of this. It requires, however, that one ignore the fact that Mr. Feldman went to great pains to make sure that the direct examination of Susan L. opened no door to character evidence. (30 RT 7809-7810.) It requires that one ignore Judge Mudd's warning to Mr. Feldman that if the latter attempted to rebut the alcohol evidence with testimony that Mr. Westerfield was never forceful with any of Susan L.'s children, then Mr. Feldman would "be walking on very thin ice." (30 RT 7921-7922.) Finally, *if* Susan L.'s testimony had the incidental implication that she trusted Westerfield because she and family went on motor home trips with him, that implication was irrelevant, and one must ignore the fundamental remedy for evidence that is admissible for one purpose but inadmissible for another: a limiting instruction from the judge. (Evid. Code, § 355.)[15] The remedy is not to twist or muddle the rules of evidence, and what respondent calls discretion was in fact its abuse.

Respondent, who invokes subtext in Susan L.'s testimony as the rationalization of evidence in question, suddenly becomes incapable of finding *any* subtext in Mr. Dusek's closing argument where he talks about stalking and alcohol. It was okay, you see, because "[a]t no time did the prosecutor suggest that Westerfield 'stalked' Susan L. and he therefore did the same to Danielle or that because he had been forceful with Susan L. while intoxicated, he murdered Danielle after having become intoxicated and forceful." (RB, p. 172.) And yet, Mr. Dusek sets out all the constituent facts and asks, "What's going on. What is going with that." (42 RT 9409-4910.) Did he intend that the jurors answer these questions? Moreover, what happened to respondent's rationale that the stalking and intoxication evidence was not offered for purposes of establishing

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[15] "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

Westerfield's character, but rather for purposes of impeaching Susan L.'s credibility? It seems clear from Mr. Dusek's argument that he trusted and believed Susan L. Respondent simply cannot keep to a consistent line of argument in this muddle. Again, as in the sixth claim of the opening brief, evidence was admitted so outside the realm of relevance and competence as to make the term "abuse of discretion" easy to apply.

As for prejudice, respondent of course finds any error to be harmless. (RB, p. 172.) He ignores appellant's argument for federal constitutional error and for a more favorable (for appellant) standard of review. (AOB, p. 308.) Apart from these points respondent's short paragraph on prejudice is simply a summary of the position he took on prejudice in regard to erroneous joinder. (See RB, p. 172.) There is no need to repeat appellant's analysis of the relative strengths and weaknesses of the defense and prosecution cases. (See above, pp. 78-82; see also AOB, pp. 253-260.) Suffice it to say that the improper evidence allowed through Susan L.'s testimony added an undue weight to the prosecution side of the ledger, and it was heavy enough to tip the scale even whether that scale is set in accord with *People* v. *Watson* (1946) 56 Cal.2nd 818 or in accord with *Chapman* v. *California* (1967) 386 U.S. 18.

VIII.
RESTRICTIONS ON THE CROSS-EXAMINATION OF PAUL REDDEN

In the eighth claim of the opening brief, appellant contended that the restrictions placed on the cross-examination of Paul Redden were erroneous and encroached on the Sixth Amendment right to confront and cross-examine adverse witnesses. Specifically, Judge Mudd effectively barred the defense from asking Redden about portions of his interview related to voluntariness insofar as that concept bore on the reliability of Westerfield's statements; and from asking about other portions where Westerfield explained his use of the first-person plural pronoun, which usage the prosecution, and even Redden in his interview, viewed as incriminating. (AOB, p. 309 *et seq.*)

Respondent takes the position that the defense could not introduce anything from the interview that was part of the redactions unless the entire interview was allowed in. In other words, the *prosecution's* rights under Evidence Code 356 had to be vindicated, with perhaps a limiting instruction that the jury should not consider Westerfield's failure of the polygraph as evidence. (RB, pp. 182-183.) Respondent also takes the position that Westerfield's incriminating use of the first-person plural pronoun "we" did not require any qualification or explanation from Westerfield that it was a simple mix-up of language and not a confession to kidnapping. It was therefore not admissible from the defense side under Evidence Code section 356. (RB, pp. 184-185.)

Respondent's notion that Westerfield's explanation of the use of "we" as a simple mix-up was not very explanatory ignores two points. The first is that even if the substance of Westerfield's explanation of the use of "we" did not exculpate or incriminate, the *fact* that he proffered an explanation when confronted with the slip tended to exculpate, just as the evidence of the slip by itself tended to incriminate. The second point is that the evidence of physical stress, fatigue, and the overbearing circumstances of the interrogation as evidenced by Westerfield's

requests for a lawyer were relevant in assessing the mental state of someone who might mix-up his pronouns innocently. Do these matters tend to controvert the prosecution's claim of Westerfield's pronominal incrimination? How these matters do *not* fall within the category of "any other act, declaration, conversation, or writing which is necessary to make [the former] understood . . . " accurately and properly (Evid. Code, § 356) needs no further elaboration at this point, and it is for this Court to judge.

What must be addressed, however, is respondent's assertion that the issue is forfeited. It is, according to respondent, forfeited for three reasons. First, before Redden testified, the defense participated in the redaction of the interview and even asked to consider the matter overnight. "At no time prior to Redden taking the witness stand did the defense argue that additional portions of the interviewed [*sic*] should be played and transcribed for the jury." (RB, p. 179.) Secondly, according to respondent, even *during* the cross-examination of Redden, "Westerfield never argued for the admissibility of the specific portions of the interview he now claims on appeal should have been admitted." (RB, p. 179.) Finally, as respondent notes, toward the close of the prosecution's case, long after Redden had testified, Mr. Feldman brought up the issue again, and Judge Mudd offered him the opportunity to present Redden as a defense witness to attest to the portions of the interview that the defense wanted to introduce, and the defense did not take advantage of this opportunity. (RB, p. 180.)

The response to this, like the assertion, must be in three parts. The first part is the pre-testimonial redaction. Respondent's implication is that the defense sandbagged the prosecution and the court by not invoking Evidence Code section 356 concerns during the redaction process. This implication requires, however, a serious distortion of the record, the correction of which extorts from appellant a verbatim quote from the record.

During an *in camera* sealed hearing to discuss jury security and media publicity, Mr. Dusek brought up the Redden transcript as an afterthought:

"MR. DUSEK: One other area. We're trying to minimize delays regarding Paul Redden will be testifying tomorrow afternoon I think we have him scheduled, and we have redacted the transcript, provided the defense a copy. In fact, both sides have been back and forth on what should be coming in. And we gave them a copy of the redacted version right before we started here this afternoon. *And I think all reference has been taken out to the polygraph.* Certainly I would ask that you look overnight *to make sure I have not made a mistake*. And the tapes are being made to conform to the transcript for tomorrow.

"THE COURT: All right.

"Now, are either one of you going to request any kind of an admonition to the jury? In other words, my experience with some of these tapes is that they have a tendency to maybe jump, and some counsel prefer the court say that parts have been deleted you're not to be concerned with. Others say don't worry about it, Judge, just play it the way it is and we'll deal with it. If either one of you have a preference, I should hear it now, to try and get that resolved.

"MR. DUSEK: I haven't listened to the tape so I don't now if it is audible. It is only an audio tape, not a visual.

"THE COURT: Oh, I see.

"MR. DUSEK: *But whatever the defense wants will be fine.*

"MR. FELDMAN: We have not – again, as counsel's just indicated, your honor, we just got a draft. We'd certainly like overnight to review it.

"THE COURT: OKAY.

"MR. FELDMAN: *We have tomorrow afternoon anyway. This is not going to be first on our platter, so we'll have an opportunity.*

THE COURT: *I just thought I'd throw that out to you so that we could at least discuss it.*

"MR. FELDMAN: Yes sir." (14B RT 4228-4229., italics added.)

Portions of this exchange have been italicized in order to highlight what this discussion was about, and the casualness with which it was viewed on all sides. This was a discussion about redacting references in the Redden interview to the fact that part of the interview was a polygraph test. The defense was to review the redactions to make sure Mr. Dusek had not *made a mistake* and inadvertently left in some betraying reference. The second concern of this exchange was whether or not Judge Mudd should admonish the jury that the statement has been redacted. Mr. Dusek did not care, and Mr. Feldman did not see this as a priority. What this exchange *was not* about was how the defense could impose on the People – the only party legally competent to offer the Redden interview as evidence in the first place (Evid. Code, § 1220) -- an Evidence-Code-section-356 expansion of what the prosecution wished to introduce. *No one* had any reason to suppose that this was what this discussion was about, and certainly Mr. Feldman had no reason to conclude he was being invited to somehow veto or mold the prosecution's presentation of this evidence. This then is the extent of the defense's "participation" in the redaction. There is no procedural default to be found here.

Respondent's characterization of what was and was not proffered *during* the cross-examination of Paul Redden also needs to be tested against the record. One of the items mentioned in the opening brief was Westerfield's statement to Redden that he, Westerfield had not eaten breakfast or lunch, and had had only six grapes to eat that day. (AOB, p. 313, referring to 46 CT 10846.) Mr. Feldman had in fact mentioned this portion of the redacted interview specifically as part of his proffered evidence. (16 RT 4499-4500; See AOB, pp. 310-311.) It is true that Feldman did not expressly mention other portions of the interview discussed in the opening brief, but to find procedural default in this requires the further finding that such a proffer would *not* have been futile.

During Mr. Feldman's cross-examination, Judge Mudd, in his side-bar conferences, made it crystal clear to Mr. Feldman that if he broached a matter that was not already on the tape as redacted, this would open the door to the admission of the entire tape: "When you raise 356 you raise the entire transcript of the entire interview. If you're going to use that objection, then you're opening the door to this entire interview." (16 RT 4495.) "Now if this is a strategy move, so be it. But I am very concerned because I made a very specific order and the District Attorney took great lengths to excise all of the references, and you're now telling me you're going to object under 356, which tells me you want the entire interview in. That's what it's telling me." (16 RT 4495.) "What I'm telling you is this is stuff that this jury has not heard. Period. It has not heard it. It has not heard it in the tape. And it has been represented that this was all tape-recorded. I'm not going to allow you to go there, Mr. Feldman. You've made your offer of proof, and I'm telling your right now there's potential for mistrial here, right at this juncture." (16 RT 4498.) "You cannot go into areas that are not on this tape." (16 RT 4498-4499.) "What I'm telling you is that what I am left with right now is an excised version of the tape that doesn't contain all the material you want to get in and this jury has not heard it. But they have heard that this witness tape-recorded it. You seem to be concerned through the objections of Mr. Boyce that the jury not be advised that there were items excised. Your questioning is going to open that door. Now, I don't know how to make it any clearer. You work with the tape you've got . . . as it is right now. And that's it." (16 RT 4499-4500.)

As with other things in this case, it is not easy to understand how something as relatively minor as the redaction of the Redden transcript to avoid reference to polygraph evidence precludes the application of Evidence Code section 356, or, more accurately, requires the violation of Evidence Code section 351.1. What does the polygraph test have to do with Westerfield's use of "we" or his explanation as to why he said "we"? Or what has it to do with any aspect of the interview that bears on the question of reliability? But be that as it may, the law of

this case, as pronounced by Judge Mudd, was that cross-examination was *absolutely* confined to elicitation of statements that the jury had heard in the playing of the redacted tape. Any statement outside the redacted tape was barred regardless of its relevance under Evidence Code section 356 or its separability from the issue of the polygraph test. Any further proffer of a redacted portion of the tape by Mr. Feldman would have been futile, and was not required to preserve the issue for appeal. (*People* v. *Tuggles* (2009) 178 Cal.App.4th 1106, 1123-1124.)

