IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. SCOTT LEE PETERSON, Appellant.	)	S132449 San Mateo No. 55500A

APPELLANT'S OPENING BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, San Mateo County

Honorable Alfred Delucchi, Judge

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INTRODUCTION

In April 2003, Scott Peterson was charged with the capital murder of his wife Laci and his unborn son Conner. The state's theory was that Scott killed Laci at home between the night of December 23, 2002 and the morning of December 24, 2002, suffocating her. (109 RT 20200, 20319.) In contrast, from day one on Mr. Peterson said he was innocent.

To prove how and where and when the crime occurred, the state called more than 150 witnesses in its case-in-chief. The trial court commented on this evidence after the state rested, accurately noting the state had presented no evidence showing either how or where the crime occurred:

> "There is no evidence in this case how this crime was committed. There is no evidence in this case where it was committed." (108 RT 20163.)

To its credit, the state did not dispute this finding. To the contrary, during closing arguments, the state itself went a step further, candidly conceding that it also could not prove *when* the crime had happened:

> "I can't tell you when he did it. I can't tell you if he did it at night. I can't tell you if he did it in the morning." (109 RT 20200.)

Despite the undisputed absence of any evidence as to how, where or when the crime occurred, the state asked a jury to convict Scott Peterson of murder and sentence him to die. Ultimately, the jury did just that.

It is probably fair to say that there are not many cases in the history of California where the state obtained a guilty verdict and death sentence for murder absent evidence of how, where or when the murder occurred. Nevertheless, Mr. Peterson does not dispute that there may be situations where a death verdict is warranted despite the absence of such evidence. But at the very least, a verdict under such circumstances raises a legitimate question as to how a jury could arrive at such a result.

Here, the answer may in part lie in the community in which the case was tried, and the manner in which the jury was selected. The Peterson trial generated an extraordinary amount of publicity. The trial judge noted that he had never seen anything like this case, and the prosecution itself conceded that this case generated more publicity than even the O.J. Simpson case. Hundreds of people showed up at the police station the night Mr. Peterson was arrested, many screaming "murderer;" according to the police, their main concern was that Mr. Peterson "didn't get lynched . . . ." (9 CT 3341.) More than a thousand prospective jurors were subsequently called for jury duty; the jury voir dire showed that virtually every one of them had been exposed to publicity about the case.

Nor was there any dispute that the publicity was extraordinarily prejudicial to the defense. Before hearing even a single witness, nearly half of all prospective jurors admitted they had already decided Mr. Peterson was guilty of capital murder. And in what may be a first for the American system of justice, outside the courthouse in which the parties would try to select a fair jury, a radio station posted a large billboard which had a telephone number for people to call in and vote:

Chronicle / Frederic Larson

The publicity continued throughout trial. A mob estimated at more than 1,000 people gathered at the courthouse to await the guilt phase verdict. After the guilty verdict was announced, the 12 jurors departing to await the beginning of the penalty phase -- and decide whether Mr. Peterson would live or die -- were met with wild applause and cheering.

Judge Girolami, the experienced Stanislaus County judge who presided over pretrial hearings, observed, "[i]n my over 30 years in this community, I've not seen anything like the publicity generated by this case." Judge Delucchi, the trial judge and also a respected, veteran jurist, agreed: "I've never seen anything like it before . . . . I can't account for the reaction of the public to this case." And as noted, the prosecution itself acknowledged that the pretrial publicity "surpassed the Manson case . . . and the O.J. Simpson case . . . ."

Despite these observations, the trial court refused to change venue from San Mateo county. Thus, Mr. Peterson was forced to pick a jury in a community that had plainly been saturated with negative publicity about the case.

But it got worse. Because of the publicity, the parties used a detailed jury questionnaire to aid the voir dire process. Over repeated and strenuous defense objection,

prospective juror after prospective juror was discharged simply because they wrote in their questionnaires that they were opposed to the death penalty. No questioning of these jurors was allowed even though every one of these jurors also stated in their questionnaire that they would consider death as an option in the case notwithstanding their views on the death penalty. Instead, each of the jurors was discharged because -- in the trial court's stated view -- "if you don't support the death penalty you cannot be death qualified."

As discussed in the following pages, there are numerous reasons why the guilt and penalty phase verdicts in this case must be reversed. They include the fact that the state was not entitled to "entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.) Yet that is exactly what occurred here when the trial court discharged juror after juror simply because "if you don't support the death penalty you cannot be death qualified." They include the state's admission of expert testimony as to the movement of bodies in water even though the state's expert candidly admitted he was "not an expert in that area." They include the state's admission of highly prejudicial dog scent evidence even though the dog had a dismal record of being wrong a remarkable 66% of the time. They include the exclusion of demonstrative video evidence offered by the defense showing that the state's theory of how the crime occurred -- Mr. Peterson dropping his

wife's body (weighted down by four anchors) over the side of his small boat in San Francisco Bay -- could not have happened without the boat capsizing.

These and other issues will be discussed in much greater detail below. Mr. Peterson recognizes, of course, that he was not entitled to a perfect trial. But he was still entitled to a fair one. As the substantial errors catalogued in this brief illustrate, Scott Peterson received neither. Reversal is required.

STATEMENT OF THE CASE

On December 3, 2003 the Stanislaus County District Attorney filed a two-count information against appellant Scott Peterson, charging him with the December 2002 murders of his wife Laci and their unborn child, Conner, in violation of Penal Code section 187. (9 CT 3284; 1 Supp. CT 4-5.)[1] The information added a multiple murder special circumstance in violation of section 190.2, subdivision (a)(3). (9 CT 3284.) Mr. Peterson pled not guilty and denied the special circumstance allegation. (9 CT 3284.) On January 9, 2004, the state filed its "Penal Code Section 190.3 Notice Regarding Aggravating Evidence." (10 CT 3691-3693.)

Trial was originally set for Stanislaus county. Prior to trial, Mr. Peterson filed a motion to change venue alleging that prejudicial publicity about the case rendered a fair trial impossible in Stanislaus county. (9 CT 3324-3393.) In its written papers the state conceded that the "pretrial publicity has been geographically widespread and pervasive" but nevertheless opposed the motion. (10 CT 3415; *see* 10 CT 3408-3604.) The trial court granted the motion. (RT PPEC at 86-87, 203-206.)[2] Over defense objection,

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[1] Citations to "CT" refer to the Clerk's Transcript on Appeal. Citations to "Supp. CT" refer to the Supplemental Clerk's Transcript on Appeal. Citations to "RT" refer to the Reporter's Transcript on Appeal.

[2] Citations to "RT PPEC" refer to the separately paginated one-volume transcript entitled "Post-preliminary Examination Certified Record."

however, the case was transferred to San Mateo county, only 90 miles away. (RT PPEC 256-264; 11 CT 3710.)

Jury voir dire began in San Mateo county on March 4, 2004. (11 RT 2025.) The parties agreed on a jury questionnaire; after nearly 1000 jurors had completed their questionnaires, the results showed that 96% of potential jurors had been exposed to publicity about the case and -- of this group -- 45% were willing to admit they had prejudged Mr. Peterson's guilt. (14 CT 4516, 4520; 10 RT 1960-1970, 2007-2014.) On May 3, 2004, defense counsel made a second motion to change venue based upon the pretrial publicity in light of the information contained in the questionnaires. (14 CT 4487-4716.) The state objected once again; this time, the trial court denied the motion to change venue. (36 RT 7094-7102.)

Opening statements in the guilt phase began on June 1, 2004. (18 CT 5626.) The state rested its case-in-chief on October 5, 2004. (19 CT 5934.) The defense rested its case on October 26, 2004. (19 CT 5960.) The jury began deliberations on November 3, 2004. (19 CT 5976.)

The jury deliberated all day on November 4, returning with a request to examine exhibits. (19 CT 5978-5979, 5983.) The jury deliberated all day on November 5,

returning with a request to see additional exhibits. (19 CT 5981-5982.) The jury deliberated all day on November 8. (19 CT 5983-5986.) The jury continued deliberating until lunchtime on November 9. (19 CT 5989-5990.) At that point the court dismissed juror 7. (19 CT 5990.)

Deliberations began anew on that afternoon, November 9, 2004. (19 CT 5990.) This second jury deliberated that afternoon, and again the next morning, until juror 5 was discharged late the next morning. (19 CT 5991.) On November 10, the jury began deliberations yet again. (19 CT 5992.)

This third jury deliberated the remainder of that day. (19 CT 5992-5993.) On the next day of deliberations -- November 12, 2004 -- the jury found Mr. Peterson guilty as charged in count one (first degree murder) and guilty of the lesser included offense of second degree murder on count two. (20 CT 6133.) The jury found the multiple murder special circumstance true. (20 CT 6133.)

The penalty phase began on November 30, 2004. (20 CT 6138.) The state's penalty phase case ended the next day. (20 CT 6143.) The defense case in mitigation began that same day and ended on December 9, 2004. (20 CT 6170.) The jury began

deliberating in the penalty phase that same afternoon. (20 CT 6172.) The jury deliberated all day on December 10. (20 CT 6174-6175.) Late the next morning the jury sentenced Mr. Peterson to die. (20 CT 6233.)

On March 16, 2005, the trial court denied Mr. Peterson's motion for a new trial, imposing a sentence of death. (21 CT 6462, 6468.) This appeal follows.

STATEMENT OF FACTS

Guilt Phase

A. Overview: A Single Question.

In December 2002, Scott and Laci Peterson lived at 523 Covena Avenue in Modesto. All parties in this case agreed that on the morning of December 24, 2002, Scott drove from Modesto to the Berkeley Marina.[3] The state's theory of the case was that when Scott left home at around 10:00 that morning, he had already killed Laci, and he was taking her body to the marina to put in San Francisco Bay. The defense theory was far different; Laci was alive when Scott left for Berkeley that morning and Scott had nothing to do with the killing.

The prosecution's theory thus turned on proving a single point: Laci was dead by the time Scott left home and drove to the Berkeley Marina. And the state certainly acted consistent with this view; as detective Brocchini himself would later admit, within days of

[3] Because numerous members of the Peterson family testified at trial, and to avoid confusion, both Scott and Laci Peterson may sometimes be referred to by their first names. Similarly, because numerous members of Laci's family (the Rocha family) testified, and again to avoid confusion, they too may be referred to by their first names. No disrespect is intended to the members of either family.

Laci's disappearance, police had already singled Scott out as the prime suspect. (58 RT 11288.) This explains why police collected and viewed much of the evidence in this case through a lens which assumed Laci had already been killed when Scott drove to Berkeley that morning, and focused exclusively on Scott Peterson as the murderer.[4]

But as also discussed fully below, virtually every link in the state's evidentiary chain of guilt was fundamentally flawed. It was not just that the state failed to establish the time, place and manner of the killing. More to the point, the evidence the state claimed conclusively established Scott's guilt was simply unreliable, and should never have been admitted in this capital trial.

Thus, the state relied on expert testimony to support its theory of the case. The state introduced expert testimony on dog scent evidence purportedly detecting Laci's scent at the Berkeley marina where Scott had launched his boat on December 24, and told the jury that if they believed this evidence, "then he's guilty . . . . as simple as that." The state introduced expert testimony about the movement of bodies in water, purportedly to prove that the conjunction of where the bodies were found and the prevailing winds and

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[4] If anything, detective Brocchini's admission was on the conservative side. According to Greg Reed -- a friend of Laci and Scott -- on the evening of December 24 itself police told him they already "had a good idea what had happened" in the case and they "thought Scott did it." (75 RT 14430-14431.)

tides established the bodies must have originated from the spot Scott said he had been fishing. Once again, the prosecutor told the jury that if it believed this evidence, "then that man's a murderer. It's as simple as that."

But as the American philosopher Alfred North Whitehead put it, "simple solutions seldom are." The state bet its case on these experts, telling the jury that if they were believed, Scott was a murderer. In this singular respect, Mr. Peterson agrees with the prosecution: Mr. Peterson agrees that, in the context of the evidence before the jury, the significance of these experts to the outcome of this case cannot be overemphasized. The facts of the case, set forth below, provide the Court with that context, against which the Court may itself evaluate the significance of the erroneously admitted evidence.

B. The Events Leading Up To Scott Peterson's Arrest For Murder.

1. Scott and Laci's background and the events leading up to December 24, 2002.

Scott and Laci Peterson met while both were living in San Luis Obispo, California. (45 RT 8819.) Laci was attending college at Cal Poly. (45 RT 8819.) Scott lived and

worked in San Luis Obispo and would later attend and graduate from Cal Poly as well. (46 RT 8968-8969.)

Over the next three years, Laci and Scott steadily dated, became engaged, and married in August 1997. (46 RT 8968.) Laci graduated from college that same year and Scott graduated in 1998. (46 RT 8968-8969.) After graduation, they started and ran a popular college hangout in San Luis Obispo called the Shack. (46 RT 8970.) Scott did the cooking and Laci worked up front. (47 RT 9165-1966.)

In 2000, they sold the Shack and moved to Modesto, California, where Laci was raised. (46 RT 8969-8970.) Laci and Scott lived with Laci's mom Sharon Rocha and step-father Ron Grantski for several weeks before renting and then buying a home in October 2000. (46 RT 8971.) Laci worked as a marketing representative for Southern Wine and Spirits and then as a substitute teacher. (46 RT 8972-8973.) Scott worked as a manager for Trade Corp., a specialized fertilizer company. (59 RT 11624, 11626.)

During this time, they remodeled their home and put in a swimming pool and a built-in outdoor barbeque. (46 RT 8976-8978.) They liked to socialize with friends but according to Laci's mother Sharon they did not do drugs, engage in any high risk behaviors, or have any psychological problems. (46 RT 8974-8975.) Laci's sister Amy

Rocha described the couple as "get[ting] along very well" and said she had never seen them fight. (46 RT 8912-8913.) Nor had Amy ever heard Scott raise his voice. (46 RT 8934.) Amy described Scott as someone who tried to give Laci everything she wanted. (46 RT 8936.) Laci's brother Brent Rocha described Scott and Laci's relationship as "very positive . . . [and] happy" and noted that they "appreciated [each other]." (47 RT 9229-9230.) One of Laci's childhood friend Stacy Boyers described Scott and Laci as "totally in love." (54 RT 10523.)

Laci became pregnant in the spring of 2002. (52 RT 10105-10106.) Laci went to prenatal yoga and Laci and Scott attended a weekly Lamaze class together. (46 RT 8926, 8929.) Laci's sister Amy recalled that Scott went to most of Laci's prenatal doctor appointments. (46 RT 8932-8933.) Amy testified that Laci and Scott both made lists of baby names and decided together to name their baby Conner. (46 RT 8936.) Laci's step-father Ron Grantski recalled that during Laci's pregnancy, Scott scheduled regular Sunday dinners with Ron and Sharon so that the family could "spend more time together because of the baby." (47 RT 9130.)

On December 23, 2002, at around 5:45 p.m. Laci and Scott met Amy at Amy's hair salon so she could cut Scott's hair. (45 RT 8835-8837.) Amy showed Laci how to use a curling iron to style her new cut. (46 RT 8916-8917.) While they were at the salon, Laci

called and ordered a pizza to pick up on the way home. (46 RT 8917.) Scott invited Amy to join them for dinner. (46 RT 8921.) Amy declined because she was meeting a friend who was visiting from out of state. (46 RT 8918.) Amy remembered that Laci and Scott "interacted with each other [like usual]" that night and nothing appeared "out of the ordinary." (45 RT 8858; 46 RT 8911.) At 8:30 that night, Laci spoke briefly with her mother Sharon about plans for Christmas Eve dinner the following night. (46 RT 8996-8997.)

2. The events of December 24, 2002.

On December 24, 2002, around 5:15 p.m., Scott called Sharon to see whether Laci was already at Sharon's house. (46 RT 8998-8999.) Scott told her that Laci's car was in the driveway and their dog McKenzie was in the backyard with its leash on. (46 RT 8999.) Sharon had not seen or spoken with Laci that day and suggested he call some of Laci's friends to see if she was with them. (46 RT 8999.)

Scott also called Amy. (45 RT 8876.) Amy described Scott as "panicked." (45 RT 8877.) Scott called some of Laci's friends and went door-to-door in the neighborhood. (54 RT 10513, 10515.) Neighbor Amie Krigbaum described Scott as "very, very upset" and "distraught." (48 RT 9510, 9523.) Laci's friends Stacey Boyers

and Lori Ellsworth described Scott as "upset" and "panicked." (54 RT 10529, 10565.) No one had seen Laci. (46 RT 8999-9000; 54 RT 10513.) Sharon's husband Ron called 911 and the local hospitals. (46 RT 9001.)

Scott later told police that before he left the house that morning Laci said she was going to walk their dog McKenzie. (51 RT 10005.) When he returned, Scott found McKenzie outside with his leash on. (46 RT 8999.) Indeed, at 10:18 that morning, neighbor Karen Servas confirmed that McKenzie was out in the street with his leash on. (48 RT 9422.) The leash was moist and covered in leaves and grass clippings. (48 RT 9423.) Servas put McKenzie in the Peterson's backyard and shut the gate. (48 RT 9425, 9428.)

When Scott told Sharon Rocha about McKenzie, her "first thought" was that Laci must have been walking the dog and thought they should look for her in the park. (46 RT 8900.) Scott, Sharon, Amy, Ron and other friends and family met at East La Loma Park near Laci and Scott's home to look for Laci. (46 RT 9005-9006.)[5]

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[5] Karen Servas initially told police that she found McKenzie at 10:30 a.m.. (48 RT 9454.) But after looking at sales receipts and a cell phone call from that morning and backtracking she thought it was closer to 10:18 a.m. when she found McKenzie. (48 RT 9422.) According to Servas, after she found the dog she then went to Austin's Patio Furniture, Starbucks, and then made a call to Tom Egan. Her 10:18 a.m. time estimate relied on (1) a receipt from Austin's Patio Furniture time stamped at 10:34 a.m. and (2) cell phone records showing a call to Egan at 10:37 a.m.. (48 RT 9422, 9435-9437.)

3. The police search of the Peterson home and Scott's truck, warehouse and boat.

Police officer Jon Evers contacted Scott as he was searching in the park for Laci that evening. (50 RT 9906-9907.) Evers asked Scott for permission to search the Peterson home. (50 RT 9906-9907.) Scott told Evers it was fine to enter the home and search it. (50 RT 9906-9907.) Officers later described Scott as "very cooperative" and noted that he did not "hesitate" when asked whether they could search his home. (50 RT 9907; 51 RT 10078-10079.) Police took control of Laci and Scott's home. (46 RT 9008.) Scott was not permitted back in the house that night unless he was accompanied by a police officer. (46 RT 9008-9009.)

Over the course of the next few days, detectives Al Brocchini and Craig Grogan -- with the help of numerous other police officers -- searched Laci and Scott's home. (57 RT 11166.) As detective Brocchini himself later admitted on cross-examination, because the detectives had already singled Scott out as the prime suspect in the case, they were specifically searching for any evidence that would link him to Laci's disappearance and possible murder. (58 RT 11288.)

There was not much to find. Just outside the Peterson home, officers found a bucket with two mops inside. (50 RT 9787.) The mops and bucket did not smell of

disinfectant or bleach. (50 RT 9851-9852; 51 RT 10070-10071.) Both were taken into evidence. (50 RT 9818.) When asked about the mops and bucket, Scott explained that Laci had mopped the floor that morning and he had taken the bucket and dumped the water outside when he returned that afternoon. (56 RT 11010-11011.)

Inside the house and on top of the clothes washer, officers found some dirty wet rags. (50 RT 9789.) These were also taken into evidence. (50 RT 9842.) Ultimately, the rags were no more sinister than the mop; Scott explained his assumption that their house cleaner Margarita Nava used the rags the day before when she cleaned the house. (57 RT 11130.) In fact, Ms. Nava later confirmed that she did indeed use the rags to clean the outside windows and the fireplace screen. (57 RT 11108-11109.)

Police found a curling iron out in the bathroom. (50 RT 9819.) Police also noticed that a rug was "scrunched" up. (50 RT 9789.) Police searched the home for any signs of blood using "an alternate light source." (57 RT 11164-11165.) No blood was found. (57 RT 11164-111165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) As one of the searching officers -- Derrick Letsinger -- forthrightly conceded, there were no signs at all of "foul play" in the house. (50 RT 9832.)

Moreover, as all officers made clear, Scott was extremely cooperative with police. As noted above, he permitted police to search and take control of his house. (50 RT 9907; 51 RT 10078-10079.) That same night, Scott allowed detective Brocchini to look at his cell phone and review his call history. (55 RT 10732-10733.) Next Scott consented to a search of his truck parked outside. (51 RT 10078-10080.) Scott voluntarily told detective Brocchini that he had a firearm in his glove box from a recent hunting trip. (55 RT 10748; 57 RT 11126-11127; 59 RT 11511.) Brocchini took the gun from the glovebox and put it into his pocket without telling Scott. (51 RT 10083; 55 RT 10748-10749.) The gun was later examined; it had not been fired recently. (59 RT 11603-11605.)

Inside the cab of the truck, Brocchini found a Big 5 Sporting bag with 2 new fishing lures still in the package and a receipt dated 12-20-02 for the lures, a 2 day fishing license for December 23 and December 24 and a salt water fishing pole. (55 RT 10746; 62 RT 12183-12184.) Scott gave officer Evers a receipt from the Berkeley Marina stamped 12:54 p.m. on December 24, 2002. (51 RT 10029.) Finally, Brocchini searched the large tool box in the back of Scott's truck and the truck bed where he found two tarps and some patio umbrellas. (51 RT 10081-10083.)[6]

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[6] Later the umbrellas and one tarp were found in a shed in the Peterson's backyard and the other tarp was found in a separate backyard shed with a gas leaf blower on top of it which was leaking gas. (55 RT 10741-10745.)

Scott also voluntarily consented to a search of his warehouse and boat. (51 RT 10038.) Inside the warehouse, police found Scott's 14 foot aluminum boat on a trailer with one circular concrete anchor inside. (51 RT 10044; 57 RT 11239-11240.) They also found (1) concrete dust (on Scott's trailer), (2) a fishing report about sturgeon fishing in the San Francisco Bay (on Scott's desk) and (3) a pair of needle nosed pliers with a single hair fragment, 5-6 inches long and dark, in the "clamping" part of the pliers. (57 RT 11239-11240; 67 RT 12962; 64 RT 12554-12558.) Detective Henry Hendee collected the pliers and the single hair and packaged them separately for examination. (64 RT 12555-12558.) The hair was consistent with hair found in Laci's hairbrush. (70 RT 13644.) As discussed more fully below, the pliers were so rusted that the state's own forensic expert would admit they had not been used recently. (86 RT 16467.)[7]

By the first week of January, Scott was under 24 hour surveillance. (58 RT 11295– 11305.) Scott's phones had also been tapped and by the third week in January there was a GPS tracking system placed on his truck. (85 RT 16275-16277; 94 RT 17770.)

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[7] When detective Hendee later opened the evidence envelope, there were two hairs, not one. (64 RT 12566.) Hendee was not sure whether the hair had broken or whether it had been two hairs that looked like one. (64 RT 12563-12567.)

4. The media frenzy begins on December 26, 2002.

By December 26, 2002, the media had set up camp outside the Peterson home. (46 RT 9017-9019.) By December 27, the media had blocked off the whole street. (47 RT 9142-9143.) According to Laci's stepfather Ron, it was "like nothing [he] had ever seen" before. (47 RT 9142-9143.) Brent Rocha described it as the media being "all . . . around" the Peterson's home. (47 RT 9248.) Neighbor Amie Krigbaum called it a media "feeding frenzy." (48 RT 9526.) She noted that the entire block in front of the Peterson home was blocked off with media and satellite trucks which continued for five months. (48 RT 9525.) The reporters would sometimes stay past midnight and then come back at four or five in the morning. (49 RT 9638.)

Ms. Krigbaum recalled that when Scott would come and go from the house, the media would take pictures of him, videotape him and shout questions at him. (48 RT 9525.) At one point, the media used a bullhorn and screamed "you murdered your wife, you murdered your child." (49 RT 9625.) Random people would drive by the home shouting "murderer." (49 RT 9625.) Neighbors were scared for their own safety. (49 RT 9625.) Instead of the media attention dying down, Ms. Krigbaum testified that it "got worse as time progressed." (48 RT 9525.)

5. Scott's repeated cooperation with police.

In the days following Laci's disappearance, Scott spoke extensively with police. He spoke with Detective Douglas Mansfield, Detective Craig Grogan, Detective Allen Brocchini, Detective John Buehler, Captain Christopher Boyer, Officer Jon Evers, and Officer Matthew Spurlock. (8 RT 1641; 50 RT 9867-9868; 51 RT 9999-10000; 55 RT 10715; 61 RT 11829-11830; 93 RT 17645-17646; 102 RT 19055.) He was repeatedly described as cooperative. (50 RT 9907 [Officer Spurlock describes Scott as "cooperative"]; 51 RT 10038 [Officer Evers describes Scott as "cooperative"]; 51 RT 10078 [Officer Evers describes Scott as "very cooperative"]; 55 RT 10715 [Detective Brocchini testified that Scott agreed to "sit down with [him] and . . . go over what [they] had talked about over the last few hours"]; 61 RT 11830 [Detective Mansfield described Scott as "very cooperative."].)

With respect to the morning of December 24, 2002, Scott told detectives that -- as was her usual routine -- Laci got up around 7 a.m. to watch the Today Show. (61 RT 11838.) When Scott got up about an hour later, Laci was mopping the floor. (61 RT 11820, 11838.) They then watched part of the Martha Stewart show. (51 RT 10004.)

Scott recalled that the episode included something on meringue. (100 RT 18769.)[8]

Scott said he left for a fishing trip to the Berkeley Marina at around 9:30 in the morning. (51 RT 10004.) He had purchased a rod and reel and a two day fishing license at Big 5. (61 RT 11820.) Laci planned to walk the dog and then go grocery shopping. (51 RT 10005; 61 RT 11821.) Scott explained that Laci's usual dog-walking route was to go to the East La Loma Park near their house, head towards the tennis courts, and then back to the house. (61 RT 11821.) The walk was "a mile loop" which took her about forty-five minutes. (61 RT 11821, 11839-11840.) Scott often walked this loop with Laci and McKenzie. (61 RT 11839.) When he left the house Laci was wearing black maternity pants, a white t-shirt and white tennis shoes. (61 RT 11823.)

Scott then drove to his warehouse to pick up the 14 foot aluminum boat that he had purchased two weeks before. (61 RT 11824, 11837.) At the warehouse, he checked his

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[8] Although the state would dispute this aspect of Scott's recollection as well, the state was wrong. In fact, on December 24, 2002, at 9:46 a.m. Martha Stewart did indeed discuss meringue on her show. (55 RT 10805-10806;100 RT 18769.) Despite the fact that meringue was discussed on the show -- and that he had reviewed the show specifically looking for any mention of meringue -- detective Brocchini wrote in his report that there was *no* mention of meringue on this date. (55 RT 10805-10806.) This false information was passed on to other detectives investigating the case. (55 RT 10806.) And it was even used in an affidavit seeking a wiretap on Scott's telephones. (55 RT 10807.) Finally, the state specifically told the jury in opening statements that "[o]n the 24th Martha Stewart didn't have a segment with meringue." (43 RT 8454.)

e-mail, cleaned up the office, put together a wood working tool called a mortiser, and unloaded tools from the green tool box in the back of his pickup truck. (61 RT 11841-11842; 93 RT 17655.) He thought he was at the office for about an hour. (61 RT 11841-11842.) Scott then drove to the Berkeley Marina. (61 RT 11824.) He spent about an hour in the water where he headed north towards an island which was later identified as Brooks Island. (61 RT 11844; 66 RT 12841.) He wanted to make sure that the boat was working properly. (61 RT 11844-11845.) Scott said that he did not have a map of area, but he had researched fishing in the bay on the internet. (56 RT 11040.) Scott put the boat back onto the trailer about 2:15 p.m. and headed back to Modesto. (61 RT 11845.) He planned to meet Laci at home around 4:00 p.m.. (61 RT 11845.) Scott tried to call Laci on the way home but got no answer. (51 RT 10006.)

When Scott returned to Modesto, he dropped the boat off at the warehouse and arrived home around 4:30 p.m.. (51 RT 10007.) Scott noticed that their dog McKenzie was outside with its leash on and the doors to the back patio were unlocked. (51 RT 10007.) Laci was not home but her car was in the driveway. (51 RT 10027.) Scott ate a couple slices of pizza, drank some milk and because his clothes were wet he put them in the wash and took a shower. (51 RT 10007-10008; 61 RT 11847.) When Laci still was not home, Scott called her mother Sharon to see if she was over at her house. (51 RT

10008.) Scott then called Laci's sister Amy and some of Laci's friends and went to several neighbor's homes looking for Laci. (61 RT 11850.)

Of course, the news that Scott had been at the Berkeley Marina on the day Laci disappeared was widely publicized within 24 hours of Laci going missing. (62 RT 12089, 12103-12104.) As Scott's defense counsel would later point out: "Only the deaf and dumb didn't know where . . . Mr. Peterson was that day." (10 RT 1998.)

A great deal of forensic and circumstantial evidence supported Scott's statements to police. As noted, Scott told police he went to the Berkeley Marina and said he had researched fishing in the bay on the internet. Scott gave police a receipt from the Berkeley Marina stamped 12:54 p.m. on December 24, 2002. (51 RT 10029.) Police found a fishing report about sturgeon fishing in the bay. (67 RT 12962.) Scott said that after he left the house, he went to his warehouse where he logged on to the internet and then built a mortiser. (56 RT 11021.) In fact, a search of Scott's work computer located at the warehouse showed internet usage between 10:30 a.m. and 10:56 a.m., during which someone researched how to assemble a mortiser. (83 RT 15753, 15759-15762.)

Sharon Rocha confirmed that on the evening of Laci's disappearance, Scott told her that Laci planned to go to the store and take the dog for a walk. (46 RT 9040.) Amy

Rocha recalled that Laci walked frequently around the time of her disappearance as Laci was conscious of her weight and staying fit during pregnancy. (46 RT 8926-8927.) Amy Rocha explained to police that Laci did yoga Mondays and walked daily or almost daily. (46 RT 8935.) Just a week before Laci's disappearance Laci and Scott spent a weekend in Carmel, California, with Scott's parents Lee and Jackie Peterson. (107 RT 19974.) Lee and Jackie both recalled that Laci walked for several hours around town shopping and then walked down to the beach and back up a hill which was 3/4 a mile to their hotel. (88 RT 16878-16880; 107 RT 19976, 19992-19993.) Laci's friend Kristin Reed confirmed that -- while Laci had stopped walking for awhile due to dizziness -- by the first part of December she was back walking again because she was concerned over how much weight she had gained. (58 RT 11405-11407.) [9]

At this point in the investigation, Laci's family and friends fully supported Scott. (46 RT 8912-8913, 9063; 47 RT 9229; 54 RT 10523.) Laci's mom Sharon "thought the world of [Scott]." (46 RT 9063.) Sharon had never seen Scott violent with Laci or even raise his voice. (46 RT 9063.) Amy Rocha agreed that she had never seen them fight nor had she ever seen Scott do anything "that would even remotely be characterized as

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[9] Although Sharon Rocha expressed a contrary view -- believing Laci had stopped walking in the neighborhood in November 2002 -- when Sharon heard that McKenzie was found with its leash on, Sharon's "first thought" was that Laci must have been walking the dog. (46 RT 8985, 9000.)

harming Laci." (46 RT 8912-8913.) Laci's step-father Ron told detectives that Laci and Scott had never been separated during their marriage, spent "90 percent of their time together" and that Scott was "supportive" of Laci. (47 RT 9132.) Ron recalled that even when Scott "should have been mad at Laci he wasn't." (47 RT 9131.) Laci's brother Brent described Scott and Laci as follows:

> "Great relationship, very positive, happy, you know whatever Laci asked for Scott did, she appreciated him and . . . he appreciated her." (47 RT 9229-9230.)

Brent had never seen Scott "get even remotely violent" with Laci. (47 RT 9277.) When detective Grogan asked Brent whether he thought Scott could have hurt Laci, Brent unequivocally answered "no." (47 RT 9229.)

Laci and Scott's friends agreed. Laci's childhood friend Stacy Boyers "thought the world of Scott." (54 RT 10523.) Scott and Laci's friend Greg Reed considered Scott and Laci to have a "great relationship" and had never heard a negative comment from either of them about their relationship. (75 RT 14440.)

6. Amber Frey reports having an affair with Scott.

On December 30, 2002, Amber Frey called the Modesto Police and reported that she was having an affair with Scott. (59 RT 11481.)

Amber and Scott first talked via telephone sometime in November 2002 and had their first date on November 20, 2002. (76 RT 14554, 14561.) They had a second date on December 2, 2002. (76 RT 14587-14590.) Amber's young daughter Ayiana accompanied them. (76 RT 14592.) Scott stayed the night at Amber's house and they saw each other the following evening as well. (76 RT 14600-14601.) Scott told Amber that he had never been married and did not have any children. (76 RT 14610-14611.)

They next saw each other on December 9. (76 RT 14614.) Scott admitted he had been married but lied and told her he had lost his wife. (76 RT 14619-14620.) Scott had also told Shawn Sibley -- a woman he had met through work and who introduced him to Amber -- that he had "lost" his soul mate. (60 RT 11711.) Scott and Amber next saw each other on December 11, 2002 and attended a birthday party together. (76 RT 14627-14628.) They last saw each other on December 14, 2002. (76 RT 14639.) Amber told police this was the last time she had seen Scott. (59 RT 11477-11478.) She had spoken with him by telephone since, including on the night of a candlelight vigil in honor of Laci.

(59 RT 11477-11478; 76 RT 14687.) During one of his earlier calls, Scott told her that he would be in Maine for Christmas and then in Europe for the New Year. (76 RT 14688.)[10]

After Amber contacted police, she taped all subsequent calls between herself and Scott. (76 RT 14719.) Police told Laci's family about the affair. (57 RT 11179.) At the same time, police falsely told Laci's family that Scott had recently taken out a life insurance policy on Laci for $250,000. (57 RT 11167-11169, 11173-11176, 11179.) Despite its falsity, the life insurance policy was also widely reported in the media. (57 RT 11173-11176.) After news of the affair and the recent life insurance policy came to light, Laci's family and friends no longer supported Scott. (47 RT 9144-9145; 57 RT 11177.)

7. Scott is arrested and charged with murder.

Several months later on April 13, 2003, the body of Conner Peterson was discovered on the shore of San Francisco bay, nearly one mile northeast of Brooks Island where Scott had been fishing on December 24, 2002. (61 RT 11871, 11880; 84 RT

[10] Scott told his sister Ann Bird that Laci knew about his affair with Amber. (97 RT 18252.) This was consistent with the testimony of Laci's mom Sharon Rocha that Laci knew of a prior affair Scott had when they lived in San Luis Obispo. (46 RT 9065.) Scott later apologized to Laci's mother and stepfather for not having come forward sooner about his affair with Amber. (97 RT 18259.)

15934.) The next day, the body of Laci Peterson was found on the shore nearly two miles northeast of Brooks Island. (61 RT 11990, 11993; 84 RT 15934.)[11]

Up until this point, Scott had never been convicted of a felony or a misdemeanor nor had he ever even been arrested. (96 RT 18118, 18157.) He had no prior criminal record of any kind. (96 RT 18118, 18157.) There was no history of domestic violence. (96 RT 18157.) Nor was there any evidence at all that Scott had a violent nature. (96 RT 18157.) To the contrary, despite an extensive police investigation into his past, law enforcement could not find anyone who had ever even had a physical fight with Scott. (96 RT 18157.) As noted, Scott and Laci's friends and family had never even heard him raise his voice with Laci let alone do anything "that would even remotely be characterized as harming [her]." (46 RT 8912-8913 *see also* 46 RT 9063; 47 RT 9277.)

There was no cause of death. There was no murder weapon. There was no confession. Nevertheless, on April 18, 2003, Scott was arrested and charged with the

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[11] Criminalist John Nelson found a piece of duct tape attached to Laci's leg. (70 RT 13667.) Attached to the duct tape was a pubic hair. (70 RT 13667.) Another pubic hair was found loose on her body. (70 RT 13667.) Neither of these pubic hairs belonged to Scott. (70 RT 13667.)

capital murders of his wife and child. (87 RT 16581.)[12]

As noted above, the state's theory was that Scott killed Laci in their home between the night of December 23 and the morning of December 24. (109 RT 20319.) Absent any evidence on the cause of death, the state theorized that Scott suffocated Laci. (109 RT 20200.) According to the state, Scott put the leash on McKenzie and let him loose in the neighborhood so that it would appear that Laci had been abducted while she walked

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[12] At the time of his arrest, Scott was staying in San Diego where his family lived. (95 RT 17976.) When he was arrested on April 18, 2003, Scott was carrying his brother's driver's license, a credit card belonging to his sister Ann Bird, $14,932 in cash and some camping equipment. (95 RT 17997; 102 RT 19095-19096, 19106-19107.) His hair and goatee had been "bleached." (99 RT 18620.) The state would later rely on this evidence to argue that Scott was about to flee the country. (109 RT 20313-20315.)

In fact, however, there was a far less nefarious explanation. Lee Peterson, Scott's father, testified that he and Scott were meeting to play golf that day. (107 RT 19997-19999.) Scott was carrying his brother's driver's license that day so that he could get a local's discount at the golf course. (107 RT 19997, 19999.) Police confirmed that, in fact, Lee Peterson had scheduled a tee time for four people that morning and there was a local's discount. (102 RT 19111, 19150.) And Scott's mother Jackie Peterson explained that she had accidentally withdrawn $10,000 from Scott's account (which she was a joint account holder on) and when the error was discovered she had given Scott the money to deposit back into the account. (107 RT 19969-19972.) The remaining money was from the recent sale of Scott's truck to his brother. (107 RT 19970-19971.)

As for fleeing the country, the fact of the matter is that Scott had *already* taken a work-related trip to Mexico in February 2003 -- when he was under suspicion for murder -- and returned to the United States. (94 RT 17811; 95 RT 17990.) When he was contacted by police at the parking lot, he did not insist on *Miranda* rights, he did not refuse to speak with police and he did not flee; instead, his first question was "have they found my wife and son?" (95 RT 18006.)

the dog. (109 RT 20202.) Then Scott moved the body to his Modesto warehouse by putting it in a toolbox in the back of his truck. (109 RT 20202-20203.) At the warehouse, Scott then attached homemade cement anchors to the body and placed it in the back of his 14-foot Sears-Roebuck boat which he then towed to the Berkeley Marina. (109 RT 20203-20204.) Finally, when he got to the marina he launched the boat and, once on the bay, he pushed the body (with the anchors) overboard. (109 RT 20203-20204.) As for motive, the state's theory was that Scott committed the crime either for financial reasons or to obtain freedom from Laci and Conner. (109 RT 20209.) The defense theory, of course, was that Scott had no motive at all to kill Laci, and did not do so. (110 RT 20376.)[13]

C. The State's Trial Evidence And Theories As To The Crime.

1. Evidence as to where and how the crime occurred.

As note above, after hearing all the state's evidence, the trial court itself concluded that the state had failed to present any evidence showing "how this crime was committed"

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[13] Veteran district attorney investigator Steve Jacobson had a very different view from his colleagues. Mr. Jacobson was an investigator with the Stanislaus district attorney for 13 years. (80 RT 15360-15361.) Before that, he was a police officer with the Modesto, Oakdale and Waterford police departments. Based on the evidence, Jacobson believed this crime could *not* have been committed by one person. (81 RT 15483-15484.)

or "where this crime was committed." (108 RT 20163.) Despite the court's observation, the state nevertheless theorized Scott killed Laci at their home.

But there was *no* physical evidence to support this theory. According to Detectives Skeltety and Hendee, despite thorough searches of the home lasting numerous days -- and begun on the same day Laci went missing -- police found *nothing* suggesting a crime occurred there. (57 RT 11164-11165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) No blood, urine, or tissue of any kind was found at the house. (57 RT 11164-11165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) Officer Letsinger noted there were *no* signs of "foul play" at the Peterson home. (50 RT 9832.) Nor did Karen Servas -- the Peterson's next door neighbor -- hear screams or other suspicious noises coming from the house on the night of the 23rd or the morning of the 24th. (48 RT 9444-9448.) Finally, there were no defensive marks or wounds on Scott at all. (64 RT 12452.)

Even the *potential* evidence police found had no connection at all to Laci's disappearance. As noted above, officer Letsinger testified that when the Peterson home was first searched he found two mops and a bucket sitting just outside the home which . he thought were "suspicious." (50 RT 9787, 9817.) The state's theory was that Scott used the mops and bucket to clean up after the killing. (109 RT 20242.) But contrary to

the state's position, the state's own criminalist Pin Kyo admitted that *nothing* of evidentiary value was found on the mops or bucket; neither blood, tissue, or anything that supported the state's theory that Scott used it to clean up a crime scene. (89 RT 17015.)

Moreover, the state's theory as to how the crime occurred involved Scott smothering Laci. (109 RT 20200.) Despite advancing this theory, detective Grogan himself admitted that although the state had collected pillow cases at the scene, it had elected *not* to test even a single one. (100 RT 18786-18787.) And state criminalist Kyo added that the state did not test any of the pillows either. (90 RT 17139-17142.) Thus, detective Grogan conceded that there was no "evidence . . . that shows smothering, strangulation, or asphyxiation." (100 RT 18787.)

The state next theorized that Scott used his truck to take the body to his warehouse. (109 RT 20202.) Once there, he transferred the body into his boat, hiding it under a tarp. (109 RT 20203.) To support this part of its theory, the state offered demonstrative evidence that Kim Fulbright -- a pregnant woman who worked for the prosecutor's office -- could fit into the toolbox in the back of Scott's truck as well as the boat. (62 RT 12173, 12186, 12192.) But according to detective Hendee and state criminalist Kyo there was a more immediate problem with this part of the state's theory: Scott's truck contained no evidence that it had been used to transport a body. (67 RT 12946-12952, 12959-

12960, 12963-12965; 90 RT 17149-17156.) There was no blood, urine, or other tissue found in his truck or toolbox. (67 RT 12946-12452, 12959-12960, 12963-12965; 90 RT 17149-17156.) None of Laci's hair was in his truck or toolbox. (67 RT 12956-12958; 70 RT 13687.) The tarps found in the back of Scott's truck -- which the state theorized Scott used to wrap the body in -- contained no relevant evidence whatsoever. (66 RT 12876.) There was no blood, urine or other tissue found on either tarp. (66 RT 12876.) Nor was there any evidence that a body had been at the warehouse. (66 RT 12881-12891.)

But the state did have evidence of concrete dust on Scott's trailer. (67 RT 13062-13063; *see* People's Exhibits 122B-G.) There was one homemade anchor found inside the boat. (67 RT 13060.) The prosecution relied heavily on the notion that Scott's trailer had been used to pour additional circular concrete anchors, as evidenced by what the prosecutor perceived to be circular spaces on the trailer bed in the midst of concrete rubble. (109 RT 20214-20215.) According to the prosecutor, this was evidence that Scott made five concrete anchors, four of which were used to weigh down the body and submerge it in the bay. (109 RT 20214-20215, 20312.)

As discussed more fully below, the state searched the bay for weeks and weeks looking for the anchors but found nothing. (64 RT 12644-12645; 65 RT 12709-12710, 12779, 12786-12787; 66 RT 12813-12825, 12837.) Police used dive boats, sonar, a

special underwater search vehicle and specialized dive teams from the FBI, Contra Costa County,, Marin County and San Francisco County. (64 RT 12644-12645; 65 RT 12786-12787; 66 RT 12819-12820.) Because they found nothing at all, the state was left with pictures of concrete dust to prove that five anchors had been made.

Rather than rely on prose descriptions of the photographs of the concrete dust, the actual exhibits given to the jury are the best indicator of the "strength" of this evidence. It is fair to say that the circular spaces the prosecution saw on the trailer bed are hardly distinctive in appearance, and looking at the photographs of the trailer, it is difficult to make out any circles rather than simply a collection of concrete detritus:

But even if the record supported the state's theory as to the concrete, that theory was puzzling for another reason as well. If the state's theory was right then Scott meticulously cleaned his home, truck and boat of any evidence tying him to the crime but left the mess from making the concrete anchors in plain view for police to find. This is even odder in light of the fact that Scott plainly had time to clean the warehouse if he had wanted to; as Detectives Mansfield, Wall, and Grogan themselves conceded, Scott was at the warehouse for an hour that morning assembling a mortiser and surfing the internet. (61 RT 11841-11842; 83 RT 15759-15760; 93 RT 17655.)

Finally, the boat itself provided no corroboration for the state's theory. Yet again, according to state criminalist Kyo, there was no blood, urine, or other tissue found in the boat itself. (90 RT 17161-17162, 17164.) The only notable evidence was Laci's hair fragment on a pair of pliers in the boat. (67 RT 12973.) The prosecutor relied on this evidence to argue that "these pliers were used in this crime." (109 RT 20309.)

But the forensic evidence simply did not support this position either. Thus, state expert Sarah Yoshida examined the pliers and testified that they were so rusted that based on their appearance, the pliers had *not* recently been used. (86 RT 16467-16468.) Ms. Yoshida also confirmed not only that the pliers had no visible signs of blood or tissue, but that as with the pillows and pillow cases, the state had elected not to do any further testing on the pliers. (86 RT 16476-16477.) Moreover, Peggy O'Donnell and Rosemary Ruiz -- two women who worked in the same warehouse as Scott -- had both seen Laci at Scott's warehouse around December 20, 2002. (97 RT 18198-18199; 98 RT 18415-18417.) This testimony became significant when the state's own hair expert, Roy Oswalt, explained the concept of secondary transfer through which the hair fragment may have fallen in the

boat at that time or been transferred from Scott to the boat. (70 RT 13688-13689.)[14]

The last part of the state's theory was that Scott pushed Laci's anchor laden body off his small boat *alone* without capsizing. But as detective Grogan admitted during cross-examination, during its investigation of this case the prosecution decided "not to try to attempt to push an -- either a body or a weight out of the boat . . . ." (99 RT 18599.)

The defense *did* offer such evidence, seeking to introduce videotaped evidence of a demonstration it had performed. (104 RT 19371.) The defense obtained the same make and model as Scott's boat and performed a demonstration near Brooks Island where the state theorized Laci's body had been pushed overboard. (104 RT 19371, 19401, 19404.) The demonstration involved a mannequin the exact weight of Laci -- 153 pounds -- which was weighted down with four anchors and a person weighted down so that he was the same weight as Scott Peterson. (62 RT 12186; 104 RT 19371, 19404-19405.) The demonstration was done at the same time of day as the state theorized -- 12:30 to 1:00

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[14] The transfer explanation became even more significant given the state's attempt to suppress it. Scott told detective Grogan that Laci had been to the warehouse. (98 RT 18418.) O'Donnell and Ruiz confirmed these statements; according to detective Grogan, they told officer Holmes that Laci had recently been to the warehouse and knew about the boat. (98 RT 18415-18419.) Detective Brocchini excised this important evidence from his report. (57 RT 11195.)

p.m. -- and it was filmed. (104 RT 19404-19405.) The boat capsized. (104 RT 19401.) But when the state objected to the evidence, the trial court excluded it. (104 RT 19402-19403, 19406-19407.)[15]

2. Evidence as to when the crime occurred.

a. The date of the crime.

As noted, the state initially theorized that Scott killed Laci on the night of December 23 or the early morning hours of December 24. In closing argument, however, the prosecutor would concede that based the evidence, he could not prove when the crime occurred. (109 RT 20200.)

With respect, the prosecutor was far too modest. In fact, the evidence suggested quite plainly that Laci was not killed on December 23.

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[15] As discussed more fully below in Argument X, the lack of evidence on the stability of the boat would not be lost on the jury. On the third day of jury deliberations, jurors asked if they could see the boat. (111 RT 20640-20642.) The court permitted this. (111 RT 20640-20642.) During the examination, several jurors asked if they could sit in the boat. (111 RT 20643.) Once in the boat, several jurors stood up and began to rock the boat back and forth testing its stability. (111 RT 20643-20644.) The boat was sitting on a trailer in a garage. (111 RT 20643.)

Computer records from the Peterson's home computer show that someone was on the internet between 8:40 a.m. and 8:45 a.m. on the morning of December 24, looking at a garden weather vane, a GAP pro fleece scarf and a sunflower umbrella stand. (83 RT 15752-15756, 15816.) While it is certainly conceivable that Scott was looking for these items, it seems far more likely that Laci was searching for these items. After all, as several prosecution witnesses noted, it was Laci who had a sunflower tattoo. (*See*, *e.g.*, 45 RT 8701, 8708; 46 RT 8988.) But there is more.

Police also found Laci's curling iron out on the bathroom counter. (50 RT 9819.) Margarita Nava -- who cleaned the Peterson's home on the 23rd -- confirmed that when she cleaned on the 23rd she put away everything on the bathroom counter. (44 RT 8660, 8681.) While it is conceivable that Laci would have used the curling iron to curl her hair just before going to sleep on December 23, the more likely scenario is that she used the iron to curl her hair on the morning of December 24. Thus, the fact that the curling iron was out on the 24th also undercuts any suggestion that Laci was killed on December 23.

Moreover, when Laci's body was found in April of 2003, she was wearing tan pants. (69 RT 13498-13499.) But Amy Rocha recalled that on the night of December 23, Laci was wearing a black blouse with cream polka dots or little flowers and cream colored pants. (45 RT 8846-8847.) Amy later saw these clothes at Laci's house when

she did a walk through with police. (46 RT 8918-8919.) Thus, if Laci was killed on the 23rd, it meant that someone had changed her clothes after her death.[16]

Thus, the prosecutor's concession that he could not prove when the crime occurred was clever, but too modest. In fact, the evidence suggests Laci was not killed on December 23. Instead, the crime occurred on December 24.

This date is significant, and explains the prosecutor's attempt to include December 23 as a possible date for the crime. Sometime after 10:30 on the morning of December 24, 2002, the Medina house across the street from Laci and Scott was burglarized. (49 RT 9590-9597, 9604.) Steven Todd was arrested for the Medina burglary. (52 RT 10177.) According to a declaration which the state itself prepared, several weeks after Laci's disappearance, Lieutenant Xavier Aponte -- a guard at the California Rehabilitation Center in Norco, California -- reported a call he had monitored between inmate Shawn Tenbrink and his brother Adam Tenbrink. During the call, Adam said his

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[16] In addition, several people reported to police that they saw Laci walking the dog in the neighborhood on the morning of the 24th. (98 RT 18496-18499 [eyewitness Homer Maldonado reports that he saw a pregnant woman walking her dog several blocks from the Peterson home between 9:45 a.m. and 10:00 a.m. on December 24, 2002]; 97 RT 18281-18282; 99 RT 18674 [Tony Freitas tells police that at 10:00 on December 24, 2002 he saw Laci walking a reddish brown dog about six blocks from the Peterson home]; 4 RT 931; 58 RT 11409 [Vivian and Bill Mitchell tell police they saw Laci walking in her neighborhood on the morning of December 24].)

friend Steven Todd admitted Laci saw him burglarizing the Medina home on December 24, 2002. (20 CT 6433-6434.) Aponte said he taped this conversation, but then lost it. (20 CT 6434, 6435.) Of course, if Lt. Aponte was correct -- and laci saw Todd burglarizing the Medina house after 10:30 on December 24 -- then Laci was alive when Scott left that morning and he is innocent.

Moreover, neighbor Diane Jackson told police she saw the Medina burglary on December 24. (99 RT 18562-18563.) She saw three men outside the home removing a safe. (52 RT 1-316-10317; 99 RT 18563.) In front of the house she saw a van which she described as "an older model . . . tan or light brown." (99 RT 18566-18567.) Detective Cloward also received a call from Tom Harshman reporting that on December 28, 2002, he saw a woman fitting Laci's description urinating by the side of the road next to a van and then being pushed into the van. (99 RT 18670-18671.)[17]

It was also notable that around the time of Laci's disappearance she owned an

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[17] As noted, Jackson reported to police the burglary occurred on December 24. (99 RT 18562-18563.) This was consistent with the Medinas leaving for Southern California that morning. (49 RT 9590.) When Todd was interviewed by officer Hicks, he lied and said the burglary was on December 27. (107 RT 20022.) After Hicks told Todd that the Medinas arrived home on December 26, Todd changed his statement and said the burglary was on December 26. (107 RT 20018-20019.) However, this was unlikely as well; by December 26, police and the media were already present at the Peterson home directly across from the Medina home. (46 RT 9017-9119; 57 RT 11166.)

expensive Croton watch inherited from her grandmother. (45 RT 8871; 53 RT 10409 10432; 94 RT 17809; 97 RT 18182.) Although the watch was never found in Laci's belongings after she disappeared, a Croton watch was pawned at a pawnshop in Modesto on December 31, 2002 -- several days after she went missing. (53 RT 10467, 10469-10470.) The pawnshop slip included a thumb print of the person who pawned the item. (53 RT 10467, 10469-10470.) The print did not belong to Scott. (53 RT 10467, 10469-10470.) The state, however, never sought the watch itself and the defense was unable to recover it because the pawnshop owner did not comply with the subpoena and the person who bought the watch refused to sell it. (106 RT 19702.)

b. The time of the crime.

As discussed above, the time of the crime ultimately became the critical disputed issue at trial. The state's theory was that Laci was killed before Scott left for Berkeley. The defense theory was that Laci was still alive when Scott left the house that morning. The state has never disputed that if, in fact, Laci was at home and alive after Scott left that morning, Scott is innocent.

In an effort to undercut the defense theory, the state offered evidence that if Scott was telling the truth -- and Laci was alive when he left the house -- there was only a ten

minute window for Laci to have been abducted by someone else. The state's theory was relatively simple and depended on two pieces of evidence.

First, the state sought to determine a time by which Scott left the house. Of course, Scott told police that he left home after seeing a meringue segment during the Martha Stewart Show. (100 RT 18769.) Martha Stewart discussed meringue at 9:48 a.m.. (55 RT 10805-10806;100 RT 18769.) To try and prove Scott's departure time more precisely, the state presented testimony from investigator Jacobson who reviewed Scott's cell phone records and corresponding cell site information. (81 RT 15383.)

These records showed that on December 24, 2002 at 10:08 a.m. Scott made a 1 minute and 21 second call which started at the 1250 Brighton cell tower and ended at the 10th and D cell tower. (91 RT 15383.) Several test calls by Jacobson showed that if Jacobson started a call in the Peterson driveway and drove towards Scott's warehouse the call would register on the same cell towers as Scott's call had registered on the 24th. (81 RT 15387-15391.) So the state's theory was that at 10:08 -- when this call was made -- Scott began driving from his home to his warehouse. (109 RT 20226.)

The second piece of evidence on which the state relied was the testimony of Peterson neighbor Karen Servas. As noted above, Servas testified that she found McKenzie (the Peterson's dog) outside at 10:18 a.m.. (48 RT 9422.)

In closing argument, the state put these two pieces of evidence together to argue that if Scott was telling the truth that Laci was alive when he left the house (at 10:08) -- and Servas found McKenzie at 10:18 -- Laci would have to have been abducted in the ten minute window between those two times. (109 RT 20226 [prosecutor argues that for Scott to be believed "[Laci] [gets] abducted . . . . the dog comes home and has to be found by Karen Servas, all in ten minutes, all in a ten minute window . . . ."].) This was even more unlikely, the prosecutor explained, because Scott said Laci was wearing *black* pants when he left home. (109 RT 20225.) Because Laci was ultimately found in *tan* pants, Laci would have had to change her pants in that 10 minute window as well. (109 RT 20225-20226; 69 RT 13498-13499.) According to the prosecutor, there was simply not enough time for this to have happened; therefore, Scott Peterson was lying. (109 RT 20225-20226.)[18]

[18] If the state was correct, of course, then Scott was lying about the color of Laci's pants. The state never offered any explanation as to why Scott would lie about the color of the pants Laci was wearing.

This theory is quite clever. But it rests on a basic assumption which the evidence simply does not support. The state relies on this argument to rebut the defense theory that Laci was alive when Scott left by assuming that when Karen Servas found McKenzie outside, Laci had already been abducted and or killed. In fact, not only did the state never offer any evidence to support this assumption, but the evidence which does exist *directly* undercuts it.

After Servas found McKenzie, she put the dog in the Peterson's backyard. (48 RT 9422-9425.) Servas herself admitted that she did not check to see if anyone was home. (48 RT 9422-9425.) Not only could Laci have simply been in the house at the time, *but Servas herself conceded that she had found McKenzie out loose in the neighborhood on prior occasions*. (48 RT 9481.) Of course, Servas's admission that she had found McKenzie outside on other occasions undercuts any suggestion that McKenzie being outside meant that Laci Peterson had already been killed.

But there was substantially more; Servas was not the only witness to testify about McKenzie. Postman and prosecution witness Russell Graybill recalled McKenzie being loose in the front of the house when he came to deliver mail on other days. (49 RT 9568.) Pool cleaner and prosecution witness Michael Imelia -- who cleaned the Peterson's pool every week -- testified that when he arrived each week, McKenzie was generally outside

in the backyard. (53 RT 10447-10450.) Laci was usually in the house and would come out occasionally. (53 RT 10450-10451.) Police officers testified McKenzie was outside in the backyard on various dates when they came by the house. (48 RT 9362; 55 RT 10732.) Sharon Rocha testified that McKenzie spent significant time outside and only "occasionally" came inside the house. (46 RT 9049.) All this evidence is particularly important in light of Servas's own admission that when she found McKenzie on December 24, *the gate to the Peterson's backyard was open*. (48 RT 9426.) The fact of the matter is that McKenzie could simply have been put in the backyard with the gate having been accidentally left open, as the evidence showed had happened on numerous occasions.

In short, the record shows (1) McKenzie spent significant time outside the house, both in the front and back yards while Laci was inside the house and (2) when Servas found McKenzie on December 24, the backyard gate was open. The simplest explanation for McKenzie being outside on December 24 is that -- like all the other times McKenzie was outside -- he simply wandered out the open gate. The state's suggestion that Servas's discovery of McKenzie outside the house at 10:18 meant that Laci had already been adducted or killed ascribes a significance to McKenzie's location that not only ignores Servas's testimony, but the testimony of Graybill, Imelia, Sharon Rocha and numerous police officers as well.

3. Evidence as to why the crime occurred.

In criminal cases, the state need not prove motive in order to convict. But in this case, the state nevertheless sought to explain why a man with no prior criminal history nor history of domestic violence would suddenly kill his wife and unborn child.

As the prosecutor explained to the jury in closing arguments, the state's theory with respect to motive was three-fold: (1) Scott killed Laci for financial reasons, (2) Scott killed Laci because he did not want to be a father, and (3) Scott killed Laci because he wanted freedom to pursue other relationships. (109 RT 20206, 20208-20209, 20242, 20300-20302.) As noted, the defense theory was that Scott had no motive at all to kill Laci, and did not do so. (110 RT 20376.)

To support its financial-motive theory, the state presented evidence from Gary Nienhuis. Nienhuis was an internal auditor for the city of Modesto who was asked by the state to review the Peterson's financial records. (73 RT 13960, 13974.) Based on the financial statements provided by the state, Nienhuis concluded that 70% of Scott's income went to fixed debt of credit card bills, mortgages and car loans. (73 RT 13977.) This did not include food, gas, or utilities. (73 RT 13977.) One of Scott's credit card

balances was $12,000. (73 RT 13979.) Moreover by November of 2002, Scott was only at 23% of his yearly goal for TradeCorp. (73 RT 13994.) Nienhuis admitted, however, that Scott always paid his credit card bills and car loan on time and many credit cards carried a zero balance. (73 RT 14003-14004, 14007.) The state relied on Nienhuis's testimony to argue that Scott was not doing well financially which was a possible motive for him to kill his wife. (109 RT 20300-20301.)

But a closer look at their finances showed that Scott and Laci typically spent less than they earned. (103 RT 19355-19356.) Certified public accountant Marty Laffer testified that a review of Scott and Laci's monthly income and expenses showed that they spent less than they earned each month. (103 RT 19339, 19355-19356.) In fact, he noted that they paid extra on their mortgage each month. (104 RT 19422.) Prosecution witness and TradeCorp accountant Jeff Coleman testified that Scott was set to receive a monthly raise from $5,000 to $5,300-$5,350 in January 2003. (73 RT 14112.)

And the fact of the matter is that there would be no financial windfall to Scott from Laci's death. Although Laci was set to inherit about $160,000 from the sale of her grandparents' home, she could not access the money until she turned 30 -- which was three years after her death. (46 RT 8936-8938; 47 RT 9183.) And if she died before the

age of 30 and had no living children, then the $160,000 went to her brother Brent and sister Amy; it did not pass to Scott. (47 RT 9215-9216.)

There was also a separate Rocha family trust worth 2.4 million dollars from the estate of Laci's grandfather. (103 RT 19357.) Under the terms of this trust, upon the death of Laci's grandfather the trust would be distributed to his three grandchildren: Laci, Brent and Amy. (103 RT 19357.) As was the case with the money from the sale of her grandparents house, however, if Laci died with no living children before the trust was distributed, her share went to Brent and Amy; it did not pass to Scott. (103 RT 19357.)