The third aspect of respondent's forfeiture claim is the post-testimonial offer by Judge Mudd to consider the presentation, through Redden, of affirmative evidence of statements made by Westerfield, but which had been redacted from the prosecution's version of the tape. First of all, Judge Mudd's relaxation was limited to certain topics and not an open invitation to press anything other than a few items. (25B RT 6771.) There was thus no guarantee that Judge Mudd would not sustain the hearsay objections interposed by Mr. Dusek if the defense attempted to introduce other portions of the interview or deem again that the door would then be open to the entire tape --- polygraph references and all. And secondly, and importantly, that Mr. Feldman passed up an opportunity to use Redden as an affirmative witness should not work a retrospective forfeiture of a claim that cross-examination was improperly restricted.

Evidence Code section 772(b) provides that "[u]nless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins." This refers to direct-examination, cross-examination, redirect-examination, recross-examination, etc. Why should the Evidence Code require "good cause" to break the continuity of each phase? Because this continuity represents the most effective structure for each party to present its case in the best light possible. Not only are the conditions of examining a witness on direct examination qualitatively different than the conditions for cross-examination, where leading questions can be employed (see Evid. Code, §

767(a))[16]; but also the effect of cross-examination would be further diminished in this case by the large hiatus between a fresh and timely cross-examination of Redden, and a cross-examination forced into the form of a direct examination of a friendly witness. In short, the failure of Mr. Feldman to take advantage of Judge Mudd's limited offer does not cure the harm from Judge Mudd's comprehensive restriction on cross-examination. There is here no procedural default; the claim is reviewable.

Finally, in regard to prejudice, respondent asserts that the matter is too negligible and that "Westerfield fails to demonstrate a reasonable probability that had the jury heard the additional self-serving statement he made in the interview, he would have achieved a more favorable verdict." (RB, p. 185.) Appellant will not repeat his overall assessment of prejudice in this case, or what was said specifically in relation to this error (AOB, pp. 316-317), but there is a further point worth noting. That Westerfield had an explanation for the use of "we" was, as noted, an important point for the defense, but also, there was in the evidence eventually presented a more substantive cast to an exculpatory explanation for the confusion. It will be recalled from the testimony of Susan L. and her daughters, Westerfield was often in company when he took his motor home excursions, and the use of the plural in talking or describing such excursions was unconsciously habitual. Certainly the combination of the enlarged context of Westerfield's statements to Redden with all other evidence presents a reasonable probability of having affected a case whose outcome depended on these details of non-forensic evidence. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-838.) And most certainly, there is a reasonable doubt that it had done so. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

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[16] "(a) Except under special circumstances where the interests of justice otherwise require: [¶] (1) A leading question may not be asked of a witness on direct or redirect examination. [¶] (2) A leading question may be asked of a witness on cross-examination or recross-examination."

IX.
THE ANONYMOUS CALLER AND THE DECLARATION AGAINST INTEREST

In the ninth claim of the opening brief, appellant contended that the proffer of the evidence of the anonymous call either qualified as a declaration against interest pursuant to Evidence Code section 1230, or, if it failed technically to meet the foundational requirements because of the anonymity of the caller, it was so substantially probative and exculpatory of Mr. Westerfield so as to render its exclusion a violation of due process under the strictures of *Chambers* v. *Mississippi* (1972) 410 U.S. 284. (AOB, pp. 318-321.)

Respondent makes the arguments anticipated, and the issue is joined. One might note one point in his argument that requires some comment. In regard to the anonymous call, respondent asserts: "The trial court was faced with an anonymous statement by an unknown declarant, *who was avoiding the possibility of identification and potential prosecution*, and whose information was inherently unreliable." (RB, p. 189, italics added.) The italicized portion of that sentence represents the very foundational requirement that is thought to render declarations against interest *reliable*. The natural description of the statement cannot avoid casting itself in the mould required by section 1230. The key to the issue in the ninth claim is that the anonymous statement either met the foundational requirement of section 1230 despite the anonymity of the declarant, or it came close enough that, when combined with other circumstances, such as Westerfield's ironclad alibi for February 15, the date the anonymous statement, it was too exculpatorily probative to be excluded without a violation of due process.

X.
CAUTIONARY INSTRUCTION ON DOG-TRACKING EVIDENCE

Appellant contended in the tenth claim of the opening brief that the cautionary instruction formulated in CALJIC No. 2.16 for dog-tracking evidence was inadequate. The instruction does not give an express admonition of caution, but requires to the jury to look for some corroborating evidence that "supports the accuracy of the dog tracking." (CALJIC No. 2.16.) This is parallel, if not modeled on, CALJIC No. 2.15, which also omits an express admonition of caution, but requires some "slight corroboration" (CAJLIC No. 2.15) of the defendant's guilt. By contrast, CALJIC No. 3.18 has a corroboration requirement and an express admonition that accomplice testimony – its subject – "be viewed with caution." (CALJIC No. 3.18.) Likewise, CALJIC No. 2.70, on party admissions, has no corroboration requirement, but nonetheless admonishes that "[e]vidence of an oral confession or an oral admission of the defendant not made in court should be viewed with caution." (CALJIC Nos. 2.70 and 2.71.) In the opening brief, appellant demonstrated that dog-tracking evidence falls more in the category of accomplice testimony and oral admissions, and requires an express cautionary admonition. (AOB, pp. 322-330, 334-341.) Indeed, as argued in the opening brief, this was the implied position of the Court in *People* v. *Craig* (1978) 86 Cal.App.3rd 905, and the position taken in Justice Fineberg's dissent in *People* v. *Malgren* (1983) 139 Cal.App.3rd 234. (AOB, pp. 330-334.) The only authority for CALJIC No. 2.16 is *Malgren*, which appellant is asking this Court to examine closely and consider in light of his contentions.

Respondent concedes that the proper instruction it is still an open question, but takes the position that an instruction based on the *Malgren* majority is perfectly adequate to "properly guide[] the jurors as to how to consider dog-scent evidence." (RB, 197.) Dog-scent evidence, contrary to appellant's contentions, is

in fact "more akin to evidence of possession of recently stolen property." (RB, p. 198.) Respondent notes:

> " . . . . Dogs and property do not lie, unlike accomplices and informants. Rather, the concern with dogs and property is that there may be an innocent explanation for the dog's behavior just as there may be an innocent explanation for the defendant's possession of stolen property. This concern, however, is alleviated by the jury instruction for both dog-scent and recently-stolen property evidence, which require corroboration.
>
> "The problems Westerfield notes with dog-scent evidence in general speak to whether this evidence is trustworthy and reliable . . " (RB, pp. 198-199.)

That the problems with dog tracking evidence inhere in its trustworthiness and reliability is precisely what was argued in the opening brief. But what was argued in the opening brief was that these problems were the very predicate for a claim that an express cautionary admonition to the jurors was required. Trustworthiness and reliability are at the very center of the question raised here, and the reason the cautionary element of CALJIC No. 2.15 is so light and negligible is because the recent possession of stolen property is empirically a *reliable* indicator of guilt for a theft crime. (*People* v. *McFarland* (1962) 58 Cal.2nd 748, 754; *People* v. *Vann* (1974) 12 Cal.3rd 220, 224.) As stated in the opening brief, the implied note of caution in CALJIC No. 2.15 arises "to forestall the effects of overconfidence" in such evidence, and to prompt the jurors to at least consider the evidentiary possibility of a non-incriminating reason for the possession of the property. (AOB, p. 325.)

In accomplice testimony and oral admissions, the trustworthiness and reliability of such evidence will tend to be, or have reason to be thought of, as illusory, and hence, the cautionary formulation is explicit, with an emphasis on

untrustworthiness and unreliability. (AOB, pp. 325-327.) Thus, respondent's claim of affinity between dogs and property in their respective forms of muteness does not go the heart of the matter. The question is whether in reference to trustworthiness and reliability dog tracking evidence is more like possession of recently stolen property, or more like accomplice testimony and oral admissions. Based on the survey of dog tracking cases across multiple jurisdictions in this country, it seems undeniable that dog tracking evidence falls into the category of the type of evidence that requires an explicit cautionary admonition.

And yet, respondent denies it because "dogs and property do not lie, unlike accomplices and informants." He leaves out witnesses who attest to oral admissions since that would not only detract from the epigrammatic quality of his formulation, but it would also point in the direction of a problem with his supposed affinity between dogs and property. Evidence attested by human witnesses, such as evidence of oral admissions, or even descriptions of property, is credible or not based on a variety of factors that include, but need not include, lying in the sense of a purveyance of a knowing and intentional falsehood. Such considerations in the case of oral admissions might well be the inherent capacity of the witness to remember or perceive, his or her circumstantial opportunity to perceive, any bias, or any motive, or interest he or she may have in the case. (See Evid. Code, § 780.) Even in accomplice and informant testimony, where the risk of knowing and intentional lying may be higher than for ordinary witnesses, this risk need not be a factor that is unalloyed with other considerations reflecting on the trustworthiness and reliability of the testimony short of the witness actually perjuring himself.

In terms of trustworthiness and reliability, dog tracking evidence presents a situation that is in fact *more* complex than those situations involving only human witnesses. If the dog itself is not a witness, it does not follow that the dog is like inorganic property. Recent possession of stolen property may "tell" us something in a metaphorical sense; but dogs and humans literally communicate, which,

indeed, is the very premise of dog tracking evidence. The dog is animate; it has appetites; it has desires; it has experiences that it somehow retains, or it would not be trainable; and all of its appetites, desires, and experiences might well be directed by the dog toward priorities not shared by the human handler or misinterpreted by the human handler. In short, if dogs do not lie, they may still deceive.

But the greater complication arises because the human handler has his own motives, interests, biases, and physical or emotional limitations independent of those of the dog, and yet he purports to be the only access the jurors and the court has to the dog. An accomplice witness can be thoroughly cross-examined; the witness to an oral admission can be thoroughly cross-examined; a dog handler witness can only be, as it were, *partially* cross-examined, and if, in the opening brief, appellant disparaged characterizing dog-tracking evidence as "hearsay" (AOB, p. 335), this element of human/canine communication is nonetheless a real factor that jurors must assess under conditions difficult to ascertain.

None of this is addressed by respondent, except by implication. When respondent asserts that " . . . Westerfield's trial is a perfect example of the degree to which such evidence can very well be impeached" (RB, p. 197), he is attempting to generalize on the adequacy of the cross-examination of the handler to test dog-scent evidence. But the fortuitous existence and then discovery of Frazee's email to another human being boasting of his dog's find is an anomaly, and in most cases the handler-dog communication, as conveyed only by the handler, will be the only evidence, and will tend to be impermeable. Further, even in the instant case specifically, the adequacy of the impeachment was not enough to render an express cautionary instruction superfluous.

The purpose of explicit cautionary instructions is to fill in a gap in the experience of the jurors with the experience embedded in the judicial system itself. Thus, in the case of accomplice testimony, although jurors are intelligent and well versed in the ways of the world, "[s]till most jurors have only limited experience

with the actual workings of the criminal justice system and the pressures that operate on testifying accomplices." (*People* v. *Guiuan* (1998) 18 Cal.4th 558, 576, Kennard, J., conc.) The same is true of oral admissions, and in sexual assault crimes there have been and are special instructions that purport to educate the jurors with the fruit of long judicial experience. (*People* v. *Putnam* (1942) 20 Cal.2nd 885, 891-892; *People* v. *Gammage* (1992) 2 Cal.4th 693, 701-702.) Even the lighter cautionary form used for possession of recently stolen property represents a restraint born of judicial experience not within the usual purview of the lay juror. In the case of dog tracking evidence, the popular overestimation of the powers of the tracking dog is apparent and well documented in the cases, and no amount of the normal procedural protections in a criminal trial will be adequate to offset the undue advantage this evidence possesses.

Thus, what respondent sees as the paradigmatic quality of the Westerfield case as illustrating how dog tracking evidence can be impeached by the cross-examination of the handler does not touch the central core of the problem. In this case, Jim Frazee happened to commit some human indiscretions that were discovered and became available to impeach his testimony. But the impeachment of the human constituent in this relationship consisted of his boast that the dog had solved the Westerfield case; this does not dispel the power of the popular misconception that the dog is unerring, and Frazee's boast had a built-in rehabilitation in the myth of the tracking dog. An explicit cautionary admonition was required here, and should be made part of any instruction on dog tracking evidence.

On the question of prejudice, respondent is cursory, in accord with his view of the respective strengths of the prosecution and defense case. (RB, p. 200.) The lines of opposition have been drawn in this regard, and what was said regarding prejudice is adequately set forth in the opening brief. (See AOB, pp. 339-341.)

XI.
REPLY CONCERNING "REASONABLE DOUBT" DEFICIENCY IN CALJIC NO. 2.16

Apart from the omission of an explicit cautionary admonition, CALJIC No. 2.16 is also deficient, as appellant argued in the eleventh claim in his opening brief (AOB, pp. 342 *et seq.*), for failure to relate dog-tracking evidence to the standard of proof beyond a reasonable doubt. Indeed, the CALCRIM committee noted the same deficiency in CALJIC No. 2.15 on the possession of recently stolen property, and added to the updated version, CALCRIM No. 376, the following: "Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." Insofar as dog-tracking evidence contains significantly less inherent trustworthiness and reliability than evidence of recent possession of stolen property to prove a theft crime, the need for a "reasonable doubt admonition" is even more urgent for dog tracking evidence.

Respondent's answer knocks down two straw men of his own making: one is that CALJIC No. 2.16 represents an unconstitutional evidentiary presumption; the second is that the instruction misleads the jury to believe that dog-tracking evidence *alone* was sufficient to prove guilt. (RB, pp. 201-202.) The first response seems an odd interpretation of appellant's statement in his opening brief that "[a]t issue *is not* an irrebuttable presumption of guilt in violation of due process [citation]; but rather the issue is by what standard of proof a 'permissive inference' is to be measured in determining its evidentiary significance in the case." (AOB, p. 345, emphasis added.)

As to the second, appellant felt no need to emphasize that the argument was also *not* about an instruction that singles out certain evidence as capable of proving, all by itself, the guilt of the defendant. This would be a hazardous contention in light of the express statement in CALJIC No. 2.16 in this case that "[t]his evidence is not by itself sufficient to permit an inference that the defendant

is guilty of the crimes of kidnapping and murder." (10 CT 2500; see AOB, p. 322.)

The problem with the omission of a "reasonable doubt admonition" is in failing to remind the jurors that the *ultimate* weight of dog tracking evidence must be measured against the standard of proof beyond a reasonable doubt. Respondent's misunderstanding of the argument seems to require that this elemental principle of criminal law be broken down further. If so, one starts with the proposition that burden of proof beyond a reasonable doubt "does not operate upon each of the many subsidiary facts on which the prosecution may collectively rely to persuade the jury that a particular element has been established beyond a reasonable doubt." (*United States* v. *Viafara-Rodriguez* (2nd Cir. 1984) 729 F.2nd 913, 913; see also *State* v. *McDonough* (Conn. 1987) 533 A.2nd 857, 861-862.) The subsidiary facts, however, must be weighed by the jury to assess the degree to which each one may contribute to the overall standard of proof. As this Court has axiomatically stated in a formulation tailored for this line of reasoning: "The credence and ultimate weight to be given the evidence of the various particular circumstances are of course for the trier of fact and [i]t is the trier of fact . . . that must be convinced of a defendant's guilt beyond a reasonable doubt." (*People* v. *Redrick* (1961) 55 Cal.2nd 282, 289, internal quotation marks omitted.) It follows from this that the jurors will demand a higher or lesser degree of persuasiveness or weight for a subsidiary fact it deems to be more or less important to the collective requirement of proof beyond a reasonable doubt.[17]

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[17] This conclusion is not contradicted by the rule that a subsidiary fact essential to an inference of guilt beyond a reasonable doubt must itself be proved beyond a reasonable doubt (*People* v. *Anderson* (2001) 25 Cal.4th 543, 582; *People* v. *Wright* (1990) 52 Cal.3rd 367, 406); indeed, it is an application of this conclusion for cases in which the jury determines that a "single strand," as opposed to a collective aggregation, of evidence is *essential* to establish an element of the crime in accord with proof beyond a reasonable doubt. (*Hebron v. State* (Md. 1993) 627 A.2nd 1029, 1032-1033.)

Thus, in the instant case, if the jurors should have happened to have subscribed to the prosecution's view that *its* evidence, apart from the dog-tracking results, was dispositive of proof beyond a reasonable doubt, each juror might accept or reject that evidence indifferently. But if it was deemed that the prosecution case had problems, difficulties, or holes that rendered its superstructure doubtful or uncertain, one or more jurors might see the truth *vel non* of dog tracking evidence as highly crucial and important. But an instruction that conveys the falsehood that dog tracking evidence, if corroborated in its accuracy by anything else, is somehow important on that basis, distorts this entire process of making a proper judgment of guilt or innocence. The jurors *needed* to be told that the elements of the overall charge had to be proved beyond a reasonable doubt to forestall the misimpression that the corroboration requirement was merely foundational and not a legal definition of the weight of the evidence. Respondent has simply not engaged *this* argument. CALJIC No. 2.16, if for no other reason, should be disapproved for the omission of a "reasonable doubt admonition."

XII.
REPLY CONCERNING REQUESTED ADDITION TO MOTIVE INSTRUCTION

In the twelfth claim, it was argued that Judge Mudd should have acceded to Mr. Boyce's request to augment CALJIC No. 2.51, the instruction on motive, with an admonition that "motive is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." Respondent counters, pointing to this Court's rejection of a similar claim on the ground that the curative admonition had nothing to cure insofar as the unaugmented instruction does not suggest at all that motive *is* sufficient to establish all the elements of the crime. (RB, pp. 206-207, quoting *People* v. *Livingston* (2012) 53 Cal.4th 1145, 1168, which, in turn, is quoting *People* v. *Snow* (2003) 30 Cal.4th 43, 97-98.)

But in *Livingston*, the contention was for a *sua sponte* modification; appellant's claim arose from a *requested* modification, and the reasons therefor are geared more specifically to the problems of this case rather than to some general deficiency in the motive instruction. The specific problem in this case is that motive, especially motive through such inherently inflammatory evidence as the pornography, was susceptible of *over* persuasion of guilt for the crimes of kidnap and murder. It was, in this case, not unlike, indeed was, other-crimes evidence, and for other-crimes evidence it is thought to be legally *necessary* to instruct the jury such evidence is insufficient by itself to prove guilt. (*People* v. *Reyes* (2008) 160 Cal.App.4th 246, 252-253; *People* v. *James* (2000) 81 Cal.App.4th 1343, 1349; *People* v. *Frazier* (2001) 89 Cal.App.4th 30, 35-36.) One could as easily assert in the case of evidence of an uncharged act, that it too is *not* an element of the crime charged, and that this too " 'leaves little conceptual room for the idea that an [uncharged act to prove motive] could establish *all* the elements of murder.'" (RB, p. 206.) But if there is no "conceptual room" in all this to mislead, there is certainly *emotional* room to establish the persuasion required for what *appears* to be proof beyond a reasonable doubt. For the inherently provocative nature of

such evidence entails a "danger that the presumption of innocence will melt under the heat of emotions aroused by defendant's prior offenses." (*People* v. *James*, *supra*, 81 Cal.App.4th at p. 1353.) Thus, what courts say across-the-board for other-crimes evidence can be said about the specific motive evidence presented in this specific case. Hence, the *requested* modification was appropriate and warranted.

One further point raised by respondent cannot go unanswered. In his opening brief, appellant argued that the evidentiary structure of this case was such that the jurors could deem motive evidence to constitute an essential link in a chain of inferences required for proof beyond a reasonable doubt, and therefore subject to the principle formulated in CALJIC No. 2.01 (and in CALCRIM No. 224), that such subsidiary facts must be proved beyond a reasonable doubt. (See above, p. 111 and fn. 17.) This was raised as one of the reference points indicating the need for the requested modification of CALJIC No. 2.51. (AOB, p. 349.) Respondent in a passing footnote takes the position that "[t]here is no legal support for such a contention" (RB, p. 207, fn. 24), i.e., that motive could be a circumstantial fact that must be proved beyond a reasonable doubt. Either respondent misunderstands the argument or misunderstands the law. The formulations of CALJIC No. 2.01 and CALJIC No. 224 are indeed the law. (*People* v. *Anderson* (2001) 25 Cal.4th 543, 582; *People* v. *Wright* (1990) 52 Cal.3rd 367, 406.) In fact, the principle, which might be paraphrased into the axiom that a chain is only as strong as it weakest link (see *State* v. *May* (N.C. 1977) 235 S.E.2nd 178, 185), is a logically inescapable correlate of the firm, constitutional principle that guilt must be proved beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364)

Finally, respondent's failure to perceive the "weak-link" principle as either existing in law, or required by the constitutional mandate of the Fourteenth Amendment, leads in turn a failure to perceive that the instructional error in this case *is* of federal constitutional magnitude. Thus, his discussion of prejudice (RB,

p. 208), which focuses on only one standard of review – and that the most favorable to his position – does not take into account the unfavorable standard of review, which places on him the burden to show the error harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) On all other matters related to prejudice, appellant refers to the reader to his discussion of this in his opening brief. (AOB, p. 350.)

XIII.
REPLY CONCERNING SUFFICIENCY OF THE EVIDENCE TO SUPPORT A FORCIBLE KIDNAPING CONVICTION, OR A CONVICTION FOR FELONY-MURDER/KINDAPING

The thirteenth claim of the opening brief questioned the sufficiency of the evidence to support a conviction for kidnaping or felony-murder kidnaping, insofar as there was insufficient evidence to establish the requisite element of force or fear and absence of consent. (AOB, pp. 351-358.) Respondent contends that there was at least sufficient evidence under the "relaxed standard of force applicable to a child victim" (RB, p. 213) pursuant to the rule of *People* v. *Oliver* (1961) 55 Cal.2nd 761 and *In re Michele D.* (2002) 29 Cal.4th 600 (RB, pp. 210-213), although, in respondent's view, there was sufficient evidence to support the conviction even without these "relaxed standards". (RB, p. 213-217.)