In light of ths evidence, Laci's brother Brent acknowledged that there was "no financial motive" for Scott to kill Laci. (47 RT 9216.) Laci knew the provisions of the trust, and the state presented no evidence that she kept this information from Scott. (46 RT 8936-3938.) Moreover, the notion that Scott killed Laci because they were in dire financial straights is totally inconsistent with the fact that Scott paid her health insurance premium on December 23, 2002 -- the day before she went missing. (110 RT 20342.)

With respect to life insurance, Brian Ullrich -- a friend of Laci and Scott -- obtained his financial investing license in 2001. (71 RT 13802.) He testified that in April of that year, he gave Scott and Laci a call to see if they were interested in financial

planning. (71 RT 13802-13803.) At this meeting, Brian recommended that they each purchase a life insurance policy. (71 RT 13804-13805.) In April 2001, each purchased a policy for $250,000. (71 RT 13804-13805.) After Laci's disappearance, Scott never called Brian or his office asking about the life insurance money. (71 RT 13817-13818.) Detective Brocchini himself did *not* think that the life insurance policy was any motive for Scott to kill Laci. (97 RT 18295-18296.)[19]

The state's second theory as to motive was that Scott did not want to be a father. (109 RT 20206.) This theory was primarily based on the testimony of Brent Rocha's wife Rose who recalled Scott once saying that he was "kind of hoping for infertility" and Amber's testimony that Scott mentioned getting a vasectomy. (47 RT 9285; 76 RT 14674; 109 RT 20206.) Rose admitted, however, that Scott might have been joking. (47 RT 9295.) And Scott had not gotten a vasectomy. (76 RT 14674.) In fact, evidence from Brent Rocha, Eric Olson and Gary Reed showed quite the opposite. Brent testified that Scott was "excited" to have a baby and that one of Scott's "goals" was to have a family. (47 RT 9228-9229.) Olson testified that Scott was "happy" about the pregnancy. (59 RT

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[19] Scott also explored selling the house and Laci's Land Rover and decided to sell Laci's car but not the house. (81 RT 15414-15415; 94 RT 17799-17800.) The state relied on this as evidence that Scott knew that Laci was not coming home. (109 RT 20247, 20266.) But as noted, the media frenzy at Scott's home was overwhelming. (47 RT 9142-9143; 48 RT 9526.) Scott explained to his sister Ann Bird that the locks on Laci's car had been damaged and he needed a truck for his business as his truck was still in the possession of police. (97 RT 18254.)

11660.) Gregory Reed confirmed; he had spoken with Scott many times about having a baby and Scott seemed "excited." (75 RT 14436.) Reed's wife Kristen was pregnant at the same time as Laci and all four had taken a birthing class together. (75 RT 14433, 14435.) Reed recalled that during Laci's pregnancy, he and Scott had once looked through a hunting and fishing catalog at the children's clothing section and joked about how excited they were to buy their kids that type of clothing someday. (75 RT 14436.)

Finally, the state theorized that Scott killed Laci because he wanted the "freedom" to pursue other relationships, like the one he had started with Amber Frey. (109 RT 20208-20209.) At trial the state played numerous calls between Amber and Scott which Amber had taped. (*See* 76 RT 14720, 14721, 14722, 14724-14725; 77 RT 14758, 14759, 14763, 14767, 14770.) Of course, to the extent that it was children Scott was trying to escape then dating Amber was a curious choice since she had a young daughter who lived at home with her. (76 RT 14592.) Perhaps recognizing this, and during closing arguments, the prosecutor was candid; "I don't think [Scott] killed Laci Peterson to go marry Amber Frey . . ." (109 RT 20209.)

4. The state's response to Scott's defense that he was fishing.

As noted, Scott told detectives that on December 24, 2002, he went to the Berkeley

Marina to fish for sturgeon and try out his new boat. A forensic search of the Peterson computers confirmed the lead-up to the fishing trip.

On December 7, 2002 someone looked at boat classifieds on the computer. (75 RT 14352.) Indeed, Scott purchased his boat in the next day or two. (62 RT 12161.) Then, on the morning of December 8, 2002, around 8 a.m., and then again in the evening, there were numerous visits to web sites focusing on boating in the Bay Area and sturgeon fishing. (75 RT 14367-14368, 14370-14371, 14374-14380, 14395-14396, 14399-14404.) There were searches for "'sturgeon', 'fishing', 'tackle', 'San Francisco' and "ten tips for better sturgeon fishing." (75 RT 14399-14404.) Someone had viewed the State of California Fish and Game website, the 2002 Ocean Sport Fishing Regulations web-page, an archived fishing report which including a report from 2000 that sturgeon fishing was good in December and a Marine Sport Fish Identification web-page on green sturgeon. (75 RT 14395-14399, 15682-15694.)[20]

[20] Angelo Cuanang -- an expert sturgeon fisherman -- noted that he would not fish sturgeon with lures like the ones Scott had purchased. (71 RT 13747.) Caunang admitted the equipment Scott had with him -- while not what an expert fisherman such as himself would use -- could certainly be used to catch surgeon in the bay. (71 RT 13789.) He also noted that San Francisco Bay is a good place to catch sturgeon between December and March. (71 RT 13740, 13742.) Finally, detective Brochinni himself conceded he found a fishing tackle box filled with lures and other fishing equipment in the boat (55 RT 10755), and Cuanang specifically agreed that some of these items could indeed by used to catch fish in the bay. (71 RT 13763-13764.)

All of these searches were conducted from the Peterson's home laptop. (75 RT 14359.) One search on the computer referenced a website for the Real Time Current Velocity website (which showed information on the currents in San Francisco Bay). (75 RT 14473-14474.) The state theorized that Scott was looking at currents to determine where to put Laci's body. (109 RT 20212.)

But this theory too was undercut by the state's own experts. According to the state's own computer expert Lydell Wall, the Petersons had dial-up internet access; because dial-up access can take a long time to load a website, before it is loaded someone may have already moved on to another website. (75 RT 14473-14474.) Mr. Wall confirmed that before the Real Time Current Velocity website was even loaded and visible on the computer screen, *the person doing the search had already clicked on the fish and game website*. (75 RT 14473-14474.)[21]

[21] Even putting this aside, the state's fishing expert Angelo Cuanang independently undercut the state's position. Mr. Cuanang testified that the movement of water or currents is important in sturgeon fishing. (71 RT 13753.) Thus, even if the Real Time Current Velocity website had loaded and been examined, it was entirely consistent with someone who wanted to go sturgeon fishing. And the fact of the matter is that there was no evidence that anyone had tried to delete any searches or other information from any of the Peterson computers. (83 RT 15807.)

Of course, the state's theory was that Scott had *not* gone fishing on Christmas Eve day but had traveled to the Berkeley Marina to put Laci's body in the bay. (109 RT 20235.) According to the state, all of Scott's prior internet research was directed at this goal. (109 RT 20234-20235.) As part of this theory, the prosecutor belittled the idea that *anyone* would travel 90 miles -- the distance to Berkeley from Modesto and pass numerous other bodies of water -- to fish. (109 RT 20214.) And that anyone would fish on Christmas Eve Day. (109 RT 20229.)

Ironically, the best response to this argument came from two prosecution witnesses: Laci's own step-father, Ron Grantski and detective Bertalotto. Bertalotto conceded that the Berkeley Marina was, in fact, the closest saltwater spot to fish from Modesto. (88 RT 16796.) And Grantski admitted not only that he too had gone fishing on Christmas Eve day for several hours, but that he went fishing around 12:30 p.m. -- just like Scott. (47 RT 9109-9110, 9127.) Sharon described how Ron would often go fishing spur-of-the-moment, had gone fishing on holidays, and might only fish for a short period of time. (46 RT 9069.) Moreover, state fishing expert Cuanang admitted that he too (like Scott) had also traveled 90 mile distances to fish. (71 RT 13783.) Both Laci's mother Sharon and sister Amy knew that Scott liked to fish and Sharon recalled him talking about fishing trips he had taken with his father Lee Peterson. (46 RT 8932, 8978.) Ron recalled that Scott had been fishing around Thanksgiving. (47 RT 9128.) Finally, when

police searched Scott's truck and warehouse, they found several 2-day fishing licences; one from 1994, 1999, and August, 2002. (57 RT 11084-11085, 11088-11092.)

The state relied on several other facts to support its theory that Scott had not driven to the marina to fish on the 24th; the fishing lures he bought at Big 5 were unopened, his new fishing pole was unassembled, and there was no rope attached to the anchor found in his boat. (109 RT 20214, 20234-20235, 20311.) With respect to each area the prosecutor was clear:

> "I don't know anyone who's ever caught a fish with a lure that's still in the package." (109 RT 20214.)
>
> "See how [the fishing pole is] apart? That's the way it was on December 24th in the defendant's boat. This pole wasn't even put together. . . . You're not going to catch a sturgeon on a rod that's not put together. (109 RT 20234-20235.)
>
> "Let's take a look at this anchor real quick. . . . [T]here is no rope on that [anchor] . . . [P]itch it over your boat? Well, of course it's gone, right? There is nothing that's going to hold your boat. This is not an anchor." (109 RT 20311-20312.)

Once again, the response to these theories came from the state's own witnesses. Detective Brocchini admitted that there was a tackle box containing lures in Scott's boat on the 24th. (55 RT 10755-10756.) So Scott plainly had numerous other lures with which to fish.

This is important for two reasons. First, and most obvious, it directly responds to the prosecutor's theory that Scott was not really fishing because his lures were "still in the package." In fact, as with most fisherman, there were many lures which were available in the tackle box. Second, the state's theory was that Scott bought the new lures to make it look like he was going fishing when -- in fact -- he never intended to fish. The presence of lures in the tackle box completely undercuts this theory as well; simply put, it makes no sense that Scott would buy new lures to support a fake fishing alibi when he already had lures in his tackle box.

The state's reliance on the unassembled fishing rod, and the absence of a rope on the anchor when the boat was searched, are equally suspect. The fact of the matter is that Detective Hendee found *two* fishing rods in the boat; one was unassembled, and the second was *assembled*. (64 RT 12542-12543, 12545.) And detective Brocchini admitted there *was* a 6 foot rope in the boat which could have been attached and then removed from the anchor. (55 RT 10766-10767.) Significantly, as internet research would have

shown, the depth of the water near Brooks Island was three to six feet. (101 RT 18902-18903.)[22]

5. The state presents three areas of expert testimony to support its theory: dogs, fetal development and the movement of bodies in water.

Finally, the state relied on three different kinds of expert testimony to support its theory of the case: (1) expert testimony on dog scent evidence, (2) expert testimony about fetal development and (3) expert testimony about the movement of bodies in water.

a. Dog scent evidence.

Though Laci Peterson's body, and the body of her unborn child, were discovered in San Francisco Bay, the state had no direct evidence that she was killed in the Peterson's Modesto home or transported by truck to the marina. The state sought to fill

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[22] The state also presented evidence that Scott told two people he had gone golfing that day rather than fishing. According to Harvey Kempell -- whose wife Gwen was friends with Laci -- on the night of December 24, Scott told him that he had been golfing that day. (48 RT 9362.) But that same night when Gwen asked Scott where he had been that day he told her he had been fishing. (48 RT 9371.) And although, Harvey spoke with police that night, he did not mention that Scott said he had been golfing. (48 RT 9376.) Peterson neighbor Amie Krigbaum also said that when Scott -- who was "very upset" and "distraught"-- came looking for Laci in the neighborhood that night he said he had been golfing all day. (48 RT 9510, 9523.)

this evidentiary void with dog scent evidence. Over defense objection, the state introduced dog scent evidence collected at the Berkeley Marina.

On December 28, 2002, Eloise Anderson brought her trailing dog Trimble to the Berkeley Marina. (84 RT 16075.) With respect to Trimble's track record for successfully following scent trails, Anderson admitted that Trimble "does make mistakes when you ask her to perform trailing exercises." (8 RT 1490-1491, 1495-1496, 1497-1500, 1500-1507, 1548.) For example, in 2001 Trimble ran two *contact trails* (where the dog trails someone who has actually made physical contact with the ground, such as by running) where she had failed to trail correctly. (8 RT 1549-1550.) And as to *vehicle trails* (where the dog trails someone who has *not* made contact with the ground, such as a person in a car) her record was bleak. Trimble had attempted three vehicle trails and failed two of them. (8 RT 1541-1542; 85 RT 16145-16147.)

Nevertheless, the state introduced a vehicle trail performed by Trimble. Anderson provided Laci's scent to Trimble using sunglasses that had been removed from Laci's purse, although she knew that the pursed had also been handled by Scott. (8 RT 1552; 84 RT 16082.) After scenting Trimble with the sunglasses, Trimble gave no indication of scent at several locations at the marina until she explored the vegetation near an entrance

to the boat ramp. (84 RT 16079.) According to Anderson, Trimble alerted at the end of the pier on the west side of the boat ramp. (84 RT 16075-16080, 16085.)

Anderson and Trimble were not the only team the police called to search at the Berkeley Marina. Ron Seitz, whose dog was also certified by CARDA, was called to search the marina. (105 RT 19603.) Seitz used one of Laci's slippers to scent his dog. (105 RT 19608.) He specifically chose the slipper as opposed to the sunglasses to avoid "cross-contamination" of scent. (105 RT 19608.) Indeed, in sharp contrast to the sunglasses used by Anderson to scent Trimble, there was no evidence at all suggesting that Scott had handled the slipper. Seitz's dog did *not* detect Laci's scent at the Berkeley Marina. (105 RT 19611-19614.)

During closing argument, the prosecutor told the jury that if it believed Trimble detected Laci's scent at the pier it established Mr. Peterson's guilt of capital murder, "as simple as that." (111 RT 20534.)

b. Fetal development evidence.

In an effort to support its theory that Laci was killed on December 23 -- and thus Scott was the only possible killer -- the state presented testimony from Greggory Devore a

doctor who specialized in high risk obstetrics and maternal-fetal medicine. (95 RT 17855.) Dr. Devore was contacted by the Modesto Police and asked to review the Conner's fetal records to determine his age at death. (95 RT 17861.) Dr. Devore reviewed two ultrasound examinations and Conner's femur bone. (95 RT 17861, 17868.) Using "an equation by [Phillipe] Jeanty." an expert in fetal biometry, Dr. Devore estimated that Conner died on December 23, 2002. (95 RT 17881, 17883.) Dr. Devore admitted that this was an estimation and Conner may have died a day or two before or after this date. (95 RT 17887.) Of course, a day or two before the 23rd was impossible (since Laci had been seen by her sister on December 23) and a day or two after meant that Scott was not the killer.

c. The movement of bodies in water.

As noted, Mr. Peterson told police that he went fishing on the day of Laci's disappearance from the Berkeley Marina, driving his boat about two miles to the north, to a small island later identified as Brooks Island. (55 RT 10723-10726.) On April 13, 2003, the body of Conner Peterson was discovered in the shoreline area of Bayside Court in Richmond. (61 RT 11871, 11880.) The next day, Laci's body was discovered, washed ashore at Point Isabel in Richmond. (61 RT 11990, 11993.) Apart from the general

proximity of Brooks Island and the points where the bodies washed ashore, there was no evidence connecting the bodies to the place where Mr. Peterson was fishing.

To connect these two points, the prosecution relied on the testimony of hydrologist, Dr. Ralph Cheng. Dr. Cheng was a senior research hydrologist with the United States Geological Survey. (66 RT 12809-12813; 100 RT 18858.) Detective Hendee, of the Modesto Police Department, asked Dr. Cheng if -- based on where the bodies had been found and the tides and currents in the bay -- Cheng could direct the police to a spot where there was a high probability that evidence related to the bodies could be found. (66 RT 12809.) Specifically, police were seeking to recover body parts of the victims or concrete weights they believed were used to anchor the bodies to the floor of the bay. (66 RT 12813.)

Dr. Cheng provided the police with a map which contained a "projected path" that the bodies might have taken to the shore, and he pinpointed an area in the bay for the officers to search. (66 RT 12814, 12819-12820.) It was 500-1000 yards southwest of Brooks Island and in the approximate area where Scott said he was fishing on December 24. (55 RT 10725-10728; 66 RT 12814, 12819-12820.)

Beginning May 16, 2003, the police, with the help of teams of divers from the FBI, Contra Costa County, Marin County and San Francisco County, searched this "high probability area," with several boats equipped with sonar. (66 RT 12819-12820.) The boats would cover the area with the sonar equipment and, if some object on the bottom was detected, the dive teams would retrieve it. (66 RT 12823-12824.)

For the next seven days, numerous boats and three dive teams searched Dr. Cheng's high probability area. (66 RT 12822, 12823, 12826, 12828, 12829, 12829-12835, 12837.) They found nothing connected to the case. (66 RT 12824, 12827, 12828, 12829, 12835.)

The search of Dr. Cheng's high probability area continued in July. This time the police used a self-propelled search vehicle called a "REMUS," which stands for Remote Environmental Unit. (64 RT 12644.) Detective Hendee explained the REMUS's accuracy:

> "So when you're done searching an area with REMUS, you can have a much higher degree of confidence that you found most of the items down there . . . ." (64 RT 12644-12645.)

Police searched with the REMUS from July 7 through July 13. (65 RT 12709.) They covered approximately 80% of an area that was much larger than Cheng's original high probability area. (65 RT 12710.) But still nothing of relevance was found to Scott's case. (65 RT 12779.)

Police searched the high probability area again in September with dive boats equipped with sonar. They searched again in April, 2004. They again found nothing. (65 RT 12786-12787.)

The state called Dr. Cheng as an expert witness at trial to give his expert opinion that the bodies had been placed on the bay bottom near where Mr. Peterson said he was fishing. In establishing his expertise, Dr. Cheng explained that as a Senior Research Hydrologist with the United States Geological Survey, his "particular assignment is [to] study of the movement of water in San Francisco Bay" as affected by currents and tides. (100 RT 18858.) On voir dire of his expertise by defense counsel, Dr. Cheng acknowledged that his work had *never* explored the movement of bodies in water or the bay. (100 RT 18865; 101 RT 18938.)

Dr. Cheng was then asked detailed questions about the movements of bodies in water, the precise subject he had admitted his studies did not involve. Dr. Cheng

produced a "vector map," which charted the movement of Conner's body, hour by hour, in the days prior to April 13. (101 RT 18904, 18908-18911.) Dr. Cheng's map, People's Exhibit 284, shows the vector diagram and concludes that Conner's body migrated to Richmond (where it was found) from the high probability area near Brooks Island where Scott said he was fishing on December 24. (55 RT 10725-10728; 101 RT 18914.) Of course, this was the same "high probability" area that police had searched for more than two weeks with dive teams, sonar equipment and the sophisticated REMUS machine without finding anything at all to connect Scott with the crime.

Interestingly, however, Dr. Cheng could not reproduce the same trajectory for Laci's body. (101 RT 18925.) When asked for an explanation why he could not provide a vector diagram that showed how Laci's body ended up in Point Isabel, Dr. Cheng confessed that "Well, I'm not – I'm not the expert in that area here. I don't know how the body is behaving in water." (*Id.*) Dr. Cheng admitted he had no experience at all with how bodies move in water:

> "Q: You have never done any study in San Francisco Bay that has anything to do with bodies or things of that size, correct.?
>
> "A: That is correct." (101 RT 18926.)

Despite Dr. Cheng's conceded lack of expertise in this area, the prosecutor told the jury in closing argument that if Dr. Cheng was believed, "then that man's a murderer. It's as simple as that." (109 RT 20279-20280.)

Penalty Phase

California Penal Code section 190.3 sets forth the type of aggravating evidence which the state may present at the penalty phase of a capital trial. But the penalty phase in this case was not like most capital trials.

In contrast to many capital cases, prior to the charges in this case Scott Peterson had never been convicted of a felony or a misdemeanor nor had he ever even been arrested. (96 RT 18118, 18157.) Thus, although section 190.3, subdivision (b) permits the state at a capital penalty phase to introduce evidence of prior criminal activity involving force -- or even the threat of force -- no such evidence was introduced here. And although section 190.3, subdivision (c) permits the state to introduce evidence of prior convictions, no such evidence was introduced here. Instead, the state's entire case in aggravation consisted of touching and emotional victim impact testimony from relatives of Laci's -- her brother, sister, step-father and mother -- about the devastating impact of Laci's loss. (113 RT 20978-21018.)

As part of its case in mitigation, the defense presented similar testimony from many of Scott's relatives. Lee and Jacqueline Peterson, defendant's parents, spoke about their love for Scott, and about Scott's upbringing: how well he did in school, how he tutored children in lower grades, how he would work at homes for the elderly and did other volunteer work, how he worked his way through college, how he adored and played with his various nieces and nephews and the devastating impact an execution would have on the family. (114 RT 21081-21095, 21103-21112; 119 RT 21567-21599.) Scott's sister Susan Caudillo testified about her love for Scott, how much Scott meant to the entire family, and what the impact would be of his execution. (113 RT 21137-21157.) Scott's sister in law Janey Peterson testified as to her relationship with Scott, how welcome he made her feel in the family, and about Scott'‘s relationship with and positive influence on the younger children in the family. (115 RT 21220-21244.) Numerous other relatives testified to their relationship with and love for Scott, the positive influence he had in their lives and the impact of an execution on the family. (*See*, *e.g.*, 115 RT 21246-21259 [brother John Peterson]; 115 RT 21261-21264 [sister-in-law Alison Peterson]; 116 RT 21289-21320]; 117 RT 21361-21372 [Scott's uncle, John Latham]; 117 RT 21374-21384 [Scott's cousin, Rachel Latham]; 117 RT 21385-21392 [Scott's uncle, Robert Latham]; 119 RT 21553-21559 [Scott's brother-in-law, Ed Caudillo]; 119 RT 21561-21564 [Scott's niece, Brittney Peterson].)

But the mitigation case went beyond family members. The defense called friends of the Peterson family that had known Scott for many years to testify about his upstanding character and his loving relationship with his family. (114 RT 21114-21123, 21125-21129, 21131-21135; 115 RT 21209-21218.) The defense called friends who had grown up with Scott to testify about his character. Aaron Fritz knew Scott for 17 years; he testified about Scott's volunteer work in high school with the mentally handicapped, his helping out of Aaron's parents when he (Aaron) was away at college, Scott's working his way through college with three jobs, and how Scott was (and would be) a positive influence on those around him. (115 RT 21169-21194.) Similarly, Britton Scheibe also grew up with Scott and told the jury about how respectful, polite, gentle and caring defendant was growing up. (115 RT 21197-21208.) William and Carrie Archer were close friends with Scott in San Luis Obispo after college; they both testified about Scott helping them as a friend, how thoughtful Scott was and the positive impact Scott had on their lives. (117 RT 21414-21423, 21426-21431.) Scott's teachers and coaches in grade school, high school and college also testified as to how courteous and industrious he was in school, as to his volunteer work with the less privileged and as to his upstanding character. (117 RT 21330-21334, 21335-21338, 21341-21347; 118 RT 21469-21476, 21491-21500.)

People who were friends with both Scott and Laci had the same view. Eric Sherar lived next to Scott and Laci in San Luis Obispo; he and his wife would socialize and were very close with Scott and Laci. Scott and Laci did not argue and were great fun to be around. (118 RT 21449-21456.) James Gray was friends with both Scott and Laci; he too saw that Scott cherished Laci and they were a perfect couple. (118 RT 21459-21467.)

Scott's employers and co-workers -- both from when he was a teenager and later -- testified to his hard working, respectful character. (117 RT 21349-21353, 21354-21358; 118 RT 21477-21489; 119 RT 21538-21546.) Julie Galloway, who worked with Scott after he graduated college, explained how he helped her get out of an abusive relationship, introduced her to her husband and was the most generous man she had ever met. (117 RT 21433-21444.)

Many of the people who knew Scott Peterson his entire life repeated the same refrain over and over again; they simply did not believe he was guilty of the crime. (*See*, *e.g.*, 114 RT 21157; 115 RT 21218; 116 RT 21319; 117 RT 21358, 21372.)

ARGUMENT

ERRORS OCCURRING DURING VOIR DIRE

I. THE TRIAL COURT IMPROPERLY DISCHARGED THIRTEEN PROSPECTIVE JURORS OVER DEFENSE OBJECTION BASED SOLELY ON JURY QUESTIONNAIRE ANSWERS SHOWING THAT ALTHOUGH THEY OPPOSED THE DEATH PENALTY, THEY COULD NEVERTHELESS CONSIDER DEATH AS AN OPTION.

A. Introduction.

From the beginning of voir dire, it became clear that the trial court and defense counsel had very different views as to the propriety of discharging prospective jurors simply because they were opposed to the death penalty. To its credit, the trial court made quite clear its view that only those who supported the death penalty could qualify as jurors in a capital case:

> "We'll excuse [juror] 6033 because the court's [sic] of the opinion that she can't -- if you don't support the death penalty you cannot be death qualified." (18 RT 3716.)

As the rest of voir dire would show, this was no mere slip of the tongue, but reflected the court's considered view. The court could not have been clearer: "Under *Wainwright v. Witt*, if you are opposed to the death penalty, you are not qualified to serve as a trial juror in this kind of case." (16 RT 3356.) Again and again the court returned to this central premise -- if a juror was opposed to the death penalty, the juror could not serve:

> "I'm going to excuse [Juror 24095] because he opposes the death penalty . . . ." (17 RT 3388-89.)
>
> "I'm going to excuse juror number 29280 because this juror is opposed to the death penalty, and fails Wainwright v. Witt. 29280 is excused." (17 RT 3486.)
>
> "So if you don't want to stipulate [to the excusal of Juror 4841], fine. But if they oppose the death penalty, they are not qualified under Wainwright v. Witt." (16 RT 3106.)
>
> "[Juror 4567] opposes the death penalty, so he wouldn't qualify [under *Wainwright v. Witt*] anyway." (12 RT 2270.)
>
> "[Juror 962] opposes the death penalty. She could never serve anyway." (12 RT 2395.)
>
> "[Juror 6264] opposes the death penalty so he wouldn't qualify under Wainwright v. Witt." (12 RT 2401.)
>
> "[Juror 630] oppose[s] the death penalty anyway, so he fails Wainwright v. Witt." (14 RT 2868.)

Defense counsel did not share this view. To the contrary, as his objections to the court's discharge of jurors mounted, counsel put on the record his very different view of the court's power to discharge jurors:

> "Strongly oppose[d] [to the death penalty] doesn't mean that he can't implement it in the appropriate circumstance." (14 RT 2715.)
>
> "Obviously I believe that opposition to the death penalty should not be a for-cause challenge. The Court has ruled on it. I'm not going to continue to raise it each time. Although I want the record to reflect that I am submitting on the Court's previous rulings." (16 RT 3109.)

The essence of the disagreement between the court and defense counsel was aptly illustrated by the following interchange:

> "MR. GERAGOS: The gentleman who said he was opposed, you can be opposed to the death penalty. There is [sic] plenty of people that opposed it, yet it's the law of the land.
>
> "THE COURT: Under Wainwright versus Witt, if you are opposed to the death penalty, you are not qualified to serve as a trial juror in this kind of a case.
>
> "MR. GERAGOS: If you are opposed and won't carry it out. If you are opposed, yet you will carry it out, you can be intellectually opposed to the death penalty, yet if you will carry it out, you qualify." (16 RT 3356.)

Indeed, at one point defense counsel complained that "we have now [lost] some twenty some odd people, losing people solely because of their opposition to the death penalty." (16 RT 3363.) The court responded, "well, that's the law in California." (*Ibid.*)

As discussed more fully below, this is *not* the law in California, or anywhere else. The trial court here discharged juror after juror simply because they stated in their written questionnaire they were opposed to the death penalty. Every one of these prospective jurors stated in the questionnaire that despite their opposition to the death penalty, they would consider death as an option, and not a single one of these jurors was ever even questioned about their views. Instead, these jurors were summarily discharged. Defense counsel objected to every one of these discharges.

During these objections, there were at least two prosecutors sitting at counsel table for the state. (*See*, *e.g.*, 17 CT 5522.) At no point during the trial court's exchanges with defense counsel did either prosecutor say anything; the state's attorneys did nothing and said nothing to correct the trial court's view. Instead, they simply took advantage of the rulings to try their case to a jury selected in this way.

This strategy of silence worked. Of the 12 jurors selected to try the case, 11 were in favor of the death penalty while the lone remaining juror was "ok with [the] death penalty if warranted." (CT MJQ 19, 42, 65, 88, 111, 134, 157, 180, 203, 226, 249, 272.)[23] Of the six alternates selected, all six supported the death penalty. (CT MJQ 295, 318, 341, 364, 387, 410.) And more important for purposes of this argument, numerous jurors who were completely qualified to sit as jurors were summarily discharged from jury service, without voir dire.

As discussed in detail below, a new penalty phase is required. More than 40 years ago the Supreme Court recognized "that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) Only five years ago the Court reiterated that a death sentence could not stand where "the systematic removal of those in the venire opposed to the death penalty had led to a jury 'uncommonly willing to condemn a man to die.'" (*Uttecht v. Brown* (2007) 551 U.S. 1, 6, citations omitted.) But that is exactly what happened here. As a matter of federal constitutional law, the trial court's clearly stated view that "if you don't support the death penalty you cannot be death qualified" is unquestionably wrong. Reversal of the penalty phase is required.

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[23] "CT MJQ" refers to the separately bound, single volume of the Clerk's Transcript labeled "Main Jury Questionnaires." This volume contains a copy of the jury questionnaires filled out by the 12 jurors picked for the jury and the six alternates.

B. The Legal Framework Governing For-Cause Discharges And The Jury Questionnaire Used In This Case.

As suggested by the cases cited above, the Supreme Court has long held that prospective jurors may not be excluded from a capital case simply because they are opposed to the death penalty. (*See*, *e.g.*, *Uttecht v. Brown*, *supra*, 551 U.S. at p. 6; *Wainwright v. Witt* (1985) 469 U.S. 412, 421; *Adams v. Texas* (1980) 448 U.S. 38, 45, 48; *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522.) Nor may prospective capital jurors be excluded simply because they are in favor of the death penalty:

> "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State."

(*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 519.)

Instead, the right a fair jury trial requires a more nuanced approach to jury selection. A juror who opposes the death penalty may be excluded from serving on a capital jury based on his views as to capital punishment only where the record shows that the juror would be unable to set aside his views, follow the law as set forth by the court and fairly consider death as an option. (*Uttecht v. Brown*, *supra*, 551 U.S. at 9; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 421; *Adams v. Texas*, *supra*, 448 U.S. at p. 48.)

As both this Court and the United States Supreme Court have concluded, even where a juror admits his or her opposition to the death penalty would make it "very difficult ever to impose the death penalty" discharge for cause is *not* proper unless the record goes further and shows the juror's "personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart* (2004) 34 cal.4th 425, 446. *See also People v. Thomas* (2011) 52 Cal.4th 336, 360 ["Mere difficulty in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties."]; *People v. Avila* (2006) 38 Cal.4th 491, 530 [same]; *Adams v. Texas*, *supra*, 448 U.S. at pp. 49-50.)

Similarly, a juror who is in favor of the death penalty may be excluded from serving on a capital jury only where the record shows he would be unable to set aside his views, follow the law and fairly consider life as an option. (*See Morgan v. Illinois* (1992) 504 U.S. 719, 728-729; *Ross v. Oklahoma* (1988) 487 U.S. 81, 85.) A trial court's erroneous for-cause discharge of even a single juror based on opposition to the death penalty requires reversal of any death sentence imposed. (*Gray v. Mississippi* (1987) 481 U.S. 648, 660.)

Here, jury voir dire began on March 4, 2004. (11 RT 2025.) Prior to voir dire, all prospective jurors completed a jury questionnaire. As relevant here, questions 107

through 116 of the questionnaire asked about jurors' views on the death penalty. (*See*, *e.g.*, CT MJQ 19-20.) Specifically, questions 107, 109, 115 and 116 sought information to assist the trial court in determining whether a juror could be discharged pursuant to *Witherspoon* or *Morgan* because of their views on the death penalty:

> "107. What are your feelings regarding the death penalty?"
> _____.
>
> . . .
>
> "109. How would you rate your attitude towards the death penalty?
>
> ___ Strongly Oppose ___ Weakly Support
> ___ Oppose ___ Support
> ___ Weakly Oppose ___ Weakly Support"
>
> "115. Do you have any moral, religious, or philosophical opposition to the death penalty so strong that you would be unable to impose the death penalty regardless of the facts?
>
> ___ Yes ___ No
>
> If yes, please explain."

"116. Do you have any moral, religious, or philosophical beliefs in favor of the death penalty so strong that you would be unable to impose life without the possibility of parole regardless of the facts?

___ Yes ___ No

If yes, please explain." (CT MJQ 19-20.)[24]

Because of the highly publicized nature of this case, many prospective jurors filled out questionnaires. For purposes of this argument, there were two general groups of responding jurors.

First, there were many jurors who indicated in response to questions 109 and 116 that (1) they supported the death penalty but (2) had no "moral, religious or philosophical" views that would preclude them from considering life without parole as an option. Second, there were many jurors who indicated in response to questions 109 and 115 that (1) they opposed the death penalty but (2) had no "moral, religious or philosophical" views that would preclude them from considering death as an option.

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[24] The entire breakdown of the jury question was as follows. Questions 1-66 asked jurors personal information about their residence, family, education, employment and military service. (CT MJQ 3-12.) Questions 67-83 asked about law enforcement, judicial and criminal justice system contacts. (CT MJQ 12-15.) Questions 84-87 asked about prior jury service. (CT MJQ 16.) Questions 88-89 asked jurors their views as to direct and circumstantial evidence. (CT MJQ 16.) And questions 90-106 asked jurors about the publicity they had been exposed to in the case. (CT MJQ 16-18.)

On the face of their questionnaires, neither of these two groups of prospective jurors was properly excludable based on their written answers alone. Those prospective jurors who supported the death penalty but would nevertheless consider life as an option could *not* properly be excluded for cause under *Morgan v. Illinois*, *supra*, and many such jurors in fact were seated as jurors and alternate jurors in this case. (*See*, *e.g.*, CT MJQ at 19-20, 42-43, 111-112, 134-135, 157-158, 180-181, 203-204, 226-227, 249-250, 272-273, 295-296, 318-319, 341-342, 364-365, 387-388, 410-411.) In fact, throughout the extensive voir dire in this case, the trial court did not discharge a single such juror from service based solely on their answers to questions 109 and 116. The trial court's decision not to discharge these jurors for cause based solely on answers to questions 109 and 116 was entirely proper.

Of course, the same rule should have applied to those prospective jurors who opposed the death penalty but would nevertheless consider death as an option. As discussed above, these jurors too are also *not* properly excludable for cause. But the trial court here applied a very different standard to these prospective jurors.

A certain number of these jurors were properly excused for reasons unrelated to their views on the death penalty, such as hardship. (*See*, *e.g.*, 12 RT 2372, 2382-83 [discharging prospective jurors 6023 and 6291 for hardship]; 14 RT 2809 [discharging

juror 30687 for hardship].) But as discussed in Argument I-C below, the trial court here discharged at least 13 of these jurors under *Wainwright v. Witt* over defense objection based solely on written answers to questions 109 and 115 showing they (1) opposed the death penalty but (2) would nevertheless consider death as an option.

As discussed in Argument I-D below, based on the record none of these 13 jurors were properly discharged under *Witt*. Although every one of these jurors opposed the death penalty, *none* indicated they were unable to consider death as an option in the case as *Witt* requires. Because the improper discharge of even a single juror under *Witt* requires reversal of the penalty phase, the improper discharge of 13 such jurors requires reversal of the death sentence here.

C. The Voir Dire Process In This Case And The Discharge Of Jurors 6963, 6284, 27605, 4841, 29280, 6960, 7056, 16727, 8340, 23873, 593, 23916 And 5909.

1. The voir dire process in this case.

Because of the extreme amount of publicity in this case, the attendant risk that prospective jurors may have been exposed to this publicity and reached opinions about the case, and the anticipated length of the trial, the court and all parties realized they

would need to voir dire a great number of jurors. Accordingly, the court's process was to bring in a large group of jurors to fill out the lengthy juror questionnaire. (1 RT 356.) The questionnaire contained a separate page which permitted prospective jurors to request a hardship discharge. The court's plan was to address the hardship requests that same day with each group. (1 RT 356.) Those jurors who did not request (or receive) a hardship discharge would be ordered back for full, individualized (*Hovey*) voir dire. (1 RT 357; 11 RT 2058.)

The hardship voir dire lasted from March 4, 2004 until March 22, 2004. (11 CT 2025; 16 RT 3099.) The juror questionnaires of those jurors discharged during this part of the voir dire have been bound and placed in 88 volumes of the Clerk's Transcript labeled "Hardship -- Excused Questionnaires."[25] The individualized *Hovey* voir dire began on March 22, 2004. (16 RT 3099.) The juror questionnaires of those jurors discharged during this part of the voir dire have been bound and placed in 31 volumes of

[25] References to the 88 volumes of the Clerk's Transcript which contains the juror questionnaires of jurors discharged during the hardship process are by volume and page number to "CT Hardship."

the Clerk's Transcript labeled "Hovey Voir Dire -- Excused Questionnaires."[26]

2. The discharge of jurors 6963, 6284, 27605, 4841, 29280, 6960, 7056, 16727, 8340, 23873, 593, 23916 and 5909.

a. Juror 6963.

Juror 6963 filled out his questionnaire on March 9, 2004. (31 CT Hardship 8753.)

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[26] References to the 31 volumes of the Clerk's Transcript which contains the juror questionnaires of jurors discharged during *Hovey* voir dire are by volume and page number to "CT Hovey."

The labels attached by the clerk to these transcripts may be misleading. In fact, during the hardship portion of the voir dire, the trial court discharged numerous prospective jurors because of their views on the death penalty. This was because many jurors who asked for a hardship discharge on their questionnaire -- and thus were considered during the hardship portion of the voir dire -- also indicated they were opposed to the death penalty and would not consider it under any circumstances. (*See*, *e.g.*, 8 CT Hardship 1958; 9 CT Hardship 2140; 11 CT Hardship 2949; 13 CT Hardship 3364, 3525, 14 CT Hardship 3709.) Juror 5873 was an example of such a juror; juror 5873 was a Quaker who in his questionnaire (1) requested a hardship discharge and (2) stated he would not consider death as an option. (14 CT Hardship 3709.) Rather than inquire into and address the hardship, the trial court simply discharged the juror for cause under *Wainwright v. Witt*, *supra*. (*See*, *e.g.*, 12 RT 2289.) Likewise, some jurors who came back for individualized *Hovey* voir dire were ultimately discharged for hardship. (*See*, *e.g.*, 17 RT 3391-3392 [discharging juror 10028 for hardship during *Hovey* voir dire].)

In other words, the location of a prospective juror's questionnaire in the *Hovey* or hardship portion of the Clerk's Transcript accurately reflects *when* the juror was discharged. It may not, however, accurately reflect *why* the juror was discharged.

He had not formed an opinion about defendant's guilt and did not believe there was any reason he could not be a fair juror in the case. (31 CT Hardship 8750-8751.) This juror was "strongly oppose[d]" to the death penalty but explained that his beliefs were not so strong he would be "unable to impose the death penalty regardless of the facts." (31 CT Hardship 8752-8753.) Neither his religion nor philosophical beliefs would interfere with jury service. (31 CT Hardship CT 8736.)

The court and parties discussed this juror on March 10, 2004. (14 RT 2715.) The court noted but did not explore at all a potential hardship, instead discharging the juror because of his views on the death penalty. The court specifically rejected defense counsel's argument that opposition to the death penalty alone was an insufficient reason to discharge a juror where the juror could still select death as an option:

> "THE COURT: Third week of July my family have a three week vacation in the Philippines. 6963. Strongly opposes the death penalty. He thinks your client's innocent. No evidence he murdered his wife.
>
> "MR. GERAGOS: When's his vacation?
>
> "THE COURT: Well, he going to fail Wainwright vs. Witt.
>
> "MR. GERAGOS: Strongly opposes; I'll rehabilitate him.
>
> "THE COURT: You won't rehabilitate anybody Mr. Geragos. *You didn't hear what I said*.
>
> "MR. GERAGOS: I heard what you said. We need to have a discussion.

"THE COURT: 6963.

"MR. GERAGOS: Strongly opposes doesn't mean that he can't implement it in the appropriate circumstance.

"THE COURT: My feeling is I'm against the death penalty. How would you rate your attitude. Strongly oppose. Just my feeling against it.

"(Prospective juror enters jury room)

"THE COURT: We're going to excuse you, okay?" (14 RT 2715-2716, emphasis added.)[27]

b. Juror 6284.

Juror 6284 filled out his questionnaire on March 8, 2004. (17 CT Hardship 4557.)

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[27] The trial court's emphasized comment that defense counsel Geragos "didn't hear what I said" was a reference to an earlier exchange between counsel and the court where the trial court said that it would not permit any voir dire at all in connection with jurors he (the judge) did not believe would qualify. Thus, relatively early on in the voir dire process, after the trial court discharged prospective juror 4823 for cause without any voir dire at all from the defense, the following exchange occurred:

"MR. GERAGOS: It wasn't given sufficient voir dire by the defense.

"THE COURT: Well, I got to tell you guys. There's also another little thing you're also going to like less[]. I'm not giving anybody any attempts to rehabilitate a jury. Once you're out, you're out. Period. Both sides don't get to rehabilitate anybody." (12 RT 2368.)

Similarly, prospective juror 99 stated in his questionnaire that he was against the death penalty. (12 RT 2303.) Over defense objection, the court discharged the juror stating it would be a "waste of time" to bring him back for questioning. (12 RT 2303.)

He asked for a hardship excusal, explaining he was unemployed and had a chance of employment on March 10, 2004. (17 CT Hardship 4558.) He had not formed an opinion about defendant's guilt and did not believe there was any reason he could not be a fair juror in the case. (17 CT Hardship 4554-4555.) Juror 6284 was opposed to the death penalty but said his beliefs were not so strong he would be "unable to impose the death penalty regardless of the facts." (17 CT Hardship 4556-4557.) Neither his religion nor philosophical beliefs would interfere with jury service. (17 CT Hardship 4540.)

The court and parties discussed this juror on March 8, 2004. (12 RT 2384.) Once again, rather than explore the claimed hardship, the trial court discharged him under *Witt* based solely on his answers to questions 107, 109 and 115:

> "THE COURT: 6284. Unemployed. Chances of employment Wednesday, March the 10th.
>
> "Let's see, this person says he opposes the death penalty. I don't believe in the death penalty. He also says or she says as the case maybe. Not enough information to decide [whether defendant is guilty or innocent]. I learned over the years not to judge too quickly. But his affair was troublesome, but it doesn't mean he's guilty. But the only problem is --
>
> "MR. GERAGOS: He's unemployed and may have a job.
>
> "THE COURT: He says -- she says there's a chance of employment March the 10th. But is he or he is opposed to the death penalty, so that eliminates the possibilities. It's a [W]ainwright v. Whit [sic] failure.
>
> "6284.

"MR. GERAGOS: Over defense objection.

"THE COURT: Yes." (12 RT 2384.)

c. Juror 27605.

Juror 27605 filled out his questionnaire in March of 2004. (16 RT 3178.) He had formed no opinion about defendant's guilt and did not believe there was any reason he could not be a fair juror in the case. (2 CT Hovey 86-87.) Although his answers to questions 107 and 109 indicated he "strongly opposed" the death penalty, juror 27605's questionnaire made clear he did *not* have any moral, religious or philosophical views on the death penalty which rendered him "unable to impose the death penalty regardless of the facts." (2 CT Hovey 88-89.) And he added that his religious and philosophical views would not impede his ability to serve as a juror. (2 CT Hovey 72.)

The court and parties discussed this juror on March 22, 2004. (16 RT 3178.) Defense counsel "submitt[ed] on the basis of your honor's previous rulings." (16 RT 3178-3179.) Based entirely on juror 27605's written answers in the questionnaire, the court discharged the juror under *Wainwright v. Witt*, *supra*:

"THE COURT: So let me read in to the record 27605, with respect to the death penalty, juror said strongly oppose the death penalty. Opposed to the death penalty.

"Response to question 106 [sic], what are your feelings regarding the death penalty. Against. So in the Court's opinion would not qualify under Wainwright versus Witt. So the DA is willing to stipulate? You [defense counsel] are going to submit it, Mr. Geragos, to preserve the record? The Court will excuse 27605." (16 RT 3179.)[28]

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[28] As noted, in connection with juror 27605, defense counsel objected and submitted "on the basis of Your Honor's previous ruling[s]." (16 RT 3178-3179.) Counsel's reference to "previous rulings" reflects the fact that at this point in the voir dire process counsel had unsuccessfully objected to the discharge of a number of jurors based on their opposition to the death penalty, including jurors 6963 and 6284 discussed above. Indeed, only moments before juror 27605 was called, defense counsel objected to the trial court's discharge of prospective juror 4755 and summarized the proceedings to that point:

"MR. GERAGOS: [The People] are going to stipulate that because of [juror 4755's] death penalty opposition, that it's a for-cause [discharge of juror 4755]. The answers to [question] 107. I will just submit based on my previous arguments that I have made to the Court.

"Obviously I believe that opposition to the death penalty should not be a for-cause challenge. The Court has ruled on it. I'm not going to continue to raise it each time. Although I want the record to reflect that I am submitting on the Court's previous rulings.

"THE COURT: All right. So you want -- you are willing to submit the matter?

"MR. GERAGOS: I'm going to submit.

"THE COURT: 4755, you are willing to stipulate?

"[THE PROSECUTOR] MR. DAVID HARRIS: Yes." (16 RT 3109. *Accord* 17 RT 3378 [trial court recognizes that defense counsel's objection to discharge of a juror based on opposition to the death penalty is "a standing objection" so "you don't have to say it every time."].)

d. Juror 4841.

Juror 4841 filled out her questionnaire in March 2004. She had not formed an opinion about defendant's guilt, agreed to decide the case based on the evidence presented in court, and did not believe there was any reason she could not be a fair juror in the case. (2 CT Hovey 224-225.) This juror "strongly opposed" the death penalty but explained that her beliefs were not so strong she would be "unable to impose the death penalty regardless of the facts." (2 CT Hovey 227.) Neither her religion nor philosophical beliefs would interfere with jury service. (2 CT H 210.)

The court and parties discussed this juror on March 22, 2004. (16 RT 3178.) The state indicated it was willing to stipulate to discharge of this juror. (16 RT 3179.) Defense counsel noted that this juror "oppose[d] the death penalty" and "submitted on the basis of Your Honor's previous rulings." (16 RT 3178-3179.) After the parties discussed another juror, the trial court asked the parties "what about [juror] 04841?" (16 RT 3180.) The following exchange then occurred:

> "MR. GERAGOS: 04841 also opposed the death penalty. I would submit based upon the Court's previous rulings.
>
> "THE COURT: Okay. The answer on page 19, [question] 109, would you please rate your attitude toward the death penalty? Strongly opposed. So

this juror also would not qualify. And District Attorney is willing to stipulate?

"MR DAVID HARRIS: Yes.

"THE COURT: All right. So 4841 is excused." (16 RT 3180.)

e. Juror 29280.

Juror 29280 filled out his questionnaire on March 8, 2004. (5 CT Hovey 940.) He had formed no opinion about defendant's guilt and did not believe there was any reason he could not be a fair juror in the case. (5 CT Hovey 937-938.) Although his answers to questions 107 and 109 indicated he "strongly opposed" the death penalty and believed it was "ethically unjust," juror 29280 did *not* have any moral, religious or philosophical views on the death penalty which rendered him "unable to impose the death penalty regardless of the facts." (5 CT Hovey 939-940.) He confirmed that neither his religious nor philosophical beliefs would prevent him from serving as a juror. (5 CT Hovey 923.)

The court and parties discussed this juror on March 25, 2004. (17 RT 3485.) The court noted juror 29280's answers to questions 107 and 109. (17 RT 3485.) The prosecutor accurately noted that this juror had also been involved in circulating a petition against the death penalty. (17 RT 3485; *see* 5 CT Hovey 940.) Based entirely on juror 29280's written answers in the jury questionnaire, the trial court ruled "this juror would

never qualify" under *Wainwright v. Witt*, *supra*, and excused this juror over defense objection:

> "THE COURT: According to -- Mr. Geragos, you are willing to submit this with the usual understanding you are submitting it, but you are objecting to it because you feel that that's not a justification to excuse the juror?
>
> MR. GERAGOS: That's correct, your honor. I'd like to indicate for the record that that particular juror, like many of the others, has not formed any preliminary opinion about the case. Has not enough information to decide.
>
> THE COURT: All right. The matter then is submitted. Then I'm gong to excuse juror number 29280 because this juror is opposed to the death penalty, and fails Wainwright v. Witt. 29280 is excused." (17 RT 3485-3486.)

f. Juror 6960.

Juror 6960 filled out her questionnaire on March 9, 2004. (8 CT Hovey 2044.) She had formed no opinion about defendant's guilt and did not believe there was any reason she could not be a fair juror in the case. (8 CT Hovey 2041-2042.) She "wish[ed]" the death penalty was not a thing needed" and stated she "opposed" the death penalty. (8 CT Hovey 2043.) Juror 6960 then made clear, however, that she did *not* have any moral, religious or philosophical views on the death penalty which rendered her "unable to impose the death penalty regardless of the facts." (8 CT Hovey 2044.)

Neither her religious nor philosophical views would interfere with her service as a juror. (8 CT Hovey 2027.)

The court and parties discussed this juror on April 7, 2004. (21 RT 4177.) Mr. Geragos submitted the matter "with the usual objection." (21 RT 4245.) Based entirely on this juror's answers in the written questionnaire, the court "excused 6960 for cause because that juror is opposed to the death penalty, without reservation." (21 RT 4245.)

g. Juror 7056.

Juror 7056 filled out her questionnaire on March 9, 2004. (10 CT Hovey 2573.) She had formed no opinion about defendant's guilt and did not believe there was any reason she could not be a fair juror in the case. (10 CT Hovey 2570-2571.) Although juror 7056 did not "believe in [the] death penalty" and stated she "opposed" it, she made clear she did *not* have any moral, religious or philosophical views on the death penalty which rendered her "unable to impose the death penalty regardless of the facts." (10 CT Hovey 2572-2573.) She too confirmed that neither her religion nor her philosophical beliefs would interfere with jury service. (10 CT Hovey 2556.)

The court and parties discussed this juror on April 12, 2004. (23 RT 4469.) The court discharged her under *Wainwright v. Witt*, *supra*, solely based on her written answers to questions 107 and 109:

> "THE COURT: 7056 I don't think is going to qualify.
>
> "[Page] 19, [question] 109 says I don't believe in the death penalty, I oppose the death penalty.
>
> "So that one would not pass Wainwright v. Witt. You want to stipulate that juror can be excused, with your usual objection Mr. Geragos?
>
> "MR. GERAGOS: Right. I'll submit on that.
>
> "MR. DAVID HARRIS: We'll stipulate.
>
> "THE COURT: All right. We'll excuse juror number 7056 when that juror arrives.
>
> "MR. GERAGOS: I want to indicate for the record that the answers were that have not formed any preliminary opinions, didn't have enough information to decide and nobody has expressed an opinion to this person and they could otherwise be a fair and impartial juror." (23 RT 4469.)

h. Juror 16727.

Juror 16727 filled out his questionnaire on March 9, 2004. (10 CT Hovey 2642.) He had formed no opinion about defendant's guilt and did not believe there was any reason he could not be a fair juror in the case. (10 CT Hovey 2639-2640.) He was

"against the death penalty" but did *not* have any moral, religious or philosophical views on the death penalty which rendered him "unable to impose the death penalty regardless of the facts." (10 CT Hovey 2641-2642.) He confirmed that neither his religion nor his philosophical beliefs would interfere with jury service. (10 CT Hovey 2625.)

The court and parties discussed this juror on April 13, 2004. (24 RT 4769-4770.) Over objection, the court discharged him for cause:

> "THE COURT: [H]e says: I am against the death penalty, I strongly oppose the death penalty.
>
> "I don't think this person would qualify because of his answers, and he's opposed to the death penalty. So I would be inclined to excuse him. Over the objection of Mr. Geragos.
>
> "Does anybody have a problem with that?
>
> "MR. DISTASO: No, your Honor.
>
> "MR. GERAGOS: I do.
>
> "THE COURT: Submitted?
>
> "MR. GERAGOS: Submitted.
>
> "THE COURT: Okay.
>
> "MR. GERAGOS: Over my vehement objection." (24 RT 4770.)

I. Juror 8340.

Juror 8340 filled out her questionnaire on March 10, 2004. (15 CT Hovey 4044.) She had formed no opinion about defendant's guilt and did not believe there was any reason she could not be a fair juror in the case. (15 CT Hovey 4041-4042.) Although juror 8340 was "strongly against [the death penalty] due to religious beliefs" and stated she "opposed" it, these beliefs were not so strong she would be "unable to impose the death penalty regardless of the facts." (15 CT Hovey 4043-4044.) Neither her religion nor her philosophical beliefs would interfere with jury service. (15 CT Hovey 4027.)

The court and parties discussed this juror on April 21, 2004. (28 RT 5485.) Over defense objection, the court discharged her based on her answers to questions 107, 109 and 115:

> "THE COURT: And then juror number 8340 is also -- what are your feelings regarding the death penalty? Answer I feel strongly against this due to religious beliefs.
>
> "MR. DAVID HARRIS: 8340 we would stipulate.
>
> "MR. GERAGOS: I'll submit.
>
> "THE COURT: With the usual objection?
>
> "MR. DAVID HARRIS: Yes.

> "THE COURT: All right. 8340 may be excused. And the juror is excused because the juror's (sic) opposed to the death penalty on religious grounds." (28 RT 5485.)

j. Juror 23873.

Juror 23873 filled out her questionnaire on March 10, 2004. (21 CT Hovey 5586.) She had not formed an opinion as to defendant's guilt and she agreed to decide the case based on the evidence presented in court. (21 CT Hovey 5583, 5584.) Juror 23873 was "strongly opposed" to the death penalty but stated her views were not so strong she would be "unable to impose the death penalty regardless of the facts." (21 CT Hovey 5585-5586.) Neither her religion nor her philosophical beliefs would interfere with jury service. (21 CT Hovey 5569.)

The court and parties discussed this juror on May 4, 2004. (32 RT 6384.) Over defense objection, the court discharged her based on her answers to questions 107, 109 and 115:

> "THE COURT: 23873.
>
> "MR. GERAGOS: I was going to stay [sic], I'll submit with my usual statement.
>
> "THE COURT: Okay.

"MR. GERAGOS: Protestation.

"THE COURT: This juror says I can't think it is fair that that is case is getting so much attention. I wonder why? Question mark. I just think there is too much attention. I don't think that it's fair. She also says on [page] 19 . . . strongly opposes the death penalty.

"MR. DAVID HARRIS: We'll stipulate as to 23873.

"MR. GERAGOS: I'll submit.

"THE COURT: With your usual objection then?

"MR. GERAGOS: Yes.

"THE COURT: All right. 23873 will be excused." (32 RT 6384-6385.)

k. Juror 593.

Juror 593 filled out his questionnaire in March 2004. He had not formed an opinion about defendant's guilt and did not believe there was any reason he could not be a fair juror in the case. (4 CT Hovey 868-869.) Juror 593 was "strongly opposed" to the death penalty but said his beliefs were not so strong he would be "unable to impose the death penalty regardless of the facts." (4 CT Hovey 870-871.) Neither his religion nor philosophical beliefs would interfere with jury service. (4 CT Hovey 854.)

The court and parties discussed this juror on March 25, 2004. (17 RT 3486.) Based on his opposition to the death penalty, the trial court excused this juror:

"THE COURT: I'm going to excuse juror number 29280, because this juror is opposed to the death penalty, and fails Wainwright versus Witt. 29280 is excused.

"Juror number 593 is also opposed to the death penalty. . . .

"This juror is opposed to the death penalty. Not enough information to decide whether or not your client is guilty or not, but he strongly opposes the death penalty. Strongly opposes. So if you want to submit that, Mr. Geragos, with the usual reservation, and if the prosecution wants to submit it, I will excuse this juror for the reason he's opposed to the death penalty.

"MR. GERAGOS: Yes, your honor. I'll submit it.

"MR. DISTASO: I'm [sic] submit it also, your Honor. And I just want to just note for the record, 110, where it says would it be difficult for you to vote for the death penalty if the crime was the guilty party's first offense? This juror said yes.

"THE COURT: All right. Juror number 593 is also excused for the reasons I stated in the record." (17 RT 3486.)

l. Juror 23916.

Juror 23916 filled out her questionnaire on March 11, 2004. (21 CT Hovey 5771.) She had not formed an opinion about guilt and did not believe there was any reason she could not be a fair juror in the case. (21 CT Hovey 5768-5769.) She was "oppose[d]" to the death penalty but explained that her beliefs were not so strong she would be "unable to impose the death penalty regardless of the facts." (21 CT Hovey 5770-5771.)

The court and parties discussed this juror on May 6, 2004. (34 RT 6672.) The trial court noted a potential hardship in connection with this juror -- the possibility that she might only be paid for three days of jury service. (34 RT 6672.) The prosecutor accurately pointed out that "this juror doesn't believe in the death penalty." (34 RT 6672.) The court elected not to pursue the potential hardship, instead discharging Juror 23916 over the "usual" defense objection. (34 RT 6672-6673.)

m. Juror 5909.

Juror 5909 filled out her questionnaire in May 2004. She had not formed an opinion about defendant's guilt, agreed to decide the case based on the evidence presented in court, and did not believe there was any reason she could not be a fair juror in the case. (27 CT Hovey 7358-7359.) This juror "strongly opposed" the death penalty but explained that her beliefs were not so strong she would be "unable to impose the death penalty regardless of the facts." (27 CT Hovey 7360-7361.) Neither her religion nor philosophical beliefs would interfere with jury service. (27 CT Hovey 7344.)

The court and parties discussed this juror on May 18, 2004. (38 RT 7861.) The state stipulated to discharge of this juror. (38 RT 7861.) Defense counsel refused to stipulated, instead submitting with the "usual objection." (38 RT 7861-7862.) The court

"excuse[d] the juror for cause, because this juror opposes the death penalty, and is not qualifiable under Wainwright v. Witt. So 5909 is excused for cause." (38 RT 7862.)

n. Summary.

Over defense objection the trial court excused 13 prospective jurors based on written answers in the questionnaire indicating (1) they were opposed to the death penalty but (2) their views did *not* preclude them from imposing death. The question remains as to whether such discharges were proper. It is to that question appellant now turns.[29]

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[29] As discussed above, many jurors who expressed opposition to the death penalty but harbored no "moral, religious or philosophical opposition" which would preclude them from imposing death were discharged for hardship with no objection by the defense. (*See*, *e.g.*, 12 RT 2283-2284, 2320, 2369, 2411; 13 RT 2480, 2544-2545, 2632-2633, 2633-2634; 14 RT 2853; 15 RT 2916-2917, 2925-2926, 2941, 2957-2958, 2973, 2993, 3056.) Mr. Peterson has no issue with these hardship discharges.

It is worth noting, though, that as to many of these jurors -- jurors who simply opposed the death penalty without any indication they would refuse to follow the law -- the trial court repeatedly noted that in addition to the hardship they could not qualify for jury service under *Wainwright v. Witt*. (*See*, *e.g.*, 12 RT 2282-2283 ["He strongly opposes the death penalty. . . . He would never qualify because he strongly opposes the death penalty . . . ."]; 12 RT 2411 ["He'll also will never pass Wainwright v. Witt."]; 13 RT 2545 ["And opposes the death penalty. Wouldn't get by Wainwright v. Witt in any event."]; 15 RT 2917 ["But he's opposed to the death penalty. Wainwright v. Witt. Bringing him back would be a waste of time."]; 15 RT 2941 ["He opposes the death penalty. . . . So he would not pass Wainwright v. Witt . . . ."]; 15 RT 2946 ["Strongly opposes the death penalty. . . . Hardship and Wainwright v. Witt failure."].) Given that none of these jurors had stated views which would prevent them from considering death as an option, these exchanges confirm the trial court's view that *Witt* permitted discharge of jurors simply because they were opposed to the death penalty.

D. The Trial Court's Discharge Of 13 Jurors Based Entirely On Jury Questionnaire Answers Showing Only That Although These Jurors Were Opposed To The Death Penalty They Were Willing To Impose Death, Violated The Sixth And Fourteenth Amendments And Requires Reversal Of The Penalty Phase.

In *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, the Supreme Court held that prospective jurors in a capital case may not be excused for cause on the basis of moral, ethical or religious opposition to the death penalty. A capital defendant's Sixth and Fourteenth Amendment right to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id*. at p. 522.) Instead, the state may properly excuse only those jurors "who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 522-523, n. 21.)

The Court modified the *Witherspoon* standard in *Adams v. Texas*, *supra*, 448 U.S. 38. The Court explained that *Witherspoon* and its progeny "establish[] the general proposition that a juror may not be challenged for cause based on his views about capital

punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Instead, a state could only insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Ibid*.) Prospective jurors may *not* be excluded from service simply because their views on the death penalty would impact "what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." (*Id*. at p. 50.) A prospective juror who opposed capital punishment could be discharged for cause only where the record showed him unable to follow the law as set forth by the court. (448 U.S. at p. 48.) This is so because "[e]ven a person with a strongly held view in favor of, or against, the death penalty could possibly set aside those views and decide a case according to the law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176. *Accord People v. Avila*, *supra*, 38 Cal.4th at p. 531.) Moreover, as the Court later made plain in specifically re-affirming *Adams*, it is the state's burden to prove a juror meets the criteria for dismissal under *Adams*. (*Wainwright v. Witt*, *supra*. 469 U.S. at p. 423.)