The *Michele D.* standard, which is now contained in Penal Code section 207(e) as a discrete form of kidnaping with its own elemental definition, was discussed in the opening brief, where it was dismissed as irrelevant because the jurors were not instructed on this form of kidnaping. (AOB, p. 354.) Respondent argues that this was of no moment because in *Oliver* and in *Michele D.*, this Court upheld the sufficiency of evidence in those cases, which were tried for kidnaping under the definition of *forcible* kidnaping. Thus, according to respondent, the instruction on forcible kidnaping is sufficient to present the *Oliver* and *Michele D.* standard to the jury. (RB, p. 313.)

In *Oliver*, a two-year-old baby was carried away with its apparent consent. (*People* v. *Oliver*, *supra*, 55 Cal.2nd at p. 763.) Contrary to respondent's representation, the sufficiency of evidence was *not* upheld in *Oliver*, because it was not even raised. The issue in *Oliver* was whether the instruction on forcible kidnaping was sufficient, and in fact, while formulating a definition of kidnaping of a baby incapable of giving consent, this Court reversed the kidnaping

conviction for the deficiency in the instruction to provide for all the necessary elements of this different form of the crime. (*Id.*, at pp. 764-768.) In *Michele D.*, in which a 12-month-old baby was carried off, the contention was insufficiency of the evidence, but there was no instructional question because there was no jury in this juvenile proceeding, while, nonetheless, the same contention of insufficient evidence for lack of force and consent was presented to the juvenile court judge. (*In re Michele D.*, *supra*, 29 Cal.4th at pp. 603-605.) Thus, *Oliver* impeaches respondent's argument, while *Michele D.* emerges from a procedural posture that is unusual and significantly different from that of the instant case.

For the instant case, unlike *Michele D.*, is governed by the constitutional principle that a criminal defendant has a "Sixth Amendment right . . . to be tried by a jury and to have every element of an offense proved by the Government beyond a reasonable doubt." (*Dillon* v. *United States* (2010) 130 S.Ct. 2683, 2688; *United States* v. *Gaudin* (1995) 515 U.S. 506, 509-510.) This right, applicable to state court proceedings through the Fourteenth Amendment (*Duncan* v. *Louisiana* (1968) 391 U.S. 145, 149), means that a "guilty" verdict must come from a jury, and not from a judge (*Sullivan* v. *Louisiana* (1993) 508 U.S.275, 277), which is precisely what occurs if appellate judges affirm a conviction based on evidence sufficient to support a theory of the crime *not* presented to the jury. (*McCormick* v. *United States* (1991) 500 U.S. 257, 270, fn. 8; *Chiarella* v. *United States* (1980) 445 U.S. 222, 236-237.)

The jury here was instructed on the elements of forcible kidnaping in accord with CALJIC No. 9.50 as follows:

> "Defendant is accused in Count Two of having committed the crime of Kidnapping, in violation of section 207, subdivision (a) of the Penal Code.
>
> "Every person who unlawfully and with physical force or by any other means of instilling fear, steals or takes, or holds, detains,

or arrests another person and carries that person without her consent for a distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a).

"[. . . .]

"In order to prove this crime, each of the following elements must be proved:

"1. A person was unlawfully moved by the use of physical fore, or by any other means of instilling fear;

"2. The movement of the other person was without her consent; and

"3. The movement of the other person was for a substantial distance, that is, a distance more than slight or trivial.

"4. The movement must have commenced at a time when the person was still alive." (10 CT 2530-2531.)

Where in all this inheres the "relaxed standard" for children incapable of consent or for babies? This is not a case, like *Oliver* or *Michele D.*, in which the alleged victim was two years old or 12 months old, and the jury was required to adjust the instruction to a situation where consent *vel non* is obviously not at issue factually. Here, Danielle was seven years old, and, from all the evidence presented at the guilt phase, where we see her writing in her journal on the Friday night before her disappearance, she appeared to be a sophisticated seven-year-old quite capable of showing some degree of resistance to a stranger attempting to take her out of the house forcibly from her own bed. CALJIC No. 9.50 in this case does not even suggest the *Michele D.* form of kidnaping.

But indeed, as seen from *Oliver*, it is unlikely that the instruction would be sufficient even if Danielle had been a baby or a very small child. After *Michele D.*, the CALJIC committee formulated CALJIC No. 9.57, which provides as follows:

"The amount of force required to kidnap an unresisting infant or child is the amount of force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent.

"*The People have the burden to prove that an infant or child incapable of consenting* was taken or moved by force as defined above. If you have a reasonable doubt as to whether the taking or movement was by force, you must find in favor of the defendant on that issue." (Emphasis added.)

The italicized language signals an added element not present in forcible kidnaping of a person capable of consent. Indeed, the elimination of consent effectively redefines "force" into a different element altogether as well.

This is apparent in the manner CALCRIM addresses the distinction between forcible kidnaping and *Michele D.* kidnaping. CALCRIM No. 1215, the instruction on forcible kidnaping, tracks in substance CALJIC No. 9.50: "To prove that the defendant is guilty of this crime, the People must prove that : 1 The defendant took, held, or detained another person by using force or by instilling reasonable fear; [¶] Using that force or fear, the defendant moved the other person a substantial distance; [¶] AND [¶] 3. The other person did not consent to the movement." CALCRIM No. 1201, which the CALCRIM committee has dubbed "Kidnapping; Child or Person Incapable of Consent (Pen. Code, § 207(a), (e))", is cast expressly as an instruction on a distinct crime:

"The defendant is charged with kidnapping (a child/ or a person with a mental impairment who was not capable of giving legal consent to the movement) . . . . [¶] To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant used (physical force/deception) to take and carry away an unresisting (child or person with a mental impairment); [¶] 2. The defendant move the (child or person with a mental impairment) a

substantial distance; [¶] AND [¶] 3. The defendant moved the (child or mentally impaired person) with an illegal intent or for an illegal purpose . . . ."

CALCRIM No. 1201 makes it clear that the crime against an "unresisting child" requires physical force only in the sense of that required to actually move the victim, while the instruction on forcible kidnaping makes it clear that force moves the victim indirectly, as it were, through the vitiation of the victim's consent, which the victim is capable of granting or withholding. The two are distinct crimes, and instruction on one does not provide for the factual resolution of the other. CALJIC No. 9.50, whether alone or in conjunction with any other instruction in this case, did not convey to the jurors the legal definitions required to resolve the factual question of kidnaping on a *Michele D.* basis, respondent's contention to the contrary notwithstanding. The conviction for kidnaping cannot therefore be affirmed on that basis by this Court without violating the Sixth Amendment.

Under the legal definition of forcible kidnaping, respondent goes through the same evidence, or lack of evidence, analyzed by appellant and finds it sufficient to establish force or fear, since "[n]o rationale [*sic*] trier of fact would believe that Danielle left her bedroom in the middle of the night of her own volition." (RB, p. 214.) Respondent does not explain why it is so difficult on this evidence to believe that she was taken from the house by fraud or deception or that she was killed in the house and moved after that. It is not, and in order to place this possibility in its proper perspective under the standard of review for sufficiency of the evidence, it may be helpful to elaborate on this standard with even greater precision than merely asserting that it heavily favors the jury's determination as is.

For in determining whether a reasonable trier of fact could have found defendant guilty, it is not enough merely to resolve all conflicts in the evidence or

inferences in favor of the People. Although inferences may constitute substantial evidence in support of a judgment, they must be the probable outcome of logic applied to direct evidence; mere speculative possibilities or conjecture are infirm. (*Kuhn* v. *Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; *Louis & Diederich, Inc.* v. *Cambridge European Imports, Inc.* (1987) 189 cal.App.3rd 1573, 1584-1585; *People* v. *Berti* (1960) 178 Cal.App.2nd 872, 876.) "A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established." (*Eramdjian* v. *Interstate Bakery Corp.* (1957) 153 Cal. App. 2d 590, 602; accord, *People* v. *Stein* (1979) 94 Cal. App. 3d 235, 239 Evid. Code, § 600, subd. (b) [inference logically drawn from facts found or established].) A doubtful or uncertain fact must inure to the detriment of the party with the burden of proof on the issue. (*Reese* v. *Smith* (1937) 9 Cal.2d 324, 328; *People* v. *Tatge* (1963) 219 Cal. App. 2d 430, 436.) Whether an inference rationally flows from the evidence is a question of law. (*California Shoppers, Inc.* v. *Royal Globe Ins. Co.* (1985) 175 Cal. App. 3d 1, 44-45; *Berti*, *supra*, 178 Cal. App. 2d at p. 876.) And all this is to say that the inference that Danielle *must* have been forced or instilled with fear is, on this record, speculative, unrooted in affirmative evidence, and so uncertain as to fail to meet even that standard of review so heavily weighted in favor of the People. Appellant's convictions for murder and kidnaping must be reversed.

XIV
REPLY CONCERNING FAILURE TO INSTRUCT ON SECOND DEGREE MURDER *SUA SPONTE* OR ON FIRST DEGREE PREMEDITATED MURDER AS REQUESTED

In the fourteenth claim of the opening brief, appellant argued that the trial court had a *sua sponte* duty to instruct on second-degree murder as a lesser included offense of first-degree felony-murder. (AOB, pp. 359-366.) The claim that second-degree murder is a lesser-included offense of felony-murder is predicated on this Court's clarification of the law of murder in *People* v. *Chun* (2009) 45 Cal.4th 1172. It is now clear that felony-murder is one of the forms of malice aforethought that can be differentiated from the compact phrase "abandoned and malignant heart" used in Penal Code section 188. (*Chun*, *supra*, at p. 1184.) If the terms "malice murder" and "felony-murder" are to be retained, it is only for *ad hoc* convenience in distinguishing different theories of a single crime, rather than for distinguishing separate crimes. For as a matter of statutory definition, first-degree felony-murder cannot be committed without also committing a homicide of a human being with malice aforethought, which is also second-degree murder.

Respondent agrees this question is still open. (RB, pp. 222-223.) But he points out that even after *Chun*, this Court still speaks in, as it were, pre-*Chun* language: " 'felony-murder liability does not require an intent to kill, or even implied malice, but merely an intent to commit the underlying felony.'" (RB, p. 223, quoting *People* v. *Gonzalez* (2012) 54 Cal.4th 643, 654.) But, again, such expressions are *ad hoc* rather than definitional. Our legal vocabulary in regard to malice aforethought has developed on an equivocating assumption that felony-murder was a distinct and different crime from malice murder. (See *People* v. *Dillon* (1983) 34 Cal.3rd 441, 474-475.) Since *Chun*, the equivocations must be seen as *only* linguistic and not substantive. (See *People* v. *Friend* (2009) 47 Cal.4th 1, 75-76.)

The substantive law is now clearly consistent with the procedural rule that the pleading of "malice-murder" in the language of Penal Code section 187 puts the defendant on notice of all forms of murder, including "felony-murder", and with the rule that a unanimous verdict for first-degree murder does not require unanimous agreement on whether the defendant committed "malice murder" or "felony-murder." (See AOB, p. 364.) If the system of lesser-included and greater inclusive offenses in criminal homicide is to be treated on a different basis, the question is why, and respondent does not provide an answer.

Indeed, when one is dealing with the greater and lesser offenses of criminal homicide, one is dealing with the most complex mental states required for any of the vast multitudes of acts proscribed in the Penal Code, and this creates certain unusual features for assessing what is or is not a lesser-included offense. Thus, voluntary manslaughter is a lesser-included offense of murder because it is defined as "an intentional and unlawful killing" without "malice" (Pen. Code, § 192), while murder is defined, as noted, as "the unlawful killing of a human being *with* malice aforethought." (Pen. Code, § 187, emphasis added.) *Formally*, all the elements of voluntary manslaughter are included in the crime of murder. Factually or empirically, however, the case is otherwise. Voluntary manslaughter requires the *presence* of certain affirmative facts: either heat of passion or imperfect self-defense. Thus, if a robbery, on the factual and legal level, must necessarily include a theft, a murder, on the factual level, does not necessarily include a voluntary manslaughter. But the factual implications of the definitional elements are not the key. In criminal homicide, the presence of heat of passion or imperfect self-defense is deemed the absence of malice *as a matter of law*, and this is all that is required to establish a lesser-included offense under the elements test. (*People* v. *Breverman* (1998) 19 Cal.4th 142. 153, fn. 5 (maj. opn.), and at pp. 181-182, Mosk, J., dissenting.) The exact same reasoning renders second-degree murder a lesser included offense of felony-murder.

Respondent advances an alternative argument that renders the legal question moot in any event. He contends that the evidence was insufficient to support an instruction on second-degree murder. He directs us back to his argument regarding the sufficiency of the evidence of kidnapping. He asserts that not only was the evidence of kidnapping sufficient, there was no substantial evidence to the contrary from which the jurors could have concluded that the perpetrator in this case committed any crime other than felony-murder/kidnapping. (RB, p. 224.) But if respondent were serious in this assertion, he would address the details of appellant's exposition of the deficiency of the evidence regarding the kidnapping. For if this deficiency did not meet the standard for insufficient evidence to require reversal of the kidnapping conviction, it does not follow that the evidence was not nonetheless weak, or that this weakness could not provide the basis from which a rational trier of fact could have conceived a reasonable doubt as to appellant's guilt for forcible kidnapping. Merely to say that "there was absolutely no evidence that Danielle walked out of her home the night she was last seen alive" (RB, p. 225) is not only to ignore who has the burden of production, persuasion, and proof (see above, p. 121), but also to ignore the resounding absence of some sign or remnant of evidence attributable to this otherwise inexplicably untraceable intrusion that occurred in this case. (AOB, pp. 355-358.) There was here indeed "substantial evidence the defendant [was] guilty of the lesser offense, but not the charged offense." (*People* v. *Moye* (2009) 47 Cal.4th 537, 556; *People* v. *Breverman*, *supra*, 19 Cal.4th 142, 162.)

But perhaps the following is, in respondent's view, the real clincher: "Most significantly, that the jury found Westerfield guilty of kidnapping as a substantive offense obviates his claim that there was a substantial basis from which the jury might have believed the abduction was something other than a kidnapping or that someone else took Danielle." (RB, p. 224.) But what respondent calls "most significant[]" is most tautological. For *if* second-degree murder is a lesser-included offense of first-degree felony-murder, and is so in the instant case

because the evidence allowed the jurors to reject the element of kidnapping in the crime of murder, then a verdict on the substantive crime of kidnapping simply duplicates the improper all-or-nothing choice given to the jurors on the murder charge. Respondent might just as well have argued that the verdict of guilt for first-degree murder itself "obviates [appellant's] claim that there was a substantial basis from which the jury might have believed the abduction was something other than kidnapping . . . ." And this argument is clearly fallacious. (*People* v. *Ramkeesoon* (1985) 39 Cal.3rd 346, 352.)[18]

In sum, there is evidence here that justifies instruction on second-degree murder. The record therefore is paradigmatic for the resolution of the legal question of whether second-degree murder is the lesser-included offense of first-degree felony-murder. For the reasons stated, it is; and the Eighth Amendment violation that results from the instructional failure in this case (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628), requires reversal of appellant's capital conviction. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ramkeesoon*, *supra*, 39 Cal.3rd at p. 352.)

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[18] Although the crime of false imprisonment is a lesser-included offense of the crime of kidnapping (*People* v. *Magana* (1991) 230 Cal.App.3rd 1117, 1120-1121), there was no basis for submitting it to the jurors in this case as a lesser included offense. Definitionally, false imprisonment is lesser-included because it lacks the element of asportation. (See *Scofield* v. *Crticial Air Medical* (1996) 45 Cal.App.4th 990, 1000-1002.) False imprisonment is deemed a felony when it is "effected by violence, menace, fraud, or deceit" (Pen. Code, § 237), but "violence and menace" is congruent with the element of force or fear in kidnapping, while "fraud or deceit" are *additional* elements in the lesser offense that disqualify it as an included offense. Although false imprisonment by fraud or deceit fits the evidence in the instant case, the presentation of this alternative to the jury was exclusively within the power of the prosecution. (*People* v. *Birks* (1998) 19 Cal.4th 108.)

XV.
REPLY CONCERNING REQUEST TO INSTRUCT ON FIRST-DEGREE PREMEDITATED MURDER

The fifteenth claim was contingent on rejection of the fourteenth. In the fifteenth, the contention was that the requested instruction on first-degree murder should have been given because there was evidence to support it, and because there was an obligation on the court to instruct the jurors on the general principles of law that were "closely and openly connected with the facts before the court, and which [were] necessary for the jury's understanding of the case." (*People* v. *St. Martin* (1970) 1 Cal.3rd 524, 531.) This was all the more important here to stymie the prosecution's encroachment on the judicial function to control the law of the case – an exclusive power that Judge Mudd in fact improperly surrendered to Mr. Dusek. (AOB, pp. 367-370.) Respondent applies Ockham's razor to argue only that there was insufficient evidence to support a finding of, and therefore an instruction on, premeditation and deliberation. (RB, pp. 225-226.)

Appellant had argued that the evidence for premeditation and deliberation was derived from the inference that the taking of the child had been thought out; that the disposing of her body had been thought out; and that the time available in between these two poles allowed for thinking out the homicide itself. Certainly if Westerfield's use of the pronoun "we" would have been construed as incriminating evidence, then the inference is unmistakable that he had to have taken time to consider beforehand and reflect on what he should do with the child. (*People* v. *Houston* (2012) 54 Cal.4th 1186, 1216; *People* v. *Mendoza* (2011) 52 Cal.4th 1056, 1069.) That one of the choices reflected on was homicide is inferable from the homicide itself.

Respondent's criticism that "Westerfield speculates that the jury could have found that there must have been a plan, absent any evidence as to what that plan was" (RB, p. 226) is simply off the mark. Premeditation and deliberation does not

require a plan, but requires a certain quality of reflection upon the choice of whether or not to kill. (*People* v. *Houston*, *supra*, 54 Cal.4th at p. 1216; *People* v. *Mendoza*, *supra*, 52 Cal.4th at p. 1069.) There is evidence here, not necessarily of a plan, but of a choice, and one that was made over the course of time under circumstances that, if believed, would have focused the defendant's attention on that choice. This was sufficient evidence to support an instruction on first-degree premeditated murder.

PENALTY PHASE ISSUES

XVI.
THE ADMISSIBILITY OF THE JENNY N. INCIDENT AS A FACTOR-B CRIME

The sixteenth claim was the first penalty phase issue raised in the opening brief, and it was argued therein that the Jenny N. incident should have been excluded insofar as it did not qualify as "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, factor (b).) The focus in the argument was to find a defining limit in the statutory terms "force or violence" in order to determine whether the undeniable physical touching fell within the definition. This amounted to the question of whether the definition of "force and violence" for the crime of battery, which consists in "the slightest touching, if done in an insolent, rude, or angry manner" is within the meaning of "force or violence" as used in section 190.3(b). (AOB, pp. 389-393.)

Respondent's counter-argument begins by dismissing appellant's "thorough explanation of the proper definition of 'force or violence' and the significance of the use of the disjunctive" as superfluous. (RB, p. 230.) This is so because "this Court has clearly spoken as to the degree of force required." (RB, p. 230.) In *People* v. *Raley* (1992) 2 Cal.4th 870, respondent points out, this Court stated that "[f]or the purpose of admissibility under section 190.3, factor (b): '[T]he force requisite . . . does not mean bodily harm but the physical power required in the circumstances to overcome [the victim's] resistance.'" (*Raley* at p. 907, quoting *People* v. *Jennings* (1988) 46 Cal.3rd 963, 983, some internal quotation marks omitted here.) (RB, p. 230.) This Court further stated in *Raley* that "[w]e have recognized inequality in size between the perpetrator and the victim as an element of such physical power." (*Raley, ibid.*) Respondent caps off his reasoning with a laconic: "Inserting one's finger into a sleeping child's mouth is a forceful act." (RB, p. 230.)

Whether the "explanation" of "force or violence" in the statute was necessary or not, appellant takes respondent's invocation of a standard measured by the sufficiency of the act overcome a victim's resistance to it under the circumstances as a concession that the special definition of "force and violence" in the crime of battery as the slightest offensive touching is below the threshold of admissibility for section 190.3, factor (b) evidence. That the "slightest offensive touching" is not sufficient for this purpose should be self-evident. For the "explanation" proffered by appellant in the opening brief, for all its appearance of technical analysis, is but an exposition of the ordinary meaning of the phrase "force or violence" augmented by an appreciation of its statutory context of death-penalty aggravators. (See *Johnson* v. *United States* (2010) 559 U.S. 133, 130 S.Ct. 1265, 1270-1271.)[19]

Was the use of force, the attempted use of force, or the implied threat of the use of force in the Jenny N. incident of such a nature as would be sufficient under the circumstances to overcome the will of the victim? One may first note that in terms of the *actual* contact, it did not overcome the will of the victim, who responded to the fondling of her teeth by biting appellant's fingers. The latter

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[19] In *Johnson*, the Supreme Court was called on to determine whether a Florida conviction for the crime of battery (which has the same definition as California's battery) qualified for a federal recidivist enhancement that imposed addition punishment for prior a conviction of a " 'violent felony,'" defined as a felony that " 'has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .'" (*Id.*, 130 S.Ct. at p. 1268, quoting 18 U.S.C. section 924(e)(2)(B)(i).) In rejecting the Government's claim that "force" should be understood in accord with the special common-law usage in the crime of battery, Justice Scalia, writing for the majority stated: "Although a common-law term of art should be given its established common-law meaning [citation], we do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately, context determines meaning [citation] and we 'do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense.' [Citation.] Here we are interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felon[ies],' § 924(e)(2)(B)." (*Johnson*, *id.*, at p. 1270.) *Here* we are interpreting a statutory aggravator for assessing the imposition of a death penalty.

immediately retreated without saying or doing anything else. One may compare this with the battery that occurred in *People* v. *Thomas* (2011) 51 Cal.4th 449, which respondent claims supports his position. (RB, p. 231.)

In *Thomas*, the defendant followed a co-worker to her car, and as she sat in the driver's seat, he leaned into the vehicle, and sucked on her neck, leaving a bruise; he retreated apologizing when she cursed at him in displeasure. (*Id.* at pp. 459, 504.) This was admitted as a factor (b) crime of battery, and this Court held that there was no error in allowing this evidence as a factor (b) crime. (*Id.*, at p. 504.) For in *Thomas*, the defendant applied force sufficient to leave a physical mark on the neck of his co-worker, who was trapped in her car. This is not the same as rubbing the teeth, or even inserting a finger in a sleeping, or apparently sleeping, child's mouth.