This Court has repeatedly held that it is the *Adams/Witt* standard which reviewing courts should apply in evaluating a trial court's decision to discharge jurors because of opposition to the death penalty. (*See*, *e.g*., *People v. Holt* (1997) 15 Cal.4th 619, 650; *People v. Avena* (1996) 13 Cal.4th 394, 412.) And both the United States Supreme Court

and this Court have held that when a trial court questions a juror about his or her ability to impose death, and determines that a prospective juror cannot impose death, that determination is subject to deference because it is "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 7; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 428; *People v. Stewart*, *supra*, 33 Cal.4th at p. 451.) "But such deference is unwarranted when . . . the trial court's ruling is based solely on the 'cold record' of the prospective jurors' answers on a written questionnaire . . . ." (*People v. Avila*, *supra*, 38 Cal.4th at p. 529. *Accord People v. Stewart*, *supra*, 33 Cal.4th at p. 451.)

As discussed above, over repeated defense objection, the trial court here discharged 13 prospective jurors -- juror numbers 6963, 6284, 27605, 4841, 29280, 6960, 7056, 16727, 8340, 23873, 593, 23916 and 5909 -- based entirely on their written answers to several questions on the jury questionnaire. Application of the *Adams/Witt* standard to the written answers on which the trial court relied to discharge these 13 jurors shows that the trial court plainly erred in discharging them for cause under *Witt*.

To be sure, the answers on the jury questionnaires show that each of these jurors opposed the death penalty. But as *Adams* held, mere opposition to capital punishment is an insufficient basis on which to discharge a prospective juror for cause. (448 U.S. at p.

45.) Instead, in order to discharge a prospective juror for cause based on the juror's opposition to the capital punishment, the record must establish that the juror's views on capital punishment would "prevent or substantially impair" the juror's ability to perform his duties as a juror and follow the law. (*Id*. at p. 45, 48.)

When there is no voir dire of the prospective juror, but the discharge is based solely on written answers in a questionnaire, the juror may be discharged only where the written answers "leave[] no doubt . . . that a prospective juror's views about the death penalty would satisfy the *Witt* standard . . . and that the juror is not willing or able to set aside his or her personal views and follow the law." (*People v. McKinnon* (2011) ___ Cal.4th ___, 2011 WL 3658915 at * 19; *People v. Wilson* (2008) 44 Cal.4th 758, 787. *Accord People v. Avila*, *supra*, 38 Cal.4th at p. 531.) And in determining whether the state has carried its burden of proof with respect to a discharge for cause, a reviewing court must consider whether defense counsel objected to the discharge and/or declined a chance for further voir dire. (*See People v. McKinnon*, *supra*, 2011 WL 3658915 at * 17; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 430-431 and n.11, 434-435 . *Compare People v. Stewart*, *supra*, 33 Cal.4th at p. 440 [in finding prospective jurors were improperly discharged this Court notes that defense counsel repeatedly objected to the excusals and was not permitted any questioning].)

Here, as to each of the 13 jurors discharged by the trial court, it cannot be said that the record "leave[s] no doubt . . . that [the] prospective juror's views about the death penalty would satisfy the *Witt* standard . . . and that the juror is not willing or able to set aside his or her personal views and follow the law." To the contrary, the record shows the *Witt* standard was not satisfied as to any of these jurors.

Thus, although each of these 13 jurors was opposed to the death penalty, they each went on to make clear they had *no* moral, religious or philosophical beliefs which would make them "unable to impose the death penalty regardless of the facts."[30] Each of these jurors stated that their religious and philosophical views would *not* impede their ability to serve as jurors.[31] In short, the questionnaires of these 13 jurors show only that they were opposed to the death penalty, nothing more. Moreover, not only did defense counsel object to each of the discharges, but the trial court made clear there would be no voir dire of any of the jurors. Discharging these 13 prospective jurors over repeated defense

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[30] *See* 2 CT Hovey 89 [Juror 27605]; 5 CT Hovey 940 [Juror 29280]; 8 CT Hovey 2044 [Juror 6960]; 10 CT Hovey 2573 [Juror 7056]; 10 CT Hovey 2642 [Juror 16727]; 15 CT Hovey 4044 [Juror 8340]; 21 CT Hovey 5586 [Juror 23873]; 17 CT Hardship 4557 [Juror 6284]; 4 CT Hovey 871 [Juror 593]; 21 CT Hovey 5771 [Juror 23916]; 31 CT Hardship 8753 [Juror 6963]; 2 CT Hovey 227 [Juror 4841]; 27 CT Hovey 7360-7361 [Juror 5909].

[31] 2 CT Hovey 72 [Juror 27605]; 5 CT Hovey 923 [Juror 29280]; 8 CT Hovey 2027 [Juror 6960]; 10 CT Hovey 2556 [Juror 7056]; 10 CT Hovey 2625 [Juror 16727]; 15 CT Hovey 4027 [Juror 8340]; 21 CT Hovey 5569 [Juror 23873]; 17 CT Hardship 4540 [Juror 6284]; 4 CT Hovey 854 [Juror 593]; 21 CT Hovey 5754 [Juror 23916]; 31 CT Hardship 8736 [Juror 6963]; 2 CT Hovey 210 [Juror 4841]; 27 CT 7344 [Juror 5909].

objection was patently improper. A new penalty phase is required. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 660 [improper exclusion of a single juror based on opposition to death penalty warrants reversal].)

II. THE TRIAL COURT'S IMPROPER DISCHARGE OF THIRTEEN PROSPECTIVE JURORS BASED ON THEIR OPPOSITION TO THE DEATH PENALTY ALSO VIOLATED MR. PETERSON'S EIGHTH AMENDMENT RIGHT TO RELIABLE GUILT PHASE PROCEDURES, AND REQUIRES REVERSAL OF THE CONVICTIONS AS WELL.

As discussed in Argument I, *supra*, the trial court improperly discharged 13 prospective jurors solely because they were opposed to the death penalty. None of these jurors had any "moral, religious or philosophical views on the death penalty" which would interfere with jury service. Under established law, as also discussed in Argument I, this requires reversal of the death sentence. But as discussed below, it also requires reversal of the convictions themselves.

In making this argument, Mr. Peterson acknowledges that this general issue has been addressed in both this and the United States Supreme Court. For example, in *People v. Stewart*, *supra*, 33 Cal.4th 425, this Court reversed a death sentence where the trial court improperly discharged jurors because of their opposition to the death penalty in violation of *Wainwright v. Witt*, *supra*, 469 U.S. 412. Citing *People v. Heard* (2003) 31 Cal.4th 946, the Court concluded that "[a]lthough the penalty judgment must be reversed on this basis, past decisions make it clear . . . that error under *Witt* . . . does not require reversal of the guilt judgment or special circumstance finding." (33 Cal.4th at p. 455.) In turn, *Heard* also found error under *Witt* and held that "although such an error does not

require reversal of the judgment of guilt or the special circumstance findings, the error does compel the automatic reversal of defendant's death sentence . . . ." (31 Cal.4th at p. 966.)

Stewart and *Heard* do not stand alone. The limitation of *Witherspoon/Witt* relief to the penalty phase in both cases stems directly from a series of cases this Court decided shortly after the United States Supreme Court decided *Witherspoon* itself. In this series of cases, this Court consistently held that errors in improperly discharging prospective jurors for cause require reversal of the penalty judgment only, not the guilt judgment. (*See*, *e.g.*, *People v. Vaughn* (1969) 71 Cal.2d 406, 422; *People v. Osuna* (1969) 70 Cal.2d 759, 768-769.)

At the time these cases were decided, these cases were on firm footing. After all, in *Witherspoon* itself the United States Supreme Court held that while the improper discharge of prospective jurors based on their opposition to the death penalty required reversal of any death sentence imposed, it did *not* require reversal of the conviction. (*Witherspoon*, *supra*, 391 U.S. at pp. 517-518.) And in the only post-*Witherspoon* cases in which the Supreme Court found error in discharging jurors for their death penalty views, the Court reversed the penalty judgment only. (*See*, *e.g.*, *Gray v. Mississippi*,

supra, 481 U.S. 648; *Adams v. Texas*, *supra*, 448 U.S. 38; *Davis v. Georgia* (1976) 429 U.S. 122.)[32]

In short, this Court's precedent holds that improper discharge of jurors for opposition to the death penalty requires reversal of the death penalty alone. This precedent comes directly from the United States Supreme Court's own decision on this point in *Witherspoon*. Since *Witherspoon*, the Supreme Court has not revisited the issue. But an examination of the arguments actually made and resolved in *Witherspoon* shows that developments in the Court's capital jurisprudence since the 1968 decision in *Witherspoon* now require a very different result.

In *Witherspoon* itself, the defendant contended that the trial court's erroneous discharge of jurors required reversal of his conviction as well as his sentence. (*See Witherspoon v. Illinois*, Brief for Petitioner, 1968 WL 112521 at * 39-40.) Specifically, the defendant argued that both the Sixth Amendment right to a jury trial, and the Equal Protection Clause, required that the conviction be reversed. (*Ibid*.) The Supreme Court quite plainly rejected these arguments. (391 U.S. at pp. 517-518.)

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[32] Undoubtedly because of the *Witherspoon* holding, the defendants in these post-*Witherspoon* cases sought reversal of the penalty judgment only and did not even ask for reversal of the guilt phase. (*See Gray v. Mississippi*, Brief for Petitioner, 1986 WL 727623 at * 1-23; *Adams v. Texas*, Brief for Petitioner, 1980 WL 339980 at * 1-26.)

Significantly, however, the defendant in *Witherspoon* did *not* contend that reversal of the guilt phase was required under the Eighth Amendment. This is no surprise; after all, both the arguments and the decision in *Witherspoon* preceded the development of the Supreme Court's capital Eighth Amendment jurisprudence by years. In fact, the Court's capital-case Eighth Amendment jurisprudence began four years *after* the *Witherspoon* decision with *Furman v. Georgia* (1972) 408 U.S. 238. In *Furman*, the Court first held that the imposition of death under several state death-penalty schemes before the Court "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."

The significance of the Court's shift to an Eighth Amendment paradigm in *Furman* should not be underestimated. After all, in 1971 the Court held that a capital punishment scheme that reposed full discretion in the jury to choose life or death did *not* violate the Due Process Clause. (*McGautha v. California* (1971) 402 U.S. 183.) The very next year, however, the Court struck down an identical scheme under the Eighth Amendment. (*Furman v. Georgia*, *supra*, 408 U.S. 238, 310 n.12 [Stewart, J., concurring] ["In *McGautha* . . . the Court dealt with claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. We expressly declined in that case to consider claims under the constitutional guarantee against cruel and unusual punishments."]; *id*. at pp. 329-330 and n.37 [Marshall, J., concurring]; *id*. at p. 400 [Burger, J., concurring].)

Similarly, in applying an Eighth Amendment analysis in the years after *Furman,* the Court found some procedures unconstitutional even when those very same procedures did not violate other constitutional provisions. (*See*, *e.g.*, *Beck v. Alabama* (1980) 447 U.S. 625, 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not]. *See Sawyer v. Smith* (1990) 497 U.S. 227, 235 [Court distinguishes between the protections of the due process clause and the "more particular guarantees of . . . reliability based on the Eighth Amendment."].)

In summary, *Witherspoon* decided that improper discharge of prospective jurors based solely on their opposition to the death penalty violated neither the Equal Protection clause nor the Sixth Amendment. *Witherspoon* was not presented with, and did not therefore resolve, the distinct question of whether such discharge of prospective jurors violated the Eighth Amendment. In fact, neither this Court nor the United States Supreme Court have ever been faced with (or resolved) this very different issue. And both *Furman* and *Beck* establish beyond question that the constitutional validity of a procedure under one constitutional guarantee does not mean the procedure is valid under others. Accordingly, the holdings discussed above limiting the remedy for *Witherspoon/Witt* error to the penalty phase simply do not resolve the Eighth Amendment issue Mr. Peterson is raising here. (*See People v. Evans* (2008) 44 Cal.4th 590, 599 [opinions are

not authority for an issue not presented by the parties]; *People v. Hill* (1974) 12 Cal.3d 731, 766 [same]; *General Motors v. Kyle* (1960) 54 Cal.2d 101, 114 [same].)

The question then becomes whether the unlawful discharge of prospective jurors because of their opposition to the death penalty requires reversal of the conviction under the Eighth Amendment. It does.

In the years after *Furman*, the Supreme Court repeatedly recognized that death was a unique punishment, qualitatively different from all others. (*See*, *e.g.*, *Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) Relying on this fundamental premise, the Court held that there is a corresponding Eighth Amendment need for procedures in death penalty cases which increase the reliability of *both* the guilt and penalty phase processes. (*See*, *e.g.*, *Herrera v. Collins* (1993) 506 U.S. 390, 407 n. 5 ["To the extent *Beck* rests on Eighth Amendment grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance."]; *Beck v. Alabama*, *supra*, 447 U.S. 625 [guilt phase]; *Gardner v. Florida*, *supra*, 430 U.S. at p. 357 [penalty phase].) Under the Eighth Amendment, the Court has not hesitated to strike down procedures which increase the risk that the factfinder will make an unreliable

determination at either the guilt or penalty phase of a capital trial. (*See*, *e.g.*, *Beck v. Alabama*, *supra*, 447 U.S. 625 [guilt]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330 [penalty]; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606 [penalty].)

In light of this established precedent, the Eighth Amendment issue presented here comes down to the question of whether improperly discharging jurors because of their opposition to the death penalty -- when those jurors could in fact fairly consider imposing death as a sentence in the case -- renders a conviction reached in the absence of such jurors less reliable. The starting point for this analysis is the Court's longstanding recognition that it is "effective group deliberation" which allows a jury to reach a reliable determination. (*Ballew v. Georgia* (1978) 435 U.S. 223, 232, 239.) After all, "[t]he very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves." (*Allen v. United States* (1896) 164 U.S. 492, 501.)

Including in a jury jurors who are less likely to convict fosters the precise exchange of different views leading both to "effective group deliberation" and a guilt phase verdict based on a reliable and robust deliberation. By the same token, a jury voir dire process which removes from the jury pool jurors who are entirely eligible to serve, but who are less likely to convict, removes this view from the deliberative process, and

makes any ensuing conviction less reliable. And that is exactly what the trial court's process did here.

In this regard, numerous scientific studies show that a trial court's *proper* discharge of jurors under *Witherspoon/Witt* -- discharging jurors who are opposed to the death penalty and who will *not* consider execution as a sentencing option -- results in a jury more significantly prone to convict in the guilt phase. (*See*, *e.g.*, Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure* (1984) 78 J. American Statistical Assn. 544, 551 [concluding that excluding those who would automatically vote for death and those who would automatically vote for life results in a "distinct and substantial anti-defense bias" at the guilt phase]; Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 Law & Human Behavior 115, 119; Seltzer, *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571, 604; Haney, *"Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 Law & Human Behavior 619, 619-622, 631.) This is because this group of jurors discharged has certain basic attitudinal perspectives which make them less willing to convict. Nevertheless, courts are willing to accept this impact on the jury pool because there are two important countervailing considerations: (1) pursuant to *Morgan v. Illinois*, *supra*, trial courts are also discharging jurors who will not consider life as a sentencing option and (2) there is a

strong systemic interest in having a single jury decide both guilt and penalty and this would not be feasible absent death qualification.

But when a trial court *improperly* discharges jurors under *Witherspoon/Witt* -- discharging jurors who oppose the death penalty but who *can* nevertheless fairly consider death as an option -- there are no countervailing considerations at all. After all, the courts are not also similarly discharging prospective jurors simply because they are in favor of the death penalty. And there is no systemic interest at all in permitting trial courts to improperly discharge jurors. Moreover, the social science research shows that jurors who oppose the death penalty, but are nevertheless willing to impose it, "share the pro-defendant perspective of [properly] excludable jurors." (Finch and Ferraro, The Empirical Challenge to Death-Qualified Juries: On Further Reflection, 65 Neb. L. Rev. 21, 63 (1986) [summarizing studies].)

In sum, the trial court's improper discharge of 13 jurors improperly and unfairly eliminated from the jury an entire group of jurors with attitudes making them less likely to convict. Removing such jurors from the case directly impacted the guilt-phase deliberative process, undercut the reliability of the guilt phase and "led to a jury uncommonly willing to [convict]." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) Reversal of the guilt phase is required.

III. THE TRIAL COURT IMPROPERLY EXCUSED AN ADDITIONAL 17 PROSPECTIVE JURORS BASED SOLELY ON JURY QUESTIONNAIRE ANSWERS WHICH DID NOT SHOW THESE JURORS WOULD BE UNABLE TO SET ASIDE THEIR OPPOSITION TO THE DEATH PENALTY.

As noted above, questions 107, 109 and 115 were designed to provide information to assist the court and the parties in determining if a particular juror's views on the death penalty justified discharging the juror from jury service:

> "107. What are your feelings regarding the death penalty?"
> _____.
>
> . . .
>
> "109. How would you rate your attitude towards the death penalty?
>
> ___ Strongly Oppose ___ Weakly Support
> ___ Oppose ___ Support
> ___ Weakly Oppose ___ Weakly Support"
>
> "115. Do you have any moral, religious, or philosophical opposition to the death penalty so strong that you would be unable to impose the death penalty regardless of the facts?
>
> ___ Yes ___ No
>
> If yes, please explain." (CT MJQ 19-20.)

As discussed in Argument I, *supra*, there were a number of jurors who opposed the death penalty (as indicated by their answers to questions 107 and 108) yet also stated they

did *not* have any "moral, religious or philosophical opposition" which would make them "unable to impose the death penalty" (as indicated by their answer to question 115). The trial court discharged at least 13 of these jurors based on these answers and the propriety of those discharges is discussed in Argument I.

There were at least 17 additional jurors who opposed to the death penalty and stated that they *did* have "moral, religious or philosophical opposition to the death penalty so strong that [they] would be unable to impose the death penalty regardless of the facts." Without any voir dire of these 17 jurors, the trial court discharged all of them under *Witt*, over defense objection. (21 CT Hovey 5891, 12 RT 2425 [Juror 651]; 4 CT Hovey 617; 17 RT 3467 [juror 4931]; 5 CT Hovey 917, 17 RT 3486-3487 [Juror 912]; 6 CT Hovey 1239, 18 RT 3717 [Juror 6263]; 6 CT Hovey 1285, 18 RT 3718-3719 [Juror 6399]; 6 CT Hovey 1216, 18 RT 3718 [Juror 6162]; 9 CT Hovey 2113, 21 RT 4162 [Juror 7152]; 16 CT Hovey 4343, 30 RT 5808-5809 [Juror 10012]; 16 CT Hovey 4159, 29 RT 5684 [Juror 29331]; 16 CT Hovey 4297, 30 RT 5914-5915 [Juror 29631]; 16 CT Hovey 4320, 30 RT 5915-5916 [Juror 8607]; 18 CT Hovey 4826 [Juror 9503]; 19 CT Hovey 5218, 31 RT 6188 [Juror 9736]; 20 CT Hovey 5471, 33 RT 6484-6485 [Juror 24073]; 23 CT Hovey 6326, 36 RT 7105 [Juror 455]; 22 CT Hovey 5958, 36 RT 7106-7107 [Juror 6712]; 22 CT Hovey 5981, 36 RT 7113 [Juror 7236].)

Of course, Mr. Peterson recognizes these 17 jurors are unlike the 13 jurors discussed in Argument I in one respect. While the 13 jurors discussed in Argument I were all opposed to the death penalty, *none* were "unable to impose the death penalty regardless of the facts." In contrast to the 13 jurors at issue there, the 17 jurors at issue here said they were "unable to impose the death penalty death regardless of the facts." The issue to be resolved here is whether the affirmative answer to this question is an adequate basis to discharge a juror under *Witt*.

The Supreme Court answered this question more than two decades ago. The answer is no. (*See Darden v. Wainwright* (1986) 477 U.S. 168.)

In *Darden* the defendant was charged with capital murder. In open court, the trial court asked prospective juror Murphy the following question, almost identical to question 115 of the questionnaire in this case:

> "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death sentence regardless of the facts?" (477 U.S. at p. 175-176.)

When Mr. Murphy replied "yes," he was discharged from service. (477 U.S. at p. 178.)

On appeal, defendant contended the trial court's question "does not correctly state the relevant legal standard [under *Witt*]." (477 U.S. at p. 176.) The Supreme Court did not dispute this contention at all, but nevertheless affirmed the death sentence because "our inquiry does not end with a mechanical recitation of a single question and answer." (477 U.S. at p. 176.) Thus, although this single question did not correctly state the *Witt* standard, the Supreme Court found that the trial court "repeatedly stated the correct standard" when questioning other jurors in Mr. Murphy's presence. (477 U.S. at pp. 176-177.) Significantly, in *Darden* the Supreme Court made clear the type of question which "stated the correct standard:"

> "[I]f a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, *even though the facts and circumstances meet the requirements of law*, then he in effect has said he would be unwilling to follow the law . . . ." (477 U.S. at p. 177, n.2, emphasis added.)

The difference between the "single question" which the Supreme Court recognized did *not* correctly state the *Witt* principle and the "correct standard" stated by the trial court captures the core holding of *Witt*. After all, *Witt* held that a juror may only be discharged for cause if the state carries its burden of proving that the juror's views on capital punishment will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Witt*, *supra*, 469 U.S. at p. 424.) Thus,

in order for a voir dire question to adequately convey the requirements of *Witt*, it must determine whether a juror's views on capital punishment will preclude him or her from following "the requirements of law." (*Darden*, *supra*, 477 U.S. at 177, n.2.) *Darden* establishes that a question which simply asks if a juror's views would prevent imposition of a death penalty "regardless of the facts" -- the precise question asked in *Darden* and recognized as inadequate -- is insufficient precisely because it fails to determine whether the juror would be willing to follow his oath under the law.

The question asked here, broken into its component parts, is virtually identical to the question which was inadequate in *Darden*:

Question in *Darden*	Question in this case
"Do you have any . . . conscientious moral or religious principles in opposition to the death penalty	"Do you have any moral, religious, or philosophical opposition to the death penalty
so strong that you would be unable without violating your own principles to vote to recommend a death sentence	so strong that you would be unable to impose the death penalty
regardless of the facts?" (477 U.S. at p. 175-176.)	regardless of the facts?" (CT MJQ 20.)

Both questions suffer from the identical vices: they do not (1) tell jurors about the requirements of the law or (2) ask them if they can put aside their views and follow the law.

In *People v. Avila* (2006) 38 Cal.4th 491, this Court made clear the type of written question that could accurately convey the *Witt* standard. There, several jurors were discharged based on answers to a written juror questionnaire. The questionnaire asked jurors their views on the death penalty. (38 Cal.4th at p. 528, n. 23.) In addition, the questionnaire contained a question specifically designed to convey the *Witt* standard, a question which not only informed prospective jurors of their duty to follow the law but which asked if they could set aside their opposition to capital punishment and follow the law:

> "One of the duties of a juror is to follow the law as it is instructed to you. Do you honestly think that you could set aside your personal feelings and follow the law as the Court explains it to you, even if you had strong feelings to the contrary? Yes ___ No ____. Please explain." (*Ibid.*)

In *Avila*, this court held that "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*Id.* at p. 531.) The juror answers in *Avila* met that standard

because they were specifically asked whether they could set aside their personal feelings and follow the law. Jurors who answered that they could not do so were properly excused without further questioning. (*Id.*)

In *People v. Wilson* (2008) 44 Cal.4th 758, this Court reiterated its holding in *Avila* -- that a trial court could summarily excuse a juror who made it clear in the questionnaire that he or she could not set aside their personal feelings and follow the law as the court gave it to them. The prospective jurors in *Wilson* were asked the following question:

> "Assuming a defendant was convicted of a special circumstances murder, would you:
>
> "___a. No matter what the evidence was, ALWAYS vote for the death penalty.
>
> "___b. No matter what the evidence was, ALWAYS vote for life without possibility of parole.
>
> "___c. I would consider all the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (44 Cal.4th at p. 783, capitalization in original.)

This Court held in *Wilson* that, consistent with *Witherspoon,* the trial court could summarily excuse jurors who checked box (a) or (b), and did not check box (c). This was so because in refusing to check box (c) the jurors indicated they would *not* "consider . . . the jury instructions as provided by the court" in choosing the appropriate penalty. This

response "made it sufficiently clear" that these jurors would not qualify under *Wainwright* for a seat on a capital jury. (*Id.* at p. 790.)

Here, question 115 of the juror questionnaire -- like the question in *Darden* -- asked jurors if they would be unable to impose death "regardless of the facts." But unlike the questionnaires used in *Avila* and *Wilson,* the jurors in this case were *never* asked if they could set aside their personal views on the death penalty and follow the law as the court instructed them. Their juror questionnaires thus did not make it "sufficiently clear" that they were excludable under *Witherspoon* and *Wainwright.*

This is even more true here when the jury questionnaire is looked at as a whole. Question 10 asked the jurors, "Would your religious or philosophical beliefs interfere with your ability to serve as a juror in this case?" Of the 17 jurors summarily discharged for their opposition to the death penalty, at least 10 explained that their beliefs would *not* interfere with their ability to serve as jurors. (4 CT Hovey 601 [juror 4931]; 5 CT Hovey 900 [juror 912]; 6 CT Hovey 1199 [juror 6162]; 9 CT Hovey 2096 [juror 7152]16 CT Hovey 4142 [juror 29331]; 18 CT Hovey 4809 [juror 9503]; 19 CT Hovey 5201 [juror 9736]; 21 CH 5874 [juror 651]; 22 CT Hovey 5941 [juror 6712]; 23 CT Hovey 6309 [juror 455].) It is difficult to understand how jurors who state that their views will *not* interfere with their ability to serve as jurors -- and who are never asked whether they can

set aside their views on the death penalty and follow the law -- have made it sufficiently clear that they cannot follow the law.

The proper standard, as recognized in *Darden*, *Avila*, and *Wilson*, asks not simply whether a juror could impose death regardless *of the facts*, but whether jurors who do not want to impose death regardless of the facts could set aside that view and fulfill their oath as a juror to *follow the law*. Because none of these 17 jurors indicated an inability to follow the law, their discharges were improper under *Witt*. Reversal is required. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 660 [improper exclusion of a single juror based on opposition to death penalty warrants reversal].)

In making this argument, Mr. Peterson is aware of this Court's decision in *People v. Thompson* (2010) 49 Cal.4th 79. There, prior to voir dire in a capital murder case, defense counsel explicitly agreed the trial court could discharge jurors based solely on their answers to questionnaires. (*Id.* at p. 96.) Several jurors stated in their questionnaire they were opposed to the death penalty and would vote against death regardless of the evidence. (*Id.* at pp. 104-105.) However, these same jurors also stated that if the judge gave them instructions which differed from their own opinion, they would follow those instructions. (*Id.* at p. 102 and n.11.) The trial court did not question any of these jurors

to resolve the tension between these answers before making a credibility determination to discharge them based on their opposition to the death penalty.

On appeal, defendant contended these jurors were improperly discharged or, in the alternative, the court should have orally voir dired these jurors to resolve the tension between the two questions and see if they could set aside their views. (49 Cal.4th at p. 102.) He specifically contended that the trial court "had a constitutional duty to personally question" some of the jurors. (49 Cal.4th at p. 96.) This Court held that defendant waived any complaint about the absence of voir dire when his trial lawyer "himself urged the trial court to excuse jurors solely on the basis of their written questionnaires." (*Id.* at p. 96.) Thus, resolving the tension between these two questions and discharging these jurors without oral voir dire was not improper. (*Ibid.*)

In short, *Thompson* involved a questionnaire which properly asked the question which *Darden* requires to be asked. The real issue there was whether, in light of defense counsel's waiver, the trial court could properly discharge potential jurors without oral voir dire. In contrast to *Thompson*, the issue here case does not involve resolving a tension between two questions on a questionnaire without oral voir dire. Instead, the question *Darden* requires to be asked (and which was properly asked in *Thompson*) was never even posed in this case. *Thompson* has no bearing here.

Indeed, that *Thompson* did not involve the *Darden* issue presented here is made even clearer by the fact that the Court did not discuss, or even cite, *Darden* in its analysis of this issue. Of course, cases are not authority for propositions not considered. (*See*, *e.g.*, *People v. Williams* (2004) 34 Cal.4th 397, 405 ["cases are not authority for propositions not considered"]; *People v. Barragan* (2004) 32 Cal.4th 236, 243 [same].) Because *Thompson* did not discuss *Darden*, it cannot stand for the proposition that *Darden* permits a discharge in the circumstances presented here.

IV. BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED FIVE PROSPECTIVE JURORS WHO WERE EQUIVOCAL ABOUT WHETHER THEIR ATTITUDES ABOUT THE DEATH PENALTY WOULD AFFECT THEIR PENALTY PHASE DELIBERATIONS, REVERSAL OF THE DEATH SENTENCE IS REQUIRED.

A. Introduction.

Prospective jurors 21369, 4486, 4475, 4823, and 17976 were called for jury service in this case. It is fair to say that each expressed some level of ambivalence about imposing death; all were discharged for cause. As more fully discussed below, the trial court erred. None of these jurors stated with anything approaching the requisite degree of certitude that they would not consider death as an option under proper instructions from the trial court. Reversal is required.

B. A Prospective Juror In A Capital Case May Not Be Excused For Cause Based On Opposition To The Death Penalty Unless The Voir Dire Affirmatively Establishes The Juror Will Not Follow The Law Or Consider Death As An Option.

As discussed in Argument I, above, this Court has held that *Adams v. Texas* and *Wainwright v. Witt* set forth the substantive standard which reviewing courts must apply in evaluating a trial court's decision to discharge jurors because of opposition to the death penalty. (*See*, *e.g.*, *People v. Holt*, *supra*, 15 Cal.4th at pp. 650-51.) As also noted above,

under *Adams* a prospective juror who opposes capital punishment may be discharged for cause only where the record shows the juror is unable to follow the law as set forth by the court. (*Adams v. Texas*, *supra,* 448 U.S. at p. 48.) *Witt* establishes that if a juror is excluded under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.)

In applying these cases, however, and with all due respect, this Court has taken a wrong turn. In a series of cases, the Court has held that where the record shows a prospective juror is equivocal about his or her ability to vote for death: (1) a trial court may decide to discharge the juror and (2) that decision is binding on the reviewing court. (See, e.g., *People v. Schmeck* (2005) 37 Cal.4th 240, 262-263; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Breaux* (1991) 1 Cal.4th 281, 309-310; *People v. Frierson* (1991) 53 Cal.3d 730, 742; *People v. Cox* (1991) 53 Cal.3d 618, 646-47.) Ultimately, these cases all rely for this proposition on *People v. Ghent* (1987) 43 Cal.3d 739 at 768. In turn, *Ghent* relied on *People v. Fields* (1984) 35 Cal.3d 329 at 355-356 for this proposition, which itself relied on this Court's 1970 decision in *People v. Floyd* (1970) 1 Cal.3d 694 at 724.

What this history shows is that the current rule which the Court is applying -- holding that a trial court may rely on a prospective juror's equivocal responses to

discharge that juror in a capital case -- is based on a 1970 precedent which pre-dates the *Adams* case by nearly a decade. In fact, an analysis of the actual voir dire in *Adams*, as well as in cases the Supreme Court has decided since *Adams*, shows that the United States Supreme Court embraces precisely the opposite rule.

In this regard, in addition to modifying the *Witherspoon* standard, *Adams* went on to apply the modified standard in the case before it to several prospective jurors. Ultimately, *Adams* held that a number of these jurors had been improperly excused for cause in that case, precisely because the state had not carried its burden of proving that the jurors' views "would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) An analysis of several of these jurors shows that this Court's rule deferring to a trial court's treatment of jurors who give equivocal responses is fundamentally contrary to *Adams*.

In fact, the voir dire in *Adams* involved several jurors who were equivocal about whether their penalty phase deliberations would be affected by the fact that death was an option. For example, prospective juror Francis Mahon was unable to state that her feelings about the death penalty would not impact her deliberations. Instead, she admitted that these feelings "could effect [sic] me and I really cannot say no, it will not effect [sic]

me, I'm sorry. I cannot, no." (*Adams v. Texas*, No. 79-5175, Brief for Petitioner, Appendix ("Adams App.") at p. 3, 8.)[33] Prospective juror Nelda Coyle expressed the same concern. She too was equivocal when asked if her feelings about imposing the death penalty would affect her deliberations. (Adams App. at p. 23-24.) She too admitted she was unable to say her deliberations "would not be influenced by the punishment . . . ." (Adams App. at p. 24.)

Similarly, prospective juror Mrs. Lloyd White was equivocal and stated that she "didn't think" she could vote for death. (Adams App. at pp. 27-28.) Prospective juror George Ferguson admitted that opposition to capital punishment "might" impact his deliberations, while prospective juror Forrest Jenson admitted that his views on the death penalty would "probably" affect his deliberations. (Adams App. at p. 12, 17.)

In connection with each of these five jurors expressing equivocal comments, the trial court resolved the ambiguity in the state's favor, discharging them all for cause. Significantly, the Supreme Court did *not* defer to any of these five conclusions; instead, the Court ruled that the record contained insufficient evidence to justify striking *any* of these jurors for cause. (448 U.S. at pp. 49-50.)

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[33] The Appendix to Brief of Petitioner in *Adams* is a transcript of the voir dire examination of prospective jurors.

In assessing *Adams*, it is important to note that all five discharged jurors had given equivocal responses. Juror White had specifically stated she "didn't think" she could consider death as an option. The state trial judge had resolved all the ambiguities in favor of discharging the jurors. Nevertheless, the Supreme Court reversed, holding that jurors could not be discharged "because they were unable positively to state whether or not their deliberations would in any way be affected." (448 U.S. at pp. 49, 50.) In other words, when a juror gives conflicting or equivocal responses -- as did jurors Mahon, Coyle, White, Ferguson and Jenson in *Adams* -- the trial court is not free to simply assume the worst and discharge the jurors for cause. The reason is simple; when a prospective juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror . . . ." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

The treatment of equivocal jurors in *Adams* was compelled by developments in the Supreme Court's capital case/Eighth Amendment jurisprudence. In the years between the Court's landmark decision in *Furman v. Georgia* (1972) 408 U.S. 238 and its 1980 decision in *Adams*, the Court repeatedly recognized that death was a unique punishment, qualitatively different from all others. (*See*, *e.g.*, *Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama*

(1980) 447 U.S. 625, 638.) Relying on this fundamental premise, the Court held there was a corresponding need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (*See*, *e.g.*, *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida*, *supra*, 430 U.S. at p. 357.)

As the Court later recognized, the rule set forth in *Adams* "dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to . . . great[] concern over the possible effects of an 'imbalanced' jury." (*Lockhart v. McCree* (1986) 476 U.S. 162, 182.) The rule in *Adams* -- precluding a for-cause challenge based on equivocal responses and specifically designed to minimize the risk of an "imbalanced jury" -- was appropriate precisely because of "the discretionary nature of the [sentencing] jury's task [in a capital case]." (*Id*. at p. 183.) In fact, the Court specifically noted that the *Adams* rule would not apply "outside the special context of capital sentencing." (*Ibid*.)

In other words, however the standard of proving a juror's inability to serve is properly applied in non-capital cases (where the jury is simply making a binary determination of fact), the standard applied in capital cases is different. In the "special context of capital sentencing" -- where the jury is making a largely discretionary decision as to whether a defendant should live or die -- there is a greater concern over the impact

of an "imbalanced jury" on the reliability of the judgment, as well as with ensuring that the state not seat juries predisposed to a death verdict. Accordingly, in *Adams* the Supreme Court made clear that in the context of a direct appeal, when a prospective capital-case juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror." *(Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

Seven years after *Adams* the Supreme Court addressed this same issue, again holding unconstitutional a trial court's exclusion of a juror who had been equivocal about her ability to serve. (*See Gray v. Mississippi* (1987) 481 U.S. 648.) There, defendant was charged with capital murder. During voir dire, prospective juror H.C. Bounds was questioned. According to the state supreme court, this voir dire was "lengthy and confusing" and resulted in responses from Ms. Bounds which were "equivocal." (*Gray v. State* (Miss. 1985) 472 So.2d 409, 422.) As the actual voir dire shows, the state supreme court's characterization was entirely correct.

When asked if she had any "conscientious scruples" against the death penalty, Ms. Bounds replied "I don't know." (*Gray v. Mississippi*, No. 85-5454, Joint Appendix at 16.) When asked if she would automatically vote against imposition of death, she first explained she would "try to listen to the case" and then responded that "I don't think I

would." (*Id*. at p. 17, 18.) When directly asked by the prosecutor whether she could vote for death, she said "I don't think I could." (*Id*. at p. 19.) The trial court discharged Ms. Bounds for cause.

Before the United States Supreme Court, the state "devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court." (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, n.10.) In fact, the state explicitly made the very argument this Court has repeatedly embraced, arguing that a conclusion Ms. Bounds was improperly excused for cause "refuse[s] to pay the deference due the trial court's finding that juror Bounds was not qualified to sit as a juror." *(Gray v. Mississippi*, No. 85-5454, Respondent's Brief at 15-16.) Noting that the trial court found Ms. Bounds to have given equivocal responses, and that "the trial judge was left with the definite impression that juror Bounds would be unable to faithfully and impartially apply the law," the state urged the Supreme Court to give the trial judge's conclusion "the deference that it was due . . . ." (*Id*. at pp. 22, 23.) In his reply, petitioner conceded that Ms. Bounds had "equivocated" in her responses, but argued that under this circumstance "the prosecutor, the party that requested Mrs. Bounds's excusal, had not carried its burden." (*Gray v. Mississippi*, No. 85-5454, Petitioner's Reply Brief at 2.)

Of course, the state's position in *Gray* represents the precise view this Court adopted in 1970. (*People v. Floyd*, *supra*, 1 Cal.3d at p. 724.) As noted above, it is a view this Court has continued to follow since *Floyd*. (*People v. Mincey*, *supra*, 2 Cal.4th at p. 456; *People v. Breaux*, *supra*, 1 Cal.4th at pp. 309-310; *People v. Frierson*, *supra*, 53 Cal.3d at p. 742; *People v. Cox*, *supra,* 53 Cal.3d at pp. 646-47; *People v. Ghent*, *supra,* 43 Cal.3d at p. 768; *People v. Fields*, *supra*, 35 Cal.3d at pp. 355-356.)

Significantly, however, it is also the same position the Supreme Court rejected, not only in *Adams*, but in *Gray* as well. To the contrary, and just as it did in *Adams*, *Gray* rejected the state's arguments that (1) the trial court was free to discharge equivocal jurors for cause and (2) a reviewing court was required to pay deference to such a discharge. In fact, not only did the Supreme Court refuse to afford *any* deference to the trial court's finding in *Gray*, but it concluded that the discharge of juror Bounds violated the Constitution. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, n.10.) As the Court held, "the trial court was not authorized . . . to exclude venire member Bounds for cause." (*Ibid.*)[34]

[34] In fact, in *Gray v. Mississippi*, *supra*, the defendant specifically relied on the "special context" of capital sentencing -- and the largely discretionary role of jurors deciding if a defendant should live or die -- in urging the Court to find improper the trial court's discharge of an equivocal juror in that case. (*Gray v. Mississippi,* No. 85-5454, Petitioner's Reply Brief at 12.)

To be sure, in two cases the Supreme Court has also addressed capital-case equivocal jurors in the context of federal habeas review: *Wainwright v. Witt*, *supra*, 469 U.S. 412 and *Uttecht v. Brown, supra*, 551 U.S. 1. In both cases, the Supreme Court held that federal courts must defer to state court findings of juror bias. (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 2, 6-7 [citing *Witt* and finding discharge proper where defense counsel stated he "ha[d] no objection" to the discharge and voir dire showed juror "had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of the case."]; *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-430.) The rationale for that deference was that both *Uttecht* and *Witt* were collateral attacks on the state court judgment. The Supreme Court has made clear, however, that this rule of deference is fundamentally inappropriate on direct appeal. (*Greene v. Georgia* (1996) 519 U.S. 145, 146 [holding that because *Witt* "was a case arising on federal habeas," the deference standard it announced does not apply to "state appellate courts reviewing trial court's rulings on jury selection."].)

Of course, this case is on direct review. In light of the actual voir dire in the Supreme Court's direct review cases -- *Gray* and *Adams* -- this Court must reconsider the 1970 precedent which forms the basis for the rule currently applied in all California capital cases. The current California rule -- which permits the state to satisfy its burden

of proof by eliciting equivocal answers from prospective jurors -- cannot be squared with (1) the rule actually applied in either *Adams* or *Gray*, (2) the Eighth Amendment developments on which they were based or (3) *Greene v. Georgia*, *supra*.

The difference between the two rules is important in this case. Applying the actual *Adams/Gray* standard to the voir dire of jurors 21369, 4486, 4475, 4823 and 17976 compels a finding that the trial court in this case erred. Because these jurors merely gave equivocal responses about their ability to serve, they should not have been discharged for cause. Reversal is required.

C. Application Of The *Adams* Standard Requires Reversal Because Although Prospective Jurors 21369, 4486, 4475, 4823 And 17976 Gave Equivocal Responses, None Made Clear They Would Refuse To Consider Death As An Option.

1. The voir dire in this case.

a. Juror 21369.

Juror 21369 was a 27 year old woman from South San Francisco. (8 CT Hardship 1958.) In her questionnaire, she explained she 'would not like to be responsible for sentencing anyone to death" and was "oppose[d]" to the death penalty. (8 CT Hardship

1958, 1974.) She "would not like to be a part of putting anyone to death . . . ." (8 CT Hardship 1975.)

The court questioned this juror on March 4, 2004. The voir dire was short:

> "THE COURT: You're opposed to the death penalty, aren't you?
>
> "PROSPECTIVE JUROR: Yeah.
>
> "THE COURT: And you could never select it as a penalty in this case?
>
> "PROSPECTIVE JUROR: I wouldn't want to.
>
> "THE COURT: Well, could you ever pick it?
>
> "PROSPECTIVE JUROR: I don't think so.
>
> ". . .
>
> "THE COURT: Okay, we'll excuse you over defense objection." (11 RT 2200-2201.)

Juror 21369 was never asked if she would set aside her preferences and follow the law given to her by the court. (11 RT 2200-2201.)

b. Juror 4486.

Juror 4486 was a 33 year old woman from Mountain View. (2 CT Hovey 118.) She explained she had no religious or philosophical views that would "interfere with [her] ability to serve as a juror in this case." (2 CT Hovey 118.) She had "mixed" feelings about the death penalty, indicating that it was a "suitable punishment for some crimes" and "depend[ed] on the evidence." (2 CT Hovey 134-135.) She had no "moral, religious or philosophical opposition to the death penalty" which would preclude her from imposing death. (2 CT Hovey 135.)

The court questioned juror 4486 on March 22, 2004. (16 RT 3141.) When asked if she could impose death, juror 4486 replied "I don't think I could." (16 RT 3143.) She explained she "would have a really hard time" selecting death as an option. (16 RT 3143.) When asked if death would be an option for her, she said "I don't think so." (16 RT 3143.) The court discharged her for cause under *Wainwright v. Witt*, over defense objection. (16 RT 3143.)

Juror 4486 had never been asked if she would set aside her preferences and follow the law given to her by the court. (16 RT 3141-3143.)

c. Juror 4475.

Juror 4475 was a 51 year old woman from San Francisco. (10 CT Hovey 2487.) She had no religious or philosophical views that would "interfere with [her] ability to serve as a juror in this case." (10 CT Hovey 2487.) She supported the death penalty. (10 CT Hovey 2503.) Imposition of death "depend[ed] on the evidence." (10 CT Hovey 2504.) She had no "moral, religious or philosophical opposition to the death penalty" which would preclude her from imposing death. (10 CT Hovey 2504.)

The court questioned juror 4475 on April 12, 2004. (23 RT 4474.) Although she admitted imposing death would be hard, she agreed she could do it:

> "Q: [by the Court] And the question is you, knowing the type of person that you are, could you ever see yourself voting to execute another human being? Is that something you think you could ever do?
>
> A: [by juror 4475] I think that would be something for me to -- to do very hardly.
>
> Q: I can't hear you ma'am.
>
> A: It was -- it would be extremely hard.
>
> Q: Of course it's hard, but do you think you could ever do it if you thought somebody deserved it?
>
> A: If I had to.

Q: Well, nobody's ever going to tell you you are going to have to do it. Forget about whether you have to do it or whether you don't have to do it.

The question is just you, knowing the type of person that you are, could you ever see yourself voting to execute another human being? Is that something that you have in you to do that?

A: I don't think I could do it.

Q: You don't think you could do it; is that right?

A: Yes.

Q: Okay. That's fair enough. You can be excused." (23 RT 4475.)

Juror 4475 had never been asked if she would set aside her preferences and follow the law given to her by the court.

d. Juror 4823.

Juror 4823 was a 60 year old woman originally from Mexico. (11 CT Hardship 2789.) She had no religious or philosophical views that would "interfere with [her] ability to serve as a juror in this case." (11 CT Hardship 2789.) She opposed the death penalty. (11 CT Hardship 2806.) She stated that she did have "moral, religious or philosophical opposition to the death penalty" which would preclude her from imposing death. (11 CT Hardship 2807.)

The court questioned juror 4823 on March 8, 2004. (12 RT 2368.) The following exchange occurred:

> "THE COURT: You checked you oppose the death penalty. . . . Does that mean you can never select?
>
> "PROSPECTIVE JUROR: I don't like the death penalty.
>
> "THE COURT: Okay. You don't like it. Do, but can you ever select it?
>
> "PROSPECTIVE JUROR: I don't think so.
>
> "THE COURT: You don't think so. Okay. You can be excused. Thank you.
>
> . . .
>
> "MR GERAGOS: Over defense objection." (12 RT 2367-2368.)

Juror 4823 had never been asked if she would set aside her preferences and follow the law given to her by the court.

e. Juror 17976.

Juror 17976 was a 57 year old woman originally from Chile. (12 CT Hovey 3039.) She had no religious or philosophical views that would "interfere with [her] ability to serve as a juror in this case." (12 CT Hovey 3039.) She opposed the death penalty. (12

CT Hovey 3055.) It would not be difficult for her to vote for death, and she had no "moral, religious or philosophical opposition to the death penalty" which would preclude her from imposing death. (12 CT Hovey 3056.)

The court questioned juror 17976 on April 15, 2004. (26 RT 5040.) The following exchange occurred:

> "Q: [by the Court] This is just as if you and I were just talking. Now, you know the type of person that you are; could you ever see yourself voting to execute another human being? Is that something you think you could do?
>
> "A: [by prospective juror 17976] The way I see it is that -- it is the law, that's the way I see it, even though I don't believe that -- I think it's wrong to kill another human being, that many things in society that exist there that I don't like it, but because it is part of the law, I abide by them. So that would be --
>
> "Q: But, you see, in this case no one is ever going to tell you that you have to vote for the death penalty. No one is ever going to tell you that. That's a choice that you would have to make after your heard all the evidence if you felt that that was the appropriate penalty. See what I'm saying?
>
> "A: Yeah. Well, I understand is that there are -- I'm sorry, I -- there are certain --
>
> "Q: Okay.
>
> "A: -- circumstances in which the law said that -- that the death penalty will apply if these are the conditions that the case --
>
> "Q: Right.
>
> . . .

"Q: Because nobody in this case is ever going to tell you that you must select the death penalty. That's a choice you have to freely and voluntarily make after you've heard all the evidence. So that's why I want to ask you if you could ever see yourself voting to execute another human being. Is that something that you could ever do? Nobody's going to make you do that choice in this case.

"A: No, it would be -- I've never placed myself in that situation. I think it would be very difficult for me to do that.

. . .

"Q: Because of the way you feel --

"A: Yes.

"Q: -- would the death penalty be an option for you in this case, understanding that no one will ever tell you that you must pick the death penalty?

. . .

"A: Probably not." (26 RT 5041-5043.)

Juror 19796 had never been asked if she would set aside her preferences and follow the law given to her by the court.

2. Because prospective jurors 21369, 4486, 4475, 4823 and 17976 never made clear they would refuse to consider death as an option under proper instructions, they should not have been discharged for cause.

It is fair to say that prospective jurors 21369, 4486, 4475, 4823 and 17976 each expressed some level of ambivalence about their ability to select death as an option. As discussed above, however, the teaching of *Adams* and *Gray* is that a prospective juror's equivocal responses do *not* satisfy the state's burden of proving impairment. Absent an affirmative showing that a juror's views would either preclude death as an option under proper instructions, or otherwise prevent the juror from following the law, the juror may not be excluded for cause.

Indeed, a comparison of the responses of prospective jurors 21369, 4486, 4475 and 4823 with the jurors held to have been improperly excluded in *Adams* and *Gray* removes any doubt that the exclusions in this case were improper. The responses of these jurors mirrored those of prospective juror White in the *Adams* case. Just like White, jurors 21369, 4486, 4475 and 4823 "did not think" they could consider death as an option. (*Compare* 11 RT 2200-2201, 12 RT 2368, 16 RT 3142-3143, and 23 RT 4474-4475 *with* Adams App. at pp. 27-28 [juror White states that she "didn't think" she could vote for death].) And juror Bounds in the *Gray* case was discharged after she told the prosecutor that "I don't think I could" vote for death. (*Gray v. Mississippi*, No. 85-5454, Joint

Appendix at p. 19.) Like White and Bounds, jurors 21369, 4486, 4475 and 4823 should not have been excluded. And juror 17976 -- who thought her views would "probably" impact her ability to select death as an option -- was just like discharged juror Jenson in *Adams*, who admitted that his views on the death penalty would "probably" affect his deliberations. (*Compare* 26 RT 5042-5043 *with* Adams App. at p. 17.) The for-cause exclusions of these five jurors violated both the Sixth and Eighth Amendments.

As noted above, the erroneous granting of even a single for-cause challenge requires reversal. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 660.) The penalty phase judgment must be reversed.

ERRORS RELATING TO THE GUILT PHASE

V. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND VIOLATED MR. PETERSON'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY FORCING HIM TO TRIAL IN A COMMUNITY WHERE 96% OF THE JURY VENIRE HAD BEEN EXPOSED TO MASSIVE PRETRIAL PUBLICITY ABOUT THE CASE AND NEARLY HALF OF ALL PROSPECTIVE JURORS HAD ALREADY CONCLUDED HE WAS GUILTY OF CAPITAL MURDER.

A. The Relevant Facts.

Mr. Peterson was arrested for murder on April 18, 2003 and taken to Stanislaus county jail. Although he was transported to jail at midnight, a mob of several hundred people showed up at the jail to cheer the arrest, many with signs, stating they believed Mr. Peterson was guilty of murder. (9 CT 3341.) According to sheriff's department spokesman Kelly Huston, many in the mob were yelling "murderer" and the department's main concern was that Mr. Peterson "didn't get lynched . . . ." (9 CT 3341.)

Trial was set to occur in the Superior Court just down the street. Prior to trial, the defense moved for a change of venue based on the size of Stanislaus county (468,566 people) and the extraordinary amount of adverse publicity the case had received. (9 CT 3324-3407.) The defense offered four surveys of potential jurors in Stanislaus county: three performed in December 2003 (one by Dr. Paul Strand and two by Dr. Stephen

Schoenthaler) and one performed in May 2003 (by Dr. Schoenthaler). (9 CT 3370; 10 CT 3654.) The December survey by Dr. Strand revealed that 98% of potential jurors had been exposed to publicity about the case and 39% believed Mr. Peterson was guilty. (9 CT 3370, 3385.) The other two December surveys revealed that 69% and 88% of potential jurors believed Mr. Peterson was guilty. (10 CT 3654.) The May survey -- which the trial court found was "the most thorough" -- concluded that 99% of potential jurors had been exposed to publicity about the case and 70% believed Mr. Peterson was guilty. (10 CT 3639, 3643; RT PPEC at 91.)[35]

The May survey also contained a detailed analysis of potential jurors in Los Angeles county. This survey showed that of ten California counties surveyed, Los Angeles -- which is the largest county in the state by far -- had (1) the *lowest* percentage of people prejudging Mr. Peterson's guilt, (2) the *lowest* percentage of people who -- in combination -- thought Mr. Peterson was guilty, thought he deserved death and would not set aside their views and (3) the second *highest* percentage of people willing to set aside any prejudgment they did have. (10 CT 3643, 3646, 3649.)

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[35] "RT PPEC" refers to the separately bound Reporter's Transcript covering the Post-Preliminary Examination hearings between December 3, 2003 and January 23, 2004.

Over the state's objection, the trial court granted the change of venue motion. The court noted that "[i]n my over 30 years in this community, I've not seen anything like the publicity generated by this case." (RT PPEC at 90, 203-206.)

Based on the information available to it, the court "exclude[d] the valley counties plus San Francisco" and asked both sides to recommend potential counties to which the case could be transferred. (RT PPEC at 206, 211.) The state recommended Santa Clara and San Mateo counties. (RT PPEC at 212.) The defense recommended Los Angeles, Orange and Alameda counties. (RT PPEC at 212.) The court referred the matter to the Administrative Office of the Courts ("AOC"). (RT PPEC at 205-206, 215.)

The AOC recommended four counties: Orange, Alameda, Santa Clara and San Mateo. (RT PPEC 251, 256.) Of these, the defense favored Orange county, the largest. (RT PPEC 256; 11 CT 3710.) The state favored Santa Clara and San Mateo, the smallest. (RT PPEC 260-261; 11 CT 3710.) After argument, the court selected San Mateo county, the smallest of all the counties recommended. (RT PPEC 264; 11 CT 3710.) At the time, San Mateo had 717,000 people. (11 CT 3710.) San Mateo was only 90 miles from Modesto, where the trial had originally been set to take place.

Response by the media was swift. On highway 101, near the San Mateo

courthouse itself, a radio station posted a giant billboard with a photograph of Mr. Peterson in jail clothes with the legend "Man or Monster" and a toll-free telephone number for people to call in and vote. (14 CT 4491, n.3 and 4509; 36 RT 7081-7082.) This is what potential jurors who drove to the courthouse saw on their way:

Chronicle / Frederic Larson

Directly outside the courthouse a similar billboard was rented on a flatbed truck parked on the street. (14 CT 4491, n.3, 4509; 36 RT 7081-7082.) This billboard had pictures of prosecutors Distaso and Harris on it and again asked viewers to call in and vote (14 CT 4491, n.3, 4509; 36 RT 7081-7082):

As the parties prepared for voir dire, they agreed to use a jury questionnaire. (10 RT 1960-1970, 2007-2014.) After nearly 1000 jurors completed their questionnaires, the results were stark, showing that 96% of potential jurors had been exposed to publicity about the case and -- of this group -- 45% were willing to admit they had prejudged Mr. Peterson's guilt. (14 CT 4516, 4520.)

On May 3, 2004 defense counsel made a second motion to change venue based upon the pretrial publicity and the information contained in the questionnaires. (14 CT 4487-4716.) The written motion was premised on "the pleadings and records on file herein" and -- when the motion was argued -- defense counsel explicitly incorporated "all of the paperwork from the first motion for change of venue . . . ." (36 RT 7084.) The

court noted that it had "reviewed that" paperwork in connection with the pending motion. (36 RT 7084.) Defense counsel argued that the case should be moved to Los Angeles because of the size of the respective counties. (36 RT 7083.)

The state opposed the second venue-change motion, just as it opposed the first. (15 CT 4717.) When the motion was argued, the state made its position plain: "[t]o move it to Los Angeles would make no difference." (36 RT 7091.)

The trial court accepted the state's position. The court denied the second venue motion, noting the "pervasive and widespread" publicity and concluding "there's no showing that this case would receive any less publicity in another venue," "there's nothing to show that [the prejudgment rate] would be any different in any other county" and therefore switching venue would "do no good." (36 RT 7097-7099.) Neither the state, nor the trial court, addressed the statistics referenced above showing that Los Angeles had (1) the *lowest* prejudgment rate in the state, (2) the *lowest* percentage of people who refused to set aside their views that Mr. Peterson was guilty and deserved to die and (3) the second *highest* percentage of people willing to set aside their prejudgments about the case. (10 CT 3643, 3646, 3649.)

As more fully discussed below, the trial court's refusal to grant the second change of venue violated both state and federal law for two distinct reasons. First, San Mateo county was saturated with publicity about the case, including print media, radio coverage, network television, and cable. This publicity, some of which was plainly inflammatory, continued unabated from the time of the crime itself until the time of trial. It made a fair trial impossible by creating a belief in Mr. Peterson's guilt through presentation of both admissible and inadmissible evidence as well as the views of prominent public officials as to Mr. Peterson's guilt. Second, there was nothing hypothetical about the impact this publicity had in San Mateo county. More than 96% of the entire jury venire admitted being exposed to this publicity, including every member of the jury eventually selected, and -- before a single witness was even called -- fully 45% of the venire confessed that they had already concluded Mr. Peterson was guilty of capital murder.

B. Because The Pervasive Pre-Trial Publicity Prevented The Court From Seating An Impartial Jury, Reversal Is Required.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant's right to be tried by a fair and impartial jury. (*Groppi v. Wisconsin* (1971) 400 U.S. 505, 508.) When a trial court is unable to seat an impartial jury because of prejudicial pre-trial publicity, due process requires that any ensuing conviction be reversed. (*Rideau v. Louisiana* (1963) 373 U.S. 723, 726; *Harris v. Pulley* (9th Cir. 1988)

885 F.2d 1354, 1361.) The Supreme Court has articulated two distinct tests for determining when reversal is required because of pre-trial publicity.

First, reversal is required when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory publicity about the crime. (*See*, *e.g.*, *Rideau v. Louisiana*, *supra*, 373 U.S. at pp. 726-727. *Accord Murphy v. Florida* (1975) 421 U.S. 794, 798-799; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 352-355, 363; *Harris v. Pulley*, *supra*, 885 F.2d at p. 1361.) In this situation, a defendant need not demonstrate actual prejudice. (*Sheppard v. Maxwell*, *supra*, 384 U.S. at p. 352; *Rideau v. Louisiana*, *supra*, 373 U.S. at pp. 726-727; *Harris v. Pulley*, *supra*, 885 F.2d at p. 1361.) Second, reversal is required where a defendant establishes actual prejudice by showing that the jury venire has demonstrated a level of partiality that is too high to tolerate. (*See*, *e.g.*, *Murphy v. Florida*, *supra*, 421 U.S. at p. 803; *Irvin v. Dowd* (1961) 366 U.S. 717, 723; *Harris v. Pulley*, *supra*, 885 F.2d at p. 1363.)

As more fully discussed below, both tests have been met here. First, the degree of prejudicial pre-trial publicity foreclosed any possibility that Mr. Peterson would receive a fair trial. The record shows that (1) the trial venue was saturated with hostile publicity, (2) this adverse publicity included frequent references to facts and circumstances which would not only reasonably be construed to suggest Mr. Peterson's guilt, but also included

references to evidence which could never come before the jury; (3) an overwhelming percentage of county residents eligible to serve on the jury were fully aware of this hostile publicity, and (4) many of these residents admitted that they had already formed an adverse opinion about Mr. Peterson's guilt. The record also shows that the venire as a whole demonstrated a degree of partiality against defendant that was so high it could not be laid aside. Reversal is required.

1. Because San Mateo county was saturated with prejudicial publicity about the crime, and because this publicity included explicit and repeated references to inadmissible evidence, due process required a change of venue to ensure a fair jury.

a. The legal standard.

As noted above, when a defendant is convicted by a jury drawn from a community which has been saturated with prejudicial publicity about the crime, reversal may be required. (*Murphy v. Florida*, *supra*, 421 U.S. at pp. 798-799; *Rideau v. Louisiana*, *supra*, 373 U.S. at pp. 726-727.) The ultimate question is whether the record shows it is "reasonably likely" pervasive pre-trial publicity resulted in an unfair trial; if so, reversal is required. (*Sheppard v. Maxwell*, *supra*, 384 U.S. at p. 363; *People v. Williams* (1989) 48 Cal.3d 1112, 1125-1126.) As this Court has made clear on numerous occasions, "the phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable

than not.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 279. *Accord People v. Williams*, *supra*, 48 Cal.3d at pp. 1125-1126.)

The "reasonable likelihood" test is applied in two different contexts. First, it is applied prior to trial in an effort to make a prospective determination whether a change of venue is required. (*People v. Williams*, *supra*, 48 Cal.3d at p. 1125.) Second, where a trial court denies a motion to change venue and the defendant is convicted, it is applied after trial to make a retrospective determination as to whether the defendant received a fair trial. (*Ibid*.)

In the former context -- where a trial or reviewing court is making a pre-trial determination whether the defendant can receive a fair trial in a particular county -- courts consider a number of factors, including (1) the nature of the offense, (2) the nature and extent of the publicity, (3) the size of the community, (4) the status of the defendant in the community and (5) the status of the victim. (*See*, *e.g.*, *Williams v. Superior Court* (1983) 34 Cal.3d 584, 588; *Odle v. Superior Court* (1982) 32 Cal.3d 932, 937; *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 578.) In the latter context -- where a reviewing court is making a post-trial determination whether the trial was fair -- courts consider not only the nature and extent of the publicity, but the actual record of voir dire as a direct measure of the prejudice (if any) caused by the pretrial publicity. As this Court has noted

in this very context, in retrospectively applying the reasonable likelihood test, "voir dire may demonstrate that pretrial publicity had no prejudicial effect or conversely may corroborate the allegations of potential prejudice." (*People v. Williams*, *supra*, 48 Cal.3d at p. 1125. *Accord People v. Vieira*, *supra*, 35 Cal.4th at p. 279; *People v. Daniels* (1991) 52 Cal.3d 815, 851 and n.12; *People v. Gallego* (1990) 52 Cal.3d 115, 167; *People v. Harris* (1981) 28 Cal.3d 935, 949; *People v. Tidwell* (1970) 3 Cal.3d 62, 67.) In the retrospective context, federal courts take the same approach, focusing on the actual voir dire to determine if there has been a fair trial. (*See*, *e.g.*, *Patton v. Yount* (1984) 467 U.S. 1025, 1033; *Murphy v. Florida*, *supra*, 421 U.S. at p. 796, 800; *Irvin v. Dowd*, *supra*, 366 U.S. at p. 727; *Sheppard v. Maxwell*, *supra*, 384 U.S. at p. 345.)

In order to prove there is a reasonable likelihood of an unfair trial, a defendant need *not* prove "the community was aroused to an emotional fever pitch." (*People v. Williams*, *supra*, 48 Cal.3d at p. 1128.) Instead, "the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in [defendant's] guilt." (*Ibid*. *Accord People v. Tidwell*, *supra*, 3 Cal.3d at p. 70; *People v. McKay* (1951) 37 Cal.2d 792, 797 [reversal required where at the time of trial, pre-trial publicity had created a "cool, widely held conviction that defendants were guilty and should be tried and sentenced to death as expeditiously as possible."].) The risk of an unfair trial from pre-trial publicity is significantly heightened

when the publicity includes prejudicial information which is inadmissible at trial. (*See*, *e.g.*, *Sheppard v. Maxwell*, *supra*, 384 U.S. at pp. 356-357. *Compare People v. Leonard* (2007) 40 Cal.4th 1370, 1396 [no risk of unfair trial where pretrial publicity did not discuss any inadmissible evidence]; *People v. Ramirez* (2006) 39 Cal.4th 398, 434 [same].)

This Court has also made clear the standard of review in applying the reasonable likelihood test. "Whether raised [pretrial] or on appeal from judgment of conviction, the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable." (*People v. Williams*, *supra*, 48 Cal.3d at p. 1125. *Accord People v. Alfaro* (2007) 41 Cal.4th 1277, 1321; *People v. Welch* (1972) 8 Cal.3d 106, 113; *People v. Tidwell*, *supra*, 3 Cal.3d 68-69.) Federal reviewing courts take the same approach to ensuring fair trials, employing de novo review. (*See*, *e.g.*, *Harris v. Pulley*, *supra*, 885 F.2d at p. 1360. *Accord Murphy v. Florida*, 421 U.S. at p. 802; *Sheppard v. Maxwell*, *supra*, 384 U.S. at pp. 345-349; *Irvin v. Dowd*, *supra*, 366 U.S. at pp. 725-726.)

Several cases show how these factors are applied in practice. In *People v. Williams*, *supra*, this Court reversed a capital murder conviction and death sentence because of prejudicial pretrial publicity. There, defendant was charged with capital murder. During the nine-month period between defendant's arrest and the change of

venue motion "more than 50 newspaper and radio reports appeared . . . ." (48 Cal.3d at p. 1127.) The trial court denied defendant's motion to change venue and defendant was convicted and sentenced to death. On appeal, defendant contended the record showed a "reasonable likelihood" the pre-trial publicity precluded a fair trial.

This Court performed a detailed de novo review of the media coverage, noting that many of these reports "were front-page or lead articles." (*Ibid*.) The court characterized these articles as "frequently sensational" and noted that some detailed statements "were inadmissible due to a 'Miranda' violation." (*Ibid*.) Some of the stories "focused on preliminary hearing evidence and sheriff's statements indicating that defendant was the actual 'triggerman'. . . ." (*Ibid*.) The Court concluded that the media coverage constituted "extensive, sometimes inflammatory pretrial publicity" which "suggest[ed] to the persons who were potential jurors . . . the probability that petitioner was the actual killer." (*Ibid*.) Based on the pre-trial publicity this Court held "a brutal murder had obviously become deeply embedded in the public consciousness" and "it is more than a reasonable possibility that the case could not be viewed with the requisite impartiality." (48 Cal.3d at p. 1129.)

Rideau v. Louisiana is also an instructive case. There, defendant was charged with murder and confessed in a filmed interrogation. This confession was broadcast three

times on television over the next two days. Although trial did not occur for nearly two months, defendant moved for a change of venue. The motion was denied. Ultimately, only three of the twelve seated jurors had seen the televised confession. After defendant was convicted of murder, he contended that his conviction by a jury drawn from a community exposed to this televised evidence violated Due Process. Although none of the three jurors who saw the confession declared a belief in defendant's guilt during voir dire, and each explicitly promised the court they could put the confession aside and be impartial, (373 U.S. at pp. 725, 732), the Supreme Court nevertheless concluded reversal was required "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury . . . ." (*Id*. at p. 727.) "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." (*Id*. at p. 726. *See also Sheppard v. Maxwell*, *supra*, 384 U.S. at pp. 356-357 [finding constitutional violation where pretrial publicity included substantial references to facts that were inadmissible at trial, such as fact that defendant exercised his constitutional right to a lawyer, that he had sexual relations with women other than his wife, and that he was alleged to be a liar; held, Supreme Court reverses, noting that "much of the material printed or broadcast . . . was never heard from the witness stand."]; *Marshall v. United States* (1959) 360 U.S. 310, 313.)

The decision in *United States v. Skilling* (2010) ___ U.S. ___, 130 S.Ct. 2896, is useful in showing the type of publicity which will *not* result in an unfair trial. There, defendant was charged with securities fraud arising out of the Enron collapse. Based on the pre-trial publicity, he moved for (and was denied) a change of venue. The Supreme Court concluded there was no constitutional violation under the facts of the case, noting (1) defendant was tried in Houston, the fourth largest city in the country, with a population of 4.5 million, (2) 40% of people surveyed had never heard of defendant, (3) the publicity about Enron had diminished substantially in the four years between Enron's collapse and the trial, (4) very little of the publicity actually named the defendant, (5) the jury acquitted defendant on nine counts, and (6) the publicity did not contain "prejudicial information." (130 S.Ct. at pp. 2915-2916 and notes 15 and 17.)

Taken together, these cases articulate the framework for analysis of the pretrial publicity here. Ultimately, as this Court stated in *Williams*, the question is whether this publicity when taken as a whole "suggest[ed] to the persons who were potential jurors . . .

the probability that petitioner was the actual killer." (*People v. Williams*, 48 Cal.3d at p. 1127.) It is to that question Mr. Peterson now turns.[36]

b. The pre-trial publicity here created a perception that Mr. Peterson was guilty and should be tried and sentenced to death.

Although the print media coverage in this case shares many of the same features as the media coverage in *Williams*, *Tidwell*, *Rideau* and *Sheppard*, there is one important distinguishing feature. As the various trial judges noted during the course of this case, none had ever seen media coverage like this case. Indeed, the state itself conceded that the media coverage here was "pervasive and widespread" and recognized that the trial

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[36] As the above discussion of *Skilling* demonstrates, in addition to examining the facts of cases like *Williams*, *Tidwell*, *Maxwell* and *Rideau* -- where courts have found a reasonable likelihood that pre-trial publicity prevented a fair trial -- it is also useful to look at the facts of cases where courts have reached a contrary result. (*See*, *e.g.*, *People v. Farley* (2009) 46 Cal.4th 1053, 1081-1087 [no constitutional violation where publicity did not include any inadmissible evidence, decreased in the years between the crime and trial, trial occurred in a county of 1.5 million people and "the seated jurors . . . either recalled nothing about the case or remembered few details."]; *People v. Davis* (2009) 46 Cal.4th 539, 578-581 [no constitutional violation where publicity did not include any inadmissible evidence, trial occurred in county with population of 1.6 million, and actual jurors chosen expressed reservations about death penalty in a case where defendant was going to admit guilt]; *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1322 [20 articles over 22 month period not considered extensive publicity]; *People v. Panah* (2005) 35 Cal.4th 395, 448 [18 articles over 12 month period not considered extensive, especially where articles ended more than one year prior to venue motion]; *People v. Vieira*, *supra*, 35 Cal.4th at p. 280-281 [no reasonable likelihood of unfair trial where publicity "quickly subsided" and was not "persistent and pervasive"]; *People v. Welch* (1999) 20 Cal.4th 701, 744 [publicity not extensive where it ended two years prior to venue motion].)

court had found the coverage "surpassed the Manson case . . . and the O.J. Simpson case in terms of pre-trial publicity." (15 CT 4720-4721.) It is fair to say that the combination of print media, radio coverage, television and cable and internet coverage made this perhaps the most widely covered trial in American history. It is equally fair to say that on balance, this media coverage created a "widely held conviction that defendant[] w[as] guilty and should be tried and sentenced to death as expeditiously as possible." (*People v. McKay*, *supra*, 37 Cal.2d at p. 797.)

There should be little dispute that the media coverage here constituted "widespread publicity describing facts, statements and circumstances which tend[ed] to create a belief in [defendant's] guilt." (*People v. Williams*, *supra*, 48 Cal.3d at p. 1128.) Much of what would become the prosecution's case was conveyed in the months, weeks and days leading up to trial, as well as solemn assurances of guilt from prominent public officials.

The two major print news sources in San Mateo county are the *San Mateo County Times* and the *Redwood City News*. (14 CT 4504.) On February 7, 2004, an article in the *Times* noted that "401 journalists . . . have applied for credentials to cover the Peterson murder trial, making this the biggest media circus in San Mateo County history." (14 CT 4557.) As might be expected, the *Times* and *Redwood City News* covered the story

extensively. Thus, between February 7 and May 3 (the date of counsel's venue change motion), the *Times* itself ran more than 50 articles about the case. (14 CT 4535-4557.) The *Redwood City News* ran more than 45 articles. (14 CT 4560-4686.)

Some dealt with the jury selection process. (14 CT 4535, 4560.) Another series of articles described in some detail numerous attempts by the defense to suppress prosecution evidence, including the wiretap evidence, the GPS evidence and the dog evidence. (14 CT 4545, 4547, 4548, 4554, 4556, 4647, 4652, 4654, 4684, 4686.) A February 24, 2004 news story conveyed the theory of the case that Laci was murdered so that Scott could continue his "affair with a massage therapist." (14 CT 4548.)

The articles were not simply objective discussions of the facts. A February 10, 2004 story described a "[p]erfect marriage. Perfect life. Perfect crime" and noted that "beautiful, pregnant Laci Peterson" was a "vivacious brunette with the brilliant smile." (14 CT 4556.) In contrast, other articles noted that Mr. Peterson "laughed and joked" during legal proceedings, was permitted to make both a movie and book deals "over the objections of Peterson's slain widow's mother," and had had other extra-marital affairs (14 CT 4544, 4548, 4670.) A March 27, 2004 article stated that Mark Geragos, Mr. Peterson's own lawyer, thought he was guilty before taking the case. (14 CT 4541.) A February 10, 2004 editorial conveyed the following message:

> "A note to anyone who thinks Scott Peterson is guilty. Based on the evidence at hand, you're right." (14 CT 4556-4557.)

In this respect, the news media may have taken their lead from the views publically expressed by the state's highest law enforcement officer. In April 2004 Attorney General Bill Lockyer told the media that the state's case again Mr. Peterson was "compellingly strong" and was a "slam-dunk" for conviction. (14 CT 4492.)

Other articles described the state's evidence in some detail. For example, a March 2, 2004, article stated that the trial judge "ruled that the jury can hear evidence that a tracking dog picked up Laci Peterson's scent at the Berkeley Marina and followed it to a pylon near the end of the marina pier." (14 CT 4649.) According to the article, the trial judge himself concluded that "[t]he inference that the jury can draw is that Mrs. Peterson was at the marina on or about the date she died." (14 CT 4646.) Both papers had articles about this piece of evidence. (14 CT 4548, 4646, 4649.)

But even this is not all. Like *Sheppard*, significant amounts of the pre-trial publicity focused on evidence that was plainly inadmissible. For example, as discussed in Argument VI, *infra*, after extensive pre-trial litigation, the trial court ruled a great deal of the state's proffered dog tracking evidence inadmissible, precisely because it was fundamentally unreliable. (10 RT 2001.) Nevertheless, a March 2, 2004 article explained

that "[p]olice used dogs extensively in Modesto to track what they claim was Laci, either alive or recently deceased, traveling in a vehicle on the highway from Modesto toward the Bay Area." (14 CT 4646-4647.) This evidence had specifically been ruled inadmissible. (10 RT 2001.)

A February 24, 2004 story discussed the results from a tracking performed by Merlin, a dog who "trailed Laci's scent approximately 20 miles from state highway 132 in Modesto to Interstate Highway 580." (14 CT 4664.) A separate article that same day summarized testimony from "[a]n expert dog handler . . . that according to her dog, Laci Peterson left her home and traveled in a vehicle to Interstate 580, more than 2 miles from the Peterson home." (14 CT 4666.) This article went on to explain that the trial court found the state's dog expert fully qualified to testify. (14 CT 4667.) According to this article, the dog was taken to Mr. Peterson's warehouse "where the 83-pound pooch immediately picked up a strong scent of Laci's and tracked it to highway 132." (14 CT 4667.) The article explained that the dog expert believed "the person left the house in a vehicle." (14 CT 4667.) This evidence too had been ruled inadmissible. (10 RT 2001.)[37]

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[37] As discussed in detail in Argument VI, not only was this evidence ruled inadmissible at trial, but some of the allegations made in the press were simply wrong. (*Compare*, *e.g.*, 14 CT 4667 [news article states that dogs alerted in the warehouse] *with* 8 RT 1531-1532, 1599 [dog handler Anderson notes that cadaver dog Twist did *not* alert in the warehouse].)

Of course, the fact that Mr. Peterson asserted his right to counsel and hired lawyer Kirk McAllister in January 2004 -- well before charges were filed -- was not admissible. Here, a series of articles in February 2004 discussed defense attempts to exclude wiretap conversations between Mr. Peterson and Mr. McAllister (and his investigator) between January and April 2003. (14 CT 4654, 4673-4682.) One of the articles discussed the trial court's ruling excluding a state witness because she had been hypnotized. (14 CT 4685.)

So far, of course, only the print media has been discussed. But as the Supreme Court itself recognized more than half a century ago, even when "[t]he record contains no excerpts from newscasts on radio or television," a reviewing court determining pre-trial publicity resulted in an unfair trial need not blind itself to the reality of both radio and television coverage. (*Sheppard v. Maxwell*, *supra*, 384 U.S. at p. 342.) This wisdom is especially applicable in this day and age, where cable talk shows such as Nancy Grace and Greta Van Susteren focus so frequently on high-profile criminal prosecutions like this case. And the state itself conceded below that "the major television networks, cable channels and national publications are responsible for the majority of information that has been disseminated." (15 CT 4722.)

Indeed, the state will be hard-pressed to dispute that the publicity painted a picture of Mr. Peterson's guilt. Although the results of the jury voir dire are discussed in greater

detail below, the fact of the matter is that at the time the second venue change motion was made, the statistics showed that (1) 96% of the potential jurors (a total of 939 potential jurors) had been exposed to the pre-trial publicity and (2) 46% of this group (a total of 432 potential jurors) had drawn a conclusion as to whether Mr. Peterson was innocent or guilty based on this publicity. (14 CT 4516, 4520.) Most significantly, of the 432 jurors who had reached an opinion as to guilt, 98.6% (a total of 426) believed Mr. Peterson was guilty, while only 1.4% (a total of 6) believed he was innocent. (14 CT 4516.)

These figures make plain what a de novo review of the news articles shows. The pre-trial publicity in this case created a "widely held conviction that defendant[] w[as] guilty . . . ." (*People v. McKay*, *supra*, 37 Cal.2d at p. 797.) The reason 98.6% of the jurors who reached an opinion as to Mr. Peterson's guilt believed he was guilty is because the case involved "widespread publicity describing facts, statements and circumstances which tend to create a belief in [defendant's] guilt." (*People v. Williams*, *supra*, 48

Cal.3d at p. 1128. *Accord People v. Tidwell*, *supra*, 3 Cal.3d at p. 70.) Reversal is required.[38]

2. Because 96 % of the jury venire was exposed to this prejudicial pre-trial publicity, and 45% of the venire admitted they thought Mr. Peterson was already guilty, the ensuing conviction must be reversed.

As noted above, even where a defendant cannot establish that reversal is required because the community was saturated with prejudicial publicity, reversal is still required

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[38] Mr. Peterson has focused primarily on the extent and nature of the pretrial publicity and the impact this had on the actual venire. That is not to say that the other factors identified above -- such as the nature of the crime, size of the community and status of the defendant and the victim -- are of no importance. In the pre-trial context – where a trial or reviewing court is trying to determine if circumstances make it likely a defendant can receive a fair trial -- these factors are central to the analysis. After all, in that situation there simply is no voir dire to examine to see the actual impact of pretrial publicity. However, in the retrospective context -- where a jury venire has in fact been called and a petit jury seated -- the results of the actual voir dire constitute direct evidence of whether the publicity actually did impact the fairness of trial.

In any event, the remaining factors here are largely neutral. Mr. Peterson was accused of murdering his pregnant wife and unborn son -- capital crimes which counseled in favor of a venue change. (*See People v. Edwards* (1991) 54 Cal.3d 787, 807.) San Mateo was only 90 miles from Modesto -- the original location -- and had only 200,000 more residents that Stanislaus county, factors which also counseled for a venue change. In prior cases, courts have reached differing conclusions as to whether San Mateo is large enough to dissipate extensive publicity, though none of these cases even remotely involved the extraordinary publicity which attended this case. (*Compare People v. Sully* (1991) 53 Cal.3d 1195, 1237 [San Mateo large enough to dissipate publicity under the facts of that case] *with Steffen v. Superior Court* (1978) 80 Cal.App.3d 623 [San Mateo not big enough to dissipate pretrial publicity].) Finally, prior to the crime, neither the defendant nor the victims here were well known.

where actual prejudice is established. In the context of pre-trial publicity, actual prejudice exists when the record shows that the jury venire demonstrates such a partiality against the defendant that even good faith protestations on the part of the jurors that they will be impartial -- protestations made in every case -- cannot be accepted. (*See*, *e.g.*, *People v. Williams*, *supra*, 48 Cal.3d at p. 1129; *Murphy v. Florida*, *supra*, 421 U.S. at p. 800, 803; *Irvin v. Dowd*, *supra*, 366 U.S. at p. 723; *Harris v. Pulley*, *supra*, 885 F.2d at p. 1363.) "The relevant question is not [merely] whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." (*Patton v. Yount* (1984) 467 U.S. 1025, 1035.) The key factor in making this assessment is the percentage of the venire who admit to a disqualifying prejudice. (*Murphy v. Florida*, *supra*, 421 U.S. at p. 803; *Harris v. Pulley*, *supra*, 885 F.2d at p. 1364.)

In making this determination, the case law establishes that three objective measures are particularly important. First, as an objective way of measuring the absolute amount of publicity -- without any assessment of whether that publicity is positive or negative from a defendant's perspective -- the case law looks at the percentage of the jury venire exposed to publicity about the case. Obviously, where this percentage is high, it indicates that the publicity was indeed pervasive. (*Compare People v. Williams*, *supra*, 48 Cal.3d at p. 1128 [reversing conviction for failure to change venue where 52% of the

jury venire had been exposed to pretrial publicity about the case] and *People v. Tidwell*, *supra*, 3 Cal.3d at pp. 65-68 [same, where 100% of jurors questioned were exposed to pretrial publicity] *with People v. Welch*, *supra* 20 Cal.4th at p. 744 [rejecting claim that venue should have been changed where less than 10% of venire even recalled publicity about the case].)

The percentage of the venire exposed to pretrial publicity is a useful starting point, but in-and-of-itself says very little about the nature of the publicity, that is, whether it was of a type which could prejudice prospective jurors. After all, if the publicity was evenhanded, objective and balanced, such publicity might not bias a jury pool at all. Thus, as an objective way of determining the nature of the publicity, courts look to see what percentage of prospective jurors who have been exposed to the publicity have concluded that defendant is guilty. Obviously, if a high percentage of those who have seen the publicity have concluded defendant is guilty, that is a strong indication that the publicity was *not* neutral in nature, but was prejudicial to the defense. (*Compare People v. Tidwell*, *supra*, 3 Cal.3d at p. 67 [reversing conviction for failure to change venue where 30% of the jurors who were exposed to the pretrial publicity concluded defendant was guilty] *with People v. Vierra*, *supra*, 35 Cal.4th at p. 281 [rejecting claim that venue should have been changed where only 13% of jurors who were exposed to pretrial publicity concluded defendant was guilty].)

These two figures provide an empirical insight into both the pervasiveness and the nature of the pretrial publicity. But one relevant question remains -- whether the publicity was so virulent that jurors could not be expected to place any predisposition aside. Thus, even if there is a great deal of publicity about a case, and even if the publicity is prejudicial to a defendant, a fair trial may still be possible if the publicity is of such a nature that jurors can be expected to set aside any views formed on the basis of such publicity. To measure this objectively, courts look at the percentage of prospective jurors who admit they are unable to set aside the views formed on the basis of the publicity and fairly judge the case. (*See Irvin v. Dowd*, *supra*, 366 U.S. at p. 727-28 [reversing conviction for failure to change venue where 67% of the venire said they could not set aside their views]; *People v. Williams*, *supra*, 48 Cal.3d at p. 1128 [same, where 8.6% of venire refused to set aside their views]; *People v. Tidwell*, *supra*, 3 Cal.3d at p. 67 [same, where 12% of venire refused to set aside their views].)[39]

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[39] Some cases also examine the seated jurors to see if they too were exposed to the pretrial publicity. (*Compare People v. Williams*, *supra*, 48 Cal.3d at p. 1128 [reversing conviction for failure to change venue where 8 of 12 seated jurors had been exposed to the pretrial publicity] and *People v. Tidwell*, *supra*, 3 Cal.3d at p. 67 [same, where 10 of 12 seated jurors had been exposed to pretrial publicity] *with United States v. Skilling*, *supra*, 130 S.Ct. at p. 2920 [rejecting claim that venue should have been changed where 14 of 16 seated jurors and alternates had *not* followed the publicity] and *People v. Leonard*, *supra*, 40 Cal.4th at p. 1396 [same, where 10 of 12 seated jurors had heard little or nothing about the case].)

By any of these three measures, venue should have been changed in this case. Here at the time of the venue change motion, 96% of the venire (939 jurors) admitted exposure to the massive publicity about the case. (14 CT 4516.) This number shows that just as in *Irvin*, *Williams* and *Tidwell*, there was significant pretrial publicity about the case.

Nor is there any real question as to the nature of the pretrial publicity. Of the more than 900 jurors who were exposed to this publicity, 46% of them (432) admitted they had already reached a decision based on this publicity. (14 CT 4516.) And most significantly, of these 432 prospective jurors that had reached a decision, a remarkable 98.6% (426) believed Mr. Peterson was guilty. (14 CT 4516.) These stark figures show that the publicity was overwhelmingly prejudicial to Mr. Peterson's ability to get a fair trial. Once again, in comparison to cases like *Tidwell* (30%) and *Vierra* (13%), the percentage of jurors who concluded Mr. Peterson was guilty based solely on the pretrial publicity counseled strongly in favor of a change of venue.[40]

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[40] All 12 members of the actual jury (as well as all six alternates) admitted they too had been exposed to this same pre-trial publicity. (CT MJQ 16-17, 39-40, 62-63, 85-86, 108-109, 131-132, 154-155, 177-178, 200-201, 223-224, 246-247, 269-270, 292-293, 315-316, 338-339, 361-362, 384-385, 407-408.) This 100% figure too compares favorably to the precedents discussed above such as *Williams* (66%) and *Tidwell* (83%).

Finally, the objective measure of the virulence of the pretrial publicity also shows that venue should have been changed. In *Williams* the seated jurors uniformly declared they would set aside their preconceived views as to defendant's guilt, although 8.6% (10 out of 116) of the venire said they could not do so. (48 Cal.3d at p. 1128.) Writing for the Court, Justice Kaufman concluded that these "declaration[s] of impartiality" were *not* conclusive and reversal was required. (48 Cal.3d at p. 1129.) Similarly, such declarations of impartiality by the seated jurors were not conclusive -- and reversal was required -- in *Tidwell* where 12.7% of the venire (13 out of 102) said they could not set aside the views created by the pretrial publicity. (3 Cal.3d at pp. 66-67, 73.) Here, as of the date the venue change motion was made, there were many hundreds of prospective jurors who though Scott Peterson was already guilty of capital murder based on the pretrial publicity. Significantly, more than half of these prospective jurors admitted their belief in Mr. Peterson's guilt was so strong that they would be unable to set it aside and judge him fairly at any trial.[41]

In short, it is true that all of the seated jurors in this case declared they would set aside their pre-existing views and be impartial. But the percentage of the venire as a

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[41] Counsel for Mr. Peterson has examined every juror questionnaire filled out and filed with the trial court prior to the May 3, 2004 venue change motion. Because there are over 900 such questionnaires, and in order to avoid a citation in text that is several pages long, the record citation showing the hundreds of jurors who refused to set aside their views is attached to this brief as Appendix A.

whole admitting to a disqualifying prejudice is so high, and the nature of the publicity so pervasive, that these declarations from the seated jurors are not conclusive. (*See Irvin v. Dowd*, *supra*, 366 U.S. at p. 728 [reversing where a significant percentage of the venire admitted to a disqualifying prejudice even though all 12 seated jurors said they would be impartial]; *People v. Williams*, *supra*, 48 Cal.3d at p. 1129 [same]; *People v. Tidwell*, *supra*, 3 Cal.3d at p. 73 [same].) As in all these cases, reversal is required here.[42]

In making this argument, Mr. Peterson recognizes that defense counsel did not use all his peremptory challenges. In fact, counsel used 16 of his peremptory challenges. (18 CT 5621.) And this Court has on occasion noted that "without a reasonable explanation" a defense lawyer's decision not to use all peremptory challenges is a factor in determining whether a trial court erred in denying a venue change motion. (*See*, *e.g.*, *People v. Davis* (2009) 46 Cal.4th 539, 581.) The rationale for this rule is that a defense lawyer's decision

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[42] Of course, the trial court's ruling on the venue change motion should be evaluated by the evidence before the court at that time. (*See People v. Cowan* (2010) 50 Cal.4th 401, 431; *People v. Beeler* (1995) 9 Cal.4th 953, 1004.) Here, that evidence consisted of questionnaires filled out by approximately 900 prospective jurors prior to the May 3, 2004 date the motion was filed. Nevertheless, it is worth noting that the evidence was almost identical *after* May 3, 2004.

After the trial court denied the May 3, 2004 venue change motion, voir dire continued and an additional 259 prospective jurors admitted reaching a decision about guilt based on the pretrial publicity. Of these 259 prospective jurors, 99% already believed Mr. Peterson was guilty of capital murder. Yet again more than half of these prospective jurors further admitted their belief in Mr. Peterson's guilt was so strong they would not set it aside to judge him fairly. (*See* Appendix B.)

not to use all peremptory challenges can indicate "the jurors were fair and the defense itself so concluded." (*People v. Prince* (2007) 40 Cal.4th 1179, 1215-1216. *Accord People v. Robinson* (2005) 37 Cal.4th 592, 623; *People v. Dennis* (1998) 17 Cal.4th 468, 524; *People v. Morris* (1991) 53 Cal.3d 152, 185.)

This principle has no application under the facts of this case in light of a separate doctrine this Court has recognized for nearly a century: the defensive acts doctrine. Under the defensive acts doctrine, a lawyer who receives an adverse ruling from a trial court does not undercut or waive his objection to that ruling by taking defensive acts to make the best of a bad situation. (*See*, *e.g.*, *People v. Turner* (1990) 50 Cal.3d 668, 704-705 n.18; *People v. Scott* (1978) 21 Cal.3d 284, 291; *People v. Sam* (1969) 71 Cal.2d 194, 207-208; *Jameson v. Tully* (1918) 178 Cal. 380, 384. *See People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1064; *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 209; *Hoel v. City of Los Angeles* (1955) 136 Cal.App.2d 295, 310.) Thus, a reviewing court can properly consider a defendant's objection to the admission of certain evidence even though as a defensive act the defendant himself introduces the evidence. (*People v. Turner*, *supra*, 50 Cal.3d at pp. 704-705, n.18.) Similarly, a reviewing court can properly consider a defendant's objection to the admission of certain evidence even though as a defensive act the defendant himself relied on this evidence in closing argument to contend he was not guilty. (*People v. Scott*, *supra*, 21 Cal.3d at p. 291.)

The defensive acts doctrine applies in full force here. Defense counsel brought a venue change motion, arguing that Mr. Peterson could not get a fair trial in San Mateo because of pretrial publicity. The trial court denied that motion. 76 jurors passed through both hardship and *Hovey* voir dire. (18 CT 5620.) Defense counsel had questioned every one of these jurors, and had lengthy questionnaires from each of them. Defense counsel was obviously aware of the voir dire and juror questionnaires of the jurors who were not yet in the jury box at the moment he decided not to use any more peremptory challenges. At that point in the proceedings -- given that his venue change motion had been denied -- defense counsel was fully entitled to act defensively, make the best of the situation and try to pick the best 12 jurors out of the pool of 76 from which he was being forced to choose. Under these circumstances, counsel's decision not to use all of his peremptory challenges simply does not support an inference that "the jurors were fair and the defense itself so concluded." (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1215-1216.) Defense counsel's decision not to use his additional challenges has no place in assessing the trial court's ruling on the venue motion. And because the percentage of the venire admitting to a disqualifying prejudice was so high, reversal is required.

VI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, AND VIOLATED MR. PETERSON'S FIFTH AND EIGHTH AMENDMENT RIGHTS, BY ADMITTING DOG SCENT IDENTIFICATION EVIDENCE THAT PROVIDED CRITICAL FACTUAL SUPPORT FOR THE STATE'S THEORY OF THE CASE.

The prosecution called more than a hundred witnesses to prove its case against Mr. Peterson. But in the end, relying solely on dog-scent evidence admitted over defense objection, the prosecutor told the jury that Mr. Peterson's guilt depended on one fact:

> "If Laci Peterson's scent is at the Berkeley Marina, then he's guilty. I mean that's as simple as that." (111 RT 20534.)

As more fully discussed below, while this dog scent evidence appeared to be among the most damning pieces of evidence in the case, it was also some of the most unreliable evidence presented. Because of its unreliability, the dog scent evidence should never have been allowed into the courtroom, much less considered by the jury in a capital case. In light of the prosecutor's characterization of that evidence as a litmus test of guilt, and the risk that one or members of the jury may have agreed with that characterization, the erroneous admission of this evidence was prejudicial and requires reversal.

A. The Relevant Facts.

As noted above, the state's theory of this case was that Mr. Peterson killed his wife in Modesto, transported the body to the Berkeley Marina in his truck, and then took the body in a boat into the bay where he pushed it overboard. Though Laci Peterson's body, and the body of her unborn child, were discovered in San Francisco Bay, the state had no direct evidence that she was killed in the Modesto home or transported by truck to the marina.

The state sought to fill this evidentiary void with dog scent evidence. That is, the state deployed trailing and cadaver dogs at four places to determine whether the dogs could detect Laci Peterson's scent: (1) the Peterson home at 532 Covena Avenue in Modesto, (2) Scott Peterson's warehouse, (3) the area between Scott Peterson's warehouse and the interstate and (4) the Berkeley Marina. Because the defense moved in limine to exclude this evidence as unreliable, there was pre-trial testimony as to each of these four areas.

1. Pre-trial testimony and rulings regarding the dog scent evidence in each of the four areas.

a. The dog scent evidence at the Peterson home.

The first site was at the Peterson home at 523 Covena Avenue in Modesto. Out of the jury's presence, the state presented testimony from dog handler Cindee Valentin that on December 26, 2002, she brought her trailing dog, Merlin, to the home. (7 RT 1338.)

A trailing dog is exposed to a person's scent through a personal item carrying that scent. (7 RT 1326.) Once scented with the item, the dog tries to detect that scent at a particular location and then follow that scent trail. (7 RT 1326.)[43]

Valentin collected various items that carried Laci's scent, including a slipper and a pair of sunglasses. (RT 1339-1340.) Outside the house, Valentin had Merlin smell the scent on the sunglasses. (7 RT 1342.) According to Valentin, Merlin caught a trail and took off across the property. Merlin led Valentin down several streets, eventually turned off the road and went to the gates of a Gallo winery. Valentin ended the search there, concluding that Merlin was not on a trail. (7 RT 1360-1361.)

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[43] A trailing dog is different from a tracking dog. A tracking dog is one that is started in a location where the subject was known to have stepped. The tracking dog is trained to follow the scent on that track from one footstep to the next. (7 RT 1326.)

At no point in the case was there any evidence that Laci had been taken to the winery, and no other explanation was ever offered for Merlin's trailing into the winery. (7 RT 1460.) Valentin nonetheless told the officers that she believed Merlin was following a "vehicle trail," rather than a foot trail. (7 RT 1348.) That is, Valentin claimed that the dog was following Laci's scent as her body was driven in a vehicle on these streets. (7 RT 1348.)

A vehicle trail is a "non-contact" trail; that is, the person whose scent the dog is attempting to follow has not made contact with the ground, as would someone who is walking. (7 RT 1390; 8 RT 1497, 1503.) Rather, the scent is disbursed as the vehicle is driven along a particular route. (8 RT 1582, 1619.) Prosecution dog-handler, Eloise Anderson, testified that even if the person is inside the car *with the windows rolled up*, a scent trial is created along the car's route. (8 RT 1581.)

The prosecution did not offer any scientific basis for this remarkable assertion. This was somewhat surprising in light of the admission by the prosecution's own dog scent expert, Christopher Boyer, that a dog's ability to follow a non-contact vehicle trail is a matter of significant dispute in the dog-handling community. (9 RT 1701.)

The defense moved to suppress evidence of the dog scent evidence from the Peterson home. (6 CT 2151-2157.) As discussed below, the trial court excluded this evidence as "lack[ing] . . . certitude," lacking corroboration and as "conjectural and speculative." (10 RT 2001; *see* Argument VI-A-1-d, *infra*.)

b. The dog scent evidence at the Peterson warehouse.

The second site was inside Scott's warehouse. On December 27, 2002, dog handler Eloise Anderson brought her dog, Twist, to the warehouse, where Scott's boat was stored. (8 RT 1530.) After all, the state's entire theory was that Laci's body had been placed in the boat.

Twist was certified as a cadaver dog by the California Rescue Dog Association ("CARDA"). (7 RT 1469.) A cadaver dog is different from either a tracking or a trailing dog. While trailing and tracking dogs are used to detect scents from a living person, a cadaver dog is used to detect scent from a dead person. Anderson thus explained:

> "Q: [By Mr. Kopp]: Okay. Now there's a – excuse me, there's a difference between live – or scent from a live human person and scent from a dead person, right?
>
> "A: [by Eloise Anderson]: Correct.

> "Q: And you use trailing dogs to trail scent from a live person, whereas you would use a cadaver dog to try and locate a dead person, right?
>
> "A: Correct. (8 RT 1577-1578. *See also* 8 RT 1590 [Anderson testifies that a trailing dog is used to trail a scent that's been left behind by a live human being.)

Unlike trailing dogs, cadaver dogs are not scented on any object because they are trained only to find decomposing bodies. (8 RT 1532.)

Anderson put Twist in the boat and commanded him to locate "dead scent". (8 RT 1532-1533.) Twist showed only mild interest, then attempted to get out of the boat. (8 RT 1531-1532.) In her contemporaneous written report of Twist's work in the warehouse, Anderson stated that although Twist showed "mild interest" there were "no alerts." (8 RT 1599.)

But Anderson's testimony changed during the pretrial proceedings. Departing from her report, she testified that she put Twist at the front of the boat, he sniffed the railing of the boat, went to explore the area under a workbench, then came back to the boat and "went into an alert, and then bark[ed] in frustration because she could not pinpoint any kind of particular source." (8 RT 1533.) Anderson told officers that Twist

was alerting in that particular area, but could not "give him a definitive point." (8 RT 1534.)

Of course, Anderson now had to explain the fact that she left out of her report the crucial information that Twist actually alerted in the warehouse. She stated that she "was not sure how to form an opinion based on the heavy chemical smell in the warehouse, and so I did not say that she actually went into an alert behavior in front of the boat there." (8 RT 1534.) Anderson nonetheless insisted that she had told a detective at the scene that Twist had alerted. (8 RT 1539.) Anderson never explained, however, why her opinion had changed between the time she wrote her report (stating that Twist showed "no alerts") and the time she gave her testimony.

The defense moved to exclude the dog scent evidence at the warehouse. (6 CT 2151-2157.) The trial court excluded this evidence as "lack[ing] . . . certitude," lacking corroboration and as "conjectural and speculative." (10 RT 2001; *see* Argument VI-A-1-d, *infra*.)

c. The dog scent evidence between the Peterson warehouse and the interstate.

As noted, prosecution witness Boyer conceded there was a dispute among dog handlers as to whether a non-contact vehicle trail was even possible. (9 RT 1701.) Despite this dispute, police in Mr. Peterson's case nonetheless attempted to use dogs to do just that. Thus, on December 26, right after the search that began at the Peterson's home, they brought Cindee Valentin and Merlin to a third site -- the area near Scott's warehouse. (7 RT 1420.)

Once again out of the jury's presence, the state presented evidence that Valentin asked police not to tell her exactly where the warehouse was located, but to drop her and Merlin off a block from the warehouse to see if Merlin could "pick up a trail and make the right choices to get to the warehouse" by following the non-contact trail. (7 RT 1420.) Officers dropped Valentin and Merlin a block from the warehouse. (7 RT 1420.)

Merlin went in a direction *directly opposite* from the warehouse. (7 RT 1421.) Merlin then ran along the fence of a storage yard, indicating that he had picked up a scent. (7 RT 1421-1422.) Valentin admitted that the Merlin's search had failed. (7 RT 1423.)

Interestingly, Captain Christopher Boyer, who supervised the dog searching, omitted this failing on Merlin's part from his report. (9 RT 1740-1742.) In fact, Boyer's report simply stated that Merlin was taken from the Peterson house directly to the warehouse. (9 RT 1740.) Boyer attempted to explain this omission by saying that "I had generalized my report . . . ." (9 RT 1742.)[44]

Undeterred, officers brought Valentin and Merlin to the warehouse where Merlin was again scented with Laci's items. (7 RT 1352.) Merlin took off out of the warehouse, through various streets, to Highway 132, which leads out of town. (7 RT 1352-1353.) Police stopped Merlin after he trailed about 1/4 mile down Highway 132, apparently due to the volume of traffic on the road. (7 RT 1353.)

On January 4, 2003, Eloise Anderson was called to bring her dog, Trimble, to search for Laci's scent on Highway 132 where Merlin's trail had ended. (8 RT 1515.) Trimble was a certified trailing dog. (7 RT 1469.)

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[44] This was not the only dog scent trailing that resulted in a false alert. On January 6, 2003, police used cadaver dogs to search an area around Tulloch Lake in Calaveras County. There were three dogs involved in the search, all three alerted multiple times. (52 RT 10299-10300.) Officers found nothing at the lake, however, other than "a bag with what they determined to be possibly deer guts, or something like that." (52 RT 10301; 53 RT 10345.) This was extremely puzzling since cadaver dogs are specifically trained only to alert on human decomposition, not animal carcasses. (7 RT 1285 [Valentin's testimony that a cadaver dog is "trained to go out and find the remains of a person."]; 7 RT 1442 [cadaver dogs are trained to detect human cadaver scent].)

Anderson explained that to obtain this certification, the dog must be able to follow trails that are between 18 hours and 96 hours old. (7 RT 1472-1473.) Anderson testified Trimble passed other trailing tests, although she admitted that Trimble "does make mistakes when you ask her to perform trailing exercises." (8 RT 1490-1491, 1495-1496, 1497-1500, 1500-1507, 1548.) On cross-examination, Anderson admitted that she had documented two *contact trails* Trimble had run in 2001 where Trimble had failed to trail correctly. (8 RT 1549-1550.)

However, prior to her work in Mr. Peterson's case, Trimble's record on *vehicle trails* was very different. According to Anderson, prior to December 2002, Trimble had attempted only two vehicle trails. Anderson said Trimble was successful on one and unsuccessful on the other. (8 RT 1541-1542.)

But as it would turn out, Anderson was not entirely forthright. Although this information did not come out during the pretrial hearings on the dog scent evidence, there was a third vehicle trail that Trimble ran prior to the instant case, at a trailing seminar in Chico, California, run by Andrew Rebman. (8 RT 1544.) Rebman was a retired Connecticut State Trooper, a trailing dog handler, and cadaver dog handler for the Connecticut State Police. (8 RT 1543.) He is acknowledged to be an expert in the field of dog trailing. (8 RT 1543.)

Anderson had told Rebman that Trimble could successfully run vehicle trails. (8 RT 1544.) Rebman designed a vehicle trail for Trimble. (8 RT 1544.) Anderson admitted that every trailing exercise she and Trimble did at Chico should have been recorded in the log books in which she recorded each of Trimble's training exercises. (8 RT 1546.) For whatever reason, however, the results of the Rebman vehicle trailing exercise were *not* included in Anderson's log. (8 RT 1546.) When directly asked if Trimble failed this test, Anderson gave what can best be characterized as an evasive reply:

> "I don't recall that she was not able to follow the scent coming out of the vehicle." (8 RT 1545.)

At trial, however, the defense showed Anderson a video that had been made of this very training seminar she and Trimble had attended in Chico with Andrew Rebman. (85 RT 16116-16119.) At that seminar, Rebman had a test subject walk along a trail and then get into a car and drive off. (85 RT 16116.)

Anderson, who believed Trimble could successfully follow a vehicle trail, had Trimble try to follow the test subject. The attempt was memorialized on the video. On the video, Trimble gave every indication of having picked up the scent -- Anderson herself admitted that Trimble came down the street in a straight line towards the

videographer, with a strong pull, with the lead line tight, and with her posture that "looked like she was on the trail of the scent." (85 RT 16146.) The videographer, however, was *not* the test subject. Trimble had failed and thus, in toto, Trimble had successfully completed only one of three non-contact vehicle trails.

Despite Trimble's one-for-three record in vehicle searches, police believed that she could follow a non-contact vehicle trail down Highway 132. This belief in the utility of vehicle trailing dogs was put to the test here, where the record showed that Highway 132 was a heavily traveled road carrying some 20,000 cars per day, that ten days had elapsed between Laci's disappearance and the search, during which there had been three to four instances of rain and winds up to 17 miles per hour. (9 RT 1748.) Prosecution expert Boyer was undaunted, insisting that these conditions would simply make the trailing "difficult, but not impossible." (*Id.*)

As a result, police forged ahead with their canine investigation. On January 4, 2003, Anderson brought Trimble to the point on Highway 132 where Valentin claimed that Merlin had detected Laci's scent. (8 RT 1515.) Anderson scented Trimble with Laci's slipper, drove the dog from one intersection to the next, let Trimble out of the car at each intersection, and then determined if the dog could detect a scent. (8 RT 1524-1525.) According to Anderson, the trail Trimble followed was indicated on People's

Exhibit 13, and ended some distance to the west of Interstate Highway 5. (*See* People's Pretrial Exhibit 13 at 1 Clerk's Pretrial Motions Exhibits Transcript 157.)

Anderson also used her cadaver dog, Twist, whom she had also brought with her that day. (8 RT 1578.) As noted above, Anderson testified that while a trailing dog is used to trail scent from a live person, a cadaver dog is used to locate the decomposing scent of a dead person. (8 RT 1578; 7 RT 1285; 8 RT 1532-1533.) Anderson worked Twist at two points just off of Highway 132. Twist did not alert to Laci's scent at either point. (8 RT 1578-1579.)

On January 30, 2003, some *five weeks* after Laci's disappearance, the officers repeated the effort to detect Laci's non-contact scent on streets and highways, beginning from the point on Highway 132 where Merlin's previous trailing ended, and going towards Interstate 580. (7 RT 1355.) This time, officers again used Valentin and her dog, Merlin. (7 RT 1355.) As Anderson did with Trimble, Valentin took Merlin in a car that was driven from on Highway 132 towards Interstate 580. (7 RT 1355.) Valentin let Merlin out of the car at every intersection to see if he picked up the vehicle trail. (7 RT 1356.) According to Valentin, although five weeks had passed, remarkably enough Merlin located Laci's scent at every single intersection between Highway 132 and Interstate 580, and ended at the intersection of 132 and 580, some 20 miles from the

warehouse. (7 RT 1356, 1358.) Of course, this was the same Merlin that had (1) taken police to the Gallo winery on December 26 and (2) run the wrong way later that same day when his handler did not know where the Peterson warehouse was. Now, however, Valentin testified that Merlin went onto the ramp leading to 580 and tugged hard on the harness on the interstate itself. (7 RT 1358.)

The defense moved to exclude all the dog scent evidence in the area between the warehouse and the interstate. (6 CT 2151-2157.) The trial court excluded this evidence as "lack[ing] . . . certitude," lacking corroboration and as "conjectural and speculative." (10 RT 2001; *see* Argument VI-A-1-d, *infra*.)

d. The trial court's exclusion of all dog trailing evidence in and around Modesto

The trial court granted the defense motion to exclude all the foregoing dog scent identification evidence. (10 RT 2000-2005.) The court's ruling encompassed the dog trailing from the Peterson home, the scent identification at the warehouse, and the trailing from the warehouse to Interstate 580. With some understatement, the court found that the evidence of dog trailing at all three sites "lacks a certain degree of certitude with respect to the dog handlers and with respect to the dog tracking," and that it lacked sufficient corroboration to be presented to the jury. (10 RT 2001.) The court further noted that,

because "you can't cross-examine a dog," the evidence tends to be "conjectural or speculative." (10 RT 2001.) Accordingly, the jury did not hear any evidence of dog trailing in or around Modesto.

e. The dog scent evidence at the Berkeley Marina.

The matter was different as to the dog scent identification at the fourth site, the Berkeley Marina. Because this was the only dog scent identification evidence the trial court admitted, and because the prosecution told the jury that it alone established Mr. Peterson's guilt, he will explore it in some detail.

On December 28, 2002, Eloise Anderson brought Trimble to the Berkeley Marina. (8 RT 1518.) As noted above, the trial court excluded evidence as to Trimble's detection of scent on Highway 132 as unreliable.

Anderson's choice of Trimble (a trailing dog) at the Berkeley Marina rather than Twist (a cadaver dog) was curious for two reasons. First, Trimble had never been trained to detect scents in or around a marine environment. (See 8 RT 1488-1508 [describing Trimble's training].) Anderson had made it clear in her testimony that a handler can only be certain of a dog's abilities if the dog was trained in the particular environment in

which they are asked to work. Thus, Anderson testified that Twist could not be relied upon in the warehouse because he had not been trained in the presence of various chemicals. (8 RT 1531.) Anderson did not feel comfortable interpreting Twist's behavior because the conditions in the warehouse were "outside of our training parameters." (8 RT 1601.) Based on the testimony regarding Trimble's training, the environment at the Berkeley Marina was similarly outside of Trimble's training parameters.

Second, and perhaps more importantly, according to the state's theory, Laci Peterson was dead by the time she was transported to the marina. (*See* 109 RT 20319 [prosecution's closing argument that "Laci Peterson was killed in her home, as we have been telling you now for five months, between the night of the 23rd and the morning of the 24th."].) And Anderson had testified quite clearly that a trailing dog is used "to trail scent from a live person, whereas you would use a cadaver dog to try and locate a dead person." (8 RT 1577-1578.) Cindee Valentin, who was an expert in cadaver dogs testified that the cadaver scent sets in quite quickly, and that her cadaver dogs had done cadaver searches one day after somebody had died. (7 RT 1443.)

In an apparent effort to explain that Anderson's testimony was not entirely correct, the prosecution called Christopher Boyer to explain that a "live smell [can] attach[] to [a

dead] person for a very long time," particularly "if the environmental conditions are very cool." (9 RT 1680.) Boyer did not quantify what constitutes "a very long time." The prosecution did not provide any scientific or academic foundation for either of these assertions.

This was hardly surprising. The state did not even seek to qualify Boyer as an expert. (*See* 8 RT 1629-1646; 9 RT 1678-1687 [Boyer's direct testimony].) And Boyer admitted that he had neither education nor training in dog scent theory. Thus, when asked if he had "any background education or training in [scent theory]," Boyer responded that "there really isn't any area to get scent theory from this from dog-handlers. It's not something offered at Berkeley or locally. You have to end up doing a lot of research on your own." (83 RT 15899.) Boyer continued that "most of it's very basic knowledge. You know, humans have been using dogs to do work and find things for centuries and so most of that education really can find [sic] in high school level-type classes in microbiology, human physiology, chemistry and physics, as well as going to seminars like at UC Davis at the School of Veterinary [sic] and that sort of thing." (*Id.*) Notably, despite suggesting that" high school level-type classes in microbiology, human physiology, chemistry and physics" could form the basis of an expert's testimony on dog scent identification, Boyer never claimed to have ever taken any such classes.

Anderson was even less helpful on this point. She stated her belief that "if [Laci Peterson] were no longer alive, there would be some skin raft still coming off." (8 RT 1588.) When asked if there "is any literature that you can alert us to that would support that opinion," Anderson replied, "[n]one that I know of," (8 RT 1588), though later she recalled an "older book" called "Scent and the Scenting Dog" that supported her opinion. (8 RT 1590.) Nor had Anderson pursued any "scientific course work in which [she] examined that theory." (8 RT 1589.)

Boyer was the "scene manager" at the marina, where Anderson was asked to have Trimble try to locate the scent of Laci Peterson. (8 RT 1516, 1643.) The Berkeley Marina had two boat ramps by which boats could be put into the actual harbor. (8 RT 1517.) Each boat ramp to the water had piers that ran down the east and the west side of the boat ramp. (See People's Exh. 210.)

Anderson checked with Boyer for instructions. Rather than telling Anderson to check the marina generally for any of Laci's scent, or taking her to other randomly selected areas in addition to the area of interest, Boyer told Anderson precisely where in the marina he hoped her dog would detect the scent. Boyer testified that he gave Anderson the following instructions:

> "Is there an entry or exit trail from that area -- and when I say marina, the Berkeley Marina is actually a very, very large place. We were in one very specific area, and that is the public boat launching area. And so when I use the term "marina" there, I'm referring contextually to the boat ramp where we were at. So my instructions to her were the same, is there an entry or exit trail to that area of the marina." (84 RT 15997.)

Anderson was given Laci's sunglasses, that had been removed from Laci's purse, to use as a scent article. (8 RT 1516-1517.) Anderson scented Trimble with the sunglasses. Anderson did not conduct what is called a "missing member" test prior to commanding Trimble to work. A missing member test is a common procedure for ensuring that, when a scent article may contain the scent of a person in addition to the scent of the target person, the dog knows which scent to detect. (85 RT 16133.) In the procedure, prior to commanding the dog to search for the target scent, the handler allows the dog to smell the scent of the person whose scent may be on the article but who is not the target of the search. In this way, the dog can identify the scent of the person who is not the target of the search, and the handler can be sure that the dog is not trailing that person's scent. (*Id.*)

Anderson admitted that she wanted to make sure that the scent article was uncontaminated by any scent other than Laci's. (8 RT 1562.) Nevertheless, she did not do the missing member test at the Marina with Scott's scent. (85 RT 16133.) Anderson said that she did not believe the missing member test was necessary. (85 RT 16133.)

This was puzzling since Anderson admitted that she did not know whether or not Scott had handled either the sunglasses or the sunglass case in the recent past. (8 RT 1551.) More puzzling still, Anderson testified that she was told that Scott had in fact handled Laci's purse. (8 RT 1552.) Anderson "did not believe anybody had said that he had handled the glasses," but according to Anderson that was "an iffy recollection." (*Id.*) Anderson did not make any inquiry to determine whether or not Scott had ever handled Laci's sunglasses. (8 RT 1553.) Anderson acknowledged that it would have only taken a moment to conduct the missing member procedure with Scott and that nothing prevented her from doing so. (85 RT 16133-16134.)

In sum, Anderson was concerned about the purity of the scent item. She knew that Scott had -- at a minimum -- handled the purse containing the item. She also knew that conducting the missing member test with Scott would have taken only seconds to complete and would have insured that Trimble did not detect Scott's scent at the Marina, rather than Laci's. Yet, Anderson did not have Trimble do this routine procedure.

After scenting Trimble with the sunglasses, Anderson brought Trimble to one of the two boat ramps. Trimble did not indicate that she found any scent. (8 RT 1517-1519.) Anderson re-scented Trimble near some vegetation at a pier on the west side of the second boat ramp. Trimble "did a circle up onto the vegetation and them came back

out, lined out, led – head level, tail up and lined out straight to the end of the . . . particular pier." (8 RT 1520.) According to Anderson, Trimble led her to a pylon at the end of the west pier where she "stopped, she checked the wind currents coming in from over the water, gave me a hard eye contact, stayed by my left side, which is an end of the trail indication." (8 RT 1520-1521.) Anderson "gave her a moment to settle." Trimble walked down another portion of the pier, then came back and gave Anderson another indication of end of the trail. (8 RT 1521.)

Based on Trimble's behavior, Anderson concluded that the scent on the pier was from a non-contact trail. (8 RT 1590-1591.) As such, the scent is subject to being dispersed by environmental factors, the chief of which is wind. (8 RT 1590-1591.) Anderson recognized that if the wind came from the west, the primary scent coming from a boat being driven in the water along the eastern side of the pier would have blown to the east, *away* from the pylon on the west pier where Trimble alerted. (8 RT 1594.) Anderson explained, however, that even if the wind was coming from the *west*, and a boat was located *east* of the pier, "you would still get some scent on the west side." (8 RT 1594.) When asked if the microscopic skin rafts could actually "swim upstream against a prevailing wind," Anderson responded that "it would depend upon the level of the wind."

(8 RT 1595.) Anderson would not expect skin rafts to migrate against a wind stronger than five miles per hour. (8 RT 1595.)[45]

The prosecution witnesses themselves made it clear that a scent identification like the one Anderson testified to at the marina is not scientifically based when the subject being trailed is not found at the end of the search. Captain Boyer was quite candid about this limitation:

> "Q. [by defense counsel Pat Harris] If you do not come up with the subject at the end of the trail, there is no way to know that that dog ever picked up that scent, is there?
>
> "A. Are you asking scientifically again?
>
> "Q. I'm asking scientifically.
>
> "A. No, sir. Scientifically there isn't.

---

[45] As noted above, the only authority Anderson could think of that described her theory of skin rafts was *Scent and the Scenting Dog* by William G. Syrotuck. (8 RT 1590.) That book, however, squarely *rejects* Anderson's claim that skin rafts can travel against a five mile-an-hour wind.

Syrotuck postulates that "the body air current being 125 feet per minute will certainly launch some rafts against the wind," but only if the "raft velocity, combined with the weight, is greater than the wind velocity." Even at that rate, "the distance [the rafts travel upwind] will be comparatively small." (*Id.* (Barkleigh ed. 2000) at p. 104.)

A velocity of 125 feet per minute is equivalent to 7500 feet per hour, or 1.42 miles per hour. Anderson thus claims that rafts could travel across the water against a 5 mile per hour wind – one that is 300% stronger than Syrotuck suggests is possible.

"Q. This is not a science, is it?

"A. No, sir, it's an art.

"Q. And that art is based on the handler's interpretation of what they see from that dog; isn't that true?

"A. The handler's interpretation of the dog's behavior, yes, sir.

"Q. Exactly. It's based on one person, one part time volunteer's beliefs about what a dog -- not a human being, but a dog did in trailing a scent, correct?

"A. Yes, sir." (9 RT 1796).

Eloise Anderson and Trimble were not the only team the police called to search at the Berkeley Marina. Ron Seitz, whose dog was also certified by CARDA, was called to search the marina. (9 RT 1774.) Seitz used one of Laci's slippers to scent his dog. (9 RT 1776.) In sharp contrast to the sunglasses used by Anderson to scent Trimble, there was no evidence at all suggesting that Scott had handled the slipper.

Boyer testified that Seitz verbally reported that he had checked near the bathrooms, but that "his dog showed no indication of a trail. And that was all he had done." (9 RT 1777.) But this was not entirely accurate; in fact, Seitz's CARDA report made clear that he also searched for Laci's scent at the boat ramp. (9 RT 1778.)

Boyer claimed that he did not request a copy of Seitz's report from CARDA. (9 RT 1782.) Instead, Boyer testified that he told the detectives they could get a copy of the CARDA report. (9 RT 1783.)

The defense moved to exclude testimony about Trimble's alleged detection of a scent at the pier. (6 CT 2151.) In contrast to its earlier rulings, the trial court ruled this evidence admissible. (10 RT 2002-2003.) The court based its ruling on the fact that (1) Trimble had been certified to detect trails up to 96 hours old, and had detected scent up to six days old; (2) Anderson testified that Trimble had detected a trail on the pier and testified "that the dog's head was level, [and] gave evidence of trail at the marina that ended at the end of the pier"; and (3) Trimble's alert was corroborated by the fact that "within months, the body of Miss Peterson and her young son were found washed up in the Bay . . . two and a half miles from the marina." (10 RT 2002.) The court also noted that its ruling was supported by the fact that Mr. Peterson told detectives he was at the Marina on December 24, 2002. (10 RT 2004.) The court concluded that "there is sufficient supporting corroborative evidence for that evidence to be admissible." (10 RT 2002-2003.)

2. Trial testimony regarding the dog scent evidence at the marina.

The prosecution's evidence at trial relating to dog scent identification was therefore limited to Trimble's alert at the Berkeley Marina. Anderson's trial testimony closely followed her testimony at the pretrial hearing on admissibility.

Anderson testified that she went to the Marina with Trimble on December 28, 2002, and scented the dog with Laci's sunglasses. (84 RT 16078.) Trimble gave no indication of scent at several locations at the marina, until she explored the vegetation near an entrance to the boat ramp. (84 RT 16079.) Trimble took Anderson in a straight line onto the pier and to the pylon at the end of the pier, indicating an end of the trail there. (84 RT 16075-16080, 16085.) When Trimble trailed to the end of the pier, she pulled steadily on her line, with a level head and maintained this posture. (84 RT 16085.) On direct examination by the prosecutor, Anderson told the jury that behavior -- pulling steadily on her line with a level head and maintained posture -- indicated Trimble was following a valid scent trail. (84 RT 16085.) Of course, this was the identical posture and conduct Trimble exhibited at Andrew Rebman's Chico seminar, discussed above, at which it was determined that Trimble's effort to follow a non-contact vehicle trail resulted in a false alert. (85 RT 16146.)

This was the evidence that the prosecution told the jury, if it believed, established Mr. Peterson's guilt of capital murder, "as simple as that."

B. The Trial Court Violated State Law By Admitting Dog Scent Evidence From A Non-Contact Vehicle Trail In A Marine Environment Which Lacked The Requisite Foundation, Did Not Meet The Requirements of *People v. Kelly,* And Was Not Based On The Sort Of Evidence Upon Which Experts Reasonably May Rely.

As explained below, admission of the dog scent evidence at the Berkeley Marina violated state law in three distinct ways.

First, to be admissible, dog scent evidence must meet certain foundational requirements, the scope of which depends on the particular type of dog scent evidence that is proffered. The dog scent evidence in this case, involving the detection of a non-contact vehicle trail in a marine environment, did not meet the requisite foundational requirements.

Second, the evidence should have been excluded under *People v. Kelly* (1976) 17 Cal.3d 24, for two reasons. First, unlike conventional dog-tracking or dog-trailing, the ability of a dog to detect and follow a non-contact, vehicle trail of a deceased person in a marine environment was a novel "unproven technique or procedure," (*People v. Leahy*

(1994) 8 Cal.4th 587, 606), that was not shown by the People to be generally accepted in the relevant scientific community. In addition, *Kelly* requires, even for techniques that have met the test of general acceptance, that the evidence be excluded unless the proponent can show that the person performing the procedure used correct scientific procedures. Here, the evidence showed that Trimble's handler, Eloise Anderson, did not use correct procedures. To the contrary, Anderson used a potentially contaminated scent article and failed to employ the so-called "missing-member test" to assure that her dog followed Laci's scent rather than Mr. Peterson's.

Finally, even if this novel use of a dog to detect a non-contact vehicle trail in a marine environment was not subject to *People v. Kelly*, the People still failed to show that Anderson's expert testimony regarding Trimble's vehicle trailing was based on the sort of matter upon which an expert may reasonably rely in forming an opinion.

For all these reasons, the evidence that Trimble detected Laci's scent at the Berkeley Marina should have been excluded.