The incident in *Thomas* also appears more ominous when considered in light of the category of "attempted use of force or violence or the express or implied threat to use force or violence." In *Thomas*, there was no indication that the defendant and his female co-worker had anything other than a co-employment relationship. To be followed by such a person for no reason related to work is at least menacing in an inchoate fashion. This inchoate menace culminated in *at least* an implied threat of force or violence, when the defendant trapped the woman in her car not only by his full body blocking her egress, but by his mouth attached to her neck with sufficient pressure to leave a bruise. This was *at least* an implied threat of force and violence quite beyond the technical meaning of those terms in the crime of battery. In the Jenny N. incident, appellant was in his own daughter's room, where it was not unusual or menacing for him to be; his hovering over the child, who was his niece, did not constitute any restraint or, as in *Thomas*, false imprisonment; and his touching was not such as to leave a mark or cause

bodily harm, let alone to coerce an unwilling victim, who in this case was successful in her rebuff insofar as there was no intent to coerce or use force.[20]

Was the actual touching in the Jenny N. incident an imminent harbinger of a greater force than would qualify as an attempted use of force or violence or at least the implied threat of force or violence within the meaning of section 190.3, factor (b)? There is nothing surrounding the incident that indicates this. The incident ended not with appellant escalating his aggression or even reflexively lashing out at the child when she bit him, any of which might be the basis for inferring an intent, and therefore and attempt or implied threat. It is in this category that the *Raley* "circumstances" of disparity in size and age *might* come into play. But in assessing this one must keep in mind that the purpose of 190.3, factor (b) is to show, *not* that the defendant was physically capable of using force sufficient to overcome resistance, but to show his character for violence. Thus, physical power that *could* overbear the will of the victim means nothing in this context unless there is evidence that the actor intended to exploit, or more or less consciously exploited his physical advantages so as to at least imply a threat of coercion or duress against the person threatened.[21]

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[20] This Court's analysis in *Thomas* was much more compact than appellant's here. The Court states in that case: "Defendant concedes that 'this was a battery and thus involved the use of force in the strict sense.' The evidence thus was admissible under section 190.3, factor (b) as 'criminal activity by the defendant which involved the use or attempted use of force or violence.'" (*Id.*, at p. 504.) It seems unlikely that these brief sentences stand for the proposition that the threshold for factor (b) admissibility is "the slightest offensive touching" and that battery is a factor (b) crime as a matter of law and not, as it is supposed to be, a matter of fact. As seen from above, there is much more to be said in justifying the incident in *Thomas* as a section 190.3, factor (b) crime.

[21] Justice Mosk in his concurring opinion in *People* v. *Jackson* (1996) 13 Cal.4th 1164 deemed this to be the meaning of "threat" in the phrase "implied threat to use force or violence" in section 190.3, factor (b). (*Jackson, id.*, at pp. 1254-1257, Mosk, J., conc.)

Here, the evidence showed that Westerfield was in fact trying to *avoid* any coercive or threatening appearance. Again, he was present in a room in his own house where his own daughter was sleeping. Thus, his mere presence there even at that time of night was not menacing. Further, Jenny N. was asleep there with her sister and cousin. Appellant knew or thought she was asleep when he touched her mouth with his fingers, and, when she bit his fingers, he did not use counterforce or even respond reflexively, except to immediately retreat from the room without a word, let alone with a warning or threat to her if she disclosed what had happened, which in fact she did do. The disparity of size and age were irrelevant and unsignifying in the circumstances of this case.

The case of *People* v. *Espinoza* (2002) 95 Cal.App.4th 1287 is illuminating in this regard. In *Espinoza*, the Court of Appeal reversed a finding of duress under Penal Code section 288(b), which proscribes lewd and lascivious acts on a child under 14 committed by means of ""force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." The evidence showed that in the early morning hours, defendant would come into his 12-year-old daughter's bedroom, climb into bed with her, and rub her breasts and vagina. He did this on five occasions. The daughter, L., who was in special education classes and of limited intelligence, was frightened and scared, but she said and did nothing. The touchings were uncomfortable to her but not painful. (*Id.*, at pp. 1292-1293.) In reversing the duress findings, the Court analyzed the evidence as follows:

> "The only way that we could say that defendant's lewd act on L. and attempt at intercourse with L. were accomplished by duress is if the mere fact that he was L.'s father and larger than her combined with her fear and limited intellectual level were sufficient to establish that the acts were accomplished by duress. What is missing here is the 'direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable

person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' [Citation.] Duress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat . . . .' [Citation.] No evidence was adduced that defendant's lewd act and attempt at intercourse were accompanied by any 'direct or implied threat' of any kind. While it was clear that L. was afraid of defendant, no evidence was introduced to show that this fear was based on anything defendant had done other than to continue to molest her. It would be circular reasoning to find that her fear of molestation established that the molestation was accomplished by duress based on an implied threat of molestation." (*Espinoza*, *supra*, at p. 1321.)

The Court in *Espinoza* was applying a definition of duress that is similar to the "force or violence" of section 190.3, factor (b), and found the evidence wanting based on the failure to establish that the defendant exploited or used his status as the girl's father or his size or anything else that suggested an intent to use, or a consciousness of using, coercion or force. In the instant case, the evidence is even more deficient in that the touching in the Jenny N. incident did not even approach the act of laying hands on breasts or genitalia as in *Espinoza*.[22]

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[22] It is doubtful, or at least unclear, that as a section 288(b) case, *Espinoza* survives the understanding of the terms "force" and "duress" as set forth in this Court's opinion in *People* v. *Soto* (2011) 51 Cal.4th 229, which holds that force, duress, and menace in section 288(b) does not require proof that the act was committed against the victim's will, and that actual consent by the victim is neither an affirmative defense nor a negation of the element of duress, which is to be measured objectively by whether the act would be coercive to a reasonable person. (*Id.*, at pp. 245-246.) This, however, was not the understanding of the law at the time *Espinoza* was decided (*Id.*, at pp. 250-253, Werdegar,J., conc. and diss.), and, the *Soto* interpretation of an element of the crime defined in section 288(b) is not the ordinary meaning of force or duress applicable generally nor is it specifically applicable to section 190.3, factor (b). (See *People* v. *Raley*, *supra*, 2 Cal.4th 870, 907; see also *Johnson* v. *United States*, *supra*, 130 S.Ct. 1265, 1270.)

A range of further comparisons will further help place the instant case in its proper perspective.

In *People* v. *Jennings*, *supra*, 46 Cal.3rd 963, this Court affirmed the prosecution's use as a section 190.3, factor (b) aggravator an incident in which appellant committed lewd acts and oral copulation in his 13-year-old sister-in-law. (*Id.*, at p. 980.) The latter was visiting her sister's home. She was sleeping on the couch when six-foot tall, 170 pound defendant lay down next to her, who was five-two and 100 pounds, turned her on her back, got on top of her, and accomplished the acts in question. She was " 'too scared'" to cry out. (*Id.* at pp. 982-983.) Here the overt sexuality of the acts was coercive, especially under the circumstances of a family relationship. *Jennings*, however, differs from *Espinoza* in that the defendant in *Jennings* actually turned the victim over, and then engaged in an even more intrusive sexual act than the fondling that occurred in *Espinoza*. This, and the disparity in size that was operating in *Jennings* certainly established at least an "implied threat to use force or violence," and if the Jenny N. incident is even more deficient in evidence than that in *Espinoza*, it falls far short of the incident in *Jennings*.

In *Raley*, in one incident, defendant told six-year-old neighbor, Michele S., that " 'bad things'" would happen to her unless she went with him into his house, where, in his bedroom, he then instructed her take off her clothes while he did the same. They then lay in his bed body-to-body naked. (*People* v. *Raley*, *supra*, 2 Cal.4th at p. 907.) In *Raley*, the disparity in size and age, coupled with the threat of " 'bad things" clearly established at least an "implied threat to use force or violence."

In another incident in *Raley*, the sixteen-year-old defendant invited seven- or eight-year-old neighborhood child, Tammy M., into his bedroom to show her something. He shut the door, told her to undress from the waist down, and then moved her hand to his naked penis. He wanted her to get on top of him, but at that point his mother came home. Defendant pushed the girl out of the window,

warning her that if she said anything about this incident, he would beat her up. (*Id.*, at p. 908.)

> "Defendant may be correct to argue that the evidence was insufficient to support a conviction for lewd act with force or coercion, as defined by section 288 subdivision (b).[23] There was little or no evidence apart from the fact of disparity in size and age, that defendant used force or violence beyond the force necessary to accomplish the lewd act. [Citations.] Nonetheless, there was evidence that the entire continuous course of criminal conduct involved the threat of force or violence. [Citation.] When there was some sound indicating interruption by defendant's mother, defendant pushed Tammy M. out the bedroom window and warned that if she told anyone, he would beat her up. Thus the criminal activity as a whole involved an *express* threat of violence, within the meaning of section 190.3, factor (b)." (*Raley*, *supra*, p. 908.)

In the Jenny N. incident there was no express threat of violence. Further, to the extent that the continuity of the Jenny N. incident was bordered at one terminus by appellant's entry into his daughter's room in his own house, and at the other terminus by his awareness that Jenny was awake, there was no *implied* threat of force here either. This is much different than Raley's having a seven-year-old child, not a member of his family or household, come into his bedroom and strip from the waist down.

Respondent expends a good deal of his argument elaborating on how the evidence was sufficient to establish the crime of lewd and lascivious acts on a child under 14, especially in regard to the element of that crime requiring sexual intent (RB, pp. 231-233), which, of course, is not the central question in assessing the element of force or violence in a section 190.3, factor (b) aggravator, except to the extent that the nature of the sexual acts and the intent informing those acts

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[23] *Raley* is of course pre-*Soto*.

contribute to the coercion or duress under the circumstances. Again, the evidence of sexual intent, not overwhelming in itself, is not manifest in an act that falls far short of the sexual acts in *Espinoza*, where defendant fondled his daughters breasts and genitals, or in *Raley*, where defendant had the children take off their clothes, or in *Jennings* in which a significantly larger defendant got on top of the victim and orally copulated her.

Finally, respondent claims that there was no prejudice in any event because of the force of the horrendous details of the murder itself, and the victim impact evidence that was concomitant with this. (RB, p. 233.) This is but a cursory response to appellant's analysis of prejudice (AOB, pp. 400-403), and at the very least should have addressed the salient problem: the undue weight this equivocally sexual, but otherwise strange, episode would have in the balance tipping the scales to death in a case where, if the evidence of child murder was horrendous, the defense case in mitigation was amply substantial. Where the scale in the trial court required the balance to weigh *substantially* more in favor of death, respondent falls far short here in the reviewing court where he is required to show *beyond a reasonable doubt* that the error was harmless, whether that error is one of state law or one of federal constitutional law. (*People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XVII.
REPLY COCERNING THE LABELING OF THE FACTOR (B) CRIME

Appellant argued in the seventeenth claim of the opening brief that if the Jenny N. incident was admissible, the trial court abused its discretion in labeling it a lewd and lascivious act on a child under 14 when that aspect of the act was not relevant to its factor (b) purpose and when the crime of battery was available for nominal purposes. Respondent's three-page answer (RB, pp. 233-236) is contained concisely in this one sentence: "But it was a lewd and lascivious act on a child under 14." (RB, p. 235.) The answer misses the point. The nominal designation of the criminal act is not the focus of section 190.3, factor (b) – a point that respondent concedes when speaking of prejudice. (RB, p. 236.)