1. The foundational requirements for dog scent identification.

Courts across the country have long noted the reliability concerns raised by dog scent identification evidence. "Historically, many jurisdictions looked upon dog-tracking evidence as evidence of the 'weakest character . . . ." (*People v. Gonzales* (1990) 218 Cal.App.3d 403, 413.) One court summarized these concerns in the following way:

> "1. That the actions of the bloodhounds are unreliable. 2. That such evidence constitutes hearsay. 3. That the defendant is deprived of his constitutional right to be confronted by the witnesses against him. 4. That the defendant should not be placed in jeopardy by the actions of an animal. 5. That a defendant cannot cross-examine the dogs. 6. That a jury might be awed by such testimony and give it much greater weight and importance than it warranted." (*People v. Centolella* (1969) 61 Misc.2d 723, 725, 305 N.Y.S.2d 279, 281-282.)

(*See also People v. Malgren* (1983) 139 Cal.App.3d 234, 241 ["The notion that such evidence is of slight probative value or must be viewed with caution stems at least in part from a fear that a jury will be in awe of the animal's apparent powers and will give the evidence *too much* weight."] [Emphasis in original]. *See generally*, "Evidence of Trailing by Dogs In Criminal Cases," 81 A.L.R.5th 563 (2003).)

These reliability concerns have prompted some courts to exclude all dog scent identification in any criminal proceeding. (*See*, *e.g.*, *People v. Cruz* (Ill. 1994) 162 Ill.2d

314, 643 N.E.2d 636; *Ruse v. State* (Ind. 1917) 186 Ind. 237, 115 N.E. 778.) As the Illinois Supreme Court explained, "[w]e continue to adhere to the principle that bloodhound evidence is inadmissible to establish any factual proposition in a criminal proceeding in Illinois. Having reviewed those cases admitting such evidence, we remain unpersuaded that this class of evidence is reliable. Moreover, we recognize that the real danger posed by admitting bloodhound evidence lies not simply in its fallibility, but in its potential to prejudice. 'It is well known that the exercise of a mysterious power not possessed by human beings begets in the minds of many people a superstitious awe.'" (*Id.* at p. 369-70.)

California courts have not taken such an extreme approach. Instead, they have charted an intermediate course, requiring the proponent to prove foundational facts sufficient to guarantee the reliability of the dog scent identification. This has been the rule at least since 1976. (*People v. Craig* (1978) 86 Cal.App.3d 905, 915-916; *People v. Malgren* (1983) 139 Cal.App.3d 234, 237-238 ["While a few courts have held that evidence of the conduct of a dog who has trailed an accused is always inadmissible, the majority view is that such evidence is admissible, provided that a proper foundation is laid. [Citations.]".)

The type of foundation required for admissibility depends on the type of dog scent identification the proponent seeks to admit. Case law has identified at least three types of dog scent identification: dog tracking, dog trailing, and dog scent lineups. Each type of canine activity is different, and requires proof of different factors to establish that the evidence is sufficiently reliable to be presented to the jury.

As the testimony in Mr. Peterson's case indicated, dog tracking occurs when a scenting dog is placed on a trial on which the target of the search was known to have walked. (7 RT 1326.) The tracking dog is trained to follow the ground scent on the track, footstep to footstep. (*Id.*) Because the tracking dog follows the scent footstep to footstep, it necessarily requires that the trail be a "contact trail," i.e., it requires that the target made physical contact with, i.e., actually walked on, the ground. (85 RT 16105.)

The foundational requirements for dog tracking derive from *People v. Malgren* (1983) 139 Cal.App.3d 234. In *Malgren,* residents returned home in the evening and surprised a burglar, who fled out the back door. Within minutes, police arrived at the house with a tracking dog. Inside the house and near the back door, the dog was commanded to "track." The dog ran out the back door, across the yard and over seven-tenths of a mile. He then ran into some bushes and began barking. The defendant was found in the bushes, out of breath, and with wet pant legs and leaves on this clothing.

The trial court admitted the dog tracking evidence, and the court of appeal found no error. The appellate court agreed that "in each case the proponent of dog tracking evidence must establish the dog's ability and reliability . . . ." The court explained this required more than anecdotal evidence of the dog's abilities:

> "[W]e believe a proper foundation must also include evidence that the circumstances of the tracking itself make it probable that the person tracked was the guilty party [citation]. We conclude that the following must be shown before dog trailing evidence is admissible: (1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated." (*Id.* at p. 238.)

Applying these five factors, *Malgren* found that the dog tracking evidence had been properly admitted. The dog and his handler were qualified, the dog was placed on the track from which the burglar fled the house, and the track was not stale since the dog began tracking "within 20 to 25 minutes after the intruder fled from the victims' home." (*Id.* at p. 238. *See also People v. Craig* (1978) 86 Cal.App.3d 905 [dog scent evidence admissible where, within minutes of robbery, tracking dog placed on the trail from the robbers' parked car containing evidence of the robbery and tracked directly to the point where the robbers were detained]; *People v. Gonzales* (1990) 218 Cal.App.3d 403 [dog scent evidence admissible where 25 minutes after the crime, tracking dog placed on track

of suspect fleeing from a burgled house].) Since 1983, the *Malgren* factors have been routinely applied to determine the admissibility of dog-tracking evidence. (See e.g., *People v. Gonzales* (1990) 218 Cal.App.3d 403; *People v. Willis* (2004) 115 Cal.App.4th 379.)

The first *Malgren* factor -- that the dog's handler had sufficient training and experience in handling the dog -- has been interpreted by many jurisdictions to include the requirement that the handler be trained in such a way as to eliminate the possibility of "handler cuing" of the animal. Handler cuing occurs when the handler believes the scent to be detected is in fact present at a particular location, the handler "may unwittingly cue the dog to alert regardless of the actual presence or absence of [the scent]" or "may consciously cue their dog to alert to ratify a search they already want to conduct". (*United States v. One Million, Thirty-Two Thousand, Nine Hundred Eighty Dollars in U.S. Currency* (N.D. Ohio 2012) __ F.Supp.2d __, 2012 WL 684757, at p. *37.) "[L]ess than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing,' may well jeopardize the reliability of dog sniffs." *United States v. Trayer* (D.C. Cir. 1990) 898 F.2d 805, 809.) As the Florida Supreme Court has explained, "[t]he relationship between a dog and its handler is the most important element in dog sniffing, providing unlimited opportunities for the handler to influence the dog's behavior." (*Harris v. State* (Fla. 2011) 71 So.3d 756, 762, *cert. granted on another issue, Florida v.*

Harris (2012) 132 S.Ct. 1796; see generally, Robert C. Bird, An Examination of the Training and Reliability of the Narcotics Detection Dog, 85 Ky. L.J. 405, 425 (1997) [noting that handler error accounts for almost all false detections].)

Malgren's requirement that admission of tracking evidence be conditioned on a showing that the handler was adequately trained seeks to avoid this well-documented pitfall of handler cuing. Other jurisdictions require, as foundation for admission of dog scent evidence, proof that the dog's handler has been trained in such a way as to eliminate handler cuing. (*See, e.g., State v. Helzer* (Or. 2011) 350 Or. 153, 159 [dog scent evidence inadmissible where record "does not reveal what training [handler] received to avoid handler cues or other errors that can cause a dog to alert falsely."].)

The foundational requirements for dog trailing, as opposed to dog tracking, add additional requirements to those imposed by *Malgren*. As the testimony in Mr. Peterson's case disclosed, dog trailing occurs when the trailing dog is exposed to the target's scent through some personal item carrying that scent. Once scented with the item, the dog tries to detect that scent at particular locations and follow the scent trail. (7 RT 1326.) Unlike the tracking dog that, as *Malgren* requires, must be "placed on the track where circumstances indicated the guilty party to have been," the trailing dog is

used to determine *if* the target person has in fact walked in the area in which the dog is instructed to work.

The case establishing the foundational requirements for trailing dogs is *People v. Willis* (2004) 115 Cal.App.4th 379. In *Willis*, the defendant was convicted of murdering his girlfriend, Crystal, whom he had a history of abusing. When Crystal ended the relationship, defendant threatened to kill her. One evening shortly thereafter, defendant arranged to have Crystal pick him up in her car. Crystal's body was later found in the car, which had been set afire and burned. A trailing dog was brought to the site of the burned car about six hours later. The dog was scented with objects found near the car. The dog was then brought to various apartment houses where defendant lived and spent time. The dog "showed interest" at these locations. After defendant was arrested, the trailing dog "went right up to [defendant] in the police station" and alerted. (*Id.* at p. 384.)

In evaluating the admissibility of this evidence, the *Willis* court properly recognized a critical distinction between dog tracking and dog trailing. "Testimony showing that a dog pursued a fleeing suspect to the site where he was hiding is a clear-cut case of dog tracking, and – depending on the fact of each case – may be admissible." (*Id.* at p. 386, citing *People v. Malgren, supra*, 139 Cal.App. 3d at 237-238.) The *Willis* court found "a more difficult case is presented when the dog is not tracking a suspect but rather

is given a scent from a [scent item] some length of time after an incident and is watched to see if the dog 'shows interest' in various locales frequented by the [target person]. Showing interest in locations is a far cry from tracking a suspect and giving an unambiguous alert that the person has been located." (*Id.* at p. 386.) In these situations, "the prosecution cannot rely solely on anecdotes regarding the dog's capabilities." As the court explained:

> "Instead, a foundation must be laid from academic or scientific sources regarding (a) how long scent remains on an object or at a location; (b) whether every person has a scent that is so unique that it provides an accurate basis for scent identification, such that it can be analogized to human DNA; (c) whether a particular breed of dog is characterized by acute powers of scent and discrimination; and (d) the adequacy of the certification procedures for scent identifications." (*Ibid.*)

Willis did not state whether these foundational elements are in addition to, or instead of, the five *Malgren* elements required for admission of dog tracking evidence. But the only sensible reading of the case is that the *Willis* factors are in addition to the *Malgren* factors. For example, *Malgren* requires proof that "the dog's handler was qualified by training and experience to use the dog," and "that the dog has been found reliable in tracking humans." *Willis* does not remotely suggest that, in the more demanding type of dog scent identification with which it was concerned, the *Malgren* requirements of proof that the handler and dog were adequately trained and experienced

can be eliminated. Thus, in laying a foundation for dog trailing, the proponent must establish the foundational facts required by both *Malgren* and *Willis*.

The cases have also addressed a third category of dog scent identification: the dog scent lineup. In this type of canine activity, the dog is scented with a particular item associated with a crime. The dog is then permitted to sniff the scent of various people in a line-up. If the dog matches the scent on the item with a particular person in the line-up, the dog will alert to that person.

The case establishing the foundation requirements for scent line-ups is *People v. Mitchell* (2003) 110 Cal.App.4th 772. In *Mitchell,* police recovered several expended shell casings from the scene of a shooting. The casings had presumably been handled by the shooter. A dog, Reilly, was scented with the shell casings and permitted to smell gauze pads containing the scent of various suspects and detectives. Reilly alerted to the pad containing the defendant's scent. (*Id.* at pp. 780-781.) The defense objected to admission of the evidence on the ground that an adequate foundation, including a foundation under *People v. Kelly* for new scientific techniques, had not been established. The trial court admitted the evidence, finding that the dog scent lineup was not subject to *People v. Kelly,* and that an adequate foundation had been laid under existing law. (*Id.* at p. 782.)

The appellate court held this ruling to be error. The court concluded that the scent lineup constituted a new technique and procedure beyond conventional dog tracking or trailing, and which required an adequate scientific foundation under *People v. Kelly* (1976) 17 Cal.3d 24. In *Kelly* this Court held that evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test. The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community. (*Id.* at p. 30.) The second prong requires proof that the witness testifying about the technique and its application is a properly qualified expert on the subject. (*Ibid.*) The third prong requires proof that the person performing the test in the particular case used correct scientific procedures. (*Ibid.*)

Mitchell acknowledged that evidence of conventional dog tracking or trailing "does not involve a scientific technique within the meaning of *Kelly.*" (*Id.* at p. 790.) But the court noted that the dog scent lineup is a marked departure from these conventional techniques approved in the tracking cases like *Malgren*: "[T]he differences between this type of evidence and evidence derived from scent identification lineups require a dramatic revision of the final element of the *Malgren* test, that 'the trail had not become stale or contaminated.'" (*Id.* at p. 790, quoting *People v. Malgren*, *supra*, 139 Cal.App.23d at p. 238.) Specifically, the court was concerned with the scientific basis for concluding that the scent on the shell casings found at the scene had not been affected by

(1) the heat and pressure of the firing, (2) the passage of time between the defendant's handling of the casings and the lineup, (3) the conditions under which the casings were stored or (4) the method for collecting scent from the casings. (*Id.* at p. 791.)

Although Reilly's handlers testified that he had been trained to detect scent under similarly adverse conditions, the court stated that "without scientific testimony establishing that dogs can indeed be so trained, the court or the jury cannot determine whether the dog's training was adequate." (*Id*. at p. 793.) Thus, while Reilly's handler testified to the fact that scent may endure great heat and long passages of time, "no effort was made to present information from any academic or scientific sources, let alone peer review journals, regarding these testimonial assertions. Thus we are left with anecdotal rather than scientific explanations of Reilly's capabilities." (*Id.* at p. 791.) The lack of scientific basis for evaluating the ability of a dog to engage in a scent identification procedure led the *Mitchell* court to conclude that a foundation was required under *People v. Kelly*:

> "a technique may be deemed 'scientific' for purposes of *Kelly/ Frye* if 'the unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury.' . . . A scent identification by Reilly appears to provide a definitive truth, with Reilly being analogous to a machine that [his handler] (and only [his handler]) can calibrate and read. Thus, we conclude that *Kelly* should have been applied to this evidence." (*Id.* at p. 793.)

Mitchell thus stands for the proposition that dog scent identification involving a departure from conventional methods of dog tracking as in *Malgren*, or trailing as in *Willis*, must be supported by scientific evidence showing its reliability. Anecdotal evidence of a dog's ability to engage in this new procedure is insufficient. Instead, the dog's ability must be shown to be generally accepted within the relevant scientific community, and proper scientific procedures must be shown to have been followed.

2. In this case, the state did not establish an adequate foundation for admitting the dog scent evidence.

In view of the foregoing authority, the evidence of Trimble's non-contact vehicle trailing in a marine environment should never have been admitted in Mr. Peterson's case. This is true for the simple reason that Trimble's alert at the Berkeley Marina did not meet the foundational requirements of *any* of the tests for dog scent identification. It did not meet the foundational requirements for dog tracking under *Malgren*. It did not meet the additional foundational requirements for dog trailing under *Willis*. And it certainly did not meet the requirements for a novel dog scent procedure under *Mitchell* and *People v. Kelly*.

a. There was inadequate foundation under *Malgren*.

In order to lay a foundation under *Malgren* for admission of Anderson's testimony, that Trimble detected Laci's scent at the Marina, the state had to show that Trimble was both trained and reliable in tracking humans, the trail had not become stale or contaminated and that Anderson had adequate training, including training to eliminate handler cuing.

While Trimble may have been shown to be reliable at tracking or trailing a human who had physical contact with the ground, that is not what Trimble was used for in this case. Here, there was no dispute that Laci Peterson did not walk from the vegetation onto the dock at the Berkeley Marina.

Instead, Trimble was engaged in an entirely different type of dog scenting work here: she was purportedly following a scent of a non-contact trail, apparently generated by the dissipation of Laci's scent as her body was driven in a boat on the water east of the dock. Though Eloise Anderson steadfastly insisted that Trimble could follow such a non-contact trail, the dog's reliability in this type of dog scent work was never established. To the contrary, the state's foundation showed (1) Trimble had only attempted to perform three non-contact vehicle trails, (2) she had succeeded once, and failed twice. This 33%

reliability rating is a far cry from the reliability of the dogs in *Malgren* and *People v. Craig*, both of which were certified as "100% accurate" in their trackings. (*Malgren*, *supra*, 139 Cal.App.3d at p. 238; *People v. Craig, supra*, 86 Cal.App.3d at p. 917.)

Trimble's record similarly pales by comparison to Reilly, the dog in *Mitchell*, who had "performed over 200 training lineups and over 100 lineups involving actual suspects. Since his certification, Reilly had not made a mistake in any training lineup, and there has been no indication that Reilly had made any mistakes in an actual lineup." (*People v. Mitchell*, *supra*, 110 Cal.App.4th at p. 779-780.) Significantly, the federal guidelines for admission of dog tracking evidence require a 90% record of reliability. (*See* Federal Bureau of Investigation, Forensic Science Communication, "Scientific Working Group on Dogs and Orthogonal Detection Guidelines: General Guidelines for Training, Certification, Maintenance and Documentation, found at http://www.fbi.gov/about-us/lab/ forensic -science -communications/fsc/jan2007/standards/2006_10_standards01.htm ["The canine/handler team shall achieve at least 90 percent proficiency for successful certification."].) No California case has sanctioned dog scent evidence based on such a dismal record of reliability.

Moreover, the state failed to show that the trail had not become contaminated. Under the state's theory, Mr. Peterson placed Laci's body in a boat, covered the body

with some type of tarp, and then motored along the dock on his way out of the Marina. (See 109 RT 20204.) Under this theory, the scent of *both* Scott and Laci would have been distributed along the dock. And since Laci's body was covered by a tarp in the bottom of the boat, the predominant scent dissipated would have been Scott's. The People failed to show, however, that Trimble was not detecting Scott's scent rather than Laci's.

Indeed, the foundational showing on this issue was particularly troubling in light of Eloise Anderson's concession that Scott's scent may have been on the sunglasses used to scent Trimble, and Anderson's failure to conduct the "missing-member" test to ensure that Trimble eliminated Scott as a target. The contamination of both the scent item and the trail requires exclusion of dog tracking evidence. (*People v. Malgren*, *supra,* 139 Cal.App.3d at p. 238. See, e.g., *State v. Moore* (N.C. 1901) 39 S.E. 626 [dog's alert to defendants charged with burglary of a store inadmissible where evidence showed that defendants frequented the store and dog's alert did not connect defendant's to the burglary.].)[46]

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[46] Anderson's failure to perform the missing member test to determine if Scott's scent was on the sunglasses is even more troubling in light of Ron Seitz's testimony. Dog handler Seitz scented his dog with Laci's slipper -- which Scott had not handled -- and his dog did *not* alert at the Marina at all. (9 RT 1776-1777.) So the only dog that alerted was one that had been scented with an item which may have had Scott's own scent on it.

Finally, the state utterly failed to show that Anderson had been trained in a way that eliminated the possibility of handler cuing of Trimble at the Marina. Indeed, Anderson's training seems to have been characterized by the very opposite approach -- to permit, if not encourage, handler cuing. Thus, Anderson testified that Trimble had successfully completed four non-contact trails of individuals riding on bicycles. (*See* 84 RT 16056-16065.) This evidence was intended by the state to prove that Trimble could in fact follow a non-contact trail. But on cross-examination, Anderson, admitted that in her trainings, "most of the time we know where the trail is." (85 RT 16108.) And, with respect to every bike trail noted above which she counted as successful, Anderson conceded that she knew where the trails were. (*Ibid.*)

This training regimen which had the propensity to condition Trimble to cuing by Anderson was particularly disturbing in the instant case, which so centrally involved the detection of Laci's scent at the marina. Once again, as in the bike trails described above, Anderson was told by Christopher Boyer, the police manager at the Marina, precisely where he hoped to locate Laci's scent. Thus, Boyer told Anderson to check for Laci's scent at the entrance and exit to the boat ramps. And unsurprisingly, that is precisely where Anderson claimed that her dog detected Laci's scent -- even though it was undisputed that Laci had never made contact with the ramp.

b. There was inadequate foundation under *Willis*.

Nor did the People's evidence meet the additional foundation requirements for dog trailing under *People v. Willis*. *Willis* requires proof of additional foundational facts where, as here, the dog is given a scent item and "is watched to see if the dog shows interest in various locales." (*People v. Willis*, *supra*, 115 Cal.App.4th at p. 386.) This is precisely what Anderson did with Trimble at the Marina. She scented her dog with Laci's sunglasses and watched to see if the dog showed interest. According to *Willis,* admission of this sort of evidence requires *inter alia*, evidence as to "how long scent remains on an object or at a location" and "the adequacy of the certification procedures for scent identifications." (*People v. Willis*, *supra*, 115 Cal.App.4th at p. 386.)

Again, the state failed to provide this foundation. There was no scientific or academic evidence to establish that Laci's scent could migrate from under a tarp, from the boat, against the wind, over the water and onto the dock. There was no scientific evidence regarding how long Laci's scent would remain on the dock, in a marine location buffeted by winds.

Nor did the state present any evidence of certification procedures Trimble underwent for non-contact vehicle trailing. To the contrary, the record showed that

Trimble had never been certified to perform non-contact vehicle trials, had only performed three such trails and had succeeded only once. The state's failure to provide the court with prior certification and reliability in the specific type of scent identification similarly requires exclusion of the scent identification. (*See People v. Mitchell*, *supra*, 110 Cal.App.4th at p. 792 [holding error to admit dog scent identification evidence where record failed to disclose adequate certification procedures]. *Accord*, *Short v. Comm.* (Ky. 1942) 165 S.W.2d 177 [dog scent evidence inadmissible where record does not contain qualifications concerning ability to trail human beings]; *People v. Whitlock* (NY. 1918) 171 N.Y.S. 109 [dog scent evidence inadmissible where record does not show dog was trained to follow strangers]; *People v. Norwood* (Mich. 1976) 245 N.W.2d 170 [dog scent evidence inadmissible where record does not show dog's tracking ability in a non-training situation].)

c. There was inadequate foundation under *Mitchell*.

Finally, the People failed to make a sufficient foundational showing as required by *People v. Mitchell* for a novel dog scenting technique. Anderson was clearly using Trimble in a novel way, qualitatively different from dog tracking, in which the dog is placed on a known, contact trail made by the target's footsteps. Here, there was no contact trail. Anderson's use of Trimble was also qualitatively different from dog

trailing, in which the dog is scented with an item and follows a trail created by the target. Here, Anderson used Trimble for the unprecedented task, for which the dog had not been certified, of trailing *the vehicle* in which Laci's body was purportedly transported, over water.

As in *Mitchell,* this novel use of a dog must be subject to the requirements of *People v . Kelly*. Of course, not all types of opinion evidence are subject to the requirements of *Kelly*, which applies only to "new scientific techniques." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1156; *People v. Kelly*, *supra*, 17 Cal.3d at p. 30). But as this Court has explained, and *Mitchell* confirmed, "a technique may be deemed 'scientific' for purposes of *Kelly/Frye* if 'the unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury.'" (*People v. Leahy*, 8 Cal.4th at p. 606.) It was for this reason that *Mitchell* found dog scent lineups to be subject to *Kelly:* the dog's alert to a person in the lineup provided a definitive truth that the dog handler needed only to recognize and relay to the jury.

In the same way as the dog scent lineup in *Mitchell* provided the jury with a definitive truth, Trimble's alert at the Marina provided the jury here with a definitive truth as well -- Laci's body had been at the Berkeley Marina. This truth had only to be

recognized by Eloise Anderson and relayed to the jury. And the prosecutor himself minced no words: Trimble's evidence proved Laci's body was there, and that Scott was therefore guilty. (111 RT 20534.)

While Trimble's alert was thus sold to the jury as a definitive truth, the state failed to establish the scientific basis for such a conclusion. There was no scientific evidence that scent could migrate from under a tarp across the water and onto a dock, much less do so against the wind. To the contrary, as discussed above, the only authority Anderson relied upon in fact established that skin rafts could *not* migrate against a wind of this velocity. (8 RT 1590; *see Scent and the Scenting Dog*, *supra*, at p. 104.)

Nor was there any evidence that a dog's ability to follow a non-contact, vehicle trail (much less one in a marine environment) is generally accepted in the scientific community. Indeed, the prosecution's own expert in dog-scent identification, Chris Boyer, candidly admitted that vehicle trailing is *not* generally accepted in the relevant scientific community. (9 RT 1701.) To the contrary, Boyer conceded that "[t]he information that I have received on who believes and who doesn't believe that car trailing can be done is a very mixed bag."].)

Finally, there was no evidence that Anderson had followed scientifically correct procedures. Although the scent item and the trail had both been contaminated, Anderson failed to perform the missing member test, required in such a circumstance. Anderson was unable to verify that Trimble was detecting Laci's scent rather than Scott's.

Anderson's testimony was all the more suspect in view of her testimony as to where Trimble detected Laci's scent. According to Anderson, Trimble picked Laci's scent on the *east* side of the boat ramp. (8 RT 1520.) Of course, this suggests that the skin rafts were traveling from west to east. But then Anderson testified that Trimble also picked up Laci's scent on the dock *west* of the boat ramp. (8 RT 1520-1521.) This suggests that the skin rafts were traveling in precisely the *opposite* direction -- from east to west. While Anderson herself testified skin rafts could travel against the wind when the wind was less than 5 miles per hour, one of the state's own witnesses testified the wind velocity on December 24, 2002 was 10 miles per hour. (62 RT 12065.) This testimony makes Anderson's hypothesis -- that the skin rafts traveled against the wind -- impossible. The state never explained how Anderson and her dog could have it both ways: picking up scent both east *and* west of the boat ramp.

Indeed, the utter lack of any scientific or academic evidence in this capital case was remarkable. Christopher Boyer testified he had no education or training in dog scent

theory and you "end up doing a lot of research on your own." (83 RT 15899.) Boyer never stated he had actually done any of that research. Eloise Anderson, for her part, was initially unable to cite any literature to support her claims regarding the migration of skin rafts off of a dead person. (8 RT 1588.) She had not "pursued any course work in which [she] examined that theory." (8 RT 1589.) Trimble's effort to follow a non-contact vehicle trail in a marine environment was thus totally without any scientific foundation.

Finally, even if the dog scent identification evidence in this case is not subject to *Kelly*, it must still be excluded on relevance grounds. As the court explained in *People v. Mitchell*, even if the dog scent identification evidence at issue there was not considered a scientific technique, "it will not be admitted unless it is 'relevant.'" (*People v. Mitchell*, *supra*, 110 Cal.App.4th at p. 783.) To be relevant, "an expert's testimony must be based on matter 'that is of a type that reasonably may be relied upon by an expert' [citations]." (*Id.* at p. 784, citing Evid. Code § 801, subd. (d), and *People v. Leahy*, *supra*, 8 Cal.4th at pp. 597-598.) "An expert opinion has no value if its basis is unsound. Evidence Code section 801, subdivision (b), states that a court must determine whether the matter that the expert relies on is of a type that an expert reasonably can rely on 'in forming an opinion upon the subject to which his testimony relates.' " (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, citing *People v. Lawley* (2002) 27 Cal.4th 102, 132; *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144.) These authorities "mean that the matter relied

on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." (*Id.* at p. 564.)

Here, the state sought to rely on Eloise Anderson's opinion that Trimble could follow a non-contact vehicle trail of a deceased person in a marine environment. The state sought admission of this evidence even though (1) Trimble had no experience at all -- with living or dead trails -- in the marine environment and (2) Trimble's record of following vehicle trials in a non-marine environment was a dismal 33%. This is simply not the sort of material an expert can reasonably rely upon in reaching an opinion. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 768 [excluding expert opinion on future dangerousness as based on unreliable foundation where "such predictions are wrong more often than they are right".].)

In sum, the dog scent identification evidence in this case was inadmissible under state law. The trial court erred in admitting it.

C. Admission Of The Dog Scent Evidence Also Violated Federal Law.

Admission of this highly incriminating evidence in a capital case also violated federal law. The Supreme Court has repeatedly recognized death is a unique punishment,

qualitatively different from all others. (*See*, *e.g.*, *Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Relying on this fundamental premise, the United States Supreme Court has held that there is a corresponding Eighth Amendment need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (*See*, *e.g.*, *Herrera v. Collins*, *supra*, 506 U.S. at p. 407 n. 5 ["To the extent *Beck* rests on Eighth Amendment grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance."]; *Beck v. Alabama*, *supra*, 447 U.S. 625 [guilt phase]; *Gardner v. Florida*, supra, 430 U.S. at p. 357 [penalty phase].) In addition, the admission of this powerful evidence also violated Due Process; as the Supreme Court has long held, "[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States* (1968) 391 U.S. 123, 131, n.6.)

As explained above in Argument VI-B, the dog scent identification evidence was central to the prosecution case, yet was entirely unreliable and admitted without sufficient foundation establishing its reliability. Because this evidence was both crucial to the

prosecution case and unreliable, its admission in a capital case violated the Eighth Amendment requirement of reliability as well as Due Process.

D. Admission Of The Dog Scent Identification Evidence Requires Reversal Under Either State Or Federal Law.

1. The legal standards.

Under federal law, the improper admission of the dog scent evidence requires reversal unless the People can establish that it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under state law, the improper admission of this evidence requires reversal if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

A reasonable probability "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.) Prejudice must be found under *Watson* whenever the defendant can "'undermine confidence'" in the result achieved at trial. (*Ibid.*) Where the case is evenly balanced, the defendant is entitled to win. (*People v. Watson*, *supra*, 46 Cal.2d at p. 837 ["But the fact that there

exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the opinion `that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'"].) In applying the state law test for prejudice, it is important to recall that a defendant need not prove that a unanimous acquittal would occur without the error. To the contrary, it is well established that a "hung jury is a more favorable verdict." (*People v. Brown* (1988) 46 Cal 3d 432, 471 n.1 [Broussard, J., concurring]; *accord Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1054; *People v. Soojian* (2010) 190 Cal.App.4th 491, 521; *People v. Bowers* (2001) 87 Cal App 4th 722, 734-735.)

As discussed below, in view of the closeness of the case, the highly incriminating nature of the dog scent evidence in the instant case, the prosecution's argument to the jury that the dog scent evidence alone proved Mr. Peterson's guilt, and the tendency of a jury to stand "in awe" of a dog's abilities, the erroneous admission of Anderson's testimony regarding Trimble's alert at the Berkeley Marina is prejudicial under either the federal or the state standard.

2. Application of *Watson* and *Chapman* to the erroneous admission of the dog scent evidence.

The starting point for the prejudice analysis is the closeness of the case. This Court has observed that "a miscarriage of justice has occurred when the case is closely balanced and the [errors] . . . are such as to have contributed materially to the verdict. (*People v. Wagner* (1975) 13 Cal.3d 612, 621, citing *People v. Perez* (1962) 58 Cal.2d 229, 247, and *People v. Lyons* (1958) 50 Cal.2d 245, 262.)

As indicated above, the evidence against Mr. Peterson was far from overwhelming. The prosecutor could not prove when the crime occurred. As the prosecutor himself conceded in closing argument, based on the evidence presented at trial "I can't tell you when he did it. I can't tell you if he did it at night. I can't tell you if he did it in the morning." (109 RT 20200.)

The prosecutor could not prove how the crime occurred; based on the absence of any forensic evidence he simply surmised that strangulation was the cause of death. (109 RT 20200.) There were no confessions or admissions of culpability, there were no eyewitnesses and there was no murder weapon found.

And the jury deliberations themselves reflected the close nature of the case. The jury began deliberations on the afternoon of November 3, 2004. (19 CT 5976.) This jury deliberated approximately 20 hours and returned with several questions for the judge. (19 CT 5976-5990.) After a juror was discharged, there was an additional several hours of deliberation before a second juror was discharged. (19 CT 5990-5992.) The third jury deliberated approximately another 9 hours before returning with a verdict. (19 CT 5992-5993; 20 CT 6132.) The objective record of jury deliberations plainly shows this was a close case indeed. (*See*, *e.g* ., *People v. Garcia* (2005) 36 Cal.4th 777, 806-807 and n. 11 [court noted that two days of deliberation shows close case and criticizes the dissent for ignoring jury deliberations in prejudice calculus]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation shows close case].)

While the jury deliberations show the case was close, there can be no doubt whatsoever that the erroneous admission of the dog scent evidence materially contributed to the verdict. This is so for three reasons:

First and foremost, the prosecutor made it as clear as he possibly could that the dog scent evidence alone proved Scott was guilty of capital murder. The prosecutor was not subtle about it:

> "If Laci Peterson's scent is at the Berkeley Marina, then he's guilty. I mean that's as simple as that." (111 RT 20534.)

This statement to the jury from the prosecutor himself cannot be disregarded or underemphasized. The United States Supreme Court has recognized that in assessing the impact of errors regarding evidence, the prosecutor's reliance on that evidence during closing argument as persuasive evidence of guilt is strong evidence of prejudice. (*Kyles v. Whitley* (1995) 514 U.S. 419, 444.) Both the Ninth Circuit Court of Appeals, and this Court, have reached the identical result: the prosecutor's argument is an important part of any prejudice calculation. As Judge Kozinski has written in the exact context of evaluating prejudice, "[e]vidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323. *See also Horton v. Mayle* (9th Cir. 2005) 408 F.3d 570, 580.) This Court too has repeatedly made the same point; as the Court stated in *People v. Powell* (1967) 67 Cal.2d 32, "[t]here is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it." (*Id.* at p. 57; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [same].)

In light of the significance the prosecutor attached to Trimble's purported detection of Laci's scent at the Marina, there is no reason to believe the jury did not agree with him. The evidence thus materially contributed to the verdict.

This conclusion is fully supported by a second factor. Courts in California and across the country have long noted the potential prejudice from dog scent evidence, based on the fact that jurors "will be in awe of the animal's apparent powers and will give the evidence too much weight." (*Malgren*, *supra*, 139 Cal.App.3d at p. 241. See Taslitz, "Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup," 42 Hastings L.J. 15, 20-28 [discussing the "mythic infallibility of the dog"].) There is no reason to believe that the jurors in Mr. Peterson's case were any less susceptible to the aura of the dog's infallibility. They thus had no reason to doubt Eloise Anderson's testimony that Trimble had detected Laci's scent, or the prosecutor's argument that it established appellant's guilt.

Third, the prejudice of the dog scent evidence is also apparent from the fact that the evidence directly filled an evidentiary gap in the prosecution's case. (*People v. Roberts* 256 Cal.App.2d 488, 491-494, disapproved on other grounds, *People v. Triggs* (1973) 8 Cal.3d 884; *People v. Harris* (1998) 60 Cal.App.4th 727, 741.) Here, though Laci's body was found in San Francisco Bay, the prosecution had virtually no evidence that Scott had transported Laci's body from Modesto to the Berkeley Marina. There were no eyewitnesses to this assumption. There was no forensic evidence proving this assumption. The prosecutor was entirely correct: the dog scent was crucial, because it filled this evidentiary gap by connecting Laci's body in the bay to Scott's boat.

This is not to say that the erroneous admission of dog scent evidence is always prejudicial. It is not. Thus, in *People v. Willis*, *supra*, 115 Cal.App.4th 379, the erroneous admission of dog trailing evidence was found harmless where the defendant had a history of physically abusing his girlfriend, the defendant threatened to kill her, the defendant had arranged for her to pick him up shortly before her death, and her body was found in her car burned to death. Similarly, the erroneous admission of dog scent evidence was harmless in *People v. Mitchell*, *supra*, 110 Cal.App.4th 772, where there was an eyewitness identification, the defendant bragged that he had shot the victim, and a co-defendant was convicted even though the scent evidence was not admitted against him. Unlike *Willis* and *Mitchell,* in this case there were no eyewitnesses, there were no admissions, there was no history of abuse, and no prior threats against Laci.

Apart from the dog scent identification, the principal evidence connecting Laci to Scott's boat were two hair fragments found in the boat, which a prosecution witness testified was consistent with Laci's hair (70 RT 13644), and the fact that her body was discovered in April 2003 in the bay, near where Scott said he had been fishing four months previously. The prosecution also relied heavily on the notion that Scott's trailer had purportedly been used to pour circular concrete anchors, as evidenced by remnant "rings" of concrete dust apparent on the trailer (109 RT 20214-20215), and on the fact

that Scott had researched the tides in the bay prior to December 24. (109 RT 20324; 110 RT 20337.)

As the protracted jury deliberations show, however, none of these facts unerringly point to guilt. With respect to the hair in the boat -- and although detective Brochinni tried to delete this information from his report -- the evidence showed that Laci had seen the boat when it was stored in the warehouse in the third week of December. (57 RT 11192-11195; 59 RT 11503-11506; 98 RT 18415-18417.) Laci's presence in the warehouse with the boat provided an alternative explanation for the presence of her hair in the boat. And prosecution criminalist Rodney Oswalt himself explained that the hair could have come from Mr. Peterson himself as a secondary transfer. (70 RT 13688-13689.)

Further, the concrete rings the prosecution saw on the trailer are hardly distinctive in appearance. (*See* People's Exh. 122B-G.) In fact, in looking at the photographs of the trailer, it is difficult to make out any circles, rather than simply a collection of concrete detritus. The prosecution offered no evidence to otherwise prove that its perceived rings the product of producing anchors and no weights were found despite an extremely extensive search of the Bay. Mr. Peterson's computer search for tidal information was also consistent with his fishing trip -- he intended to fish in the bay in a relatively small

craft, and a boater's efforts to inform himself the outgoing tides is not necessarily unusual. Finally, the fact that Laci's body was found in the bay near to where Mr. Peterson was fishing does not point unerringly to guilt. Laci's body was found four months after the case became publicized. As Mr. Peterson's defense counsel pointed out, the search for Laci's remains in the area of Brooks Island was extraordinarily widely publicized within 24 hours of Laci going missing: "Only the deaf and dumb didn't know where they were searching and where Mr. Peterson was that day. That doesn't give you any corroboration." (10 RT 1998.)

In sum, the state cannot prove that the erroneously admitted and highly unreliable dog scent evidence, purportedly proving that Laci's scent was at the Berkeley Marina, did not "materially contribute to the verdict." *A fortiori,* it cannot prove that the error was harmless beyond a reasonable doubt. The judgment should be reversed.

VII. THE TRIAL COURT CREATED AN UNCONSTITUTIONAL PRESUMPTION, AND LIGHTENED THE STATE'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT, BY TELLING THE JURY IT COULD INFER MR. PETERSON WAS GUILTY OF MURDER BASED ON (1) THE DOG TRACKING EVIDENCE AND (2) ANY EVIDENCE WHICH SUPPORTS THE ACCURACY IF THAT EVIDENCE.

Counts one and two of the information charged Mr. Peterson with first degree murder. At the close of the case, the jury was given two theories on which it could rely to convict of the charged murders.

First the jury was instructed on malice murder. The jury was told it could convict of murder based on an "unlawful kill[ing] . . . with malice aforethought." (19 CT 6092.) Alternatively, the jury was told it could convict of murder based on the dog tracking evidence introduced at trial:

> "Evidence of dog tracking of the victim has been received for your consideration. The evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crime of murder. Before guilt may be inferred, there must be other evidence that supports the accuracy of the dog tracking evidence.
>
> "The evidence can be direct or circumstantial and must support the accuracy of the dog tracking evidence." (19 CT 6071.)

The court went on to give examples of what the jury could consider as evidence "support[ing] the accuracy of the dog tracking evidence," including (1) whether the handler was qualified, (2) whether the dog was adequately trained, (3) whether the dog had been found reliable, (4) whether the dog had been at a place where "circumstances have shown the victim to have been," (5) whether the scent had become stale and (6) "any other factor that could affect the accuracy of the dog-tracking evidence." (19 CT 6071-672; 111 RT 20549-20550.)

The prosecutor explicitly relied on the dog tracking evidence in his closing argument. The prosecutor was not subtle; according to the prosecutor the dog tracking evidence was itself enough to convict:

> "If Laci Peterson's scent is at the Berkeley Marina, then he's guilty. I mean that's as simple as that." (111 RT 20534.)

As more fully discussed below, this dog-tracking theory of culpability was fundamentally improper and violated a number of Mr. Peterson's constitutional rights. Although the trial court may have intended to provide general guidance on the use of dog-tracking evidence, this instruction did no such thing. Instead, the instruction affirmatively told the jury it could find Mr. Peterson "guilty of the crime of murder" based on (1) dog-tracking evidence and (2) the existence of any direct or circumstantial evidence which

"support[ed] the accuracy" of the dog evidence. (19 CT 6071.) This was fundamental constitutional error; it gave the jury an unconstitutional shortcut to conviction, it constituted an improper evidentiary presumption as to the elements of murder, and it improperly lightened the state's burden of proof. Reversal is required.

A. The Court Erred In Instructing The Jury It Could Convict Mr. Peterson Of Murder Based On (1) The Dog Tracking Evidence And (2) Any Evidence Corroborating The Accuracy Of That Evidence.

As given here, the jury was explicitly instructed it could find Mr. Peterson "guilty of the crime of murder" if it found (1) Trimble alerted at the Berkeley Marina and (2) there was either direct or circumstantial evidence which "supported the accuracy" of that alert. But there is no such theory of murder under California law. Instead, murder generally requires the state to prove (1) a killing with malice aforethought ("malice murder") or (2) a killing during certain types of felonies ("felony murder"). (*See* Penal Code §§ 187, 189.) Thus, it was plain error to give the jury an alternate "dog-tracking" theory of murder.

To be sure, the court also gave correct instructions on malice murder. (19 CT 6092.) Thus, the initial question is whether the court's provision of an alternate "dog-tracking theory of murder was even error.

It was. This Court has long held that provision of "conflicting instructions on an element of a substantive offense which may have resulted in the removal of the issue from the jury's consideration" constitutes federal constitutional error. (*People v. Odle* (1988) 45 Cal.3d 386, 414-415. *Accord People v. Lee* (1987) 43 Cal.3d 666, 673-674; *People v. Chavez* (2004) 118 Cal.App.4th 379, 387.)

That is precisely what occurred here. In order to convict of murder, the jury was required to determine if the state had proven beyond a reasonable doubt the existence of malice. The trial court's alternate dog-tracking theory of murder removed this issue from the jury's consideration. Federal constitutional error has occurred.

B. The Erroneous Provision Of A Dog-Tracking Theory Of First Degree Murder Requires Reversal.

The question then becomes whether this error requires reversal of Mr. Peterson's murder convictions. As more fully discussed below, there are three distinct ways of looking at the error in this case. Under any of these three approaches, the murder convictions must be reversed.

1. Because the jury was given a fundamentally incorrect theory of culpability as to the murder charge, and because it is impossible to determine if the jury relied on that theory in convicting Mr. Peterson, reversal is required.

Where a jury is given both proper and improper theories of culpability in a criminal case, and the jury verdicts do not indicate the jury relied on the proper theory in convicting a defendant, reversal is required. (*See*, *e.g.*, *People v. Smith* (1984) 35 Cal.3d 798, 808 [trial court instructs jury on both proper and improper theories of murder; held, reversal is required because "the People cannot show that no juror relied on the erroneous instruction as the sole basis for finding defendant guilty of murder. In these circumstances it is settled that the error must be deemed prejudicial."]; *accord People v. Guiton* (1993) 4 Cal.4th 1116, 1120; *see also People v. Morris* (1988) 46 Cal.3d 1, 24; *People v. Boyd* (1985) 38 Cal.3d 762, 770; *People v. Cantrell* (1973) 8 Cal.3d 672, 686; *People v. Robinson* (1964) 61 Cal.2d 373, 406.) As one appellate court has correctly concluded, "[w]here the reviewing court cannot determine upon which theory the jury convicted defendant and one of the theories is an improper basis for conviction, 'it must find the error to have been prejudicial.'" (*People v. Macedo* (1989) 213 Cal.App.3d 554, 561-562.)

That is exactly what happened here. On the one hand, the jury was told it could convict of first degree murder if the state proved premeditated, malice murder. On the

other hand, the jury was also told it could convict of first degree murder simply by relying on the dog tracking evidence in conjunction with evidence supporting its accuracy.

This latter theory had no basis in state law. As a consequence, of course, provision of this theory to the jury plainly violated Mr. Peterson's state and federal constitutional rights to Due Process, a fair trial and proof beyond a reasonable doubt. (*See Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664 [due process violation found where defendant charged with murder, jury presented with two theories of culpability only one of which had a basis in state law]; *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587 [same].) Because the jury returned a general verdict, it is impossible to determine if the jury relied on this improper theory of first degree murder. Pursuant to the authorities discussed above, reversal of the murder conviction is therefore required.

2. Because the jury instructions permitted the jury to infer the elements of first degree murder solely from proof that Trimble alerted at the Marina, and some corroborating evidence, reversal is required.

There is a second way to characterize the court's error in providing CALJIC 2.16 as to the murder charges. This instruction operated as an improper permissive instruction which allowed the jury to infer all elements of murder (and therefore convict of murder) from proof that (1) Trimble alerted at the Marina and (2) there was some evidence

supporting the accuracy of that alert. Because the state cannot establish that the jury did not do exactly what it was told it could do -- that is, convict Mr. Peterson of murder by relying on this evidence -- reversal is required.

The starting point for this analysis is the Fifth Amendment requirement that in criminal cases the state prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358; *Patterson v. New York* (1977) 432 U.S. 197.) In turn, the Sixth Amendment requires that the jury make the determination that the state has proven the elements of the charged offense beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Together, these rights require a jury determination, based upon proof by the state beyond a reasonable doubt, of every factual element of the crime charged. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 512-514; *In re Winship*, *supra*, 397 U.S. at pp. 363-364.)

Jury instructions violate these constitutional principles when they relieve the state of the burden of proof beyond a reasonable doubt of every element of the crime charged. (*See Sandstrom v. Montana*, *supra*, 442 U.S. at p. 520-524. *Accord Carella v. California* (1989) 491 U.S. 263, 265; *Francis v. Franklin* (1985) 471 U.S. 307, 313.) A state may not make certain facts elements of a criminal offense and then impose a presumption as to

the existence of these facts based on proof of other, predicate facts. (*Carella v. California*, *supra*, 491 U.S. at p. 265; *Francis v. Franklin*, *supra*, 471 U.S. at p. 313; *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 515.) "Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California*, *supra*, 491 U.S. at p. 265.)

There are two types of presumptions. A mandatory presumption requires the jury to infer an ultimate fact from proof of a predicate fact. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) A permissive presumption permits, but does not require, the jury to infer the ultimate fact from the predicate fact. (*Francis v. Franklin*, *supra*, 471 U.S. at p. 314.) In both situations, the vice is identical; presumptions which permit or require a jury to presume an element of the offense from proof of certain predicate facts "render[] irrelevant the evidence on that issue" and make it impossible to determine "[i]f the jury may have failed to consider evidence" on the issue by relying on the presumption. (*Connecticut v. Johnson* (1983) 460 U.S. 73, 85-86.)

Here, Mr. Peterson was charged with first degree murder. The charge required the prosecutor to prove an unlawful killing with both malice and premeditation.

As given in this case, CALJIC No. 2.16 permitted the jury to convict of murder based on (1) the dog tracking evidence and (2) any direct or circumstantial evidence supporting the accuracy of that evidence. (19 CT 6071.) In other words, the court's instruction permitted the jury to infer every element of a murder charge from the dog tracking evidence plus some evidence supporting its accuracy..

While permissive inferences (or presumptions) are less intrusive than mandatory presumptions, they are nevertheless disfavored because they "tend to take the focus away from the elements that must be proved." (*United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 900 [Rymer, J. concurring].) Permissive presumptions are constitutional only if can be said "with substantial assurance" that the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend." (*Ulster County v. Allen*, *supra*, 442 U.S. at p. 166, n. 28.) A permissive inference violates Due Process whenever "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin*, *supra*, 471 U.S. at pp. 314-315.)

In *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, the Ninth Circuit Court of Appeal applied these principles in a case analogous to this one. There defendant was charged with vehicular assault. Under Washington state law, one element the state had to prove to obtain a conviction was that defendant drove in a reckless manner. As to

this element, however, the jury was given a permissive presumption and told that it could (but was not required to) infer the defendant had driven in a reckless manner solely from evidence that he was speeding. The court found that even though "it is certainly true that excessive speed is probative of a jury's determination of recklessness, here we cannot say with substantial assurance that the inferred fact of reckless driving more likely than not flowed from the proved fact of excessive speed." (*Id.* at p. 316.) Thus, the instruction was constitutionally deficient and defendant's conviction was reversed. (*Id.*)

Schwendeman is virtually identical to this case. With respect to the murder charge here, it cannot be said with "substantial assurance that the inferred fact of [an unlawful killing with malice] more likely than not flowed from the proved fact [that Trimble alerted at the Marina]." As one court has concluded in holding analogous instruction 2.15 improper in a murder case, "[p]roof a defendant was in conscious possession of stolen property simply does not lead naturally and logically to the conclusion that the defendant committed a murder to obtain the property." (*People v. Barker* (2001) 91 Cal.App.4th, 1166, 1176.) So too here; proof that Trimble alerted -- even when that alert is supported by some corroborating evidence -- "simply does not lead naturally and logically to the conclusion that the defendant committed a murder."

In short, the permissive presumption given to the jury in this case violates the Due Process Clause precisely because the suggested conclusion (that defendant is guilty of murder) "is not one that reason and common sense justify" in light of the predicate facts on which the presumption is based (Trimble's alert plus some corroboration). (*Francis v. Franklin*, *supra*, 471 U.S. at p. 315.) Because of the federal constitutional dimension to this error, the *Chapman* standard applies, requiring the People "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; *see Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316 [applying *Chapman* to improper permissive presumption]; *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1038 [same].)

In assessing whether the error was harmless, the question is not whether there is sufficient evidence from which the jury could have found the ultimate fact under other instructions. (*See*, *e.g.*, *Hanna v. Riveland*, *supra*, 87 F.3d at p. 1039; *Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.) Instead, the question is whether the state can prove beyond a reasonable doubt that the jury did not rely solely on the predicate fact -- thereby ignoring all other evidence -- in deciding the ultimate fact. *(Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.)

Here, as to the murder charge, the jury was instructed it could infer every element of a murder charge from the dog tracking evidence with some corroboration. As in *Schwendeman*, "[b]y focusing the jury on the evidence of [the dog tracking] alone, the challenged instruction erroneously permitted the jury to find an element of the crime of which [Mr. Peterson] was convicted without considering all the evidence presented at trial." (*Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316; *see Yates v. Evatt* (1991) 500 U.S. 391, 405-406 ["[S]ome presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed."].) The error was compounded by the prosecutor in closing argument when he explicitly told the jury that the dog evidence alone was enough for conviction "as simple as that." (111 RT 20534.)

Mr. Peterson recognizes that in light of the deferential standards of appellate review, there was sufficient evidence from which a jury could have convicted on a malice murder theory. Thus, he is not raising a sufficiency of the evidence argument in this brief. But the fact of the matter is that the evidence against him was entirely circumstantial and depended almost entirely on inferences which were strongly disputed during trial. The improper presumptions provided by CALJIC 2.16 "permitted the jury to find [all] element[s] of the crime of which [Mr. Peterson] was convicted without considering all the evidence presented at trial." This is especially true here, where the

prosecution argued that Trimble's alert was sufficient for conviction. Accordingly, the state will be unable to prove there was "no reasonable probability that the instruction did not materially affect the verdict." (*Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.) Reversal of the murder convictions is required.

3. Telling the jury that it could convict Mr. Peterson of murder based on Trimble's alert along with some evidence supporting the accuracy of that alert undercut the presumption of innocence and improperly lightened the state's burden of proof beyond a reasonable doubt.

Reversal is also required because this instruction permitted a conviction for murder based on proof less than reasonable doubt. As discussed above, jury instructions are unconstitutional if they relieve the state of the burden to prove every element of the offense beyond a reasonable doubt. (*See Sandstrom v. Montana*, *supra*, 442 U.S. at p. 521.)

Here, the jury was told that the dog tracking evidence was not alone sufficient to prove the charged crime of murder. (19 CT 6071.) This statement of the law is manifestly correct since the charged offense of murder contains elements that cannot logically be proven simply by dog tracking evidence.

But the jury was then told that "guilt may be inferred" so long as there was "other evidence that supports the accuracy of the dog tracking evidence." (19 CT 6071.) In other words, the jury was told that it could convict of murder based on proof of a fact which is alone insufficient to prove murder (the dog tracking evidence), so long as the state also introduced some other evidence supporting the accuracy of that evidence.

Several courts have considered similar instructions permitting a conviction on the basis of proof of some fact that is insufficient to establish guilt plus other corroboration. These courts have found such instructions violate due process. Thus, the Fifth Circuit has repeatedly held that it violates due process to instruct the jury that a defendant may be convicted of conspiracy upon proof of the existence of the conspiracy plus "slight evidence" connecting the defendant to it. (*United States v. Partin* (5th Cir. 1977) 552 F.2d 621, 628-629, *cert. denied*, 434 U.S. 903; *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500-501.) The Fifth Circuit explained in *Partin* that the "slight evidence" instruction "reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt." (*United States v. Partin*, *supra*, 552 F.2d at p. 629. *See United States v. Durrive* (7th Cir. 1990) 902 F.2d 1221, 1228, *quoting United States v. Martinez de Ortiz* (7th Cir. 1989) 883 F.2d 515, 524-525[conc. opn. of Easterbrook, J.]; *United States*

v. Dunn (9th Cir. 1977) 564 F.2d 348, 356-357.) Similarly, telling the jury here that it could infer guilt based on the dog tracking evidence so long as there was some other evidence which "support[ed] the accuracy" of that evidence also undercut the requirement of proof beyond a reasonable doubt.

It is true, of course, that the trial court gave a general instruction which correctly described the state's burden of proof. But as the Supreme Court has held, a correct instruction does not remedy a constitutionally infirm instruction if the jury could apply either instruction to arrive at a verdict. (*Francis v. Franklin*, *supra*, 471 U.S. at pp. 319-320.) Because the court here explicitly told jurors they could infer guilt from the dog tracking evidence along with some supporting evidence, there is at least a reasonable likelihood that jurors would have "interpreted the two sets of instructions as indicating that [dog tracking evidence] was a means by which proof beyond a reasonable doubt . . . could be satisfied." (*Id*. at p. 319.)

Put another way, an error which lessens the prosecution's burden is structural and requires automatic reversal. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) This is because, when the jury receives instructions which permit it to convict without applying the reasonable doubt burden of proof, "there has been no jury verdict within the meaning

of the Sixth Amendment [and] the entire premise of [a *Chapman* harmless error] review is simply absent." (*Id*. at p. 280.) Reversal is therefore required.

VIII. THE ERROR IN INSTRUCTING THE JURY WITH CALJIC NUMBER 2.16, PERMITTING THE JURY TO CONVICT IF IT FOUND THAT THE DOG TRACKING EVIDENCE WAS CORROBORATED BY OTHER EVIDENCE, WAS COMPOUNDED BY THE COURT'S FAILURE TO INFORM THE JURY THAT IT COULD RELY ON THE DOG TRACKING EVIDENCE TO ACQUIT, AS WELL AS TO CONVICT.

As discussed in Argument VII, above, the trial court erred in instructing the jury it could convict Mr. Peterson if it found that the dog tracking evidence was corroborated. In addition, however, and as discussed below, by singling out the state's inculpatory dog scent evidence -- and telling the jury it could rely on that evidence to convict -- but failing to give a balanced instruction telling the jury it could acquit based on the exculpatory dog scent evidence, the court not only compounded its error in giving CALJIC 2.16, but fundamentally violated the Supreme Court's explicit requirement of instructional equality between the state and the defense articulated nearly 40 years ago in *Cool v. United States* (1972) 409 U.S. 100. Reversal is required.

A. The Relevant Facts.

According to the state, the crime in this case occurred on December 23 or 24, 2002. Ultimately, the state's theory was that Mr. Peterson's motive in committing the crime was to obtain his freedom. (109 RT 20209.) The defense theory, of course, was that Mr. Peterson had no motive at all to kill Laci, and did not do so. (110 RT 20376.) In

light of these two conflicting theories of the motive evidence, the trial court gave a properly balanced motive instruction which told the jury that (1) if it found there *was* a motive, this "may tend to establish the defendant is guilty" and (2) if it found there was *no* motive, this would "tend to show the defendant is not guilty." (19 CT 6079.)

Separate and apart from the motive evidence, as discussed above, the prosecution presented dog scent evidence supporting its case that Laci was taken to the Berkeley Marina. (*See* Argument VI, *supra*.) Specifically, the state presented testimony from Eloise Anderson that her trailing dog Trimble alerted on Laci's scent at the Berkeley Marina. (84 RT 16085.)

To rebut this testimony, the defense introduced dog scent evidence of its own. Thus, on the very same day that Trimble alerted, dog handler Ron Seitz's scented his dog at the Berkeley Marina with Laci's scent. Seitz' dog worked the same area near the boat ramp as Trimble, but did *not* alert. (105 RT 19605-19613.)

The trial court here singled out the state's inculpatory dog scent evidence and told the jury "guilt could be inferred" from this evidence so long as there was some "other evidence that supports the accuracy of the dog tracking evidence." (19 CT 6008.) However, in contrast to the balanced instruction it had given on motive, the trial court

never focused on the defense's exculpatory dog scent evidence or gave an instruction telling the jury that it could also rely on dog scent evidence to acquit.

B. The Trial Court Violated Due Process In Giving A One-Sided Instruction Telling The Jury It Could Rely On Dog Scent Evidence To Convict, But Failing To Instruct That The Jury Could Rely Dog Scent Evidence That Was Favorable To the Defense To Acquit.

This Court has long made clear "there should be absolute impartiality between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527.) Where a trial court in a criminal case treats the parties differently in the matter of instructions, due process has been violated. (*See Wardius v. Oregon* (1973) 412 U.S. 470, 474 ["[T]he Due Process Clause speak[s] to the balance of forces between the accused and his accuser."].) Indeed, the United States Supreme Court has long made clear that it violates the Constitution for a state to apply unequal standards to criminal defendants and the prosecution in a criminal case. (*See*, *e.g.*, *Washington v. Texas* (1967) 388 U.S. 14, 22 [Texas rule permitted accomplices to testify for the state, but not for the defendant; held this was unconstitutional because the distinction was not rational]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295-298 [unconstitutional to bar a defendant from impeaching his own witness although the government was free to do so]. *Accord Lindsey v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection].)

Significantly, the Supreme Court has specifically applied this rule in the instructional context, holding unconstitutional instructions which distinguish between a criminal defendant and the state in connection with how evidence is to be treated. (*Cool v. United States* (1972) 409 U.S. 100, 103, n.4. [jury instruction telling jury it could convict on the basis of accomplice testimony, but failing to tell jury it could acquit on that basis was unconstitutional]. *See also Reagan v. United States* (1895) 157 U.S. 301, 310 ["the court should be impartial between the government and the defendant"]; *United States v. James* (9th Cir. 1999) 169 F.3d 1210, 1214 [no different rules of evidence for prosecution and defense].) Put another way, the constitution requires that what is sauce for the goose is sauce for the gander.

The error in this case -- giving a one-sided instruction on dog scent evidence -- is the exact error which the United States Supreme Court condemned in *Cool v. United States*. In *Cool*, defendant was charged with possession of counterfeit bills. Defendant contested the state's case, affirmatively relying on testimony from an accomplice that he (defendant) was not involved. (409 U.S. at p. 101.) The state itself relied on the testimony of this same accomplice to support parts of its own case. (409 U.S. at p. 105 [Rehnquist, J., dissenting] ["Much of [the accomplice's] testimony tended to exculpate petitioner, but there were significant aspects of it that did not."].)

The trial court instructed the jury that accomplice testimony "may alone and uncorroborated support your verdict of guilty . . . if believed by you to prove beyond a reasonable doubt the essential elements of the charges . . . ." (409 U.S. at p. 103, n.4.) The trial court did not also instruct the jury that it could also acquit on the basis of the accomplice testimony. Defendant was convicted.

On appeal, defendant challenged this instruction because it singled out a certain type of evidence -- accomplice testimony -- and told the jury it could rely on this evidence to convict, without also telling the jury it could rely on this same type of evidence to acquit. The Supreme Court explicitly agreed that such an instruction was improper:

> "[T]he instruction was . . . fundamentally unfair in that it told the jury it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis. Even had there been no other error, this conviction would have to be reversed on the basis of this instruction alone." (409 U.S. at 103, n.4.)

Of course, that is exactly what the trial court did here. The trial court singled out the inculpatory dog scent evidence and told the jury this evidence, if corroborated, could be used to convict defendant of special circumstances murder. The trial court never told the jury that the exculpatory dog scent evidence could also be relied on to acquit.

While this is the exact error which occurred in *Cool,* the error here is more problematic for two reasons. First, the improper dog scent instruction followed a balanced and proper instruction given in connection with the motive evidence, which told the jury that it cold rely on the *presence* of motive to convict and the *absence* of motive to acquit. (19 CT 6079.) A reasonable juror, hearing these two instructions back-to-back, could easily have thought that the dog scent evidence could indeed only be considered as evidence of guilt. A juror might reasonably have concluded that if the absence of dog scent evidence could genuinely be considered as evidence of innocence, then the court would have given an instruction to that effect, just as it did in the motive context. (*See People v. Dewberry* (1959) 51 Cal.2d 548, 557; *People v. Salas* (1976) 58 Cal.App.3d 460, 474. *See also People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.].)

The second, and more important, reason the one-sided dog-scent instruction here was more egregious than the one-sided accomplice instruction in *Cool* was that it compounded the unconstitutionality of the CALJIC dog-scent instruction which the trial court did give. As discussed in Argument VII, *supra*, the standard dog-scent instruction given in this case permitted the jury to convict appellant of murder based solely on "evidence of dog tracking of the victim" together with some corroborating evidence. (19 CT 6071.) When the trial court singled out the inculpatory dog-scent evidence as capable

of producing a guilty verdict of murder alone, it elevated the importance of that evidence above all the other evidence in the trial. The trial court did not, after all, tell the jury that it could find appellant guilty based on any other single piece of evidence.

In light of the importance the trial court's provision of CALJIC 2.16 gave the dog-scent evidence, it was even more crucial to Mr. Peterson's right to a fair trial that the trial court similarly tell the jury that dog-scent evidence favorable to the defense could support an acquittal. The court's failure to do so left the jury with a straight and direct route to conviction, but with no corresponding route at all to acquit. This was error.

C. The Error In Giving A One-Sided Dog-Scent Instruction Was Prejudicial Because The Exculpatory Dog Scent Evidence Completely Undercut The State's Theory Of The Case.

Because the court's one-sided dog-scent instruction violated due process, (*Wardius v. Oregon, supra,* 412 U.S. at p. 474; *Cool v. United States, supra*, 409 U.S. 100), reversal is required unless the prosecution can prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) This, it cannot do, principally because of the overarching importance of the dog-scent evidence.

As Mr. Peterson has argued at length (*see* Argument VI, *supra*), the state's dog-scent evidence was among the most important evidence in the case and the most unreliable. First, Trimble was a trailing dog not a cadaver dog, yet under the state's theory, Laci had already died. Second, Trimble had failed on two of the three non-contact vehicle trails he had tried. (8 RT 1541-1542; 85 RT 16146.) Third, Trimble had never been trained to detect scents in a marine environment. (*See* 8 RT 1488-1508.) And fourth, Trimble was scented with an item from Laci's purse -- which Mr. Peterson had handled -- and so might have been responding to the wrong scent. (8 RT 1551-1553, 1562; 85 RT 16133-16134.)

It was this unreliable evidence on which the trial court told the jury it could rely to find Mr. Peterson guilty of capital murder so long as there was some "other evidence" that supported the accuracy of the dog scent evidence. (19 CT 6071.) It was this unreliable evidence the prosecutor told the jury it could rely on to find Mr. Peterson was guilty -- "as simple as that." (111 RT 20534.) There is no reason to believe that at least one juror did not agree with the prosecution's theory of the importance of this evidence. (*See People v. Powell*, *supra*, 67 Cal.2d at pp. 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz*, *supra*, 61 Cal.2d at p. 868 [same].)

In contrast to the state's dog tracking evidence, the defense evidence was considerably more reliable. The defense called dog handler Ron Seitz to testify. Though Mr. Seitz was originally a prosecution witness, the prosecution chose not to call him. (105 RT 19664.) Police had called Mr. Seitz, along with Eloise Anderson, to bring his trailing dog, TJ, to the Berkeley Marina on December 28. (105 RT 19603.) Seitz works with CARDA, the California Rescue Dog Association, and for 28 years worked with the Alameda County Sheriff's Search and Rescue Unit. (105 RT 19604.) In fact, Seitz was the chief of the Sheriff's Search and Rescue Unit. (105 RT 19604.) Seitz kept a log of how reliable TJ was in his searches. In contrast to Trimble's meager success rate of 33%, TJ's accuracy rate was 70 to 80 percent under varying conditions. (105 RT 19640.)

At the marina, Captain Boyer gave Seitz two scent items: the sunglasses case and a pink slipper. (105 RT 19607.) Unlike Eloise Anderson, Seitz queried Boyer carefully about whether Mr. Peterson had handled either of these items. Specifically, Seitz asked the following questions:

> "I asked when they were secured, by whom they were secured, how they were handled, in whose custody that they were in during the time that -- in which they were secured and to the present time when I was provided the opportunity to use them." (105 RT 19607.)

When asked to explain why these questions were important, Seitz stated:

> "These are handler questions that you ask. One, you want to get some background. They would be the typical questions that you would ask of a family member, or somebody when you are trying to secure scent articles, you want to minimize the opportunity for cross contamination. Who's handled the article? Where the article has been? Has it had an opportunity to degrade in somebody's custody? How it's been kept, and things of that particular nature." (105 RT 19607-608.)

Based on the answers to his inquiry, Seitz chose to scent TJ with the slipper. He chose the slipper because, "[g]iven both articles, or the opportunity for both articles, and the vagueness to which the questions were answered about where they had been, who's handled them, possibility of cross contamination, I felt that probably the pink slipper, of the two, were probably the best that I was offered." (105 RT 19608.) Unlike Anderson, Seitz was concerned that there would have been cross-contamination; if Mr. Peterson had touched the glass case, it was "very likely" that they would have been cross-contaminated. (105 RT 19625.)

As previously noted, Seitz's far more reliable dog did *not* detect Laci's scent at the marina. Yet although the jury was told it could rely on the state's inculpatory dog evidence to convict, it was never told it could consider Seitz's exculpatory dog tracking evidence to acquit.

The problem created by the court's decision to single out the state's dog tracking evidence is basic. If one juror found the Seitz evidence compelling proof that Laci's scent was *not* at the marina, that juror would not have been authorized by the jury instructions to consider such evidence in determining the question of guilt or innocence. If the one-sided instruction had related to a matter of little import, the error may well have been harmless. But given the prosecution's enormous reliance on the dog-scent identification, it is impossible for the state to show that the one-sided instruction had no effect on the verdict. The judgment must therefore be reversed.

IX. THE TRIAL COURT VIOLATED BOTH STATE AND FEDERAL LAW BY ADMITTING EXPERT "SCIENTIFIC" EVIDENCE, BASED ON WHERE CONNER'S BODY WAS FOUND, TO INFER THAT CONNER WAS PLACED IN THE WATER WHERE MR. PETERSON HAD BEEN FISHING.

A. Introduction.

Mr. Peterson told police that on December 24, 2002 he was fishing in San Francisco Bay. On April 13, 2003, the body of Conner Peterson was discovered on the shore of the bay, nearly one mile north-northeast of the southern tip of Brooks Island. On April 14, 2003, the body of Laci Peterson was found on the shore nearly two miles east-northeast of the southern tip of Brooks Island.

The prosecution's theory was that Mr. Peterson put Laci Peterson into the bay near where he was fishing. But apart from the erroneously admitted and flawed dog-scent evidence (*see* Argument VI, *supra*), there was no forensic or other evidence connecting Mr. Peterson's fishing trip with the bodies of Laci and Conner.

The prosecution bridged this evidentiary chasm with the testimony of Dr. Ralph Cheng, a hydrologist employed by the United States Geological Survey. Over defense objection, Dr. Cheng was permitted to testify that, based on the location of where Conner was found, Conner's body had been anchored to the bay bottom in an area 500-1000

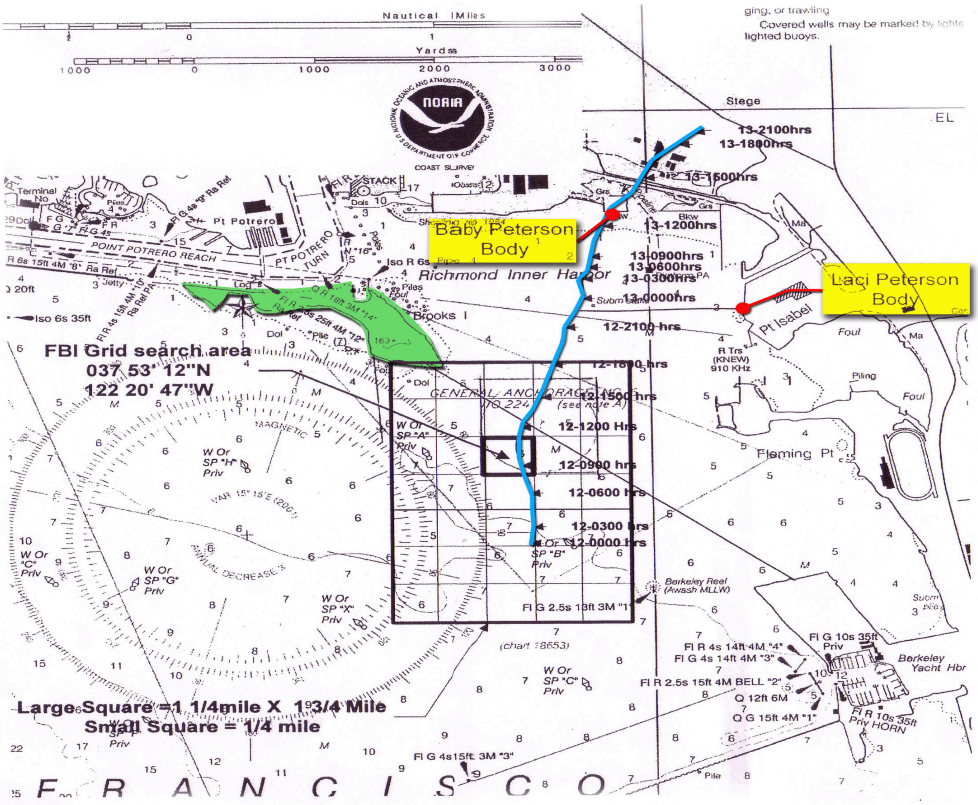
yards southwest of Brooks Island. That was the approximate area in which Mr. Peterson said he was fishing on December 24. (55 RT 10725-10728.)

The import of this evidence is obvious. It literally "connected the dots" between Mr. Peterson's boat and Conner's body. Echoing the precise refrain he had used with the dog scent evidence, the prosecutor told the jury that if Dr. Cheng was believed, "then that man's a murderer. It's as simple as that." (109 RT 20279-20280.)

But this evidence should never have been admitted. As the party offering the evidence, the state had the burden of establishing its admissibility. To do so, the state had to prove Dr. Cheng was employing either (1) a well-accepted scientific technique that was not new (and therefore not subject to the foundational requirements for new scientific evidence of *People v. Kelly*, *supra*, 17 Cal.3d 24); or (2) a new technique that complied with the foundational requirements set forth in *Kelly*. Here, the state established neither of these preliminary facts. Accordingly, admission of this highly prejudicial evidence was improper. Given the importance of this evidence to the state's case, the improper admission of the evidence requires reversal.

B. The Relevant Facts.

Police interviewed Mr. Peterson the night Laci disappeared. Mr. Peterson told police that he had gone fishing that day from the Berkeley Marina, driving his boat about two miles to the north, to a small island later identified as Brooks Island. (55 RT 10723-10726.) On April 13, 2003, the body of Conner Peterson was discovered in the shoreline area of Bayside Court in Richmond. (61 RT 11880.) The next day, Laci's body was discovered, washed ashore at Point Isabel in Richmond. (61 RT 11993.) The location of Brooks Island, and the locations where the bodies were discovered, are depicted on People's Exhibit 284:



PEOPLE'S EXHIBIT 284 SC55500 Adm 1974

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As Exhibit 284 shows, Conner's body was found approximately 2000 yards north of the southern tip of Brooks Island.[47] Laci's body was found approximately 3000 yards northeast of the southern tip of Brooks Island. Apart from the general proximity of Brooks Island and the points where the bodies washed ashore, there was no evidence connecting the bodies to the place where Mr. Peterson was fishing.

To connect these two points, the prosecution relied on the testimony of hydrologist, Dr. Ralph Cheng. Dr. Cheng was a senior research hydrologist with the United States Geological Survey. (66 RT 12809-12813; 100 RT 18858.) Police consulted Dr. Cheng soon after the bodies of Laci and Conner had been found. Detective Hendee, of the Modesto Police Department testified that his department asked Dr. Cheng if -- based on where the bodies had been found and the tides and currents in the bay -- Cheng could direct the police to a spot where there was a high probability that evidence related to the bodies could be found. (66 RT 12809.) Specifically, police were seeking to recover body parts of the victims or cement weights they believed were used to anchor the bodies to the floor of the bay. (66 RT 12813.) They hoped that Cheng could tell them where to look. (66 RT 12813.)

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[47] People's Exhibit 284 is drawn to a scale in which one nautical mile corresponds to 1-5/8 inches on the map. A nautical mile is 1.1508 of a mile.

Dr. Cheng complied. He provided the police with a map which contained a "projected path" that the bodies might have taken to the shore, and he pinpointed an area in the bay, approximately 700 meters by 700 meters, for the officers to search. (66 RT 12814, 12819-12820.)

Beginning May 16, 2003, the police, with the help of teams of divers from the FBI, Contra Costa County, Marin County and San Francisco County, searched this "high probability area," with several boats equipped with sonar. (66 RT 12819.) The Coast Guard divided the 700 meter by 700 meter area into 35 grids, each of which were the subject of a search. (66 RT 12822.) The boats would cover the area with the sonar equipment and, if some object on the bottom was detected, the dive teams would retrieve it. (66 RT 12823.)

On May 16, 2003, the first day of the search, three boats with sonar and three dive teams searched Dr. Cheng's high probability area for seven hours, and found bottles, sticks, pipes and assorted debris. (66 RT 12822, 12823, 12837.) They found nothing connected to the case. (66 RT 12824.)

On May 17, 2003, dive teams with four boats searched Dr. Cheng's high probability area for seven hours. (66 RT 12826.) Again, they failed to find anything connected to the case. (66 RT 12827.)

On May 18, four boats and three dive teams spent another seven hours searching Dr. Cheng's high probability area. Again they found nothing. (66 RT 12828.)

On May 19, four boats and dive teams from the FBI, San Francisco, Marin and Contra Costa again combed the high probability area. Yet again, nothing was found. (66 RT 12829.)

On May 20, May 21 and May 22, the search of the high probability area and adjacent areas continued, for approximately seven hours each day, with several boats, sonars and dive teams. (66 RT 12829-12835.) Again, no evidence related to the case was found. (66 RT 12835.) Thus, after seven days of searching the high probability area designated by Dr. Cheng, no evidence was recovered.

The search of Dr. Cheng's high probability area continued in July. This time the police used a self-propelled search vehicle called a "REMUS", which stands for Remote

Environmental Unit. (64 RT 12644.) Detective Hendee explained how accurate the REMUS was in finding material on the ocean floor:

> "[is] like a missile, and goes underwater, and it works between two radio-controlled buoys set out in the water. It sends signals back and forth, so it knows exactly where it is at all times. It also sends from those radio-controlled buoys a signal back to a computer on shore, and you can monitor exactly where the device is, on shore.
>
> "The device costs around 300 thousand dollars. We rented it for a week-long operation, and it motored back and forth and covered a very large area. The advantage to this particular operation is that this device will drive nice, straight lines underneath the water, back and forth, as opposed to the boats which are affected by the wind and the waves."
>
> "So when you're done searching an area with REMUS, you can have a much higher degree of confidence that you found most of the items down there, if -- in fact, you know, you can't always say that you're going to find everything because sometimes things moved under the water, or things get buried under mud when the tide comes in and out. But with REMUS you had a much higher feeling of confidence than you did after running side-scan sonar boats." (64 RT 12644-12645.)

Police searched with the REMUS from July 6 through July 13. (65 RT 12709.) They covered approximately 80% of an area that was 1-1/8 miles wide by 1-1/2 miles long, an area much larger than Cheng's original 700 square meter high probability area. (65 RT 12710.) After filtering out items located by REMUS that were obviously not relevant to the search (such as fish), the search vehicle located 221 potential targets of interest. (65 RT 12775.) Divers then searched for these targets. They found more fish,

mud piles, fishing line, sticks, bottles, a tire, a battery and pipes, but nothing of relevance to Mr. Peterson's case. (65 RT 12779.)

Undeterred, police searched the high probability area again in September with dive boats equipped with sonar. They searched again in April, 2004. They found nothing. (65 RT 12786-12787.)

At trial, the state called Dr. Cheng as an expert witness to give an opinion that the bodies had been placed on the bay bottom near where Mr. Peterson said he was fishing. Dr. Cheng's testimony was based largely on a multi-slide Power Point presentation he had prepared for the jury. The print-outs of the presentation were introduced as People's Exhibit 283. (100 RT 18866.) Prior to Dr. Cheng's testimony, the defense suggested that the court review the Power Point, which the court did. (100 RT 18853.) The defense then objected to Dr. Cheng's testimony as having "no foundation for this as any kind of scientific theory," and requiring a *Kelly-Frye* hearing. (100 RT 18853.) The court overruled the objection on the ground that "I don't think we have to have a Kelly-Frye to have somebody testify as to tides. That's generally accepted in the scientific community. They've been charting tides since Sir Frances Drake went up the coast." (100 RT 18853.)

Defense counsel responded, with some prescience as it would turn out, that Drake's charting of tides had nothing to do with predicting how bodies move in water. (100 RT 18853.) The court ultimately ruled that Dr. Cheng's testimony did not require a *Kelly-Frye* hearing, and Cheng's opinion as to where bodies will move in water "goes to the weight rather than the admissibility." (100 RT 18855.)

Dr. Cheng then began his testimony. (100 RT 18857.) In establishing his expertise, Dr. Cheng testified that he is a Senior Research Hydrologist with the United States Geological Survey. (100 RT 18858.) His "particular assignment is study of the movement of water in San Francisco Bay" as affected by currents and tides. (100 RT 18858.) On voir dire of his expertise by defense counsel, Dr. Cheng forthrightly acknowledged that his work had *never* explored the movement of bodies in water or the bay. (100 RT 18865; 101 RT 18938.) Defense counsel then objected to his testimony, stating that "he is qualified as a hydrologist, [but] what they are asking him to do is a completely different matter." (100 RT 18866.)

The court disagreed. Based on Dr. Cheng's training and experience, the court accepted him "as an expert hydrologist and qualified to give an opinion about the movement of water in San Francisco Bay, *among other things*." (100 RT 18866, emphasis added.)

Dr. Cheng told the jury that police contacted him after the bodies of Laci and Conner were found and asked him, based on where the bodies were found and the tides and currents in the bay, to determine the spot from which the bodies came. (101 RT 18901.) Dr. Cheng was candid, explaining that there was uncertainty in any such calculation because they only knew when the bodies were found on shore, which is different from knowing the time the bodies actually arrived there. (101 RT 18901.) Nonetheless, Dr. Cheng looked at the tides and wind conditions in the days before the bodies were found. (101 RT 18895.) Dr. Cheng testified that the wind conditions were important since the area between Brooks Island and where the bodies washed ashore is shallow -- between three and six feet deep. (101 RT 18902-18903.) In shallow water, the winds are a more significant force than tides in causing the movement of water. (101 RT 18898.) This is because the energy from the wind is transmitted to the bottom more readily in shallow water than in deep water. (101 RT 18898-18899.) Dr. Cheng noted that in the days before the bodies were found, there was a combination of extremely low tides on April 12 and April 13, 2003, and high winds, in excess of 40 knots. (101 RT 18895-18896.) A wind speed of 20 knots persisted for 18 to 20 hours. (101 RT 18896.)

Dr. Cheng testified that without the winds, the tides will move in shallow water at approximately one knot. (101 RT 18906.) Dr. Cheng was asked if this was "enough energy in the water to move a body?" (101 RT 18906.) As noted above, during voir dire

Dr. Cheng had admitted that his work had never involved studying the movement of bodies in the waters of the bay. Nevertheless, although the prosecutor's question required information which Dr. Cheng admitted was beyond his expertise, he responded "I don't think so." (*Id.*) Dr. Cheng was then asked if a storm "would produce enough energy in the water to move a body." (*Id.*) Dr. Cheng responded: "It does. I mean, again, it depends on whether the body is -- well, with it, it doesn't -- in other words , suppose the body is still anchored here, it may not have enough energy to move it." (*Id.*) Cheng opined that if the body were not anchored, "it would have enough energy to move it." (*Id.*)

The prosecutor then went on to answer detailed questions about the movements of bodies in water, the precise subject Dr. Cheng had admitted his studies did not involve. Dr. Cheng explained that he looked at the wind conditions and currents to determine the point from which the bodies would have to have started traveling in order to arrive at the location they did. (101 RT 18904.) Dr. Cheng made calculations based only on wind drift, since the tidal currents were relatively weak. (101 RT 18910.) Using a United States Army Corps of Engineers Coastal Engineering Handbook, he produced a "vector map," which charted the movement of Conner's body, hour by hour, in the days prior to April 13. (101 RT 18904, 18909-18911.) Dr. Cheng's map, People's Exhibit 284, shows the vector diagram and concludes that Conner's body migrated to Richmond (where it

was found) from the high probability area near Brooks Island. (101 RT 18914.) Of course, this was the same "high probability" area that police had searched for more than two weeks with dive teams, sonar equipment and the sophisticated REMUS machine without finding anything at all to connect Mr. Peterson with the crime.

Interestingly, however, Dr. Cheng could not reproduce the same trajectory for Laci's body. (101 RT 18925.) When asked for an explanation why he could not provide a vector diagram that showed how Laci's body ended up in Point Isabel, Dr. Cheng confessed that "Well, I'm not – I'm not the expert in that area here. I don't know how the body is behaving in water." (*Id.*) Dr. Cheng stated that he "had done some similar studies of particle tracking, but not body." (101 RT 18926.) Dr. Cheng once again admitted he had no experience at all with how bodies move in water:

> "Q: You have never done any study in San Francisco Bay that has anything to do with bodies or things of that size, correct.?
>
> "A: That is correct." (101 RT 18926.)

Despite Dr. Cheng's conceded lack of expertise in this area, the prosecutor told the jury in closing argument that if Dr. Cheng's testimony was correct, Mr. Peterson was guilty:

> "The only reason those bodies were found is remember what Dr. Cheng testified to. There was an extremely low tide on February 12th. And there was a very 24 violent storm on February 12th. That combination broke the -- broke Laci Peterson free and sent her floating towards the shore. That's the only reason that those bodies were found at all. Not because of some magical frame-up job, or for any other reason. And if that's the fact, and that's the evidence that was before you in this case, then that man's a murderer. It's as simple as that."

(109 RT 20280-20281.) The jury apparently agreed.

C. The Trial Court Violated State Law By Admitting Scientific Evidence That Lacked The Requisite Foundation, And That Did Not Meet The Requirements of *People v. Kelly.*

The state was the proponent of Dr. Cheng's expert testimony regarding the movement of bodies in the bay. As the proponent of this evidence, the state bore the burden of establishing the admissibility of that evidence. "Of course, the party offering the evidence has the burden of proving its admissibility. [Citation omitted]. The weight of his burden is by a preponderance of the evidence. That is the general burden of proof '[e]xcept as otherwise provided by law . . . .'" (*People v. Ashmus* (1991) 54 Cal.3d 932, 970. *Accord People v. Morris* (1991) 53 Cal.3d 152, 206.) Here, once Mr. Peterson objected to Dr. Cheng's scientific testimony, contending it was inadmissible because its reliability had not been established, the burden fell to the State to establish that the testimony was sufficiently reliable to be heard by the jury. (100 RT 18853-18855.)

The law regarding the state's burden of proof in connection with scientific evidence is familiar, and requires the state to establish three distinct elements. First, if the scientific testimony is "'based in whole or in part on a technique, process or theory which is new to science and, even, more so, to the law,'" the proponent must establish its general acceptance under *People v. Kelly*, *supra*, 17 Cal.3d 24. (*People v. Leahy* (1994) 8 Cal.4th 587, 605, quoting *People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) "The hallmark of the *Kelly/Frye* rule . . . is that the proponent must establish, 'usually by expert testimony,' that the technique is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" (*People v. Stoll*, *supra*, 49 Cal.3d at p. 1155, *quoting People v. Kelly*, *supra,* 17 Cal.3d at p. 30.) Second, in addition to general acceptance, the proponent must also establish that the witness testifying as to general acceptance is "properly qualified as an expert to give [such] an opinion." (*Id*. at p. 1155.) Third, the proponent of the evidence must finally establish that "correct scientific procedures were used in the particular case." (*Id.* at p. 1155.)

As this Court has made clear, however, general acceptance need not be established each and every time a proponent seeks to admit scientific evidence. *Kelly* applies "only to 'new scientific techniques.'" (*People v. Leahy*, *supra*, 8 Cal.4th at p. 605.) Thus, if the proponent can establish that the technique is not new to science or to the law, the proponent will have established an adequate foundation for the admission of that

evidence. Of course, scientific evidence is no different from other evidence with respect to who bears to the burden of proof as to admissibility. The party offering scientific evidence has the burden of proving its admissibility by a preponderance of the evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 970.) And where the party proposing to introduce scientific evidence fails to show that the evidence is not based on a new technique or approach, that party must satisfy the three-part test in *Kelly*. (*People v. Dellinger* (1984) 163 Cal.App.3d 284, 292-293.)

In the instant case, the state did neither. The state failed to establish Dr. Cheng's testimony about how bodies move in water was not new to either science or the law. Nor did the state establish that Dr. Cheng's theories satisfied the three-prong test of *Kelly*.

Here, after Mr. Peterson objected to Dr. Cheng's testimony, the trial court reviewed the Powerpoint exhibit (People's Exhibit No. 283) that Dr. Cheng intended to present to the jury. (100 RT 18866.) Without seeking a response from the state, the trial court overruled the objection on the ground that "I don't think we have to have a Kelly-Frye to have somebody testify as to tides. That's generally accepted in the scientific community. They've been charting tides since Sir Frances Drake went up the coast." (100 RT 18853.) The court concluded, "Well, I don't think that this is the subject matter of Kelly-Frye. I mean, you know, this is – this is most – a lot of this stuff is, you know,

the – the – why the sea level rises, why the sea level goes down. That's generally accepted in the scientific community, and I don't think you have to have Kelly-Frye to determine that." (100 RT 18855.)

The trial court was, of course, entirely correct that there was no need for a *Kelly-Frye* hearing in connection with "why the sea level rises, why the sea level goes down." But Dr. Cheng testified to far more than this. Instead, he testified that, given where Conner's body washed ashore, and in light of the water depth, wind direction, wind velocity and the local tidal currents, it was scientifically possible to determine *the one and only area* in the entire bay from which Conner's body began its journey to shore. Other than the court's reference to Sir Frances Drake's charting of tides, neither the prosecution nor the court stated any basis whatsoever for concluding that Cheng's technique -- the reconstruction of the movement of large objects in bays and estuaries over a significant period of time -- was generally accepted in science or the law such that the *Kelly* requirements could be dispensed with.

The trial court's reliance on the practical application of tidal action by sailors was wholly inadequate to prove general acceptance. This Court's decision in *People v. Leahy, supra*, 8 Cal.4th 587 establishes this.

In *Leahy*, this Court addressed the admissibility of the horizontal gaze nystagmus ("HGN") test to establish a driver's intoxication. The state in *Leahy* argued that HGN was not a new scientific technique -- and therefore not subject to *Kelly* -- because it "has been used by *law enforcement agencies* for more than 30 years." (*Id.* at p. 605, italics in original.) This Court rejected the State's reliance on police practice as proving general acceptance, noting that "long-standing use by police officers seems less significant a factor than repeated use, study, testing and confirmation by scientists or trained technicians . . . . To hold that a scientific technique could become immune from *Kelly* scrutiny merely by reason of long-standing and persistent use by law enforcement *outside* the laboratory or the courtroom, seems unjustified." (*Id.* at pp. 605-605. italics in original.)

In precisely the same way, the trial court's reliance below on sailors' experience with tides is wholly inadequate to establish the scientific acceptance of Dr. Cheng's technique of reconstructing the movement of bodies in the bay. Beyond the trial court's reference to Sir Frances Drake, there was no evidence to support the state's position that Dr. Cheng's technique was not a new scientific technique. The prosecution -- as proponent of the evidence -- offered no studies on the movement of bodies in complex tidal areas, no treatises on the matter, and no caselaw in which such evidence was "routine[ly]" admitted. (*People v. Leahy*, *supra*, 8 Cal.4th at p. 606.)

In short, while the trial court may have been correct that the science of tidal movement is well established, that is not what Dr. Cheng was testifying about. Instead, he testified about something new and quite different, *i.e.*, the physics of the movement of objects in the waters of the bay. Unlike HGN, there was no history of the use of this in forensics, with or without studies; it was both unproven and new. Dr. Cheng's testimony about the movement of bodies in water was thus a novel scientific theory which should not have been introduced unless the state met the requirements of *People v. Kelly*.

There was, moreover, a further reason Dr. Cheng's testimony could not meet the *Kelly* test. The second prong of *Kelly* requires that, "[i]n addition to general acceptance, the proponent must also establish that the witness testifying as to general acceptance is "properly qualified as an expert to give [such] an opinion." (*People v. Stoll*, *supra*, 49 Cal.3d at p. 1155.) By his own admission in court, Dr. Cheng's expertise did not extend to the physics of the movement of large objects in bodies of water -- to what kinds of objects, and what weights, will be moved by currents in the bay, and how far. (See 100 RT 18865; 101 RT 18926-18938) Quite to the contrary, Dr. Cheng candidly admitted, "Well, I'm not – I'm not the expert in that area here. I don't know how the body is behaving in water." (101 RT 18925.) The prosecution thus established neither that such a body of scientific information regarding the physics of the movement of large bodies in

the water exists, nor that Cheng was capable of using it to form an opinion even if it did. The admission of Dr. Cheng's testimony violated state law.

D. Admission Of The Evidence Describing The Migration Of Bodies In The Bay Also Violated Federal Law.

Admission of this unreliable but highly incriminating evidence in a capital case also violated federal law. As noted above, the Supreme Court has recognized death is a unique punishment, qualitatively different from all others. (*See*, *e.g.*, *Gregg v. Georgia*, *supra*, 428 U.S. at pp. 181-188; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gardner v. Florida*, *supra*, 430 U.S. at p. 357; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) As a consequence, and as also noted above, the Eighth Amendment requires that procedures in death penalty cases increase the reliability of both the guilt and penalty phase processes. (See, e.g., *Herrera v. Collins*, *supra*, 506 U.S. at p. 406 n. 5; *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) In addition, under the Due Process clause "[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States*, *supra*, 391 U.S. at p. 131, n.6.)

Here, Dr. Cheng's scientific evidence regarding the path of Conner's body from the bay to the shore was central to the prosecution case, yet was entirely unreliable and

admitted without sufficient foundation establishing its reliability. Because this evidence was both crucial to the prosecution case and unreliable, its admission in this capital case violated the reliability requirement of the Eighth Amendment as well as Due Process.

E. Under Either State Or Federal Law, Admission Of Cheng's Unreliable Evidence Requires Reversal.

1. Legal standards

Admission of unreliable evidence in violation of federal law requires reversal unless the state can establish that admission of the evidence it was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Admission of unreliable evidence in violation of state law requires reversal whenever "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

As discussed above, a reasonable probability "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital, Inc. v. Superior Court*, *supra*, 8 Cal.4th at p. 715.) Prejudice must be found under *Watson* whenever the error "'undermine[s] confidence'" in the result achieved at trial. (*Ibid.*) This does not require defendant to prove that a unanimous acquittal would occur without

the error. Instead, as noted above, for purposes of prejudice, a "hung jury is a more favorable verdict." (*People v. Brown*, *supra*, 46 Cal 3d at p. 471 n.1 [Broussard, J., concurring]; *accord Richardson v. Superior Court*, *supra*, 43 Cal.4th at p. 1054; *People v. Soojian*, *supra*, 190 Cal.App.4th at p. 521; *People v. Bowers*, *supra*, 87 Cal App 4th at pp. 734-735.)

In this case, it does not matter which standard of prejudice is applied. Given the nature of Dr. Cheng's testimony, reversal is required regardless of the standard used.

In this regard, there are only two possible ways to find harmless the trial court's error in admitting Dr. Cheng's testimony without requiring the state to meet the *Kelly* standard. First, if the current record showed that -- in fact -- the state carried its burden of proving all three prongs required by *Kelly*, then any error by the trial court in failing to apply *Kelly* would necessarily be harmless. In that situation, Dr. Cheng's testimony would have been admitted even if the trial court had applied *Kelly*, and so any error in failing to apply *Kelly* would be harmless. Alternatively, if the current record did not show that *Kelly* was satisfied -- and Dr. Cheng's testimony was therefore improperly admitted -- the error could still be harmless if Dr. Cheng's testimony was tangential or unimportant to the state's case.

Regardless of whether the Court applies the state or federal standard, the admission of Dr. Cheng's testimony is not harmless. First, the current record shows that the state did not come close to establishing the three requirements for admission of scientific testimony set forth in *Kelly*. And, in fact, Dr. Cheng's testimony was central to the state's case. Reversal is required.

2. The trial court's refusal to apply *Kelly* cannot be rendered harmless by finding that Cheng's testimony would have met the *Kelly* test for reliability.

As discussed, *Kelly* requires that before the trial court could properly admit testimony from Cheng about his theory as to where Connor's body was located, the state had to prove the reliability of that theory by showing (1) Cheng's conclusions were based on methods or techniques generally accepted in the relevant scientific community; (2) Cheng was properly qualified to testify in this area and (3) Cheng used proper scientific procedures. The state did not prove these requirements.

To the contrary, Dr. Cheng, himself acknowledged the inherent unreliability of his own novel method of reconstructing the trajectory of an object in the bay, based on the date and time the object was found on shore. Dr. Cheng candidly admitted that his calculations of the trajectory of Conner's body were based on a critical assumption: the

time when Conner's body actually arrived on the shore, as opposed to the time it was discovered on shore. Dr. Cheng's method was to assume a time the body arrived on shore, then observe the velocity and direction of the winds and tides in the hours preceding that time, and reconstruct the path the body would have taken. (101 RT 18900-18903.) As Dr. Cheng explained, however, his conclusion regarding the distance the body traveled and the direction in which it traveled is dependent *entirely* on the assumed time it landed on the shore:

> "Q: [by prosecutor David Harris] And did [the police] ask you, based on where the bodies were found, if you could go back and do this re-creation from what you were talking about, the tides and currents, and try and plot a path or a course where the bodies had come from?
>
> "A: [by Dr. Cheng] I told them following here I could try. However, it involves similar uncertainty. That is now, when the body was spotted on shore at a certain time, it does not imply the body arrived there at that time." (101 RT 18901.)

Dr. Cheng continued that while he knew precisely *where* the body landed, "we didn't know *when* the body precisely landed at that location. Therefore, in order to reconstruct where the body started moving from, certain position in the bay, still involves *some uncertainty*." (*Id.*, emphasis added.)

With all due respect, the phrase, "some uncertainty," is something of an understatement. Even if Dr. Cheng was entirely correct about how fast the body was moving in the water, without knowing both when the body started moving, and when it stopped (that is, when it landed), it is impossible to determine where it originated from by relying on how fast the body was moving.

Here, Dr. Cheng hypothesized that the body was freed of restraints on the sea floor during a storm that occurred on April 11th through April 12th. (101 RT 18896-18899, 18912.) But Dr. Cheng testified that the storm lasted for 18 hours. (101 RT 18896.) Under Dr. Cheng's own hypothesis, the bodies could have begun moving at the beginning of the storm or at the end of the storm. Because there was enormous uncertainty as to when the bodies began to travel, it was impossible for Dr. Cheng to conclude how far they traveled before they made landfall.

An analogy will show how unreliable Dr. Cheng's testimony was. If a car travels at 60 miles per hour, and arrives in San Francisco at noon, a specific estimate as to how far the car has traveled is certainly possible if the starting time is known. But if the starting time is *not* known, but instead falls in an 18 hour window, then any specific estimate of how far the car traveled is totally unreliable.

But even putting aside questions as to Cheng's thesis for when the bodies began to move, there is equal uncertainty as to when the bodies stopped moving. Conner's body was found at around 4:30 p.m. on April 13, 2004. (61 RT 11905.)[48] But that does not mean that is when the body actually landed on the beach. If the body arrived on shore 24 hours before being found on April 13th, it would have been traveling for a significantly shorter prior of time than Dr. Cheng assumed, and would necessarily have traveled a much shorter distance than Dr. Cheng concluded. On the other hand, if the body arrived on the shore at or near 4:30 p.m. on April 13th, it would have been in the water (and traveling) a much longer time, and would necessarily have originated from a point much farther away. In that scenario, the body would also have been subject to different winds and currents over the extended time it was traveling, and thus the direction from which it came would have been different. In either scenario, the body would not have originated from the area where Mr. Peterson had been fishing: it could have come from an area much farther away than Brooks Island, or from an area very close to the shore on which the body was found.

A return to the analogy discussed above will again show the unreliability of Dr. Cheng's testimony. Assuming one knew the precise starting time for a car that travels 60

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[48] Michael Looby, the man who discovered Conner's body, did not testify as to the exact time of discovery. However, the Richmond Fire Department, which was dispatched to the scene based on a 911 call from Mr. Looby, arrived at 4:49 p.m. (61 RT 11905.)

miles per hour, if the arrival time in San Francisco is known then a scientifically reliable estimate can be made of how far the car traveled. Once again, however, if the arrival time is *not* known, but falls within a 24 hour window, then any specific estimate of how far the car traveled is totally unreliable.

In short, the reliability of Dr. Cheng's testimony regarding Conner's body thus depended on two variables for which there was no proof whatsoever: the time the body began moving in the water, and the time it stopped. It also depended on another variable about which Dr. Cheng really knew nothing: the distance and direction in which the currents might carry an object such as Conner's body.

The matter was even more unreliable as to the trajectory of Laci's body. Indeed, the number and degree of variables regarding her body were so extreme that Dr. Cheng himself admitted he could not draw any reliable conclusion with respect to her trajectory:

> "Q: [by Mr. Geragos]. . . following the same exercise [in reconstructing Connor's trajectory] you cannot reproduce the trajectories of Laci's body?
>
> "A: [by Dr. Cheng] That is correct." (101 RT 18924-18925, 18944-18945.)

In the end, even Dr. Cheng admitted that, because he was forced to make assumptions regarding timing (assumptions he did not have the expertise to make), his conclusions featured "large uncertainties." (101 RT 18931.)

Faced with similar uncertainties and uncontrolled variables underlying scientific testimony, courts have not hesitated to rule such testimony inadmissible under *People v. Kelly*. Thus, for example, in *People v. Dellinger* (1984) 163 Cal.App.3d 284, the defendant was charged with murder of his two year old stepdaughter, who died of blunt force trauma to the head. To contradict the defense that the child died from a fall down a flight of stairs, the prosecution introduced the testimony of a biomedical engineer. The engineer had used an anthropomorphic dummy in an experiment in which he dropped the dummy down a similar flight of stairs, examined the indentations on the dummy's metal head, and made calculations that the force of such a fall could not have caused the sort of force to which the child-victim had been subject. The appellate court held that evidence was subject to *People v. Kelly*, and that its admission was prejudicial error. The court explained that "[t]here were flagrant loopholes in the acceptability of the procedures and calculations used in the . . . analysis:"

> "In her calculations Dr. Ward neglected to consider several important factors, including the mass of the child's body and the compressibility of the carpet, skull, and scalp. These factors were integral to the calculation of the force of the impact of Jaclyn's head on the stair. Dr. Ward tried to calculate

> the velocity of the head hitting the fifth step, but in doing so, she used only the mass of the head, not the body. Dr. Ward admitted that the inclusion of the body mass would have altered her calculations and results. Furthermore, the figure used in the analysis representing the mass of the head came from a chart, not from measurements of Jaclyn's head."
>
> "Similarly, although Dr. Ward took measurements on the compressibility of the carpet, she did not use them. In addition, she did not have data on the compressibility of the victim's skull and scalp. She assumed an average compressibility measurement, although conceding that if this were decreased, the force to the head would be greater. Even a slight change in this initial assumption could have significantly distorted the results by as much as 200 percent. She failed to offer a rational or scientific basis for her decision not to use the actual compressibility of the carpet, skull, and scalp. We conclude these foundational omissions invalidated the scientific conclusions offered to the jury. We are not convinced that 'correct scientific procedures were used.'" (163 Cal.App.3d at p. 295.)

In precisely the same way, Dr. Cheng's analysis was fraught with uncertainty from the large number of uncontrolled variables. For this reason alone, the prosecution failed to carry its burden of proving that Dr. Cheng's testimony followed any generally accepted scientific procedure. Dr. Cheng made unfounded assumptions about when the body started moving. He made unfounded assumptions about when the body stopped moving by arriving on shore. As a result, Dr. Cheng did not take into account what other wind and current variables would have come into play if his timing assumptions were wrong. That is, if he was wrong about how long the body was in the water, he could not accurately predict how far the body would travel or the direction it would come from, since the winds and currents (which are important under Cheng's thesis for determining

direction) change the more time the body is in the water. Further, because Dr. Cheng admitted that he was not an expert at all in the movement of bodies in water (101 RT 18925-18926), he could not factor into his analysis how the shape and size of a body would impact his conclusions. The failure of Dr. Cheng's model to account for the variable of the shape and size of the body moving through the water is fatal to any conclusion he might reach as to the movement of the bodies in the bay. In short, Dr. Cheng's conclusion was no more reliable than that in rejected in *Dellinger*. The trial court's refusal to apply *Kelly* cannot be rendered harmless by finding that the evidence would have been admitted under *Kelly*.

3. The trial court's refusal to apply *Kelly* cannot be rendered harmless by finding that Cheng's testimony was unimportant.

Regardless of whether the state or federal standard of prejudice is applied to the trial court's admission of Dr. Cheng's testimony, reversal is required. As Mr. Peterson has explained in Argument VI, *supra*, regarding the prejudicial impact of the erroneous introduction of dog scent evidence, four factors compel a finding of prejudice: (1) the closeness of the case, (2) the highly incriminating nature of the erroneously admitted evidence, (3) the prosecution's argument to the jury that the evidence alone proved Mr. Peterson's guilt, and (4) the tendency of a jury to stand "in awe" of a the scientific evidence, which jurors may assume is infallible.

All four factors are equally present in connection with the erroneous admission of Dr. Cheng's testimony. For the same reasons as described in the dog-scent argument, the case was closely balanced. Dr. Cheng's testimony was highly incriminating. Indeed, it was the only evidence in the entire trial that "connected the dots" between where Mr. Peterson was fishing and where Conner's body washed ashore: Dr. Cheng confidently told the jury that Conner's body was deposited in the bay at the very spot Mr. Peterson told authorities he had been fishing.

Moreover, because of the ostensibly scientific nature of this evidence, Dr. Cheng's testimony carried an aura of infallibility with the jurors. Indeed, this is precisely the reason that courts have required such evidence to meet strict foundational requirements. As this Court has explained, "[l]ay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Leahy*, *supra*, 8 Cal.4th at p. 595.) It is precisely this "misleading aura of certainty" (*ibid.*), that, as here, heightens the prejudicial effect. Dr. Cheng, after all, had impressive credentials, having taught at major universities and worked in the area of water movement in the San Francisco Bay as a senior hydrologist for the U.S. Geological Survey. His powerpoint exhibit was based on a great deal of technical information that had an aura of certainty. And, of course, the prosecutor told the jury that if Dr. Cheng was believed, "then that man's a murderer. It's as simple as that." (109 RT 20279-20280.)

As in the dog-scent argument, in light of the significance the prosecutor attached to Dr. Cheng's testimony, there is no reason to believe the jury did not agree with him. Moreover, Dr. Cheng's testimony bridged the major weakness in the prosecution case, i.e., that there was no forensic evidence connecting Mr. Peterson's boat or fishing trip with the bodies of the victims.

In short, Dr. Cheng's evidence materially contributed to the verdict. Reversal is required under either the state or the federal standard of prejudice.

X. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, AND VIOLATED MR. PETERSON'S FIFTH AND SIXTH AMENDMENT RIGHTS, IN (1) EXCLUDING CRITICAL DEFENSE EVIDENCE UNDERCUTTING THE STATE'S THEORY OF THE CASE, (2) REFUSING TO ALLOW DEFENDANT TO EXAMINE EVIDENCE ABSENT THE PRESENCE OF STATE PROSECUTORS AND (3) REFUSING TO GRANT A MISTRIAL AFTER THE JURY ITSELF PERFORMED AN EXPERIMENT DURING DELIBERATIONS.

A. The Relevant Facts.

The state's theory of this case was that Scott Peterson killed his wife in Modesto and put her body in the San Francisco Bay. The prosecutor had a three-part explanation for exactly how the body was transported from Modesto to the bay.

According to the prosecutor, Mr. Peterson first moved the body to his Modesto warehouse by putting her in a toolbox in the back of his truck. (109 RT 20202-20203.) Second, when Mr. Peterson got to the warehouse he attached homemade cement anchors to the body and placed it in the back of his 14-foot Sears-Roebuck boat which he then towed to the Berkeley Marina. (109 RT 20203.) Third, when he got to the marina he launched the boat and, once on the bay, he pushed the body (with the anchors) overboard. (109 RT 20203-20204.)

The prosecutor offered demonstrative evidence to support the first part of its theory and show that a woman who was nine months pregnant could fit in the toolbox in the back of the truck. (62 RT 12186, 12192.) The model in the state's demonstration was Kim Fulbright, a member of the prosecutor's own office. (62 RT 12173.) At the time of the demonstration, Ms. Fulbright was between 35 and 38 weeks pregnant. (62 RT 12191 [38 weeks], 12196 [35 weeks].)

The prosecutor also offered demonstrative evidence to support the second part of its theory and show that a woman who was nine months pregnant could fit in the back of Mr. Peterson's boat. (62 RT 12192.) The model was again Ms. Fullbright from the prosecutor's own office. (62 RT 12192.)

Defense counsel objected, contending that the demonstrations were inappropriate because of some basic differences between the demonstration and the state's theory. Counsel pointed out that the demonstration used a live person who could "fit herself" into certain positions, whereas the state's theory required transportation of a "dead person with rigor mortis setting in." (62 RT 12188.) In addition, Ms. Fulbright had a "different body type[]." (62 RT 12188.)

The trial court ruled that Ms. Fulbright was "close enough" in size so that the demonstration was admissible. (62 RT 12188.) According to the court, whatever differences there were, and whatever motive Ms. Fulbright had to "fit in" the truck and the boat by virtue of her employment with the prosecutor's office, were questions of weight not admissibility. (62 RT 12188.) In accord with the court's ruling, the state presented evidence that Ms. Fulbright could fit both in the truck and the boat. (62 RT 12192-12195.) Of course, this supported the first two-parts of the state's theory as to how Mr. Peterson transported the body to the bay, and that is exactly how the prosecutor used this demonstrative evidence in closing argument. (109 RT 20295.)

Curiously, although the prosecution had presented demonstrative evidence on the first two parts of its theory, it did not offer any demonstrative evidence at all as to the third part of its theory -- that Mr. Peterson could push an anchor laden body off his small boat without capsizing. Instead, the prosecutor called David Weber, who worked at the company which made the boat, and testified as to the stability of the same model boat in tests performed in on the same model boat in 1979, in a freshwater pool without waves or currents. (71 RT 13851-13853, 13854, 13866-13868, 13874.) Mr. Weber admitted on cross-examination that he did not know how stable the boat would be if several hundred pounds were moved to the side of the boat. (71 RT 13880.)

The defense sought to fill this obvious gap, offering videotaped evidence of a demonstration it performed as well. Using an employee of defense counsel's office -- paralegal Raffi Naljian -- the defense obtained the "exact same boat" and performed a demonstration in the same location as theorized by the state -- off Brooks Island. (104 RT 19371, 19401, 19404.) Because Laci Peterson weighed 153 pounds, Mr. Naljian attempted to push off the boat a mannequin that exact weight. (62 RT 12186; 104 RT 19371, 19404.) The mannequin had been placed in one of the same spots in the boat that the state had positioned Ms. Fulbright in its earlier demonstration. (104 RT 19405.) It also had four weights on it, equivalent in weight to the anchors which the state alleged had been used to weigh down Laci Peterson. (104 RT 19405; 20 CT 6338-6339.) Mr. Naljian wore a weight belt to duplicate Mr. Peterson's weight. (104 RT 19404.) The demonstration was done at the same time of day theorized by the state (12:30 to 1:00 p.m.) and the demonstration was filmed. (104 RT 19404-19405.) The experiment showed that the boat capsized.

The state objected, arguing that there were differences between the demonstration and the state's theory which rendered the demonstration inadmissible. (104 RT 19402-19403.) In particular, the prosecutor noted there was a piece of plywood in the bottom of the boat used by the defense for the test. (104 RT 19407.) According to the prosecutor, and without offering any supporting expert testimony, this piece of plywood somehow

"change[d] the stability of the boat." (104 RT 19407.) In addition, the prosecutor argued that there was no information about the tides, weather or wave conditions. (104 RT 19403.)

Of course, the prosecutor voiced none of these concerns when it introduced testimony from expert witness David Weber about the stability of the boat. As noted above, Mr. Weber testified about stability tests run *not* on the actual boat owned by Mr. Peterson but on the same model boat. And by his own admission, these tests were run in 1979, in a freshwater pool with no waves, tides or currents, and with the boat weighed down by water in the bottom (and therefore more stable). (71 RT 13854 [tests done in swimming pool]; 13865 [the tests were run with water in the boat to stabilize it]; 13866-13868 [tests were run without waives, tides or currents], 13874 [tests were run in 1979].)

The trial court noted that any demonstrative evidence as to disposal of the body must be "substantially similar" to the state's theory as to how the body was put in the ocean. (104 RT 19407.) According to the court, because there was no testimony about how the body was actually disposed of, the demonstrative evidence offered by the defense was inadmissable:

> "[I]t has to be substantially similar. We don't know what -- we don't know what the situation was there. There is no testimony has [sic] to how this

> body may have been disposed of from a boat. We don't know that." (104 RT 19407.)

The trial court's rationale was curious. After all, at every point in the case Mr. Peterson had protested his innocence. And under the state's theory, no-one else was present when the body was placed in the ocean. So as a practical matter, there was never going to be "testimony as to how this body may have been disposed of from a boat." And as defense counsel immediately pointed out, although there was (and could not be) any testimony as to how the body may have been disposed of, the state's entire theory of the case was predicated upon its belief that Mr. Peterson had put the body in the bay from his boat:

> "Excuse me. They have got a whole theory. That's the whole theory of the case. How could you possibly say it's not admissible? How can we test that theory?" (104 RT 19407.)[49]

The court expressed concern that (1) the defense had not used the actual boat, but only the same model boat (2) the test was performed by an employee of counsel's law

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[49] The trial court's rationale was curious for another reason as well. The trial court *excluded* demonstrative evidence offered by the defense because "we don't know what the situation was there." (104 RT 19407.) Ironically, at the state's request the trial court had previously *permitted* the jury to view the boat, despite its recognition that ""[w]e don't know how it was when he was out fishing." (71 RT 13836.) Moreover, the court permitted the state's demonstrative evidence of Ms. Fullbright in the truck and boat, although once again there was "no testimony" about how (or if) a body was transferred.

firm and (3) there was no information on whether the tide and wave action was the same as on December 24, 2002. (104 RT 19408.)

Defense counsel accurately pointed out that the prosecutor had used an employee (Ms. Fulbright) when he performed his demonstrative tests. (104 RT 19409.) The court noted that Ms. Fulbright did not have to demonstrate throwing something in the water. (104 RT 19409.)

Defense counsel asked to have the boat turned over to the defense so he could perform a test using the same boat. (104 RT 19409-19410.) Fairly read, the record shows the court and counsel became irritated with one another before the court's final ruling:

> "I don't have to explain my damn rulings. I made my rulings. I made this ruling, and that's the ruling period. All right. I'm not giving you the boat either." (104 RT 19410.)

Later, calmer heads prevailed and the court modified its ruling. The court ruled that it would provide the actual boat to defense counsel so long as the state was allowed to have someone present during any experiment. (104 RT 19413-19414.) The court said it would then "revisit" the issue of admissibility. (104 RT 19414-19415, 19418.)

The defense did not seek to re-do the experiment a second time with the state present. Defense counsel made clear his view that the court's limitation on the defense's ability to use the actual boat -- permitting access to the boat only on condition that the state be present for any test -- was an unconstitutional limit on the ability of the defense to present its case. (113 RT 20960.) And although the state had full access to the boat, it elected not to pursue demonstrative evidence on this point. (*See* 99 RT 18599 [detective Grogan admits that the prosecution decided "not to try and attempt to push an -- either a body or a weight out of the boat . . . ."].)

Having successfully objected to the defense's demonstrative evidence on the stability of the boat, the prosecutor repeatedly argued in closing argument that "there's no evidence that [the boat] would have" capsized. (109 RT 20292.) To the contrary, the prosecutor reminded the jury that "the guy from the company that made these boats" had talked about the stability tests. (109 RT 20292.) The prosecutor explained exactly how Mr. Peterson could have pushed a body out of the boat: "[you] [s]it on the middle of the seat, pull her so you kind of counterbalance it, and push her over. That's it. It's done in probably a minute, or less." (109 RT 20294.) The prosecutor again told the jury the boat was stable and argued that "[t]here's no evidence to contradict that whatsoever." (109 RT 20294.)

The jury began deliberating in the guilt phase on November 3, 2004. On the third day of deliberations the jury asked if it could see the boat again. (111 RT 20640-20642.) The court permitted this.

During examination of the boat, several jurors asked if they could sit in the boat. (111 RT 20643.) Once in the boat, several jurors stood up and began to rock the boat back and forth to test its stability. (111 RT 20643-20644.) At the time, the boat was sitting on a trailer in a garage. (111 RT 20643.) Defense counsel objected, and the court told the jurors that stability was not the same on a trailer as in the water. (111 RT 20644-20645.)

Outside the jurors' presence, defense counsel contended the jurors' actions constituted an improper juror experiment and an equally improper taking of additional evidence. (111 RT 20643-20644.) The court itself explained that when it permitted the jurors to see the boat it did not know the jurors would "jump up and down on the boat . . . ." (111 RT 20645.) Later, the court agreed with defense counsel that jurors in the boat were shifting their weight back and forth from one leg to another. (111 RT 20646.)

The prosecutor disagreed with the trial court's own characterization, arguing that the jurors were not "jumping up and down." (111 RT 24646.) According to the

prosecutor, the jurors' actions did not constitute "an experiment or demonstration by the jury." (111 RT 20645.)

Defense counsel renewed his request to introduce the demonstration the court had earlier excluded. (111 RT 20643-20644, 20647.) In the alternative, defense counsel asked for a mistrial. (111 RT 20647.)

The court denied both motions. (111 RT 20647-20648; 112 RT 20713.) According to the court, the jurors did not engage in a prohibited demonstration or experiment, but simply engaged in "physical manipulation of evidentiary exhibits." (111 RT 20647.)

As more fully discussed below, reversal is required for three distinct reasons. First, the trial court erred in excluding the demonstrative evidence when it was originally offered by the defense. Although the experiment was not performed under conditions which were identical to the conditions of the original event theorized by the state, absolute identity has never been required for experiments to be admissible. Instead, because the experiment was substantially similar to state's theory of what happened on December 24, 2002, the experiment should have been admitted. And although the court was correct that (1) "[t]here is no testimony []as to how this body may have been disposed

of from a boat," (2) although the same model boat had been used, the actual boat was not used, and (3) a member of defense counsel's law firm performed the demonstration, none of these facts has anything to do with admissibility.

Second, even assuming the court properly excluded the evidence, the court violated the Fifth and Sixth Amendments when it ruled that the defense would not have access to the actual boat for testing unless the prosecution was present at any such testing. Because the testing was non-destructive, Mr. Peterson had an absolute constitutional right to have his counsel prepare the defense case without the prosecutor's involvement.

Finally, even setting aside both these issues, reversal is required because the jury performed an improper experiment regarding the stability of the boat under conditions which could not have given the jury anything close to a reliable indication of how the boat acted in the open ocean. The experiment introduced entirely new information into the deliberative process, in violation of Mr. Peterson's Fifth and Sixth Amendment rights. Considering these violations either separately or together, reversal is required.

B. The Trial Court Violated Both State And Federal Law In Excluding The Demonstrative Evidence Regarding The Stability Of The Boat.

The state theorized that Mr. Peterson pushed Laci's body, with anchors attached, off the 14-foot boat into the bay. The trial court excluded defense evidence of an experiment showing that if a man of Mr. Peterson's weight tried to do what the state suggested, the boat would capsize. In closing argument, the prosecutor then relied on the absence of any defense evidence suggesting the boat was unstable. The trial court's ruling violated both state and federal law.

1. Exclusion of this evidence violated state law.

Under state law, all relevant evidence is admissible. (Evidence Code § 350.) This same rule applies to demonstrative evidence -- it must be relevant to be admissible. (*See*, *e.g.*, *Culpepper v. Volkswagen of America* (1973) 33 Cal.App.3d 510, 521.) Courts have long held that for a demonstrative test to be relevant and admissible, it must be conducted under "substantially similar conditions as those of the actual occurrence." (*People v. Bonin* (1989) 47 Cal.3d 808, 847; *Culpepper v. Volkswagen*, *supra*, 33 Cal.App.3d at p. 521.) Because conditions can rarely ever be matched exactly, however, courts have long recognized that the test conditions need not be identical, but need only be substantially similar. (*See*, *e.g.*, *People v. Bradford* (1997) 15 Cal.4th 1229, 1326; *People v. Turner*

(1994) 8 Cal.4th 137, 198; *Sonoma County v. Stofen* (1899) 125 Cal. 32, 38.) As one court has noted, "[e]xact identity of conditions is next to a scientific impossibility." (*Odell v. Frueh* (1956) 146 Cal.App.2d 504, 512.)

There are numerous examples of this rule holding that the proponent of an experiment need not perform a test under the exact same atmospheric conditions as the original event. For example, in *People v. Spencer* (1922) 58 Cal.App. 197, defendant was convicted of murder. The state's theory was that a witness heard the victim scream on the night of the murder from some distance away. Over defense objection, the trial court admitted a test performed by the investigating sheriff as to whether a scream from the crime scene could be heard from the witness's location. The record showed that (1) the crime occurred at night, (2) on the night of the crime the wind was not blowing and (3) the witness who heard the screams was lying in his bed at the time. Nevertheless, the investigating sheriff performed an experiment (1) during the day, (2) at a time when the wind *was* blowing, and (3) the sheriff was not lying down in bed but was "in a standing position, and out in the open." (58 Cal.App. at p. 228.) The reviewing court nevertheless held that only "substantial likeness" was required, and the test was properly introduced; the differences between the night of the crime and the conduct of the test went "to the weight of the testimony" rather than its admissibility. (*Ibid. Accord People v. Phelan* (1899) 123 Cal. 551, 568 [test performed to determine if sounds could be heard were

admissible at trial even though the crime occurred at night, the tests were conducted during the day and there was no showing "that the atmospheric conditions . . . were the same."].)

Similarly, when a crime involves a car or a gun, experiments are admissible even when they involve a different gun or a different car, so long as the items used are "substantially similar." (*See*, *e.g.*, *People v. Turner* (1994) 8 Cal.4th 137, 196-198 [victim was killed by a .38 caliber gun, test performed with a different gun of the same caliber with "similar ammunition;" held, test results properly admitted since relevance requires test to be under "substantially similar, although not necessarily identical, conditions as those of the actual occurrence."]; *Hasson v. Ford Motor Co*. (1977) 19 Cal.3d 530, 548-549 [plaintiff injured in crash while driving a 1966 Lincoln Continental, defendant performs test with other models of this car; held, evidence admissible]; *People v. Crawford* (1940) 41 Cal.App.2d 198, 205 [in murder case where defendant's car went over a cliff with the victim in it, defendant said his brakes failed as he drove downhill, state performed test using different cars to show that even if brakes failed, car would not have gone off the cliff; held, tests admissible even though cars were of "different makes, models and weights" than defendant's car].)

Here, the trial court's exclusion of defendant's demonstrative evidence violated state law. Although the test conditions for the demonstration may not have been identical to December 24, 2002, they were substantially similar. Thus, as noted above, the defense here (1) obtained and used the same model boat as the state alleged was involved in the case, (2) performed the demonstration in the same location as theorized by the state, (3) required Mr. Naljian to wear a weight belt so his weight matched that of Scott Peterson, (4) used a mannequin which weighed the same as Laci Peterson, (5) placed that mannequin in the same location of the boat as the prosecutor contended Laci Peterson had been placed, (6) used anchors weighing the same amount as theorized by the state and (7) performed the test at the same time of day as Scott Peterson was concededly on the bay on December 24, 2002. (62 RT 12186, 104 RT 19371, 19401, 19404-19405.)

The trial court accurately noted that although the defense used the same model boat, it did not use the actual boat that the state alleged was involved. (104 RT 19408.) Although this may go to the weight of the evidence, the case law simply does not support this as a factor permitting an absolute exclusion of the evidence. As noted above, in numerous cases involving cars or guns, performing a test using the same model car or gun as was involved in the case has consistently been deemed sufficiently similar. (*See*, *e.g.*, *People v. Turner*, *supra*, 8 Cal.4th at pp. 196-198; *Hasson v. Ford Motor Co.*, *supra*, 19 Cal.3d at pp. 548-549; *People v. Crawford*, *supra*, 41 Cal.App.2d at p. 205.)

The trial court also relied on the fact that the person who performed the test, Mr. Naljian, worked at the law firm of defendant's lawyer. The record of this case itself does not support this as a factor justifying exclusion of the evidence; after all, the prosecution was permitted to introduce demonstrative tests performed by Kim Fulbright, an employee of the prosecutor. (62 RT 12188.) Nor does the case law support the trial court's position; experiments performed by members of the prosecution team have consistently been admitted on the state's behalf in criminal cases. (*See*, *e.g.*, *People v. Turner*, *supra*, 8 Cal.4th at pp. 196-198 [experiment offered by state properly introduced even though it was conducted by investigating police officer]; *People v. Dyer* (1938) 11 Cal.2d 317, 321 [experiment offered by state properly introduced even though it was conducted by police]; *People v. Crawford*, *supra*, 41 Cal.App.2d at p. 205 [same]; *People v. Spencer*, *supra*, 58 Cal.App. at p. 228 [experiment offered by state properly introduced even though it was conducted by investigating sheriff].) What each of these cases recognize is that the relevant question for purposes of admissibility is not who conducts the test, but how it is conducted. If the test is "substantially similar" to the events at issue, it is admissible; the question of who performed the test goes to weight, not admissibility.