One must consider here that although, in a penalty phase trial, the trial court has no discretion under Evidence Code section 352 to preclude otherwise admissible evidence of a factor (b) crime altogether (*People* v. *Box* (2000) 24 Cal.4th 1153, 1200-1201), the court still retains discretion as to the details of how and by what evidence the factor (b) crime is presented. (*Ibid.*) Here, the so-called rule of necessity, whereby provocative and inflammatory evidence should be avoided when it is superfluous (*People* v. *Schader* (1969) 71 Cal.2nd 761, 774-775; see also *People* v. *Holt* (1984) 37 Cal.3rd 436, 462; *People* v. *Cardenas* (1982) 31 Cal.3rd 897, 905; and *People* v. *Avitia* (2005) 127 Cal.App.4th 185, 194) should have prevailed. For although the judicial labeling of the factor (b) crime was not, strictly speaking, evidence, it was a provocative and inflammatory procedure when the irrelevant label "lewd and lascivious act on a child" was used superfluously to any legitimate purpose.

In regard to prejudice, respondent maintains that in speaking no more than the apparent truth, i.e., that the evidence clearly established lewd and lascivious acts on a child, the labeling was harmless. As noted in the opening brief, the truth of the matter was not at all apparent on the evidence, but more importantly, the

label *did* distract from the true focus of the evidence in this context, which should have been on its level, if any, of violence and force. In that regard, the labeling unduly magnified the *weight* of that evidence, which was not, even granting the sufficiency of the evidence for factor (b) admissibility, very high. Respondent cannot show beyond a reasonable doubt that the abuse of discretion here was harmless.

XVIII.
REPLY CONCERNING FAILURE TO SUBMIT FACTOR (B) FOUNDATIONAL FACTS TO THE JURY

In claim eighteen, appellant contended that the uniformly negative authority against submitting the question factor (b) force and violence to the jurors through CALJIC No. 8.87 had never taken into account Evidence Code section 403, which required the court to submit such foundational facts to the jury on the request of a party (Evid. Code, § 403(c)(1)), and in the instant case there was such a request. Further, as appellant argued in the opening brief, the requirements of section 403 cannot be circumvented by a characterization of "force or violence" as a question of law, which characterization is misleadingly inaccurate. (AOB, pp. 409-412.)

Respondent answers that Evidence Code section 403 does not apply because Penal Code section 190.3 factor (b) is a sentencing factor, the applicability of which in any particular trial is for a judge, and not the jury, to determine." (RB, pp. 239.) This not only begs the question insofar as a capital sentencing hearing is an evidentiary hearing before a jury, but it is contradicted by actual practice. For CALJIC No. 8.87 submits to the jury *as a foundational fact* the question whether criminal activity *vel non* has taken place. The question is why it does not submit to the jury as a foundational fact the question whether there is criminal activity that involves "the use or attempted use of force or violence or the express or implied threat to use force or violence" (Pen. Code § 190.3, factor (b))? Unless the Evidence Code does not apply to capital sentencing proceedings, which is not the case (Evid. Code, § 300; see *People* v. *Edwards* (1991) 54 Cal.3rd 787, see also *People* v. *McDowell* (2012) 54 Cal.4th 395, 431), then Evidence Code section 403(a)(4) should apply for the element of "force or violence" as well as for the element of "criminal activity."

Perhaps respondent does not make the effort to salvage an argument from this inconsistency because he believes the issue is forfeited in any event for failure

to press for a ruling on the request to include "force or violence" as part of the foundational portion of CALJIC No. 8.87. (RB, pp. 237-238.) But the request was made in writing. (11 CT 2785-2786.) The trial court announced on the record that it was aware of the request and even cited to the portion of the motion where the request was made. (59 RT 10408-10409.) And if the purpose requiring counsel to press for a ruling is to give the trial court an opportunity to avoid error (*People* v. *Valdez* (2012) 54 Cal.4th 82, 143) then the rule does not apply when the request is adequately before the court in writing, the court has notice of it, and the supposed default lay simply in failing to argue a written motion orally. (*In re Estate of Carithers* (1909) 156 Cal.422, 422-423; *Boin* v. *Spreckels Sugar Co.* (1909) 155 Cal. 612, 614-616.)

XIX.
REPLY CONCERNING THE STATUS OF PORNOGRAPHY EVIDENCE AT THE PENALTY PHASE OF TRIAL

The nineteenth claim addressed the penalty phase status of the pornography evidence admitted at the guilt phase of trial. If that evidence was before the jury due to legal error in joinder or in the guilt-phase admission of evidence, or both, then it was question of the prejudice emanating from these errors and projecting itself into the penalty phase; if there was no error in joinder or in the admission of any of the pornographic evidence, there was still an independent error in allowing the use of that evidence at all in the penalty trial as either factor (a) or implied factor (b) aggravation. (AOB, pp. 409-423.)

Respondent of course need not address the issue of prejudice projected from the guilt phase insofar as he does not share the premise that there was guilt phase error from which prejudice could project itself. But he still insists, as he did in his argument for joinder (RB, p. 141), that the pornography evidence was, at the penalty phase, independently admissible as factor (a) aggravation. (RB, pp. 239-243.) His reasoning in the nineteenth argument is partly the same as that adduced in the fifth argument: the pornography evidence, admitted in the guilt phase to show motive for the capital crime, thereby became a "circumstance[] of the crime of which the defendant was convicted in the present proceeding . . . ." (Pen. Code, § 190.3, factor (a).) (RB, p. 241.)

But respondent adduces, at least impliedly, a second reason that is independent of this one. Respondent notes that this Court has repeatedly stated that it has assumed, without deciding, that the phrase "circumstances of the crime" as used in section 190.3, factor (a), referred to the " 'circumstances' of *all* offenses, singular or plural, that were adjudicated in the capital proceeding . . . ." (*People* v. *Thomas* (2012) 53 Cal.4th 771, 821, emphasis in original; see also RB, p. 240.) Respondent suggests that this Court might here simplify the question by

declaring this assumption to in fact be the meaning of factor (a). This of course would mean that any crime properly joined under Penal Code section 954, and not severed in accord with the discretion of the trial court, becomes a factor (a) crime by virtue of joinder if for no other reason.

If one may presume to paraphrase the issue as framed by respondent, it seems to be this: either the pornography charge and its supporting evidence is a factor (a) aggravator as a matter of law by virtue of proper joinder; or it is a factor (a) aggravator as a matter of factual relationship to the charged crime. If this Court declares the first alternative to be the law, the question is settled summarily; if not, it is settled adversely to appellant on the facts of the case. Appellant will begin his reply with the first alternative, since that is more easily and straightforwardly disposed of.

Section 190.3 addresses what considerations may and may not be taken into account at a death penalty trial. The statute announces clearly and unequivocally that its application begins if and when "the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true . . . ." (Pen. Code, § 190.3, ¶ 1.) But, as the statute makes clear, it applies not only to first-degree murder with special circumstances, but also to any crime for which the defendant "may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code . . . ." (Pen. Code, § 190.3, ¶ 1.)

There is then a list of distinct and individual crimes that can trigger death penalty procedures, each of which will have a first phase for a guilt determination and a penalty phase for a potential capital punishment. Thus when the statute later declares the specific factors that may be considered, and describes factor (a) as "[t]he circumstances of *the crime* of which the defendant was convicted in the present proceeding . . . .", the plain meaning of the word "crime" in this context is *one* of the crimes specified in the first paragraph. This is a natural, unstrained

interpretation, and it is informed by the primary principle of statutory interpretation that first consults the plain meaning of the statute, based on the ordinary meaning of words in context. (*City of Alhambra* v. *County of Los Angeles* (2012) 55 Cal.4th 707, 718-719.)

But one may test this interpretation by consequences as well as context. Joinder of counts does not necessarily require that the conjoined non-capital crime be relevant to the proof of the capital crime. (*People* v. *Myles* (2012) 53 Cal.4th 1181, 1201; Pen. Code, § 954.1.)[24] Thus, the relationship between the joined crimes in a capital case may be random and irrelevant to each other. Can the word "crime" in section 190.3, factor (a) really be intended to include offenses that have *no* significance in the assessment of whether or not the death penalty is appropriate? If an offense becomes a factor (a) crime merely by the fact of joinder, then interpretation of "crime" as any offense that happens to have been adjudicated in the guilt phase produces an anomalous and unlikely result. (See *Johnson* v. *United States* (2010) 559 U.S. 133, 130 S.Ct. 1265, 1270.) If this Court is to declare a rule, it should declare that the word crime in section 190.3, factor (a) refers only to the list of capital crimes set forth in the first paragraph of that section.[25]

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[24] Pen. Code section 954.1 provides: "In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact."

[25] Of course, if joinder is based on the membership of the conjoined crimes in the "same class of crimes or offenses . . ." (Pen. Code, § 954), the question for the penalty phase would not be admissibility under factor (a), but under factor (b), and chances are high that a crime of the same class as murder will be admissible as a factor (b) crime in any event.

The true question then is the meaning, not of "crime," but of "*circumstances* of the crime". This raises the question here, and in general, regarding the status of Evidence Code section 1101(b) crimes and the status of a conjoined crime that has 1101(b) probative value. The argument in this regard has already been made. Sometimes 1101(b) evidence will be part of the historical sweep of the charged crime itself – part of its *res gestae* – so that it will be admissible under factor (a) as the "immediate temporal and spatial circumstances of the crime . . . ." (*People* v. *Tully* (2012) 54 Cal.4th 952, 1042.) But sometimes it will not. Is 1101(b) "motive" a circumstance that falls within the *res gestae*? It certainly is if it manifest in an overt event that forms part of the events proximately leading up to the crime. That is not the case here. There is no evidence that appellant even looked at his child pornography in a time period proximate to the kidnap and murder of Danielle Van Dam. Rather, the evidence of possession of child pornography is here supposed to establish on the part of appellant an abiding disposition that can prompt action at any time in any spatial area.

Is "motive" here then a circumstance like that of victim impact evidence, which "materially, morally, or logically" surrounds the crime? (*People* v. *Tully*, *supra*, 54 Cal.4th 952, 1042; *People* v. *Edwards* (1991) 54 Cal.3rd 787, 833.) If it is, it is *qua* motive, not *qua* specific acts of conduct used to prove motive. Indeed, this defines the status of 1101(b) evidence for the penalty phase in the same manner as the guilt phase. In the guilt phase, the specific acts of conduct are not admissible to show character or propensity (Evid. Code, § 1101(a)), but rather are admitted on a limited basis to establish a circumstantial inference of a relevant fact in the case (Evid. Code, § 1101(b)), and here the fact is "motive." Guilt phase or penalty phase, the 1101(b) evidence is admissible for one purpose and inadmissible for another. (See Evid. Code, § 355.) In the penalty phase, this means that the specific acts of conduct admitted to prove motive for the capital crime is admissible *only* for this purpose, and not to establish aggravation under

Penal Code section 190.3, factor (a), let alone under Penal Code section 190.3, factor (b).