Finally, the court relied on the fact that there was no information on whether the tide and wave action was the same as on December 24, 2002. (104 RT 19408.) But as the above case law also shows, because these kinds of atmospheric conditions are

impossible to control completely, identity is not required; the general rule is that such differences do not require exclusion of the evidence, but simply go to the weight of the evidence. (*People v. Spencer*, *supra*, 58 Cal.App. at 228; *People v. Phelan*, *supra*, 123 Cal. at p. 568.)

It is true, of course, that the decision as to whether to admit an experiment is within the discretion of the trial court. (*See*, *e.g.*, *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1388.) And in determining whether a trial court has abused its discretion, many courts (including this one) have noted that "[d]iscretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) Other courts have written that discretion is abused only when the trial court's ruling was "arbitrary, whimsical or capricious." (*See*, *e.g.*, *People v. Linkenauger* (1995) 32 Cal.App.4d 1603, 1614.)

With respect, neither of these phrasings is particularly helpful or, indeed, even accurate. While "exceed[ing] the bounds of reason," or making an "arbitrary, whimsical or capricious" ruling will certainly be sufficient for a reviewing court to conclude a trial court has abused its discretion, these are certainly not the necessary requirements for a conclusion that discretion has been abused. Indeed, some courts have criticized these colorful descriptions of the abuse of discretion standard in search of principles that can

actually be used in practice. (*See People v. Jacobs* (2007) 156 Cal.App.4th 728, 736; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 [criticizing the "arbitrary, whimsical or capricious" test as "pejorative boilerplate"].) Putting aside colorful descriptions and "pejorative boilerplate," the ultimate question is whether the trial court's decision was unreasonable in light of the governing law and the facts presented. (*People v. Jacobs*, *supra*, 156 Cal.App.4th at pp. 737-738.)

Here it plainly was. The case law supports *none* of the factors on which the trial court relied. And, in fact, although the demonstration offered may not have been performed under identical conditions to those theorized by the prosecution, in light of the case law developed in this area over the years, it was plainly "substantially similar" and should have been admitted. The trial court's contrary ruling violated state law.[50]

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[50] As noted above, the trial court also found the experiment was not substantially similar because "[w]e don't know what -- we don't know what the situation was there. There is no testimony has [sic] to how this body may have been disposed of from a boat. We don't know that." (104 RT 19407.) This Court has specifically rejected the notion that where two parties have different explanations for an event, a trial court may exclude from evidence an experiment which assists the jury in assessing which explanation is valid simply because "it is not definitively known" what happened during the event in question in the first instance. (*People v. Turner*, *supra*, 8 Cal.4th at p. 199.)

2. Exclusion of this evidence also violated federal law.

There are two federal constitutional dimensions to this error as well. First, exclusion of this evidence violated the Fifth and Sixth Amendment rights to present a defense.

In this regard, the Fifth Amendment provides that no person may be deprived of liberty without "due process of law." Under this constitutional guarantee, while a defendant is not entitled to a perfect trial, he is entitled to a fair one. (*Estes v. Texas* (1965) 381 U.S. 532.) In gauging the fairness of a trial, "few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Thus, the right to present evidence "has long been recognized as essential to due process." (*Id*. at p. 294.)

Similarly, the Sixth Amendment provides that defendants in criminal cases shall "have compulsory process for obtaining witnesses in his favor . . . ." The Sixth Amendment requires "at a minimum that criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.)

Taken these rights together, the Supreme Court has repeatedly held that when a trial court excludes reliable defense evidence which fully corroborates a defense presented to the jury, the defendant's Fifth Amendment right to a fair trial and his Sixth Amendment right to confrontation, have been violated. (*See*, *e.g.*, *Davis v. Alaska* (1974) 415 U.S. 308, 319-320; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23.) The Court has applied this rule when the state court's exclusion of defense evidence is based on a general rule of state law declaring inadmissible an entire class of evidence. (*See*, *e.g.*, *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302 [constitutional error where state statute precluded defendant from introducing evidence to impeach his own witness]; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23 [constitutional error where state statute precluded defendant from calling an accomplice to testify for the defense].) The Court has also applied this very same rule when the state court's exclusion of evidence is *not* based on a general rule of state law, but instead is based on a state trial court's individual exercise of discretion in ruling evidence inadmissible in a particular case. (*See*, *e.g.*, *Crane v. Kentucky* (1986) 476 U.S. 683, 687-691 [constitutional error where state trial court made discretionary ruling precluding defense from offering evidence regarding voluntariness of defendant's confession]; *Smith v. Illinois* (1968) 390 U.S. 129, 130-133 [constitutional error where

state trial court made discretionary ruling precluding defense from asking certain questions on cross-examination].)[51]

Here, for many of the same reasons as discussed above, the exclusion of this evidence violated these authorities. The state's entire theory of the case depended on the jury accepting the premise that Mr. Peterson put the body in the bay from his boat. If that could not be accomplished without capsizing the boat, the state's theory could simply not be accepted. And the Court does not have to guess at the importance of this issue; the jury's decision to perform a stability experiment on its own (discussed more fully in Argument X-D below) makes clear this was critical evidence which should not have been excluded.

Exclusion of this evidence violated the constitution in a second way as well. In addition to guaranteeing the right to present a defense, the Fifth Amendment provides a right to respond to evidence presented by the state. Thus, where the prosecution is

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[51] Not surprisingly, every federal circuit to reach the issue has reached the identical result. A state trial court's discretionary decision to exclude reliable and critical defense evidence is unconstitutional even where that ruling is not based on a "general rule of evidence" creating a per se exclusion of the evidence at issue. (*See*, *e.g.*, *Howard v. Walker* (2nd Cir. 2005) 406 F.3d 114; *Lyons v. Johnson* (2nd Cir. 1996) 99 F.3d 499; *Kittelson v. Dretke* (5th Cir. 2005) 426 F.3d 306; *Ferensic v. Birkett* (6th Cir. 2007) 501 F.3d 469; *Vasquez v. Jones* (6th Cir. 2007) 496 F.3d 564; *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057; *Ellis v. Mullin* (10th Cir. 2002) 326 F.3d 1122.)

permitted to introduce evidence on a particular issue, Due Process precludes preventing a defendant from introducing evidence on the same issue. (*See*, *e.g.*, *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169 [in a capital case, Due Process does not permit the state to argue future dangerousness to the public as a reason to sentence defendant to death while at the same time exclude evidence from defendant showing that he would never get out of prison]; *Crane v. Kentucky*, *supra*, 476 U.S. at pp. 690-691 [Due Process and Confrontation clauses do not permit the state to rely on a defendant's confession while at the same time exclude evidence from defendant explaining why the confession was unreliable].

Here, the state was permitted to introduce evidence as to the stability of Mr. Peterson's boat by calling a witness who testified to stability experiments (1) performed in 1979, (2) on the same model boat (3) in a pool (4) with no waves, current or tides. Mr. Peterson should have been permitted to rebut this evidence by calling a witness to testify about an experiment also performed on the same model boat, but done in the open ocean, exactly where the state said the incident occurred with bodies the exact same size as theorized by the prosecutor. Exclusion of this evidence violated the Fifth and Sixth Amendments for this reason as well.

3. The exclusion of this evidence requires reversal under either state or federal law.

When a trial court erroneously excludes relevant evidence in violation of state law, the error is reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818. Such state law errors require reversal whenever "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d at p. 837.) When a trial court excludes evidence in violation of a defendant's Fifth and Sixth Amendment rights, reversal is required unless the state can show the error was "was harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

In this case, it does not matter whether the error is reviewed under the state or federal standard. Under either standard, reversal is required.

As discussed above, in order to convict the jury had to find that Mr. Peterson put Laci's body in the bay from his boat. The trial court excluded evidence directly supporting the defense theory that the boat would have capsized had such an attempt been made. Had the jury accepted this defense evidence, the state's theory simply could not be accepted. Indeed, the importance of this evidence was recognized not only by the defense in seeking to offer the evidence, but by (1) the state in offering its own evidence on

stability of the boat and (2) the jury by performing its own experiment on stability. Finally, the prosecutor himself recognized the importance of this testimony, explicitly (and repeatedly) urging the jury to rely on the absence of any defense evidence that the boat was unstable. (109 RT 20292, 20294.) The exclusion of this evidence was prejudicial under any standard.

C. The Trial Court Violated Both State And Federal Law In Hinging Defendant's Access To The Boat On The Prosecutor's Presence At Any Experiment.

As noted above, one reason the trial court gave for excluding the original demonstration videotape was that the defense had not used Mr. Peterson's actual boat (which was in police custody) but had instead simply used the same model. (104 RT 19408.) Accordingly, defense counsel asked to have the boat released to the defense so he could perform another test. The court initially refused to provide the boat at all, then agreed to provide the actual boat to defense counsel so long as the state was allowed to have someone present during any experiment. (104 RT 19410, 19413-19414.) Defense counsel refused to perform a second experiment under these conditions, explaining that the court's order violated the Fifth and Sixth Amendment. (113 RT 20960.)

Defense counsel was right. Because the testing defense counsel sought to do was not destructive, and because the state would have been free to itself test the boat, the trial court violated defendant's Sixth Amendment right to the effective assistance of counsel, and his Fifth Amendment right to due process, in hinging defense counsel's ability to test the boat on the prosecutor's presence at any testing. Because counsel's ineffectiveness was induced by the trial court, reversal is required without a showing of prejudice.

1. Hinging defendant's access to potentially exculpatory testing on the prosecutor's presence at any such testing violates the Sixth Amendment.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall [have] the right . . . to have the [a]ssistance of [c]ounsel for his defense." This includes the right to effective assistance of counsel. (*United States v. Cronic* (1984) 466 U.S. 648, 655.)

This right to effective assistance applies not only to trial itself, but to counsel's preparation of a case for trial. (*See*, *e.g.*, *Powell v. Alabama* (1932) 287 U.S. 45, 71; *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 750; *People v. Carter* (1967) 66 Cal.2d 666, 669; *People v. Douglas* (1964) 61 Cal.2d 430, 434.) It includes the right to

assistance of ancillary personnel necessary to prepare a defense, such as investigators and experts. (*See*, *e.g.*, *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319, 320.)

Of course, the right to counsel would be of little value if counsel could not speak freely with members of the defense team in preparing for trial. Thus, the right to counsel also includes the right to communicate with experts and investigators and prepare the defense in confidence. (*See Jones v. Superior Court* (1962) 58 Cal.2d 56, 61; *People v. Lines* (1975) 13 Cal.3d 500, 510.) A trial court violates the constitution when it conditions investigative or expert assistance to a criminal defendant on condition of automatic disclosure to the state of any evidence developed as a result of that investigation or assistance. (*See*, *e.g.*, *Smith v. McCormick* (9th Cir. 1990) 914 F.2d 1153, 1159-1160; *United States v. Alvarez* (3rd Cir. 1975) 519 F.2d 1036, 1045-1046.) For similar reasons, a court may not require the defense in a criminal case to use the prosecution's investigator. (*Marshall v. United States* (10th Cir. 1970) 423 F.2d 1315, 1319.)

These rules have been applied to a defendant's right to test evidence admitted against him. Where defendant seeks to perform tests that will consume or destroy the evidence -- such as where the defendant seeks to perform DNA or other tests which will use the entirety of a biologic sample -- it does not violate the Sixth Amendment for a trial

court to preclude the defense from conducting an independent test, and require any testing be performed in the presence of both parties. (*See*, *e.g.*, *People v. Cooper* (1991) 53 Cal.3d 771, 815.) But where the defense seeks to perform tests which will *not* destroy evidence, and which the state is free to repeat on its own if it sees fit, it violates the Sixth Amendment right to counsel for a trial court to hinge defense access to evidence on condition of automatic disclosure to the state of the test results. (*See*, *e.g.*, *People v. Prince* (1992) 8 Cal.App.4th 1176, 1179-1181; *State v. Mingo* (N.J. 1978) 392 A.2d 590.)

State v. Mingo, *supra*, is instructive because it involves virtually the same issue presented here. There, defendant was charged with rape. The victim had gotten lost in a section of Patterson, New Jersey and had stopped to ask for directions. Her eventual assailant provided handwritten directions. In order to prepare his case, defense counsel asked the court to release this handwriting sample for a handwriting analysis. Although the defense test would not have destroyed the evidence, and over defense objection, the trial court agreed to release the evidence only on condition that the defense would automatically furnish the results to the state. Defense counsel's expert concluded the note was indeed written by the defendant, the state received a copy of this report and called the witness to testify at trial.

On appeal, the New Jersey Supreme Court first noted that to safeguard the Sixth Amendment right to effective counsel, it is essential that a defense attorney "be permitted full investigative latitude in developing a meritorious defense on his client's behalf" and observed that this latitude "will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial." (*State v. Mingo*, *supra*, 392 A.2d at p. 592.) The court pointed out that a defense attorney has a "right to seek out . . . evidence in aid of the defense without risking its disclosure to the State if for any reason the expert's opinion turns out to be unfavorable to the defense." (*Id*. at p. 593.) In finding a Sixth Amendment violation, the court concluded that defense counsel "'must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.'" (*Ibid*.) The court added that if the state believed the handwriting analysis was important it was "fully capable" of performing its own test on the handwriting sample. (392 A.2d at pp. 582, 585.)

The California Court of Appeal reached the same result in *Prince*. There, defendant was charged with five counts of murder. Police recovered vaginal swabs from one of the victims. There was enough biologic material on these swabs to create five separate samples for possible testing. When defendant requested access to the material for testing, the trial court ordered that the swabs "be divided between the parties to

conduct [DNA] tests." (8 Cal.App.4th at p. 1179.) But the trial court went on to order that "[e]ach party may observe both tests and will be provided with a report on both." (*Ibid*.) On appeal, defendant challenged this order on both Due Process and Sixth Amendment grounds. (8 Cal.App.4th at p. 1180.)

The appellate court did not reach the Due Process issue "since the trial court order deprives [defendant] of effective assistance of counsel." (*Id*. at p. 1180.) The court noted that the right to effective assistance applied to counsel's preparation for trial and required that he be allowed to communicate with other members of the defense team in confidence. (*Ibid*.) In concluding that the Sixth Amendment was violated, the court was careful to note that because there was sufficient biologic material, "[t]he People will have, at least, four semen test samples" to test on their own. (8 Cal.App.4th at p. 1180.)

These same principles govern this case. The trial court excluded defense counsel's first offer of demonstrative evidence at least in part because the defense had not used Mr. Peterson's actual boat. When defense counsel sought the actual boat, the trial court conditioned release of the boat on the state's presence at any testing. The obvious effect of this limitation was to require automatic disclosure of the test results to the state. This is exactly what cases like *Prince*, *Mingo*, *Alvarez* and *Smith* cautioned against. And as in *Prince* and *Mingo*, if the state considered this issue important, it could always have

conducted a test on its own. The trial court's limitation on defendant's access to the boat violated the Sixth Amendment right to the effective assistance of counsel.

2. Hinging defendant's access to potentially exculpatory testing on the prosecutor's presence at any such testing violates the Fifth Amendment.

It also violated the Fifth Amendment right to due process. In this regard, the due process clauses of the Fifth and Fourteenth Amendments guarantee criminal defendants "a fair opportunity to present [a] defense." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 76.) This "fair opportunity" includes not only "an adequate opportunity to present . . . claims fairly within the adversary system," but "access to the raw materials integral to the building of an effective defense." (*Id.* at p. 77.) In other words, encompassed within the due process right to present a defense is the right to access evidence necessary for the defense. When the state makes a particular issue critical to the case, it may not preclude defendant from the tools needed to contest that issue. (*Id.* at p. 80, 83. *Compare Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 168-169 [where states argues future dangerousness to the public as a reason to sentence defendant to death, Due Process does not allow the state to exclude defense evidence showing that defendant would never get out of prison]; *Crane v. Kentucky*, *supra*, 476 U.S. at pp. 690-691 [where state relies on

defendant's confession, Due Process and Confrontation clauses do not allow the state to exclude defense evidence explaining why the confession was unreliable].)

The due process right articulated by *Ake* -- "access to the raw materials integral to the building of an effective defense" -- necessarily includes the right to build that defense in confidence. After all, the purpose of providing these raw materials is "to help determine whether" a particular defense "is viable" in the first instance. (*Ake v. Oklahoma*, *supra*, 470 U.S. at p. 82.) If the state is entitled to be present at tests where a defense is being considered and/or prepared, the right to conduct such tests and prepare a defense would be a hollow one indeed. (*See Smith v. McCormick*, *supra*, 914 F.2d at p. 1159 ["To impose such a condition . . . takes away the efficacy of the tool."]. *See also Alvarez v. United States*, *supra*, 519 F.2d at p. 1046; *Powell v. Collins* (6th Cir. 2003) 332 F.3d 376, 391-392.)

Here, the testing requested by the defense would not have altered the boat at all. Thus, the state could always have performed its own test. In this situation, permitting the defense to use the boat for a test only on condition that the prosecution be present at that test was a fundamental violation of Due Process.

3. Because the court itself induced counsel's ineffectiveness, reversal is required under the Sixth Amendment.

In *Strickland v. Washington* (1984) 466 U.S. 668, the Supreme Court addressed for the first time the question of what standard should apply to "judge a contention that the Constitution requires a criminal judgment be overturned because of the actual ineffective assistance of counsel." (466 U.S. at p. 684.) The Court initially held that a defendant must prove his lawyer's performance was deficient. (*Id*. at pp. 687-691.)

The Court then addressed allocation of the burden of proof in connection with the question of prejudice. The Court was explicit that allocation of the burden of proof depended on whether the right to counsel had been impaired by state conduct, or simply by an ineffective lawyer. Thus, the Court ultimately concluded it was appropriate to impose the burden of proving prejudice on the defendant in *Strickland* itself precisely because the state was not responsible for the error in the first instance:

> "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." (466 U.S. at p. 693.)

The Court was careful to distinguish these types of ineffectiveness claims from situations where the lawyer's effectiveness was compromised because of state action. The Court noted that in cases involving "state interference with counsel's assistance" the defendant did *not* have a burden to prove prejudice, but prejudice was "presumed." (466 U.S. at p. 692.) The Court explained that the reason these types of errors were treated differently was because the state was responsible for the error and as a result such errors were "easy for the government to prevent." (*Ibid*.)

The different treatment *Strickland* afforded state-created impediments to counsel's assistance reflected the exact position taken by the State of California as well. In *Strickland*, Solicitor General Lee filed an amicus brief on behalf of Florida, the petitioner in that case. The California Attorney General joined that brief. (466 U.S. at p. 670.) California argued it was fair to impose the burden of proving prejudice on defendants "because neither the prosecution *nor the court* is responsible for the alleged defects in the proceedings." (*Strickland v. Washington*, 82-1554, Brief of Solicitor General (Joined by California) at p. 28, emphasis added.) California explained that in the typical ineffective assistance of counsel situation it would be unfair to impose a prejudice burden on the state because the state was simply not responsible for counsel's error:

> "[B]ecause neither the prosecution nor the court is responsible for the alleged errors by defense counsel, it would be unfair to require . . . that the government bear the burden on the question [of prejudice].) (*Id*. at p. 44.)

Strickland's focus on the source of the error in allocating the burden of proof was not only premised on California's own position in the case, but on a long line of Supreme Court case law holding that where the state itself created an impediment to counsel's representation in a criminal case, the defendant did not have to prove prejudice. Indeed, the Court's case law both before and after *Strickland* makes this point plain.

For example, the Court has properly held that where defense counsel in a criminal case decides not to present closing argument on a defendant's behalf, a defendant seeking to prove counsel ineffective must establish prejudice under *Strickland*. (*Bell v. Cone* (2002) 535 U.S. 685, 696-699; *see People v. Dickey* (2005) 35 Cal.4th 884, 925-926.) But where defense counsel's failure to present closing argument is caused *not* by defense counsel himself, but by a state-created rule, the Court has held defendant need *not* prove prejudice. (*Herring v. New York* (1975) 422 U.S. 853.)

The difference between *Herring* and *Bell*, of course, is that the impediment in *Herring* was state-created. As the state of California argued in *Strickland*, it is entirely fair to put the prejudice burden on the state where the state is "responsible for" the error

as it was in *Herring*. And the Court in *Strickland* agreed, noting that prejudice should be presumed where the state "is directly responsible" for the error. (466 U.S. at p. 692.) Indeed, in *Bell v. Cone* itself the Court explained the result in *Herring* by noting that it involved "government action." (*Bell v. Cone*, *supra*, 535 U.S. at p. 696, n.3.)

Significantly, the Court's focus on "government action" in allocating the burden of proof in *Strickland*, *Bell* and *Herring* is entirely consistent with more than four decades of Supreme Court case law:

- Where defense counsel fails to consult with the defendant, a defendant seeking to prove counsel ineffective must establish prejudice under *Strickland*. (*See*, *e.g.*, *Kleba v. McGinnis* (7th Cir. 1986) 796 F.2d 947, 954.) But where it is a state-created impediment that prevents counsel from consulting with defendant, the defendant need *not* prove prejudice. (*Geders v. United States* (1976) 425 U.S. 80.)

- Where defense counsel fails to call certain witnesses, a defendant seeking to prove counsel ineffective must prove prejudice under *Strickland*. (*See*, *e.g.*, *Strickland v. Washington*, *supra*, 466 U.S. at pp. 699-700.) But where defense counsel is precluded from calling certain witnesses by a state statute, no prejudice need be shown. (*Washington v. Texas* (1967) 388 U.S. 14.)

- Where defense counsel fails to cross-examine certain witnesses, a defendant seeking to prove counsel ineffective must prove prejudice under *Strickland*. (*See*, *e.g.*, *Higgins v. Renico* (6th Cir. 2006) 470 F.3d 624, 634-635; *Welch v. Sirmons* (10th Cir. 2006) 451 F.3d 675, 706.) But where defense counsel is precluded from cross-examining

> a state witness by a state statute, no prejudice need be shown. (*Davis v. Alaska* (1974) 415 U.S. 308.)[52]

In each of these cases, where the impediment is state-created the Court has refused to require defendants to prove prejudice under *Strickland*. Indeed, in *Bell v. Cone* the Court again explained the result in *Geders* by noting that it involved "government action." (*Bell v. Cone*, *supra*, 535 U.S. at p. 696, n.3.) As the Court has noted, where the state itself has interfered with defense counsel's representation, the standard of prejudice is "a different matter." (*Perry v. Leeke* (1989) 488 U.S. 272, 279.) State interference with defense counsel's ability to represent a criminal defendant "is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." (*Id*. at p. 280.)

Lower federal courts have consistently followed this authority. Thus, when the state is not a passive spectator of an inept defense, but instead interferes with the ability of counsel to make independent decisions about how to conduct the defense, the defendant's "burden of showing prejudice is lifted." (*Walberg v. Israel* (7th Cir. 1985) 766 F.2d 1071, 1076.) And the Eleventh Circuit Court of Appeal has concluded the *Strickland* harmless error standard does not "apply to situations where the state, the court,

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[52] *See also Brooks v. Tennessee* (1972) 406 U.S. 605 [no showing of prejudice required where impediment to defense counsel's representation was caused by state law]; *Ferguson v. Georgia* (1961) 365 U.S. 570 [same].

or the criminal justice system denies a defendant [the effective] assistance of counsel." (*Crutchfield v. Wainwright* (11th Cir. 1986) 803 F.2d 1103, 1108; *accord United States v. Green* (D.C. Cir. 1982) 680 F.2d 183, 189.)

The same is true here. The trial court directly interfered with defendant's right to counsel when it hinged counsel's ability to perform tests on the boat on the presence of representatives from the prosecutor's office. Pursuant to clear authority from the Supreme Court, prejudice is presumed and reversal is required.[53]

D. The Trial Court Violated Both State And Federal Law In Denying Defense Counsel's Motion For A Mistrial After The Jury Performed An Experiment During Deliberations.

As noted above, in the middle of guilt phase deliberations the jury asked to see Mr. Peterson's boat. (111 RT 20640-20642.) The boat was then sitting on a trailer in a

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[53] As discussed above, in addition to violating the Sixth Amendment, the court's order also violated the Fifth Amendment. Because the Sixth Amendment component of this issue requires reversal (as discussed above), there is no need to dwell on the prejudice caused by violation of the Fifth Amendment.

Suffice it to say here that even if the error under the Fifth Amendment permitted a harmless error inquiry, the state would have to prove the error harmless beyond a reasonable doubt. Given that (1) the jury deliberations show the jury was plainly concerned with the stability of the boat, (2) the one experiment showed the boat was *not* stable, but would capsize, and (3) the prosecutor relied in closing on the absence of any evidence showing that the boat was unstable, the state cannot carry this burden.

garage. (111 RT 20643.) During the examination, several jurors got in the boat and began to rock it back and forth to test its stability. (111 RT 20643.)

Out of the jury's presence, defense counsel objected to this jury experiment and asked for a mistrial. (111 RT 20643-20645, 20647.) The court denied the motion, ruling that the jurors did not engage in a prohibited demonstration or experiment, but simply engaged in "physical manipulation of evidentiary exhibits." (111 RT 20647.) The trial court's ruling violated both state and federal law.

In making this argument Mr. Peterson recognizes that "[n]ot every experiment constitutes jury misconduct." (*People v. Cumpian* (1991) 1 Cal.App.4th 307, 316.) The seminal state case distinguishing between proper and improper experiments is this Court's decision in *Higgins v. Los Angeles Gas & Electric Co*. (1911) 159 Cal. 651. There, the Court noted the "fundamental rule that all evidence shall be taken in open court and that each party . . . shall . . . thus be enabled to meet and answer" the evidence. (159 Cal. at p. 656.) The Court went on to set forth a general rule to apply in distinguishing proper from improper jury experiments:

> "[Jurors] may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. They may carry out experiments within the lines of offered evidence, but if their experiments shall invade new fields and they

> shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain." (159 Cal. at p. 657.)

Over the many years since *Higgins*, state courts have frequently been called on to decide whether a jury's experiment is simply "within the lines of offered evidence" (which is permissible) or "invade[s] new fields" (which is impermissible). When a jury (or juror) performs an experiment with physical evidence which closely approximates the testimony given in open court as to the conditions of the event at issue, the experiment is squarely "within the lines of offered evidence" and does *not* constitute misconduct. (*See*, *e.g.*, *People v. Cumpian*, *supra*, 1 Cal.App.4th 307, 314-15 [defendant charged with robbery of a duffel bag, at trial a security officer testified as to how defendant held the bag, during deliberations, some jurors experimented with the bag to see how long it would take to take off the bag; held, the experiment was proper and did not introduce any new evidence, where jurors simply "strapped the duffle bag across their torsos in a fashion similar to that described by the witnesses during trial."]; *People v. Cooper* (1979) 95 Cal.App.3d 844, 852-854 [defendant charged with possession of heroin for sale, at trial a police officer demonstrated the manner in which defendant threw away the bag of heroin, during deliberations, some jurors re-enacted the alleged act of throwing the heroin

away; held, the experiment was proper, and did not introduce new evidence, where jurors "simply repeated the officer's re-enactment."].)

But when a jury (or juror) performs an experiment with physical evidence which departs from the conditions of the event at issue or the trial testimony, the experiment is necessarily outside the "lines of offered evidence;" such experiments introduce new evidence and constitute misconduct. (*See*, *e.g.*, *Bell v. California* (1998) 63 Cal.App.4th 919, 932 [plaintiff sues defendant for false arrest and testifies about his arrest by several officers, juror performed experiment to re-enact arrest; held, the experiment was "not 'within the lines of offered evidence" because it did not "accurately duplicat[e] critical factors such as the size, strength and height of the individuals, the amount of force involved, and the specific or unusual physical characteristics of each individual involved."]; *Smoketree-Lake v. Mills Concrete Construction Co*. (1991) 234 Cal.App.3d 1724, 1749 [in civil action for construction defect, juror committed misconduct in performing an experiment with materials that had not been testified about in trial]; *People v. Castro* (1986) 184 Cal.App.3d 849, 855 [defendant charged with arson, at trial witness testified he identified defendant by looking through binoculars, during deliberations a juror experimented with binoculars to confirm this was possible; held, this experiment introduced new evidence and was misconduct because juror used a different pair of binoculars and did not seek to match either the lighting conditions or distances testified to

at trial]. *See also People v. Conkling* (1896) 111 Cal. 616, 627-628 [defendant charged with murder after shooting victim with rifle, defense was self-defense, at trial victim had no powder burns on his clothes, several jurors used a different rifle to perform experiments to see distances from which powder burns would be apparent; held, such experiment was misconduct].)

Federal law is similar. A defendant's federal constitutional right to trial by an impartial jury gives rise to a correlative duty on the part of the jury to consider only evidence that is presented in court. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-73; *Hughes v. Borg* (9th Cir. 1990) 898 F.2d 695, 700.) When the jury considers facts not introduced in evidence "a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence. [Citations.]" (*Hughes v. Borg*, *supra*, 898 F.2d at p. 700. *See also Dickson v. Sullivan* (9th Cir. 1988) 849 F.2d 403, 405; *Marino v. Vasquez* (9th Cir.1987) 812 F.2d 499, 504; *Gibson v. Clanon* (9th Cir.1980) 633 F.2d 851, 854.) A jury may not consider evidence not presented at trial, acquired through experiments conducted by the jury. (*United States v. Navarro-Garcia* (9th Cir. 1991) 926 F.2d 818, 821; *Marino v. Vasquez*, *supra*, 812 F.2d at p. 504.)

Here, the jury performed an experiment to determine the stability of the boat. But this experiment was not conducted under conditions which even remotely approximated the testimony which had been given about the crime. After all, under the state's theory, Mr. Peterson pushed his wife's body overboard from the 14-foot boat while in the open ocean, near Brooks Island. Several state witnesses testified to the rainy, windy and generally "nasty" weather on the bay that day. (62 RT 12065, 12088.)

Indeed, in excluding evidence of the defense demonstration, the court noted that although the defense had performed the test at the same time of day theorized by the state, there was no evidence showing that the tide or wave action was the same as it was on December 24, 2002. (104 RT 19408.) By contrast, the actual jury demonstration was performed while the boat was not even on the water, but in a garage, sitting on a trailer. Just like *Bell*, *Smoketree*, *Castro* and *Conkling*, the jury demonstration here departed from all testimony about how the killing actually occurred; necessarily then this experiment was not "within the lines of offered evidence" and introduced new evidence into the case. (*See Bell v. California*, *supra*, 63 Cal.App.4th at p. 932 [where trial court refuses to permit parties to present a demonstration on an issue, juror demonstration on that same issue is not "within the lines of offered evidence."].) Moreover, the record shows that after the jury performed its experiment, the trial court told jurors that "stability is not the same on a trailer as it is in the water." (111 RT 20644-20645.) This contemporaneous

reaction by the trial court shows beyond any real question that the judge believed the jury had learned new facts in testing the stability of the boat, facts which had to be countered or modulated by some kind of instruction.

Under state law, when juror misconduct occurs, a presumption of prejudice arises which the state must rebut. (*People v. Castro*, *supra*, 184 Cal.App.3d at p. 856. *Accord People v. Pierce* (1979) 24 Cal.3d 199, 207.) Federal law is similar; when the jury has considered evidence that was not presented at trial, the defendant is entitled to a new trial "if there is 'a reasonable possibility that the [extraneous] material could have affected the verdict.'" (*Hughes v. Borg*, *supra,* 898 F.2d at p. 700.) Because the error is of constitutional dimension, the state bears the burden of proving the error harmless beyond a reasonable doubt. (*Hughes v. Borg*, *supra*, 898 F.2d at p. 700; *Dickson v. Sullivan*, *supra*, 849 F.2d at p. 405; *Marino v. Vasquez*, *supra*, 812 F.2d at p. 504; *Gibson v. Clanon*, *supra*, 633 F.2d at p. 854.)

There are two general ways the state may carry its burden of proving such errors harmless. First, the state may demonstrate that the extrinsic evidence -- in this case, the jurors' perceptions about the stability of the boat -- was "merely duplicative" of evidence that was properly introduced at trial. (*Hughes v. Borg*, *supra*, 898 F.2d at p. 700; *United States v. Bagley* (9th Cir. 1981) 641 F.2d 1235, 1241; *United States v. Guida* (11th

Cir.1986) 792 F.2d 1087, 1094.) Second, the state may show that the evidence against Mr. Peterson was "so overwhelming" that the jury would have reached the same verdict even without considering the extraneous material. (*Hughes v. Borg*, *supra*, 898 F.2d at p. 700; *United States v. Bagnariol* (9th Cir.1981) 665 F.2d 877, 887; *United States v. Tebha* (9th Cir.1985) 770 F.2d 1454, 1456; *United States v. McKinney* (5th Cir.1970) 434 F.2d 831, 832-33.)

The state cannot prove the burden harmless under either test. First, the stability evidence was not "merely duplicative" of evidence properly introduced at trial. Nor could it have been. After all, the trial court excluded the defense demonstration about the boat's stability, and neither party at trial introduced any evidence about the stability of the boat while sitting on a trailer in a garage. Indeed, if either party had attempted to offer evidence about the boat's stability on a trailer in a garage, the trial court would undoubtedly (and properly) have excluded such evidence as unreliable and irrelevant.

Nor can the state prove the error harmless by arguing the evidence was overwhelming. The prosecutor could not prove when the crime occurred. As the prosecutor himself conceded in closing argument, based on the evidence presented at trial "I can't tell you when he did it. I can't tell you if he did it at night. I can't tell you if he did it in the morning." (109 RT 20200.)

The prosecutor could not prove how the crime occurred. As the prosecutor himself noted, based on the absence of any forensic evidence he simply surmised that strangulation was the cause of death. (109 RT 20200.)

In terms of corroborating evidence, there were no confessions or admissions of culpability. There were no eyewitnesses. There was no murder weapon found.

Finally, the jury deliberations themselves reflected the close nature of the case. In this regard, the prosecutor explained that this was "a very simple case." (109 RT 20202.) The prosecutor was right -- there was no complex scientific evidence and there were no complex defenses presented. Both the state and defense cases were simple and direct. There were no nuanced questions regarding levels of culpability.

The jury began deliberations on the afternoon of November 3, 2004. (19 CT 5976.) This jury deliberated approximately 20 hours and returned with several questions for the judge. (19 CT 5976-5990.) After a juror was discharged, there was an additional several hours of deliberation before a second juror was discharged. (19 CT 5990-5992.) The third jury deliberated approximately another 9 hours before returning with a verdict. (19 CT 5992-5993; 20 CT 6132.) The objective record of jury deliberations plainly shows this was a close case indeed. (*See*, *e.g* ., *People v. Garcia* (2005) 36 Cal.4th 777,

806-807 and n. 11 [court noted that two days of deliberation shows close case and criticizes the dissent for ignoring jury deliberations in prejudice calculus]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case"]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation shows close case].)

Moreover, as discussed above, the jury experiment went to a critical facet of the case. In order to convict, the jury would have to accept the state's theory that Mr. Peterson put the body in the bay from his boat. The jury's decision to perform an experiment on this aspect of the case shows that the jury recognized it as important. And the prosecutor specifically relied on the lack of any defense evidence regarding stability of the boat in asking the jurors to convict of murder. On the record of this case, the state will be unable to prove the jury experiment was harmless error. Reversal is required.

XI. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AND VIOLATED DUE PROCESS BY URGING THE JURY TO REJECT THE DEFENSE THEORY AND CONVICT MR. PETERSON OF FIRST DEGREE MURDER BECAUSE DEFENSE COUNSEL DID NOT PRESENT DEMONSTRATIVE EVIDENCE SHOWING THE INSTABILITY OF MR. PETERSON'S BOAT WHEN, IN FACT, THE TRIAL COURT HAD EXCLUDED THIS VERY EVIDENCE AT THE PROSECUTOR'S OWN REQUEST.

A. The Relevant Facts.

The defense theory in this case was simple: Mr. Peterson did not kill Laci or Connor. As discussed above, the defense offered videotaped evidence of an experiment conducted with the same boat which, under the state's theory, Mr. Peterson used to transport and throw Laci Peterson's body into San Francisco Bay. The experiment was conducted at the same time of day as the state theorized, in the same general location, involved a subject the same size as Laci Peterson with anchors the same weight as the state hypothesized and a perpetrator the same weight as Mr. Peterson. (104 RT 19371, 19401, 19404-19405.) The experiment showed the boat was unstable, and capsized.

The prosecutor objected. (104 RT 19402-19403.) Ultimately, the court sustained the objection and excluded the evidence. (104 RT 19409-19410.)

During closing arguments, the prosecutor capitalized on this ruling. Despite having kept out the defense experiment showing the boat was unstable, in urging the jury to reject the defense and convict Mr. Peterson of murder, the prosecutor specifically asked the jury to rely on the fact that the defense had introduced no evidence showing that boat was unstable:

> "Let's talk about the boat. The 14 foot aluminum fishing boat. You know, and these kind of boats have been around for years. And, you know, I know there was a lot of talk that -- I don't know if 'talk' is the right word. Maybe insinuation is the right word; that, you know, somehow these are unstable and, you know, they're ready to tip over at the drop of a hat and boy, there's no way that, you know, you could dump a body out of the boat and that's impossible because, you know, it's going to go over and the defendant would have gone in the water, and the whole bit.
>
> Of course, there's no evidence that would have done that." (109 RT 20292.)

Nor was this a passing point. To the contrary, the prosecutor then spent several pages telling the jury the boat was stable. (109 RT 20292-20293, 20294.) He again reminded the jury that "[t]here's no evidence to contradict that whatsoever." (109 RT 20294.)

As discussed below, this was patent misconduct. The prosecutor knew full well that the defense was willing to present evidence showing the boat was unstable. Indeed,

the experiment offered by defense counsel would have done just that. The only reason there was no evidence showing the instability of the boat was because the prosecutor had successfully moved to exclude this evidence. The prosecutor's reliance on the absence of evidence that he himself successfully excluded violated due process and requires reversal.

B. The Prosecutor's Arguments Constituted Gross Misconduct And Violated Mr. Peterson's Federal Due Process Rights To A Fair Trial.

When a prosecutor's closing argument "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process," he commits misconduct. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 170, 181. Of course, one of the hallmarks of due process is providing a defendant a fair opportunity to meet the state's case against him. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

Pursuant to this principle, due process precludes a prosecutor from asking a jury to convict a defendant because he failed to present certain evidence without having given the defendant a full opportunity to present that evidence. (*See Simmons v. South Carolina* (1994) 512 U.S. 154.) Applying the same principle, due process precludes a prosecutor from asking a jury to convict a defendant because he has failed to introduce evidence which the court has specifically excluded on the prosecution's own motion. (*Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, 1217-1218 ; *United States v. Ebens* (6th Cir. 1986)

800 F.2d 1422, 1440-1441, abrogated on other grounds, *Huddleston v. United States* (1988) 485 U.S. 681; *United States v. Toney* (6th Cir. 1979) 599 F.2d 787, 790-791; *State v. Bass* (N.C. 1996) 465 S.E.2d 334, 337-338; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757-758; *People v. Varona* (1983) 143 Cal.App.3d 566, 570. *See United States v. Cruz-Garcia* (9th Cir. 2003) 344 F.3d 951, 957 n.5; *Franklin v. Duncan* (N.D. Cal. 1995) 884 F.Supp. 1435, 1454 n.19.) Because there is no way for a defendant to respond to such an argument, such arguments by prosecutors violate a defendant's "constitutional rights . . . to rebut evidence and argument used against him . . . ." (*Paxton v. Ward*, *supra*, 199 F.3d at p. 1218.) Indeed, this type of argument is nothing short of "foul play." (*United States v. Toney*, *supra*, 599 F.2d at p. 790.)

The same rule applies here. Here, on the prosecutor's own motion, the trial court excluded evidence directly supporting the defense theory that the boat was unstable. (104 RT 19409-19410.) As discussed in some detail above, that ruling was fundamentally improper. But even putting that ruling aside, the problem here is that the prosecutor filled the evidentiary gap with argument to the contrary. The prosecutor argued that the boat was stable and repeatedly told the jury the defense had presented no contrary evidence. (109 RT 20292, 20294.) Of course the prosecutor, the trial court and the defense lawyers all knew that there was indeed contrary evidence. But the jury never knew this.

In short, the prosecutor knew full well there *was* evidence supporting the defense theory that the boat was unstable. The only reason the jury did not hear this evidence was because the prosecutor kept it out by objection. The prosecutor's reliance on the absence of evidence he himself moved to exclude violated Due Process.

The next question is whether the misconduct was prejudicial. To the extent the misconduct deprived Mr. Peterson of due process under the federal Constitution, the error is subject to the *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; *accord People v. Barajas* (1983) 145 Cal.App.3d 804, 810-811; *People v. Villa* (1980) 109 Cal.App.3d 360, 366. *See Chapman v. California*, *supra*, 386 U.S. at p. 24.) To the extent the misconduct violated Mr. Peterson's rights under state law, reversal is required if there is a reasonable probability that the error impacted the outcome of trial. (*People v. Green* (1980) 27 Cal.3d 1, 34-35. *See People v. Watson, supra*, 46 Cal.2d at p. 836.) Under either standard, reversal is required here.

The very fact that the prosecutor relied on the absence of this evidence in closing argument shows its importance. (*See United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 ["closing argument matters; statements from the prosecutor matter a great deal"]. *See also People v. Powell, supra*, 67 Cal.2d at pp. 55-57 [prosecutor's reliance on

evidence in reveals its importance to both the state's case and the jury]; *People v. Cruz, supra*, 61 Cal.2d at p. 868 [same].)

Moreover, the point the prosecutor drove home during his closing argument did not relate to some minor, tangential issue. Instead, it went directly to whether Mr. Peterson could have accomplished the crime as the state hypothesized. This inquiry was at the heart of the jury's determination.

Finally, as the objective record of jury deliberations in this case shows, the case against Mr. Peterson was anything but overwhelming. There were no eyewitnesses, no confessions, no admissions and scant physical evidence connected him to the crime. The prosecutor admitted he could not prove when the crime occurred, nor could be prove how the crime occurred. He could not prove what the murder weapon was, nor connect any such weapon to Mr. Peterson. And during deliberations, the jury itself asked to get in the boat precisely to examine its stability. (111 RT 20643-20644.) This shows unequivocally that the stability of the boat was an issue with which the jury was concerned.

In sum, the prosecutor's closing argument left the jury with a fundamentally distorted view of the truth on a critical point. The fact of the matter is that there *was* substantial evidence supporting the defense theory that the boat was unstable. But

because of the trial court's ruling excluding the evidence, defense counsel was simply unable to respond to the prosecutor's argument and the jury was permitted to believe no evidence supported the defense theory.

The prosecutor's conduct was fundamentally unfair and cannot be deemed harmless. Reversal is required.

C. The Merits Of This Claim Are Properly Before This Court.

Mr. Peterson recognizes that trial counsel raised no objection to the prosecutor's misconduct. Respondent may try to avoid the merits of this issue by arguing that trial counsel's failure to object and request an admonition bars Mr. Peterson from raising it on appeal. There are two reasons to reject this argument.

First, this Court has made clear that prosecutorial misconduct may be raised on appeal if a "timely objection and admonition would [not] have cured the harm." (*People v. Clair* (1992) 2 Cal.4th 629, 662; *People v. Green, supra*, 27 Cal.3d at p. 34.) In this regard the Court has also said that statements from a district attorney assume great influence on the jury due to the district attorney's appearance as an objective and official representative of the state. (*See*, *e.g.*, *People v. Purvis* (1963) 60 Cal.2d 323, 341;

People v. Perez (1962) 58 Cal.2d 229, 247.) As the Court has noted, "juries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence." (*People v. Perez*, *supra*, 58 Cal.2d at p. 247.) Thus, when a prosecutor impermissibly refers to a defendant's failure to present certain evidence, it is unlikely that an admonition by the court will protect the accused. For this reason, review of this issue is appropriate notwithstanding the absence of an objection below.

Second, and assuming *arguendo* that an objection and admonition would have cured the harm, the question is whether Mr. Peterson should lose the right to have this Court consider whether prejudicial misconduct occurred because of trial counsel's failure to object. Of course, the failure to object to inadmissible testimony or to make appropriate motions can be the basis for a conclusion that trial counsel was ineffective. (*See*, *e.g.*, *People v. Sundlee* (1977) 70 Cal.App.3d 477, 482; *People v. Coffman* (1969) 2 Cal.App.3d 681, 690.) If an admonition could somehow have cured the harm in this case, there could have been no tactical reason not to object and request an admonition, particularly in view of the considerable lengths to which defense counsel went to admit the contrary evidence of the boat's instability. This Court should therefore address the merits of this claim.

XII. THE TRIAL COURT ERRED IN DISCHARGING JUROR 5 FOR DISCUSSING THE CASE IN VIOLATION OF THE COURT'S ADMONITION BUT THEN REFUSING TO DISMISS OTHER JURORS AND ALTERNATES WHO ADMITTED THEY TOO HAD DISCUSSED THE CASE IN VIOLATION OF THE IDENTICAL ADMONITION.

A. The Relevant Facts.

1. Introduction.

On June 23, 2004 -- several weeks after the trial started -- the trial court told the parties that three jurors had contacted the court bailiff (Jenn) and said that juror 5 was (1) watching the news on television about the trial and (2) discussing the evidence contrary to the court's order. (56 RT 10853.) The trial court had also received a letter directly from juror 8. (56 RT 10859.) The letter said that juror 5 had spoken about facts in the case including (1) the anchor, (2) Detective Brocchini's testimony, (3) Laci's weight during pregnancy, (4) the Modesto Police Department's reports, (5) the prosecution lawyers, and (6) his (juror 5's) girlfriend's report that he had been cited by Court TV as taking pride in being "a loose cannon and very gregarious." (56 RT 10859.)

Juror 8 later explained his motive for writing the letter. Juror 8 said he saw juror 5 "with the clique, and that -- meaning that three or four people that are constantly with

him, talking" and juror 6 and alternate juror 2 were "all together." (56 RT 10908, 10909.) According to juror 8, the improper conversations were generally started either by juror 5 or by alternate juror 2; he testified that juror 5 was "the leader of the clique" who "usually starts the conversation" or "alternate number 2 will come in at times and she'll start the conversation with him." (56 RT 10910.) Juror 5 was "not always the one that initiates it, but those two are the ones that do a majority of them" for "90 percent of them." (56 RT 10910.)

Defense counsel asked to question the bailiff about the jurors' reports. (56 RT 10854.) The court refused and instead, decided to question all the jurors. (56 RT 10854, 10855-10856.)[54]

2. The court questions juror 5.

Juror 5 was questioned first. He denied that he had been watching television reports. (56 RT 10858.) He also denied the specific allegations in juror 8's letter. (56 RT 10860.) Instead, juror 5 told the trial court that there were "general conversations" which

[54] The first witness in the case was called on June 2, 2004. (18 CT 5629.) Juror 8 later claimed he reported the incident about juror 5 discussing the accuracy of the police reports to the bailiff during "week one of the trial." (56 RT 10904.) Of course, if juror 8 was telling the truth, the bailiff would have undoubtedly reported the first incident during the first week of trial. Juror 8 reported the remaining incidents involving juror 5 to the bailiff on June 22, 2004. (56 RT 10905.)

"you can sit there and you can skew them any way that you want." (56 RT 10860.) When asked about what he meant by "general conversations," juror 5 explained that "people will bring something up, like a story about something that could be related to the case," but "we don't really talk about the facts of the case." (56 RT 10861.)

The court asked juror 5 if he talked about "the anchor that was marked in evidence;" juror 5 explained that "one of the jurors, I can't remember which one, asked if -- if it was heavy enough, I think something about the weight, if it was heavy enough in the ocean or something, and we -- had looked at me, and I had said, you know, it's nothing I had never used in Hawaii, or something, when I had gone fishing." (56 RT 10861.)

Juror 5 did not think he had discussed Brocchini's testimony. (56 RT 10862.) He recalled that "comments were made" about Laci's weight during to pregnancy, but he did not think he made them, but instead "may have responded or said something during that conversation." (56 RT 10862.) He denied that he had said anything about the prosecution and their deficiencies as lawyers to present the case. (56 RT 10863.)

Juror 5 then admitted that he had told jurors yesterday that his friends had called him and told him about "simple incidences on the news when they were talking directly

about me." (56 RT 10863.) But the friends never discussed with him the details of the case. (56 RT 10863.) When asked if he mentioned taking pride in being a loose cannon, juror 5 replied, "Well, that's a big joke downstairs." (56 RT 10864.) He explained that "loose cannon" was not the only name he was being called, and he did not take pride in it, but simply said, "Hey, you know, keep them coming." (56 RT 10864.) For instance, another juror had said, "Blame juror number 5 because he's the moron," as a joke. (56 RT 10864.)

When asked if he had made any other comments about the trial in front of other jurors, juror 5 replied that he had "in general," but "I think all of us have, like, mentioned one thing or another at one time" and "we're not in there going over evidence, if that's, you know, if that's what you mean, but like somebody will bring something up and somebody will say this and that, and that will be the end of it." (56 RT 10864.) According to juror 5, "usually even if like a personal discussion on something else starts to lean towards one way or the other, it will start feeling that way, we'll usually cancel the conversation." (56 RT 10864-10865.)

For instance, according to juror 5, "one of the discussion[s] was a report." (56 RT 10865.) He had not brought up the report; "[t]hat was a conversation between another juror and another juror" and "they had mentioned the reports." (56 RT 10865.) One of

the jurors then asked him, "Well, when you file reports, do you this and that." (56 RT 10865.) The discussion was about "reports in general for my work" and not "court port -- reports." (56 RT 10865.) He also testified that juror 6 had said, "Yeah, when you file reports you have to be really accurate" and "he actually went on about his work reports, saying Yeah, when I'm at work and we're doing the medical stuff, you know, it has to be very, you know, detailed, and yada, yada, yada." (56 RT 10866.) Juror 5 assured the court that it had "nothing to do with" the case. (56 RT 10866.)

3. The trial court questions the other jurors, confirming that numerous other jurors (including juror 5) ignored the court's admonition not to discuss the case.

The trial court then decided to question the remaining jurors and alternate jurors. The jurors were questioned in order of their juror numbers. The court questioned each of the jurors about seven areas, asking them whether they heard comments about (1) the anchor, (2) Brocchini's testimony, (3) Laci's weight, (4) the police department reports, (5) the state's lawyers or (6) television reports. In addition, the court asked each juror whether they heard admonishments by other jurors. As discussed below, the court learned that numerous jurors had discussed aspects of the case.

a. Alternate juror 2 initiates discussion about the anchor, and jurors 4 and 5, and alternate juror 6, join the discussion.

Jurors 1, 2, 3, 10, 11, and 12, and alternate jurors 1, 3, 4 and 5 heard no comments at all about the anchor. (56 RT 10869, 10873, 10877, 10917, 10921, 10924, 10927, 10935, 10941, 10944.) The jurors who did hear comments about the anchor revealed that at most, it was a short discussion involving the anchor's weight and ability to anchor a boat in the currents of the Bay, which had been initiated by alternate juror 2, and discussed not only by juror 5, but also by juror 4 and alternate juror 6:

- Juror 4 stated "the only thing that I recall regarding an anchor was there was a question asked by one of the alternates regarding wanting to see the anchor, wanting to know how much it weighed." (56 RT 10883.) According to juror 4, "I don't know, it could have been 5, said it may only weigh this much, and I said, You know, we'll get a chance to ask that information later." (56 RT 10883.) Juror 4 did not exactly recall which juror had initially asked the question about the anchor. (56 RT 10884.)

- Juror 6 heard juror 5 make comments about an anchor, but it was not the anchor marked as evidence in the case. (56 RT 10887.) According to juror 6, "[t]hey were just talking about an anchor and he went out boating and how it's amazing what underwater currents can do, or whatever, and pull a boat with an anchor." (56 RT 10887.) Juror 6 reiterated, "[i]t wasn't actually specific to this case, as far as I know." (56 RT 10888-10888.)

- Juror 7 heard a conversation about the anchor marked into evidence. (56 RT 10897.) According to juror 7, "there was some conversation in the room about wishing that we had been able to handle the anchor, because there was maybe some interest in knowing how

heavy it was." (56 RT 10897.) He did not know who had the conversation; "[t]here were several people that expressed an interest in the weight of it, the size of it" but "I can't tell you who said it first." (56 RT 10897.)

- Juror 8 heard juror 5 comment "[a]bout the anchor, about the -- about the weight of it." (56 RT 10901.) According to juror 8, juror 5 said, "he thought the anchor was really too small to anchor that size of boat in the Bay" and "the current itself would just drag the boat." (56 RT 10901.) Juror 8 said juror 4 and alternate juror 2 were involved in the conversation about the anchor. (56 RT 10906, 10907.)

- Juror 9 had not heard a discussion about the anchor marked into evidence, but there was a conversation which was a "general fishing thing." (56 RT 10913.) She did not think there was a discussion about the anchor being too small. (56 RT 10913.)

- Alternate juror 2 explained "what happened was my fault" and "I apologize." (56 RT 10931.) She explained, "when we got in the room, I wanted to see if we could hold the anchor to see how much it weighed" and "I brought the anchor up." (56 RT 10931.) She thought "you know, could we write a note to you or just ask could we hold and see how heavy the anchor was." (56 RT 10931.) Other jurors replied, "when we get got into deliberations, all the evidence will be there" and she said, "okay." (56 RT 10931.) She did not know if juror 5 was one of these jurors. (56 RT 10931-10932.) Another juror said "we should not be talking about this," and "then it was dropped." (56 RT 10933.) Juror 5 did not "say anything and he didn't go on." (56 RT 10933.)

- Alternate juror 6 said, "He [juror 5] and I talked about anchors that one would use for fishing" and "I think I asked him, would you use an anchor like that in the Bay, and he said, no, probably not." (56 RT 10949.) Juror 5 said the anchor "was smaller than he anticipated, or thought it was" and "that anchor was too small to anchor a boat like the one we saw." (56 RT 10949.) He thought the issue just "emerged," and juror 5 only may have raised the issue, but claimed "I certainly didn't raise it." (56 RT 10950.)

b. Jurors 4 and 5 make passing remarks about the inadequacy of Brocchini's testimony.

Jurors 1, 2, 3, 7, 9, 10, 11 and 12, and alternate jurors 1, 2, 3, 4, 5 and 6 heard no comments at all about Brocchini's testimony. (56 RT 10869, 10873, 10877, 10897, 10913, 10917, 10921, 10924, 10927, 10932, 10936, 10941, 10944, 10950.) The jurors who did hear comments about Brocchini's testimony revealed at most that juror 5 had made remarks in passing, which also involved juror 4:

- Juror 4 heard juror 5 comment about Brocchini's testimony. According to juror 4, "I went to lunch with number 5, number 6, number 7, and a couple of the alternates yesterday, and we went into the jury room" and "[o]n the way to the jury room he asked me if I got anything out of Detective Brocchini's testimony." (56 RT 10884.) Juror 4 replied, "Yes." (56 RT 10884.)

- Juror 6 heard "[s]omebody" make a comment about Brocchini's testimony and about him "[g]etting a reaming" during cross-examination. (56 RT 10888.) She did not know if it was juror 5. (56 RT 10888.)

- Juror 8 heard juror 5 make "comments on Detective Brocchini's testimony" and "felt that there were many questions." (56 RT 10901.) Juror 8 said juror 5 "didn't go in depth all" but "just his personal opinion." (56 RT 10901-10902.)

c. Juror 5 may have made one comment on Laci's weight.

Jurors 1, 2, 3, 4, 6, 7, 9, 10, 11 and 12, and alternate jurors 1, 2, 3, 4, 5 and 6 heard no comments at all about Laci's weight during pregnancy. (56 RT 10869, 10873, 10877, 10884, 10888, 10898, 10913, 10917, 10921, 10924, 10927, 10932, 10936, 10941-10942, 10944-10945, 10950.) Juror 8 was the only juror who claimed this comment occurred. According to juror 8, juror 5 commented on "the weight, when they looked up the chart -- when the -- from the doctor about the -- her weight of 126 to 153, I believe that he thought it was -- it was a lot of weight and that it might have been more than the eight months." (56 RT 10902.)

d. Jurors 5 and 6 make general remarks about the inaccuracies of the Modesto Police Department reports.

Jurors 1, 2, 3, 4, 7, 9, 10, 11 and 12, and alternate jurors 1, 2, 3, 4, 5 and 6 heard no comments at all about inaccuracies in the Modesto Police Department reports. (56 RT 10870, 10873, 10877, 10884, 10898, 10913, 10917, 10921, 10924, 10928, 10932, 10936, 10942, 10945, 10950-10951.) The jurors who heard juror 5's comment again revealed that they were general remarks, which both juror 5 and juror 6 had discussed:

- Juror 6 heard juror 5 comment about the Modesto Police Department reports, but did not "remember what it was." (56 RT 10889.) According to juror 6, it was "[j]ust little things that -- apparently he has a law enforcement background, or something." (56 RT 10889.)

- Juror 8 claimed that "[w]e were in the hallway and [juror 5] was speaking that -- that the Modesto police reports, that -- that the reports of the inacc -- he thought that they should have been done a better job, because he as (sic) an SFO screener reports and they should be accurate." (56 RT 10902.) Juror 8 said juror 5 "was talking actually to number -- he was talking to Cap [Juror 6] about that." (56 RT 10902.) There were four or five jurors present at the time. (56 RT 10903.) Juror 5 talked "about the accuracy of the report, they should be accurate when they submit a report." (56 RT 10903.)

e. Juror 5, along with other jurors, make passing remarks about the lawyers and their presentation of the case.

Jurors 1, 7, 9, 10, 11 and 12, and alternate jurors 1, 2, 3, and 4 heard no comments at all about the prosecution and the way it was presenting its case. (56 RT 10870, 10988, 10914, 10917, 10921, 10924, 10928, 10932, 10936, 10942.) The jurors who did hear comments in this regard indicated that they were passing remarks that other jurors had also made:

- Juror 2 heard other jurors make comments about the deficiencies of the prosecution; he could not remember which jurors. (56 RT 10873-10874.)

- Juror 3 heard juror 5 make comments to other jurors about the prosecution's lawyers "ability to speak and presentation style." (56 RT 10878.)

- Juror 4 recalled that "there may have been something said" about the prosecution and the manner in which it was presenting the case, but did not know if it was Juror 5 who said it. (56 RT 10884.)

- Juror 6 heard juror 5 comment about the prosecution and the manner in which it presented the case. (56 RT 10889.) Juror 5 said "[t]hey don't seem organized." (56 RT 10889.)

- Juror 8 claimed that juror 5 commented on "the prosecution and their deficiencies and manner in which they're presenting this case" on "[m]ore than one occasion." (56 RT 10903.) Juror 5 said, "the prosecution doesn't come across gracefully, they don't -- they don't hit the point as Mr. Geragos does" and "[i]t's a little to be desired." (56 RT 10903.) Yesterday juror 5 commented "about as far as after Mr. Geragos cross-examines, then if he recrosses, you know, there's, you know, he -- he points at times -- he hasn't had a chance to do this yet on re-cross on the last one, but that's what he spoke of yesterday" and "[t]he prosecution doesn't hit the points." (56 RT 10903.)

- Alternate juror 5 did not recall juror 5 saying anything about the prosecutor's case; instead, the juror recalled "right after the opening statements there was a comparison contrast" and "a response was, they have different roles." (56 RT 10945.)

- Alternate juror 6 had not heard juror 5 comment on the prosecution's case. (56 RT 10951.) Instead, "[t]here has been comments that have floated around the jury room about, you know, about general responses to -- or opinions about somebody doing something particularly well, or . . . ." (56 RT 10951.) Alternate juror 6 stopped himself because he was "trying to be polite, since everybody is in the room." (56 RT 10951.) When asked if "[t]hey have commented upon the lawyers' performance," alternate juror 6 replied, "It's been very kind of tentative" and 'it's hard to not," and "[t]his is a whole group of people that are trying to avoid having the conversation, for the reason that they are all there." (56 RT 10951-10952.)

f. Juror 5 tells the other jurors he learned he had been poorly portrayed in the media, and the other jurors joke with him about it.

Juror 7 and alternate juror 4 did not hear juror 5 comment about the media or about talking to his girlfriend about television reports. (56 RT 10898, 10942.) The jurors who did hear juror 5 comment in this regard indicated the comments all related to juror 5 learning that he had being poorly portrayed in the media, and had nothing to do with the facts and issues in the case:

- Juror 1 heard juror 5 comment that his girlfriend had said he was in trouble. (56 RT 10870.)

- Juror 2 heard juror 5 comment that someone called him and said he was on television. (56 RT 10874.) He and other jurors told juror 5 that he was not supposed to discuss the case; he responded that discussing being on television was not discussing the case but a "something outside of" the case. (56 RT 10874.) Juror 5 was not discussing the evidence in the case. (56 RT 10875.)

- Juror 3 had heard juror 5 comment on the media. (56 RT 10879.) A couple days earlier when there was an issue around juror 5, juror 5 commented the next day about "what he thought the media was saying about him" (56 RT 10879.) Juror 5 said he was being called a "loose cannon" and a "moron." (56 RT 10880.)

- Juror 4 heard juror 5 comment on being contacted by his girlfriend and "about some allegations made on a Court TV about supposedly his actions within the courtroom" and "outside the courtroom." (56 RT 10885.) Juror 4 asked juror 5 what the television anchor looked like, and juror 5 said it was "attractive blond," so juror 4 replied,

"what are you complaining about an attractive blond giving you attention." (56 RT 10885.)