All this is simply a straightforward application of principles of law that pertain to all criminal cases, indeed to all cases whatsoever, tried in California. Similarly, this Court's recognition that joinder and severance in a capital case require a special consideration (*Alcala* v. *Superior Court* (2008) 43 Cal.4th 1205, 1220-1221) implies an adjustment necessary to accommodate joinder and severance to the unique feature of a unitary trial with two separate phases each with its own verdict. (See *People* v. *Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1233 [[T]he penalty phase of a capital trial is merely a part of a single, unitary criminal proceeding."].) It is indeed this accommodation that helps preserve the plain meaning of section 190.3, factor (a) as referring to the *capital* crime adjudicated at the guilt phase.

From all this it follows, like night follows day, that the specific acts of conduct from which motive was inferable (if it was), were not in themselves factor (a) circumstances. But this is precisely what Mr. Dusek told the jurors (60 RT 10500-10501; AOB, p. 415), and this is precisely how he incorporated the specific acts of conduct into a speculative narrative of events that began with the Jenny N. incident, the continuing "fantasies" of sexual relations with children as evidence until all this culminated in the kidnap and murder of Danielle Van Dam. (60 RT 10516; AOB, p. 416.)

Finally, it should be noted that in the usual situation, there would be none of the difficulties or problems presented in the instant case. Most often, a conjoined crime will be of the same class of offense as the capital crime and therefore admissible in the penalty phase as factor (b) aggravation. Further, oftentimes an 1101(b) crime, if it does not qualify independently as a factor (b) crime, will be sufficiently intertwined with the events of the capital crime so as to qualify under factor (a). Finally, in the vast majority of those cases where the 1101(b) crime's probative value consists, in the penalty phase, only in a logical

comparison with the capital crime in order to establish a subsidiary fact by inference, then either the argument of counsel or limiting instructions will suffice to make sure the jurors do not use the 1101(b) evidence of specific acts of conduct as factor (a) aggravation.

Here, not only did the argument of counsel fail to keep the evidence within bounds, but, again, invited the jurors to take it out of bounds. As for a limiting instruction, the sheer volume of the pornography evidence that went to the jurors in this case clearly rendered the otherwise curative effect of such an instruction useless. (See *Rufo* v. *Simpson* (2001) 86 Cal.App.4th 573, 599 ["Whether it would be impossible for a jury to follow limiting instructions is determined by the circumstances of each case . . . ."].)[26]

Respondent's assertion that even if appellant's position is correct, "there is no reasonable possibility he would have received a verdict other than death had the pornographic evidence been excluded from consideration" is presented in a perfunctory fashion, as though four volumes of pornography, which included violent animé, bestiality, and videos of simulated rape that brought some of the jurors to tears in the guilt phase when they were shown, had no ponderable weight in the assessment of whether or not the death penalty should be imposed. This could only be possible if there was *no* evidence in mitigation in this case. There in fact was such evidence, it was substantial, and respondent's assertion that there was no possibility of prejudice is not even colorable.

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[26] This is also the answer to any contention that the failure here to request limiting instructions constitutes procedural default. (See *People* v. *Whalen* (2013) 56 Cal.4th 1, 52.)

XX.
REPLY CONCERNING PENALTY PHASE ASPECT OF ERROR IN ALLOWING SUSAN L.'S STALKING TESTIMONY AND OPINION EVIDENCE

The twentieth claim related back to the seventh claim regarding the trial court's admission of Susan L.'s testimony regarding the stalking incident and her opinion as to appellant's character for violence when he was intoxicated. Appellant contended that the errors in admitting this evidence had penalty phase prejudice that was not forestalled by any penalty phase rehabilitation of this evidence as rebuttal of appellant's good character evidence. Respondent expresses some hesitation about this as though the contention was that the failure to rehabilitate the evidence was in itself the error, and invokes procedural default in case the contention was that the evidence was admitted or used as bad character evidence. (RB, pp. 243-244.) But because the issue here is prejudice, and there was no procedural default in the guilt phase when the admissibility of the evidence was litigated, and because, moreover, an objection and limiting instruction would not have cured the prejudice at this point in the trial (*People* v. *Whalen* (2013) 56 Cal.4th 1, 52), procedural default is not an issue.

Beyond that respondent contends that when *any* good character evidence is adduced at the penalty trial on behalf of the defendant, then *any* bad character evidence may be introduced in rebuttal. Appellant's contention, however, is that the rules of relevance still apply, and the rebutting bad character evidence must be responsively relevant to the good character evidence it rebuts. Here, neither the stalking incident nor L.'s opinion as to appellant's character for violence when he was intoxicated was responsive. No more elaboration is required than that presented in the opening brief. (AOB, pp. 419-421.)

XXI.
CUMULATIVE ERROR

Appellant contended that the cumulative prejudice from the claims set forth in the previous penalty phase arguments (XVI through XX) were cumulatively prejudicial.[27] Respondent asserts that there was no error from which to accumulate prejudice, which leaves nothing to which appellant needs to respond.

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[27] In the opening brief these arguments were correctly described, but misidentified as arguments XVIII through XXII. (AOB, p. 422.)

XXII.[28]
REPLY CONCERNING VICTIM IMPACT EVIDENCE

Appellant argued that victim-impact evidence in the instant case was excessive because in its *typical* features, i.e., the murder of a seven-year-old girl, the evidence was sufficient to convey the nature, quality, and extent of the loss to the jurors without the elaboration of unique details. (AOB, pp. 424-425.) Respondent has drawn his line in general terms that are used to justify victim impact evidence. (RB, pp. 249-252.) There is nothing here that requires a specific response, and the issue is ready for submission to this Court's judgment.

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[28] Respondent is correct; appellant through inadvertence repeated XXI for this argument in his opening brief. (RB, p. 249.) In accord with respondent's correction, the numeration of the arguments will be adjusted in this brief.

XXIII.
SEQUESTRATION FOR PENALTY PHASE OF TRIAL

Appellant continued his narration of events whose accumulation, in his view, warranted sequestration at the very least for the penalty phase of trial. (AOB, pp. 426-427.) Respondent takes the same persistently benign view in averting his eyes from the real problems of allowing the jurors to be released into an overcharged atmosphere of communal emotions, which is more than a problem of "information" or "publicity," but rather one of communal pressure in favor of a specific outcome. All of this is discussed in detail in connection with the guilt-phase sequestration issue in both the opening brief (AOB, pp. 180-221) and in this brief (see above, pp. 60-62), including a detailed discussion regarding the appropriate standard of review, which respondent gets wrong. (RB, pp. 252-254.)

XXIV.
REPLY CONCERNING CHALLENGE FOR CAUSE TO JUROR 2

This is a continuation of issue III of this brief. If the denial of the request for additional peremptory challenges required a showing of an improper denial of a challenge for cause of a sitting juror, that improper denial was to Juror No. 2, who declared that he would automatically vote for death if appellant were found guilty of special circumstance murder. (AOB, pp. 431-434.) Respondent answers by trying to contextualize a record to soften the matter and bring it more within the realm of the trial court's discretion. (RB, pp. 260-262.) Whether the record resists this treatment or not is before this Court to judge. Appellant's argument in his opening brief answered respondent's in anticipation.

XXV.
REPLY CONCERNING REFUSAL TO PROVIDE ADDITIONAL PEREMPTORY CHALLENGES

This is a continuation of the second issue raised in this case, which has been discussed extensively in both the opening brief and in this reply brief. (See above, pp. 20-45.) Respondent basic line of attack has not changed: "[I]f Westerfield's point is that he pretrial publicity was so pervasive at the time he proceeded to trial exercising his speedy trial right and declining to move for a change of venue, then an infinite number of peremptory challenges was not going to assist him. Westerfield was not entitled to jurors who knew nothing about his case." (RB, p. 264.)

"Westerfield's point", however, is much clearer than respondent is either able or willing to give him credit for. "Westerfield's point" is that *he could* have gotten a fair and speedy trial in the proper venue *if* he was given additional peremptory challenges to guarantee a fair cross-section of the community not free from knowledge about his case, but rather free from passion and prejudice about his case. Again these points are adequately addressed above and in the opening brief, and if respondent is not careful to read them, appellant is confident that this Court will be.

XXVI.; XXVII.; XXVIII.; XXIX. STRUCTURAL CLAIMS REGARDING THE CONSTITUTIONALITY OF THE DEATH PENALTY

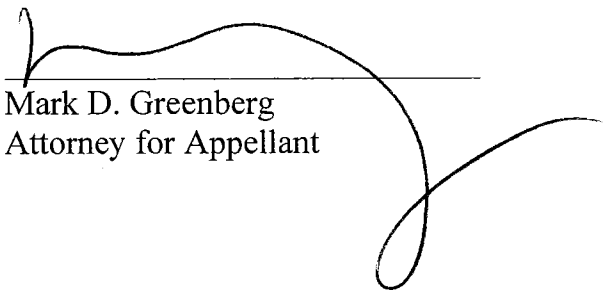
In the final arguments of the opening brief, appellant raised structural claims regarding the constitutionality of the death penalty: the failure of California's death penalty adequately to narrow the class of death-eligible offenders (AOB, pp. 440-442); failure to require a reasonable doubt standard for the death penalty (AOB, pp. 443-444); failure to require jury unanimity as to aggravating factors (AOB, p. 445); and lack of intercase proportionality review. (AOB, p. 446.) Because this Court has persistently rejected these claims, they were raised in the opening brief for purposes of preserving them for future review. This Court is of course free to change its mind on one or more of these claims.

CONCLUSION

For the reasons stated in this brief and in appellant's opening brief, judgment of conviction and sentence should be reversed.

Dated: May 10, 2013

Respectfully submitted,

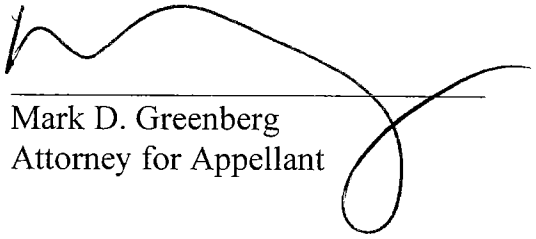


Mark D. Greenberg
Attorney for Appellant

CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 49,116 words, which exceed the limit of 47,600 words as set by California Rules of Court, Rule 8.630. However, this brief is proffered for filing pursuant to the permission of this Court, granted on May 6, 2013, to file a brief in excess of the limits set by the Rules of Court.

Dated: May 10, 2013



Mark D. Greenberg
Attorney for Appellant

[CCP Sec. 1013A(2)]
The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 484 Lake Park Avenue, No. 429, Oakland, California; that he served a copy of the following documents:

APPELLANT'S REPLY BRIEF

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on May 13, 2013 addressed as follows:

Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

California Appellate Project
101 Second St., Ste. 600
San Francisco, CA 94105
ATTN: Linda Robertson

Superior Court, San Diego County
220 W. Broadway, Rm. 3005
San Diego, CA 92101-3877

District Attorney of San Diego County
330 W. Broadway
San Diego, CA 92101

David A. Westerfield, T-77622
San Quentin State Prison
San Quentin, CA 94974

Steven Feldman, Esq.
934 23rd Street
San Diego, CA 92102

Robert Boyce, Esq.
934 23rd Street
San Diego, CA 92102-1911

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 13, 2013 at Oakland, California.

Mark D. Greenberg
Attorney at Law