- Juror 4 heard juror 5 comment about "the attention that he was getting from the alleged statement made at the security point, and prior to that him and 6 made some statements about the media." (56 RT 10885.)

- Juror 6 was "shocked what people know in there." (56 RT 10890.) Juror 6 did not know anything "because I've been very busy," but "people are -- know all this stuff when they get there in the morning" and "I'm like, Where did you guys hear this stuff?" (56 RT 10890.)

  According to juror 6, "a lot of the people in there know a lot of things that I don't." (56 RT 10890.) The other jurors did not say where they got the information. (56 RT 10890.) Juror 6 thought "a lot of people have, speculation, but I think a lot of people have friends, or whomever, that call them up" and "speak to them." (56 RT 10890.) Juror 6 did not sense that "everybody's going out every night at home and watches the news or reading." (56 RT 10890-10891.)[55]

  Juror 6 recalled one time where jurors were discussing "juror number 5's little fiasco with speaking to Brent Rocha, apparently." (56 RT 10893.) Juror 6 "walked in the next morning and everybody -- he was just kind of saying Oh, yeah, apparently this, apparently that" and "I'm like What are you guys talking about?" (56 RT 10894.) Juror 5 said "his girlfriend called him up and said he was on TV." (56 RT 10894.) The prior day, juror 6 got a call from an acquaintance, asking if he was juror 5. (56 RT 10894.)

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[55] The trial court questioned the jurors to ensure that none had intentionally exposed themselves to the media. As noted above, juror 5 denied juror 8's allegation in this regard. (56 RT 10858.) Jurors 1, 2, 3, 4, 7, 9, 10, 11, 12, and alternate jurors 1, 2, 3, 4, 5 and 6 had not watched television accounts, nor read newspaper accounts, about the trial, or brought information from those sources into the jury room, sharing it with other jurors. (56 RT 10896, 10912, 10916, 10920, 10923-10924, 10927, 10930, 10935, 10941, 10943-10944, 10948, 10953-10955.) Jurors 6 and 8 were never questioned on this point. (56 RT 10886-10895, 10900-10911.)

- Juror 8 claimed juror 5's girlfriend was "telling him things about juror number 5 on TV" and "[f]riends calling him, some from even as far away as Hawaii." (56 RT 10904.) According to juror 8, "I guess he was a characterized as a loose cannon, gregarious, and he said Well, I sort of pride myself on that." (56 RT 10904.)

- Juror 10 heard juror 5 "mention that he had found out the information that he had been on television from his girlfriend, that she had called -- . . . -- and said that he was on television and that it was Court TV and the woman was really slamming him." (56 RT 10918.)

- Juror 11 said the only comments made about juror 5 getting reports about Court TV from his girlfriend where he was described as a loose cannon and very gregarious was that "Monday morning there was (sic) some comments, some jokingly comments that was made about him" and "they were just jokingly, and they were laughing about it." (56 RT 10922.)

- Juror 12 had heard juror 5 comment on "something that his girlfriend told him that the Court TV anchor person was being disrespectful about him." (56 RT 10925.) Juror 5 did not describe himself as a "loose cannon," but "felt it was how others were perceiving him." (56 RT 10925.)

- Alternate juror 1 heard juror 5 say "specifically that his girlfriend apparently was very upset with a reporter for Court TV, and I remember specifically him saying that she said she was going to kill this reporter, that she wouldn't tell him what it was that had made her so upset, but she had recorded it or had otherwise made a copy or would tell him later, presumably after the trial was over, and that she was keeping these types of records." (56 RT 10928-10929.)

- Alternate juror 2 heard juror 5 comment that "his girlfriend said that the Court TV lady, whoever she is, was slamming him." (56 RT 10933.)

- Alternate juror 3 heard juror 5 comment that "his girlfriend felt that he was being, you know, torn up or, you know" and "[s]lammed by the Court TV." (56 RT 10937.) According to juror 3, "[t]he funny

part was that the girlfriend always thought that the Court TV reporter was really a good reporter." (56 RT 10937.)

- Alternate juror 5 heard juror 5 "say that his girlfriend told him" that "the Court TV lady was a bitch." (56 RT 10946.)

- Alternate juror 6 heard juror 5 comment that "he knew that he was being trashed by someone at Court TV." (56 RT 10952.)

g. Jurors repeatedly admonish each other not to discuss the case.

Jurors 1, 4, 9, 11, and 12, and alternate juror 1 had not heard other jurors admonish juror 5 not to discuss facts and issues in the case. (56 RT 10871, 10885, 10914-10915, 10922, 10926, 10929.) The jurors who had heard these comments revealed that juror 5 was not alone in receiving admonishments from other jurors:

- Juror 3 heard juror 5 make a comment which led her to confront him about not making comments about what he heard in the courtroom; she could not recall what juror 5 had said. (56 RT 10878.) She also recalled that "there was a couple jurors that were leading into an area that I felt was inappropriate." (56 RT 10879.) She told the jurors it was not appropriate. (56 RT 10879.) She did not "recall the specifics." (56 RT 10879. *See also* 56 RT 10880 ["we were all grouped in very close areas" and "it was hard for me to tell specifically who was in that area."].)

- Juror 7 had "on occasion" heard some conversation in the room and "someone would go 'Shh,' and everybody would stop." (56 RT 10898-10899.) She did not know if juror 5 was part of these conversations. (56 RT 10899.)

- Juror 8 confronted juror 5 on two occasions but "stopped because it's not -- its not working." (56 RT 10904.)[56]

- Alternate juror 3 had once -- very early in the case -- heard juror 5 make a comment and "someone said, you know, we really shouldn't be talking about this." (56 RT 10938.) He could not recall the comment, but it was not about the evidence in the case. (56 RT 10938.)
- Alternate juror 5 had not heard juror 5 specifically admonished not to discuss the case; according to alternate juror 5, "I can't think of anyone singled out" but "[t]here will be times that people just say, I don't think we ought to be talking about that." (56 RT 10946.)[57]

4. The arguments and the trial court's ruling.

After questioning all the jurors, defense counsel renewed its motion for

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[56] Juror 8 claimed that juror 5 "keeps saying if anybody has a problem with this, they should be man enough to come up to him." (56 RT 10904.) But according to juror 8, alternate juror 2 and juror 6 said the same thing. (56 RT 10907-10908, 10909.) Juror 9 heard "[a] couple of people" say "[i]f anybody's got anything to say, they should do this man to man, or words of that effect." (56 RT 10914.) She did not remember if juror 5 was one of these people, but "[w]e just decided that if we have something to say, we need to say it to each other." (56 RT 10914.) Juror 10 said juror 5 was *not* the juror who commented that "if anybody had anything to say about him they should . . . step up and talk to him about it directly." (56 RT 10918.)

[57] Nothing jurors 2, 3, 4, 6, 7, 8, 9, 10, 11 and 12, and alternate jurors 1, 2, 3, 4, 5 or 6 heard affected their ability to be a fair and impartial juror. (56 RT 10875, 10881, 10886, 10895, 10899, 10910, 10915, 10919, 10922, 10926, 10929, 10933, 10938, 10942, 10947, 10952) Juror 7 said the "little conversation that I have heard has never had anything to do with drawing conclusions, expressing opinions of any sort." (56 RT 10899.) Juror 9 concurred, telling the trial court that juror 5 had never discussed matters "directly related to the case." (56 RT 10915.)

sequestration given the way "the media has just insinuated themselves into this case." (56 RT 10956-10960.) The court again denied the motion, indicating that it had instead made arrangements for the jury to enter the courtroom to avoid the media. (56 RT 10961-10964.)

Turning to juror 5, defense counsel argued that juror 8 had made the accusations against Juror 5 because "he thinks there is cliques, and he doesn't feel like he's part of the cliques" like in "junior high school." (56 RT 10960.) Counsel thought the court should "have a really strong ten minute talk with them" by way of an admonishment. (56 RT 10960.) The prosecution argued "the Court needs to exercise its discretion at this point in time and remove him." (56 RT 10966.) Defense counsel disagreed, insisting that only "a stern come-to-Jesus admonition delivered by you in your, forceful, from-on-high, is what's needed." (56 RT 10966.) According to counsel, if the court dismissed juror 5 for violating the court's admonition not to discuss the case, it must likewise dismiss all the other jurors, and alternate jurors, who also violated this very same admonition. (56 RT 10967.)

The trial court disagreed, pointing out that juror 5 had been admonished by other jurors "not to talk about the facts." (56 RT 10968-10969.) According to the court, "I'm of the opinion that this guy is, in fact, a loose cannon in there, number one; and, number

two, I think having a talk to him -- talking to him about Jesus is not going to make much difference, because this guy describes himself as a loose cannon" and "apparently he's proud that he is a loose cannon." (56 RT 10970.) Moreover, the court claimed "this is the second incident we have had with this particular juror" because "[w]e had an incident with him down at the screening station, which, as you said, the press made an issue out of." (56 RT 10970-10971.) "And now," according to the court, "we have this other juror reporting," and juror 3 "complaining about his conduct, and there was a third unnamed juror that Jenn said was complaining about this conduct also," but "when they came in here, all of a sudden this didn't happen." (56 RT 10971.)

Defense counsel again asked to question bailiff Jenn under oath. (56 RT 10971.) The trial court denied the request, stating "I have talked to every one of these jurors," and "I have the testimony of Juror Number 8, and I'm more inclined to believe Juror Number 8 than I am to believe Juror Number 5," and finding "there is good cause to remove this juror." (56 RT 10971, 10973.)

Defense counsel moved for a mistrial. (56 RT 10973.) The court denied the motion and dismissed juror 5. (56 RT 10973-10974.) Alternate juror 1 took juror 5's place on the jury. (56 RT 10978.) Counsel again moved for a mistrial. (56 RT 10978.) The court again denied the motion. (56 RT 10978-10979.)

As more fully discussed below in Argument B-1, the trial court erred in discharging juror 5. Although this juror violated the court's admonition not to discuss the case with his fellow jurors and alternate jurors, the violation was technical only; the juror's misconduct was not deliberate and certainly did not demonstrate the juror was unable to perform his duties. But as discussed in Argument B-2, assuming the trial court's ruling was correct, then the court was further obliged to remove numerous other jurors for committing the exact same misconduct. Reversal is required in either event.

B. The Trial Court Erred In Discharging Juror 5 For Violating The Court's Admonishment Not To Discuss The Case, And Then Refusing To Dismiss Jurors 4 and 6, Alternate Juror 2 And Alternate Juror 6, For Committing The Exact Same Misconduct.

1. The trial court abused its discretion in discharging juror 5.

"If at any time, whether before or after the final submission of the case to the jury, a juror . . . upon . . . good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged . . . ." (Pen. Code § 1089.) "A trial court's ruling whether to discharge a juror for good cause under section 1089 is reviewed for abuse of discretion. [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1158.) "[A] court's decision to remove a juror must be supported by evidence showing to a demonstrable reality that the juror is unable to perform the duties of a juror. [Citation.]."

(*People v. Wilson* (2008) 44 Cal.4th 758, 840.) "This is a 'heightened standard' [citation] and requires a 'stronger evidentiary showing than mere substantial evidence' [citation]." (*Ibid*.)

"[W]here a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance, 'open to [corroboration by] sight, hearing, and the other senses' [citation], which suggests a likelihood that one or more members of the jury were influenced by improper bias." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) "When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct." (*Id*. at p. 294.)

Misconduct can be good cause for discharge of a juror under section 1089. (*People v. Ledesma* (2006) 39 Cal.4th 641, 743.) In determining whether discharge is required in a particular case, it should be remembered "[m]isconduct by a juror . . . usually raises a rebuttable 'presumption' of prejudice. [Citations]." (*In re Hamilton*, *supra*, 20 Cal.4th at p. 295.) But it must also be remembered that "[i]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors" and "it is virtually impossible to shield jurors from every contact or

influence that might theoretically affect their vote." (*People v. Danks* (2004) 32 Cal.4th 269, 302-303 [citations omitted].) Thus, when a juror discusses a pending case with another juror in violation of the standard instruction forbidding such discussions, courts may not reflexively discharge the juror; instead, the court must look to "the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 839.) "Trivial violations that do not prejudice the parties do not require removal of a sitting juror." (*Id*.)

As these authorities make clear, the improper dismissal of a deliberating juror violates state law. But it also violates the Fifth Amendment right to a fair trial and the Sixth Amendment right to a jury trial. As the Supreme Court has made clear, the fundamental right to a fair jury trial is violated when the state is allowed to discharge for cause jurors who agree to consider the facts and apply the law given to them by the court. (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Discharging such a juror, especially when the record suggests the juror is critically viewing the state's case, can eviscerate the core of the jury trial right; as the Supreme Court has long noted, the state "may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" (*Witherspoon v. Illinois*, *supra,* 391 U.S. at p. 521. *See Fay v. New York* (1947) 332 U.S. 261, 294.)

Here, there is no question that juror 5 violated the trial court's admonition not to discuss the case with the other jurors prior to deliberations. After swearing the jury, the court gave the following admonition:

> "You must not converse among yourselves or with anyone else on any subject connected with this trial [prior to deliberations]." (43 RT 8415.)

Here, juror 5 candidly admitted he answered another juror's question about the weight of the anchor. (56 RT 10861.) Jurors 4, and 6 through 9, confirmed they heard a conversation about anchors, and alternate jurors 2 through 6, admitted they asked juror 5 questions about the weight of the anchor. (56 RT 10883, 10887-10888, 10897, 10901, 10906-10907, 10913, 10931-10933, 10949-10950.) Likewise, jurors heard juror 5 comments on (1) Brocchini's testimony (56 RT 10884, 10901-10902) and (2) the prosecution's lawyers. (56 RT 10877-10878, 10889, 10903). Similarly, a juror heard juror 5 comment about Laci's weight. (56 RT 10902.) Finally, juror 5 admitted he had answered another juror's question about the inadequacies of police reports. (56 RT 10865-10866.) Jurors 6 and 8 confirmed they heard a conversation in this regard. (56 RT 10889, 10902-10903.)

Instead, the only real question here is whether these discussions were "trivial violations" or whether they instead affirmatively proved to a "demonstrable reality" that

"actual prejudice may have ensued." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 839.) As discussed below, under established law, juror 5's comments did not come close to establishing a "demonstrable reality" that "actual prejudice may have ensued."

As an initial matter, juror 5 did not deliberately and willfully disobey the trial court's admonishment. Instead, juror 5 told the trial court he had only had "general conversations" where "people will bring something up, like a story about something that could be related to the case," but "we don't really talk about the facts of the case." (56 RT 10860-10861.) Juror 5 assured the court that all the conversations about the trial had been made "in general" and "I think all of us have, like, mentioned one thing or another at one time," but "we're not in there going over evidence . . . ." (56 RT 10864.) Put simply, this was not a juror who deliberately and willfully refused to follow the court's instructions. (*Compare People v. Holloway* (2004) 33 Cal.4th 96, 125 [no error for failing to discharge juror who "had not thought" he violated admonition because he "did not see" conversation with nonjuror as "'talking about' or 'discuss[ing]'" the case] *with People v. Ledesma* (2006) 39 Cal.4th 641, 743 [juror admitted deliberately committing misconduct by discussing case with wife; juror's serious and willful misconduct is good cause to believe juror will not be able to perform duty].)

Moreover, these conversations were hardly consequential. Juror 5 answered a question by another juror about on the size and weight of the anchor, and its ability to anchor a boat. But as noted above, six jurors, and four alternates did not even hear the comments, and the jurors who did hear the comments said the comments were confined to a very short colloquy and would not affect deliberations at all.

The comments about Brocchini's testimony and the prosecution lawyers were even fewer and more innocuous. Eight of the jurors, and all of the alternate jurors, heard nothing about Brocchini's testimony, and six of the jurors, and four of the alternate jurors, heard nothing about the prosecution's lawyers. The three jurors who heard something about Brocchini's testimony -- one of which did not even recall if it was juror 5 -- cited to innocuous comments made in passing. (*See*, e.g., 56 RT 10884 [Juror 5 asking if juror 4 "got anything out of" Brocchini's testimony]; 10888 [Juror 6 recalling that "[s]omebody" mentioned Brocchini "[g]etting a reaming" during cross-examination]; 10901-10902 [Juror 5 indicating to juror 8 "there were many questions" about Brocchini's testimony].) Even the juror who reported the misconduct -- juror 8 -- admitted juror 5 "didn't go in depth [at] all." (56 RT 10901.)

The comments jurors attributed to juror 5 about the prosecution's lawyers were equally innocuous. (56 RT 10878 [comment on "ability to speak" and "style"]; 10889

["[t]hey don't seem organized"]; 10903 ["doesn't come across gracefully," "[i]t's a little to be desired," and "doesn't hit the points."].) As for the comment about Laci's weight, Juror 5 denied making the comment -- a denial corroborated by every single other juror, and alternate juror, other than the complaining juror 8.

Finally, as to the comments about the inaccuracies of the Modesto Police Department Reports, juror 5 explained that he had simply answered a question by another juror as to whether reports in general had to be accurate; juror 5 responded that reports should be "really accurate" and "detailed." (56 RT 10865-10866.) As noted above, nine of the jurors, and all of the alternate jurors, heard nothing of this comment. The complaining juror -- juror 8 -- actually corroborated juror 5's claim about the little that was said. (56 RT 10902-10903 [reports should have been "accurate."].) And the only other juror who heard anything at all -- juror 6 -- confirmed that the comment was just "little things," but could not even remember what was said. (56 RT 10889.) Although juror 8 claimed four or five jurors were present (56 RT 10903), as noted above, the comments were completely lost on these jurors, as none could ever recall that the comments occurred.

In sum, these were hardly in depth conversations about the case which could have had an affect on the juror's ability to impartially deliberate. (*Compare People v. Wilson*,

supra, 44 Cal.4th at p. 841 [juror improperly discharged even though he voiced out loud "various concerns about the case"] *with People v. Ledesma*, *supra*, 39 Cal.4th at p. 742-43 [juror properly discharged who "needed to "'straighten things out in [his] head,'" so "recounted the story of the case to his wife" who then "gave some opinion [sic] which left me with the same decision that I had before."]; *People v. Daniels* (1991) 52 Cal.3d 815, 863, 866 [juror properly discharged when he discussed the details of the case with nonjurors and expressed his belief that he "couldn't see how a man that was in a wheelchair could shoot another man and get out of the wheelchair and get another gun to shoot the other officer" and "can't see how that nigger was able to kill two policemen."].)

For this reason, the trial court erred in discharging juror 5. Juror 5 merely voiced general comments about tangential matters related to the case. This was a "trivial violation" and did not establish to a "demonstrable reality" that "actual prejudice may have ensued." (*See People v. Wilson*, *supra*, 44 Cal.4th at p. 839.) As this Court has itself noted in evaluating whether jury misconduct required a new trial, courts must be "mindful of the 'day-to-day realities of courtroom life'" and aware that it is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' . . . [T]he jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. . . . [Jurors] are imbued with

human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.'" (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

This is especially true given that every single juror confirmed that none of the passing remarks they heard from juror 5 affected their ability to be a fair and impartial juror. (56 RT 10875, 10881, 10886, 10895, 10899, 10910, 10915, 10919, 10922, 10926, 10929, 10933, 10938, 10942, 10947, 10952.) Indeed, a juror's assurance that misconduct did not affect his or her ability to fairly and impartially decide the case is an important factor in concluding that misconduct was trivial in nature, and did not warrant discharge. (*Compare People v. Stewart*, *supra*, 33 Cal.4th at p. 511 [juror's assertion that misconduct did not affect ability to serve as juror supported trial court's conclusion that misconduct was not "inherently and substantially likely to have influenced the juror"].) Reversal is required.

2. Assuming Juror 5's violation was something more than technical, and actually rose to the level of misconduct, the court should have dismissed jurors 4 and 6, and alternates 2 and 6, for committing the exact same misconduct.

Assuming the trial court was correct that juror 5 committed willful and serious misconduct which demonstrated an inability to serve as a juror, then reversal is required

for another reason as well. The reason is simple. Jurors 4 and 6, and alternate jurors 2 and 6, committed the exact same misconduct right along with juror 5.

In this regard, juror 5 explained that his comments about the case generally involved discussions with other jurors. (56 RT 10861.) For instance, juror 5 told the court he spoke about the anchor only in direct response to another juror who asked about the weight of the anchor. (56 RT 10861.) Similarly, his remark about the police reports was in direct response to another juror asking him the necessity for accuracy in the reports for his job. (56 RT 10865.) He said that juror 6 too was discussing the necessity for accuracy in the reports for his own job. (56 RT 10866.) Juror 5 noted that general comments were made by "all of us" who "mentioned one thing or another at one time." (56 RT 10864.)

Juror 5's testimony was directly corroborated by the other jurors. Alternate juror 2 confessed that she was the juror who had brought up the weight of the anchor, wanting to know (and asking) "if we could hold the anchor to see how much it weighed." (56 RT 10931.) Alternate juror 6 confessed that he asked juror 5 if he would "use an anchor like that in the Bay." (56 RT 10949.) Juror 4 confirmed that there was a conversation about anchors brought up by "one of the alternates." (56 RT 10883.) Jurors 6, 7 and 9 confirmed that juror 5 was not alone in the anchor conversation. (56 RT 10887 ["[t]hey

were just talking about an anchor"]; 10897 ["several people . . . expressed an interest in the weight of it, the size of it"]; 10913 [there was a conversation which was a "general fishing thing.") Juror 8 heard juror 4 and alternate juror 2 involved in the conversation. (56 RT 10906-10907.)

The same goes for other comments made by juror 5. Other jurors confirmed that these comments involved not only juror 5, but other jurors as well. (*See*, *e.g.*, 56 RT 10884 [juror 4 admits he told juror 5 he had gotten something out of Brocchini's testimony]; 10902 [juror 8 says jurors 5 and 6 discussed inaccuracies of Modesto Police Department reports]; 10873-10874 [juror 2 testifies that other "jurors" made comments about the deficiencies of the prosecution]; 10945 [alternate juror 5 says that "right after the opening statements," jurors made "a comparison contrast [between the lawyers]," and "a response was, they have different roles]; 10951 [alternate juror 6 says "[t]here has been comments [by jurors] that have floated around the jury room," and ""general responses" or "opinions," about the lawyers].)

As noted above, the trial court dismissed juror 5 for committing misconduct in violating the admonition not to discuss the case with other jurors. And yet the record made just as clear that (1) alternate 2 began the conversation about the anchor (56 RT 10931), (2) juror 4 and alternate juror 6 joined the conversation about the anchor (56 RT

10906, 10949), (3) juror 4 spoke with juror 5 about Brocchini's testimony, and (4) juror 6 spoke with juror 5 about Modesto police reports (56 RT 10888-10889). Of course, this conduct also violated the very same admonition which was the basis of juror 5's discharge. Accordingly, defense counsel argued that if the court discharged juror 5, it should also dismiss the other jurors, and alternate jurors, who had likewise violated the admonition. (56 RT 10967.)

With all due respect, what is sauce for the goose is sauce for the gander: the state cannot have it both ways. If juror 5's conduct in making comments about the case rendered him incapable of fulfilling his duties as a juror, then the identical conduct of juror 6, and alternate jurors 2 and 6, rendered them equally incapable of fulfilling their duties as jurors. The court erred in refusing to dismiss these jurors on the very same grounds it had dismissed juror 5.

To be sure, the trial court distinguished juror 5 from these jurors on the ground that juror 5 had been admonished by other jurors "not to talk about the facts." (56 RT 10968-10969.) But as noted above, juror 5 was not the only juror on the receiving end of admonishment. Juror 3 admonished "a couple of jurors that were leading into an area that I felt was inappropriate." (56 RT 10879.) Juror 7 recalled that "on occasion" jurors had an inappropriate conversation and "someone would go 'Shh,' and everybody would stop."

(56 RT 10899.) Alternate juror 5 "can't think of anyone singled out," and "[t]here will be times that people just say, I don't think we ought to be talking about that." (56 RT 10946.) Thus, the record simply does not support the trial court's attempt to distinguish juror 5 from the other jurors.

The trial court also found that juror 5 was "a loose cannon in there" and "I think having a talk to him -- talking to him about Jesus is not going to make much difference, because this guy describes himself as a loose cannon" and "apparently he's proud of that he is a loose cannon." (56 RT 10970.) With all respect, that is not what occurred at all.

As noted above juror 5 specifically denied that he took pride in being a "loose cannon." (56 RT 10864.) He instead told the court that he learned the media called him a "loose cannon," and it had become "a big joke downstairs," with the other jurors. (56 RT 10864.) Juror 8 contradicted juror 5, claiming juror 5 stated, "I sort of pride myself on that," but juror 8 was not corroborated, and in fact, other jurors corroborate juror 5's version of what happened. Juror 11 claimed that juror 5 learned the media called him a "loose cannon," and that "there was . . . some jokingly comments that was made about him" and "they were just jokingly, and they were laughing about it." (56 RT 10922.) Juror 12 claimed that juror 5 had not described himself as a "loose cannon," but instead indicated that he "felt it was how others were perceiving him." (56 RT 10925.) The trial

court ultimately decided, "I'm more inclined to believe Juror Number 8 than I am to believe Juror Number 5," but the court's finding of credibility completely ignored the unbiased opinions of juror 11 and 12 about what actually occurred.

Finally, the trial court claimed "this is the second incident we have had with this particular juror" because "[w]e had an incident with him down at the screening station, which, as you said, the press made an issue out of." (56 RT 10970-10971.) The court was referring to an incident which occurred days earlier and was fully investigated on June 21, 2004. After a full hearing on the matter, the court told juror 5, "You haven't done anything wrong out there, any juror misconduct, so I wouldn't worry about that."

(54 RT 10486.) The court's sudden decision that this incident now supported its decision to discharge the juror is simply inexplicable, and cannot stand.[58]

The trial court's ruling violated both state and federal law. Assuming juror 5 committed "serious and willful" misconduct and was incapable of fulfilling his duties, the

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[58] Here is what happened on June 21, 2004. The trial court told the parties that there was a videotape of juror 5 speaking with Laci's brother Brent Rocha which had "been all over the media over this weekend." (54 RT 10474.) The court had seen the tape and, according the court, "there was no conversation, rather it looked more like a comment." (54 RT 10474.) The court decided to question Rocha and juror 5 to investigate whether there had been juror misconduct. (54 RT 10475.)

Rocha told the trial court that while at the court's security checkpoint on the previous Wednesday or Thursday, he had been waiting for his items to come off a conveyor belt when juror 5 passed on his left-hand side, which blocked the news camera's view of Rocha, and said, "I got in the way of your shot for the news today." (54 RT 10477, 10478.) Rocha responded, "Well, at least they're not bugging you yet . . . ." (54 RT 10477.)

Juror 5 corroborated Rocha's version of events. He told the court that on the prior Thursday, he was passing Rocha at the security checkpoint and said something like, "I'm ruining all your shots, I guess you're not going to be on the news tonight." (54 RT 10481, 10482.) Rocha responded, "Good," and walked the other way. (54 RT 10481.)

Juror 5 then complained that he learned through his girlfriend, family and friends that the media had been falsely reporting events occurring in the courtroom. For instance, a woman from Court TV reported that juror 5 had said, "Yo, yo, peace out," to Mr. Peterson. (54 RT 10483.) And the Modesto Bee reported that juror 5 had whispered at the podium into Mr. Geragos's ear. (54 RT 10484.)

Juror 5 denied that he had spoken to anyone about the case. (54 RT 10485.) The trial court told juror 5, "You haven't done anything wrong out there, any juror misconduct, so I wouldn't worry about that." (54 RT 10486.) The court then allowed juror 5 to return to the jury room. (54 RT 10489.)

court's decision to allow jurors 4 and 6, and alternate 2 (who later was seated on the jury to replace juror 7 (112 RT 20775)), to serve on the jury deprived Mr. Peterson of his state law right to 12 fair jurors applying the law as well as his Fifth and Sixth Amendment right to a fair jury trial and his constitutional rights under *Hicks v. Oklahoma*, *supra*, 447 U.S. 343 [arbitrary deprivation of state created right violates Due Process] and *Gray v. Klauser* (9th Cir. 2002) 282 F.3d 633, 645-646, overruled on other grounds, *Klauser v. Gray* (2002) 537 U.S. 1041 [arbitrary and unequal application of state law to state and criminal defendant violates the constitution]. Reversal is required.

XIII. THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE HEARING IN DETERMINING WHETHER JUROR 8 DISCUSSED THE CASE WITH A NONJUROR REQUIRES REMAND.

A. The Relevant Facts.

The jury rendered its verdict in the guilt phase on November 12, 2004. (20 CT 6133.) The penalty phase began on November 30, 2004. (20 CT 6138.) That same day, however, the trial court received information that one juror -- juror 8 -- had discussed the case with his bartender, Gino Gonzales. (113 RT 20875; Court Exhibits 33 and 36.)[59]

In light of this information, the trial court held a hearing. The trial court heard testimony from Paula Canny, who had learned about and reported Juror 8's misconduct.

Canny was an attorney who had worked for the district attorney's offices in Ventura and "was a Deputy DA here," but currently worked as part of the Private Defender Program. (113 RT 20878.) Canny knew Gino Gonzales for "a long time," because they had been neighbors, and she even knew his wife and child. (113 RT 20878.)

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[59] Exhibits 33 and 36 were marked as court exhibits on November 30, 2004. (112 RT 20820, 20835.)

On November 13, 2004 -- the Saturday after the guilt verdict -- Canny was in Redwood City for a media appearance about the case. (113 RT 20879.) That afternoon she was outside making a telephone call when she saw Gonzales drive up in his green Jeep. (113 RT 20879-20880.) After her call, she went over to Gonzales's Jeep to say hello. (113 RT 20880.)

Gonzales told Canny that he and his wife had fun watching her on television. (113 RT 20881.) Gonzales then told Canny that juror 8 was "a friend of mine." (113 RT 20881.) Gonzales said that he and juror 8 were having a beer at 8:00 p.m. "to celebrate" at a "dive bar" which was down the street from her house. (113 RT 20881-20882.)

Gonzales said that juror 8 told him he "hated Juror Number 5" and that "he was a geek." (113 RT 20882.) Juror 8 also told Gonzales that "he learned a lot by doing this trial" and "he didn't take a lot of notes, like [Juror] five just took notes," and he "learned to really get his mind going again by watching the witnesses," and "every day at the end he would go home and write all the things that he thought were important in his notebook." (113 RT 20882.) According to Gonzales, juror 8 said "they are so happy that they got Scott" and "they are going to get Scott in the next phase, or something like that." (113 RT 20882.) Gonzales warned Canny that "[a]ll this is attorney-client privilege." (113 RT 20882.)

Canny, a former district attorney, was upset by what Gonzales had told her. (113 RT 20883.) She told Gonzales she had to go, and then told her girlfriend about what Gonzales had told her. (113 RT 20883.) The next day, Canny spoke with Gonzales and confronted him about what he had told her the previous day. (113 RT 20884.) Gonzales replied, "Paula, Paula, he's a great guy" and "Number 8 has integrity." (113 RT 20884.)

Gonzales then told her that juror 8 worked the midnight shift as a parking attendant at the Union Street Parking Garage. (113 RT 20884.) Gonzales said that when juror 8 got off work, he would come down for a beer or two at the restaurant bar, and have breakfast, and then go to court. (113 RT 20884.) He said that juror 8 would discuss "who was there" in the courtroom and was "particularly impressed when Kimberly Guilfoyle Newsom was there." (113 RT 20884.) He also said that "it was being bandied about the bar that a guilty vote was worth at least a hundred thousand dollars," and juror 8 was present at the time. (113 RT 20893.)

Upon learning about juror 8's misconduct, Canny contacted a friend, former police officer John Mannis. (113 RT 20890.) She then spoke to Bill Cody, an investigator for the San Mateo County District Attorney's office, and defense counsel. (113 RT 20890.)

Cody confirmed that he received a call from Canny. (Court Exhibit 33 at p. 1.) Canny told him what she had heard from Gonzales. (*Ibid*.) Cody interviewed Gonzales, confronting him with Canny's allegations, and Gonzales replied, "That's ridiculous and not true in any sense." (Court Exhibit 36 at p. 1.)

But Gonzales did admit he met juror 8 -- whom he knew as John -- at the Sharp Park Golf Course restaurant. (Court Exhibit 36 at p. 1.) Juror 8 told Gonzales that "he was called for jury duty on a 'high profile case.'" (*Ibid*.) Gonzales admitted that juror 8 later told Gonzales he "was picked for the jury." (*Ibid*.) Gonzales denied that juror 8 ever told him that he was picked as a juror on Mr. Peterson's case. (*Ibid*.) Gonzales said juror 8 was a "regular" at the restaurant but never heard him discuss the case. (*Id*. at p. 2.)

Gonzales called Canny again after he was visited by Cody. (113 RT 20885.) Canny testified that Gonzales was "kind of upset." (113 RT 20885.) Canny told Gonzales, "Gino, I told you I was going to tell." (113 RT 20885.) Gonzales again called Canny after defense counsel had him served with a subpoena; it was 7:15 a.m. on Thanksgiving. (113 RT 20886.) She told him, "Gino just tell the truth." (113 RT 20886.) Gonzales asked Canny several times why "don't they just go get [juror] eight's notebook and see." (113 RT 20891.)

The trial court told Canny, "You know, he [Gonzales] denies this conversation with you." (113 RT 20886.) Canny replied, "look, I don't know this" and "I feel terrible that I talked to him," but "I'm not in the business of making stuff up." (113 RT 20886.) When defense counsel told Canny that Gonzales had warned counsel's investigator that, "maybe I'll just say I exaggerated, or maybe I said I'll just say I don't remember, something to that effect," Canny replied, "That's just crazy." (113 RT 20887.) Canny said that she told Gonzales to hire a lawyer, and Gonzales did hire a lawyer. (113 RT 20887.) She thought it was "crazy" for Gonzales "to say he didn't have a conversation with me." (113 RT 20887.) Counsel confirmed for the court that Canny's girlfriend "Woody," said she saw the conversation take place, but could not hear what was said. (113 RT 20887-20888.)

At this point, the court had two different hearsay versions of what had happened (1) Canny's version about what Gonzales said and (2) Cody's version of what Gonzales said. Ultimately, of course, the question of what Gonzales said could not be resolved until Gonzales himself was questioned.[60]

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[60] As noted above, Canny said that Gonzales told her juror 8 worked the midnight shift as a parking attendant at the Union Street Parking Garage. (113 RT 20884.) As it turns out, Canny's testimony was entirely correct: juror 8's questionnaire shows this was true. (CT MJQ 168.) But the juror questionnaires were not public record, and this information was not part of juror 8's voir dire. (26 RT 5052-5085.) Thus, there was no evidence that Canny could have gotten this information from any source other than Gonzales.

Sure enough, after Canny's testimony, the trial court called Gonzales to the stand. (113 RT 20895.) By this time, however, Gonzales had hired a lawyer, Ian Loveseth.

When Gonzales was called to testify, Loveseth intervened, saying "[w]e are not sure we want to do it." (113 RT 20895.) The court asked Loveseth if Gonzales was prepared to testify about his conversations with Canny and juror 8. (113 RT 20895.) Loveseth declined, saying "[a]t this point, our position would be, since our big mouth got us into this situation, that unless we are immunized, we're not going to testify." (113 RT 20896.) Loveseth later told the court that Gonzales would only answer whether he had a conversation with juror 8 about the case; according to Loveseth, Gonzales would only say "he asked Juror Number 8 about what was going on," and Juror 8 replied, "I'm a, I believe, a potential juror in a high profile case," to which Gonzales said, "maybe after this is all over we can talk." (113 RT 20908, 20909.) Because Gonzales was not willing to subject himself to any further questioning, the court sent Loveseth and Gonzales to the presiding judge to "see whether or not they are going to give him immunity." (113 RT 20896.) The court asked Cody to call someone at the San Mateo County District Attorney's office to be present with Loveseth and Gonzales. (113 RT 20898.)

The trial court questioned juror 8. Juror 8 denied the allegation that when he got off work, he went to a bar and had a couple of beers and breakfast, and then came to court

to serve as a juror. (113 RT 20922.) When asked about speaking to Gonzales, juror 8 admitted that he had been to the bar, but said that he never had conversations about the case. (113 RT 20923.) He also denied telling anyone that jurors kept secret notebooks. (113 RT 20923.)

Outside the presence of juror 8, defense counsel noted that juror 8 looked down and would not look the trial court in the eye when questioned about drinking before coming to court. (113 RT 20930.) Defense counsel moved for a mistrial. (113 RT 20932.) Counsel stated juror 8 admits going to the bar, and "[w]e have got Miss Canny at great pains -- I think the Court would agree with me, that she was did not seem to relish being here today, and has made some statements which, if true, are grounds for mistrial." (113 RT 20932.) The court denied the mistrial motion, finding that "[o]ne of the statements Miss Canny has attributed . . . talking to this guy, Mr. Gonzales, is that the jury has already decided to impose the death penalty," but the statement was "[c]ompletely false, based on what you have heard from these people." (113 RT 20932.) Moreover, according to the court, juror 8 "denies that he's ever kept secret notebooks, or any members of the jury keeping secret notebooks." (113 RT 20932.)

Thus the trial court resolved the issue, and determined what juror 8 said to Gonzales, without ever hearing from Gonzales himself. Of course, if Gonzales testified

that juror 8 had indeed committed the misconduct he (Gonzales) described to Canny -- and the trial court believed Gonzales -- a finding of misconduct was certain and juror 8 would have been discharged. On the other hand, if Gonzales testified that juror 8 had not committed any misconduct -- and the trial court believed Gonzales -- no finding of misconduct would have been proper.

But as noted above, the court permitted Gonzales to refuse to testify about the incident. The court never heard from Gonzales and, as a consequence, never resolved the credibility issue at this heart of this issue: which version given by Gonzales was accurate?

As more fully discussed below, the trial court erred in failing to conduct an adequate evidentiary hearing into the allegation that juror 8 had discussed the case with Gonzales. Because it is impossible on this record to determine whether or not juror 8 committed serious misconduct, or whether any misconduct was harmless, remand for an adequate hearing is required.

B. The Trial Court Erred In Failing To Conduct An Adequate Hearing Into Juror 8's Misconduct.

When a defendant in a criminal case alleges that there has been jury misconduct, the trial court has discretion to hold an evidentiary hearing to determine the truth of these

allegations. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415.) Although the defendant is not entitled to a hearing as a matter of right, a hearing should be held whenever (1) the "defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred" and (2) "the evidence presents a material conflict that can only be resolved at such a hearing." (*Id*. at p. 419.) At such a hearing, it is entirely appropriate for jurors to testify. (*Id*. at p. 416.) Once a court decides to hold a hearing, it has a duty to "conduct a sufficient inquiry to determine facts alleged as juror misconduct . . . ." (*People v. Davis* (1995) 10 Cal.4th 463, 547.) When a court fails to conduct an adequate and proper hearing, the remedy is to remand the case for an appropriate hearing. (*People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 420-421.) As this Court has noted, the "[f]ailure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review." (*People v. Burgener* (1986) 41 Cal.3d 505, 520.)

Here, given the information alleging that juror 8 had discussed the case with a nonjuror, the trial court had before it evidence showing a strong possibility that misconduct had occurred. (*See In re Hamilton*, *supra*, 20 Cal.4th at p. 294 [juror commits misconduct when he or she "discusses the case with nonjurors"].) Given this showing, the trial court properly exercised its discretion to hold a hearing to determine the truth of the allegations.

Unfortunately, however, the scope of that hearing was completely inadequate to "determine [the] facts alleged as juror misconduct . . . ." (*People v. Davis*, *supra*, 10 Cal.4th at p. 547.) Former district attorney Paula Canny testified under oath that Gonzales said juror 8 spoke with him about the case. (113 RT 20881-20882.) As a former prosecutor, and officer of the court, Canny reported this to the prosecution immediately. (113 RT 20890.) And not only did Canny have no motivation to lie; in fact, she repeatedly told the court that felt "terrible" about reporting Gonzales, but she was "not in the business of making stuff up." (113 RT 20886.)

To its credit, the trial court questioned juror 8 about the allegation. Not surprisingly, the juror flatly denied the allegation. According to juror 8, "[t]hat is false." (113 RT 20922.) He denied that he had ever had a conversation with Gonzales about the case. (113 RT 20923.)

In resolving the issue, the trial court now had before it (1) Canny's hearsay testimony that Gonzales *had* claimed the misconduct had occurred, (2) Cody's hearsay report that Gonzales denied saying this to Canny and (3) juror 8's unsurprising denial that he ever said anything at all to Gonzales anything about the case. The judge also had Gonzales's lawyer's telling remark that "our big mouth got us into this" and Gonzales's insistence on immunity -- something it is hard to imagine he would have needed if he

merely had to testify truthfully that juror 8 had said nothing to him about the case. Plainly, a proper resolution of this issue required the court to determine which version Gonzales gave was the truth: the version to Canny or the version to Cody.

Of course there was good reason to believe that Gonzales was not telling the truth when he denied having a conversation with Canny. Gonzales told Canny that he thought what he was telling her was confidential under the "attorney-client privilege." (113 RT 20882.) When Canny told Gonzales she would have to report the misconduct, Gonzales got upset and insisted that juror 8 was "a great guy" and had "integrity." (113 RT 20884.) After Gonzales was questioned by Cody, Gonzales called Canny "kind of upset," and after receiving defense counsel's subpoena, told Canny that he thought that his allegations should instead be proven by getting juror 8's secret notebook. (113 RT 20891.) Gonzales told defense counsel's investigator that "maybe I'll just say I exaggerated" or "I'll just say I don't remember." (113 RT 20887.) Thus Gonzales gave Canny every indication that he was going to now deny the conversation, which, of course, is exactly what he ended up doing to both Cody and Loveseth. (Court Exhibit 36 at pp. 1-2; 113 RT 20908-20909.)

Moreover, there was equally good cause to believe that -- in fact -- Gonzales did have the conversation with Canny. First, Canny was a former prosecutor, with no motive to simply make this story up. Second, at least part of the information Canny relayed as

coming from Gonzales -- that juror 8 worked the midnight shift at a parking garage -- was independently verified. (*See* CT MJQ 168.) Third, Canny herself made clear she was not all happy about having to testify against Gonzales, who was a neighbor and friend she had known for a long time and whose family she knew as well. (113 RT 20878, 20886.)

Under all these circumstances, the trial court had reasonable cause to suspect that Gonzales might not be telling the truth in denying the conversation. But as noted above, Gonzales refused to testify about the conversations he had with juror 8. While that refusal itself should perhaps have caused the trial court to question whether the version Gonzales gave to Cody was true, the fact of the matter is that without hearing from Gonzales himself, the trial court had no way to reliably determine whether Gonzales was telling the truth (1) when he spoke to Canny or (2) when he spoke to Cody. Because this determination was essential in determining whether misconduct occurred, the trial court's failure to hold an adequate hearing to resolve the misconduct claim requires remand. (*People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 420-421.)

ERRORS RELATING TO THE PENALTY PHASE

XIV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND VIOLATED MR. PETERSON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, WHEN IT REFUSED TO SEAT A NEW PENALTY PHASE JURY AFTER THE JURORS WHO CONVICTED MR. PETERSON OF MURDER WERE APPLAUDED BY WILDLY CHEERING MOBS.

A. The Relevant Facts.

As discussed in Argument V, above, on the evening of Mr. Peterson's arrest, a mob of several hundred people showed up at the Stanislaus county jail to cheer the arrest, many with signs stating they believed Mr. Peterson was guilty of murder. In light of the furious media blitz which followed, defense counsel moved to change venue, offering a series of surveys indicating that between 98% and 99% of the public had been exposed to the pre-trial publicity, and between 39% and 70% of the public already believed he was guilty without even a trial. (9 CT 3370, 3385; 10 CT 3639, 3643, 3654.) The trial court changed venue to San Mateo county.

As also discussed above, during voir dire defense counsel made a second motion to change venue. (14 CT 4487-4716.) Based on the questionnaires, 96% of the potential jurors had been exposed to publicity about the case and 45% already believed Mr.

Peterson was guilty. (14 CT 4516, 4520.) The trial court denied this second venue motion. (36 RT 7097-7102.)

Prior to trial, the defense requested that the jury be sequestered for the case. (13 CT 4334-4392; 9 RT 1665-1677.) The trial court denied the motion and opening statements began to the unsequestered jury on June 1, 2004. (9 RT 1674-1677; 43 RT 8423.)

After the close of evidence, defense counsel asked the court to sequester the jury for deliberations. (107 RT 19878.) The court agreed, and the jury began deliberations on the afternoon of November 3, 2004, deliberating approximately 20 hours and returning with several questions for the judge. (107 RT 19878; 19 CT 5976-5990.) After a juror was discharged, there was an additional several hours of deliberation before a second juror was discharged. (19 CT 5990-5992.) The third jury deliberated approximately another nine hours before returning with a verdict on November 12, 2004. (19 CT 5992-5993; 20 CT 6132.) The jury was released from sequestration and ordered to return ten days later for the penalty phase. (112 RT 20831-20832.)

But the public reaction the jury was released into was something no member of the defense, the prosecution or the court had ever seen before. Indeed, as the following

exchange shows, there should be little genuine dispute that the mob reaction to the verdict was unique:

> "[by defense counsel Geragos] I believe the court can take judicial notice that the atmosphere outside of this courthouse is like nothing anybody's ever seen that's seated at this table or sitting in this courtroom.
>
> "[The Court] I've never seen anything like it before." (112 RT 20850.)

Given the public reaction into which the jury was released, and pursuant to both Penal Code section 190.4 and the federal and state constitutions, defense counsel asked the court to empanel a new jury to hear the penalty phase. (17 CT 5343-5381.) Defense counsel described the scene as follows:

> "The announcement of the [guilty] verdicts triggered bedlam outside the courthouse where a crowd of some 1,000 people had assembled. When the verdicts were read the mob cheered wildly and exulted as car horns honked in celebration (audible in the courtroom while the jury was still in the box) registering approval of the jury's verdicts. As jurors left the courthouse after the verdict was announced they were applauded and cheered as if they were members of a winning Super Bowl team. . . . In stark contrast, the mob jeered Scott Peterson's mother and members of Mr. Peterson's family." (17 CT 5344.)

In its opposition, the state disagreed with counsel's description in two (and only two) respects. First, the state argued the mob consisted of 400 people, not 1,000. (17 CT

5451. *But see San Jose Mercury News*, November 13, 2004 ["The scene outside the courthouse was controlled chaos as nearly 1,000 onlookers joined an army of photographers [and] reporters . . . ."].) Second, the state argued "there is . . . no evidence car horns were honked as the jury 'was still in the box.'" (17 CT 5451.) The state did *not* dispute that the crowd wildly cheered the departing jurors, nor that it jeered the Peterson family. (17 CT 5451.)

The trial court did not resolve these relatively minor factual disputes. As referenced above, the court noted that it had "never seen anything like [this] before." (112 RT 20850.) The court explained it could "not account for the media coverage" which was "beyond my control." (112 RT 20852.) According to the court, this was "a problem without a solution" since there was no place which "hasn't been inundated with the media coverage." (112 RT 20852-20853.) The court concluded "[t]here's no place to send this case." (112 RT 20853.)

Turning to the public reaction and its impact on the jurors -- the actual reason for the then-pending motion to seat a new jury -- the court noted that "I can't account for the reaction of the public to this case." (112 RT 20856.) The court further observed that because "this is still a free country" it did not have power to stop people from "expressing their views." (112 RT 20857.) The court denied the defense motion for a new penalty

phase jury, adding that it would instruct the jury which had been exposed to the public reaction to ignore public sentiment, and "that's all a court can do." (112 RT 20857.)

As discussed more fully below, when faced with a mob wildly cheering a jury that has just found a defendant guilty of capital murder -- the same jury that will soon decide whether that same defendant will live or die -- a jury instruction is most certainly *not* "all a court can do." The trial court's refusal to take any real action violated both state and federal law and requires a new penalty phase.

B. The Trial Court's Refusal To Discharge The Jury And Seat A New Jury For The Penalty Phase Violated State Law.

Section 190.4, subdivision (c) was added to the Penal Code by initiative in 1978 and has remained unchanged since. Although this section provides generally that the jury which returns a guilt-phase verdict in a capital case should also decide the penalty, that section explicitly authorizes trial courts to discharge the guilt phase jury and seat a new jury for the penalty phase when good cause has been shown:

> "If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider . . . the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn."

Because this section expresses a "legislative preference" for a single jury, this Court has held that "good cause to impanel a new jury must appear on the record as a demonstrable reality and show the jury's inability to perform its function." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1170. *Accord People v. Bradford* (1997) 15 Cal.4th 1229, 1354.) In more than three decades since section 190.4, subdivision (c) was enacted, this Court has never held that good cause was shown as a demonstrable reality.

Defense counsel's expressed desire to voir dire the jury differently for guilt and penalty -- so he could ask prospective penalty phase jurors about prior offenses which the guilt phase jurors would not hear -- does not meet this test. (*See*, *e.g.*, *People v. Catlin* (2001) 26 Cal.4th 81, 114; *People v. Rowland* (1992) 4 Cal.4th 238, 268; *People v. Nicolaus* (1991) 54 Cal.3d 551, 573-574.) Nor does the suggestion that a jury hearing the guilt phase evidence (and finding the defendant guilty of special circumstances murder) might be less likely to fairly judge the penalty phase evidence. (*See*, *e.g.*, *People v. Kraft* (2000) 23 Cal.4th 978, 1069-1070; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1059.) And the "demonstrable reality" test is not met simply because the defense strategies at the guilt phase and the penalty phase are different. (*See*, *e.g.*, *People v. Pride* (1992) 3 Cal.4th 195, 252; *People v. Taylor* (1990) 52 Cal.3d 719, 737-738.) As this Court has concluded, good cause is not established by speculation; it "is established only by facts

which appear in the record as a demonstrable reality.'" (*People v. Gates* (1987) 43 Cal.3d 1168, 1199. *See People v. Williams* (1997) 16 Cal.4th 153, 229.)

But the "demonstrable reality" test -- while demanding -- is neither unique to section 190.4 nor impossible to meet. Thus, where a defendant challenges an identification procedure as unduly suggestive, he must prove the suggestive nature of the lineup "as a demonstrable reality, not just speculation." (*People v. Cook* (2007) 40 Cal.4th 1334, 1355; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) In this context, the "demonstrable reality" test simply requires the defendant to show that the procedure is "so impermissibly suggestive as to give rise to a very *substantial likelihood* of irreparable misidentification." (*People v. Cook*, *supra*, 40 Cal.4th at p. 1355, emphasis added.)

Similarly, Penal Code section 1089 gives trial courts discretion to discharge sitting jurors when "upon good cause shown to the court [the juror] is found to be unable to perform his or her duty . . . ." Here too, a juror's inability to perform may not be based on speculation but "must appear in the record as a 'demonstrable reality' and will not be presumed." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1158.) In applying the demonstrable reality test in this context, the courts have again relied on a "substantial likelihood" test; where the facts show a substantial likelihood a juror cannot perform his duty, the "demonstrable reality" test has been met even if the matter has not been proven

with certainty. (*See*, *e.g.*, *People v. Zamudio* (2008) 43 Cal.4th 327, 349-350; *People v. Bell* (1998) 61 Cal.App.4th 282, 287-289.)

People v. Bell is instructive. There defendant was charged with robbery and attempted robbery. On the second day of trial a juror called the court before proceedings began, explaining that he had to drive his son to the doctor and would be back in court by 1:30 that afternoon. (61 Cal.App.4th at p. 287.) The juror promised to call back before 10:30 with more information. (*Ibid*.) The trial court did not wait for the 10:30 call and simply discharged the juror without further inquiry. (*Ibid*.) On appeal, defendant argued there was insufficient cause to discharge the juror. The reviewing court disagreed, holding the trial court properly "discharge[d] [the] juror . . . and replace[d] him with an alternate juror." (*Id*. at p. 289. *Accord People v. Smith* (2005) 35 Cal.4th 334, 349; *People v. Hall* (1979) 95 Cal.App.3d 299, 307.)

In short, as *Bell* shows, while the demonstrable reality test precludes reliance on speculation, it does not require absolute certainty. A substantial likelihood is all that is required. Here, this test was met.

There was nothing speculative about releasing the guilt phase jurors into a mob of spectators that were cheering the verdict and applauding the jurors. There was nothing

speculative about the public reaction to the verdict -- the jury had reached the precise verdict which a vast and vocal majority of the population wanted to see. And there was nothing speculative about what verdict the public wanted to see in the penalty phase. Once the jury was released into the cheering mob -- while it may have been conceivable that jurors would ignore the public reaction -- there was at the very least both a substantial likelihood and a substantial risk jurors would be unable to ignore what they had seen and decide the penalty phase without being influenced by the strongly held (and expressed) views of the public for vengeance. Because this is all the "demonstrable reality" test requires, there was good cause to seat a new penalty phase jury here.

This case was, as all parties below recognized, unique in the amount of press coverage and the public reaction. But that did not absolve the trial court of its responsibility to ensure a fair penalty trial. The Court need carve out no new territory in holding that releasing penalty phase jurors into a mob wildly cheering the jurors' guilt phase verdicts of guilt -- with the obvious implication as to the public's view on the appropriate punishment -- is not merely unseemly, but in violation of state law. A new penalty phase is required.

C. The Trial Court's Refusal To Seat A New Penalty Phase Jury Violated Due Process And The Sixth Amendment.

Taken together, the Fifth and Sixth Amendments guarantee criminal defendants the right to a fair trial by an impartial jury. (*Duncan v. Louisiana* (1968) 391 U.S. 145; *Estes v. Texas* (1965) 381 U.S. 532; *Irvin v. Dowd*, *supra*, 359 U.S. 394.) This includes the right to a trial by a jury free from outside influences, such as prejudicial publicity. (*See*, *e.g.*, *Sheppard v. Maxwell*, *supra*, 384 U.S. at pp. 362-363.) The California Constitution guarantees the same basic rights. (*See*, *e.g.*, *Maine v. Superior Court* (1968) 68 Cal.2d 375.) And, of course, these same rights apply with equal force to the penalty phase of a capital trial. (*Fain v. Superior Court* (1970) 2 Cal.3d 46, 52.) As the United States Supreme Court held nearly 50 years ago, where circumstances surrounding a highly publicized murder case raise the specter of improper considerations coming into play in a jury's verdict, Due Process is violated and the ensuing verdict cannot stand regardless of solemn assurances of neutrality given during the voir dire process. (*See Rideau v. Louisiana*, *supra*, 373 U.S. at p. 727 [defendant charged with murder, jailhouse confession filmed and broadcast on local television, three of the seated jurors saw the confession but assured the trial judge they would disregard it, trial court denied defendant's change of venue motion; held, due process violated "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury . . . ."].)

Due process was violated here as well. As defense counsel noted without contradiction from the state, after returning guilty verdicts on the murder charges, the jurors "were applauded and cheered as if they were members of a winning Super Bowl team . . . ." (17 CT 5344.) That this reaction was no fault of the court's, or the prosecution, is beside the point. The risk was that this public reaction influenced the jury which would in short order be called on to decide if Mr. Peterson was to live or die. As in *Rideau*, this risk was unacceptable. Just as the Court concluded there, "[d]ue process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." (*Rideau*, *supra*, 373 U.S. at p. 727.) A new penalty phase is required.

D. The Trial Court's Refusal To Seat A New Penalty Phase Jury Violated The Eighth Amendment.

Separate and apart from the Due Process grounds discussed above, a new penalty phase is compelled by the Eighth Amendment. The death penalty is a qualitatively different punishment than any other. (*See*, *e.g.*, *Beck v. Alabama*, *supra*, 447 U.S. at p. 638, n.13; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. (*See*, *e.g.*, *Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638, n.13.)

Procedures which risk undercutting this heightened need for reliability violate the Eighth Amendment. (*See*, *e.g.*, *Lankford v. Idaho* (1991) 500 U.S. 110, 127; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118-119 (O'Connor, J., concurring); *Gardner v. Florida*, *supra*, 430 U.S. at p. 362; *Lockett v. Ohio*, *supra*, 438 U.S. 586.) This is so even when those same procedures do not violate the Due Process clause. (*See*, *e.g.*, *Beck v. Alabama*, *supra,* 447 U.S. at pp. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not]. *See Sawyer v. Smith* (1990) 497 U.S. 227, 235 [distinguishing between the protections of the due process clause and the "more particular guarantees of sentencing reliability based on the Eighth Amendment."].)

Here, the jury's exposure to the public reaction certainly raises a risk that the result of the penalty phase verdict would be improperly influenced. The release of the jurors into a mob of spectators cheering the guilty verdict could have sent only one message about the appropriate penalty phase verdict in the eyes of the public: that verdict was death. And while it may be that one or more jurors would have ignored the public reaction in accord with the trial court's instruction, a new penalty phase is required "so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 119 [O'Connor, J., concurring].)

XV. THE TRIAL COURT ERRED IN PRECLUDING MR. PETERSON FROM PRESENTING RELEVANT MITIGATING EVIDENCE WHICH COULD HAVE SERVED AS A BASIS FOR A SENTENCE LESS THAN DEATH.

A. The Relevant Facts.

After the jury returned a guilty verdict, the matter went to a penalty phase. As part of the mitigation case, defense counsel offered testimony from retired Orange County Superior Court Judge Donald McCartin. (114 RT 21020.) Out of the jury's presence the defense made an offer of proof that Judge McCartin had presided over 15 death penalty cases and sentenced 9 defendants to death. (114 RT 21020.) Defense counsel initially offered to present Judge McCartin's opinion that death was not the appropriate sentence in this case:

> "Judge McCartin would, if called, would testify that, based upon his examination of this particular factual situation and the lack of record of my client, and the nature and circumstances of the crime, that, in his opinion, my client does not qualify for a death penalty -- imposition of the death penalty, number one. Number two, that he certainly is not among the worst of the worst that he has seen, and that this is not a case that should -- where the death penalty should be imposed." (114 RT 21020-21021.)

The state objected to this opinion evidence. (114 RT 21021.) The court sustained the objection. (114 RT 21022.) The court advised defense counsel that he was free to

"argue that your client is not the worst of the worst" and he could "compare him to other cases without talking about specific disposition of those causes." (114 RT 21022.) But Judge McCartin's "opinion is totally irrelevant." (114 RT 21023.)

Counsel then asked why he was precluded from producing evidence on a point which the court said he could argue. (114 RT 21023.) The court responded that "you can produce evidence. You can't do it through Judge McCartin's opinion. It's totally irrelevant." (114 RT 21023.)

Given the court's ruling that Judge McCartin's opinion was irrelevant, defense counsel shifted gears. He then offered the judge as a "fact witness" to testify about "various types of cases" where death had been imposed. (114 RT 21023.) Although this was no longer opinion evidence, the trial court ruled this fact-based evidence inadmissible as well:

> "No. Answer is no. Totally irrelevant. Okay? So don't mention Judge McCartin." (114 RT 21023.)

Defense counsel made clear he understood that under the court's ruling, Judge McCartin "can't come in and opine as to a legal conclusion." (114 RT 21024.) But counsel emphasized that in light of the court's ruling he was revising his proffer and was

now asking that Judge McCartin be permitted "to come in and compare or testify as to [the facts of] other capital cases . . . ." (114 RT 21024.) The court excluded the evidence:

> "No, can't do that. But you can certainly argue it." (114 RT 21024.)

Mr. Peterson here has no quibble with the trial court's initial ruling, excluding Judge McCartin's opinion as to whether death was a proper sentence in this case. But as discussed more fully below, the trial court's next ruling -- precluding defense counsel from presenting evidence of cases in which death was imposed -- violated the Eighth Amendment. The United States Supreme Court has broadly defined mitigation as any evidence which might serve "as a basis for a sentence less than death" or which "a fact-finder could reasonably deem to have mitigating value." As courts and legislatures around the country have all recognized, the evidence proffered in this case met *both* these definitions. The trial court here was not free to simply ignore the pronouncements of the United States Supreme Court. A new penalty phase is required.

B. Because The Other-Case Evidence Not Only *Could* Serve As A Basis For A Sentence Less Than Death, But *Has* Done So In More Than 17 Capital Cases, The Trial Court Here Was Not Free To Exclude It In Its Entirety From The Calculus Of Death.

It is now well established that the Eighth and Fourteenth Amendments will not permit a death sentence to stand where the sentencer has been barred from considering mitigating evidence. (*Eddings v. Oklahoma*, *supra*, 455 U.S. 104.) "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. . . . Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances." (*Jurek v. Texas* (1976) 428 U.S. 262, 271.)

In a number of cases the Supreme Court has defined exactly what the term "mitigating evidence" means. The Court has explained that mitigating evidence is evidence which "might serve 'as a basis for a sentence less than death.'" (*Tennard v. Dretke* (2004) 542 U.S. 274, 287.) In another case, the Court noted that mitigation is "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*Smith v. Texas* (2004) 543 U.S. 37, 44.)

Given these precedents, the question here is simple: did the mitigating evidence offered at trial meet these definitions? Or, put in the exact language of the case law, is this evidence (1) "of such a character that it might serve as a basis for a sentence less than death" or (2) the type of evidence "a fact-finder could reasonably deem [it] to have mitigating value?" The answer is yes.

Indeed, the fact of the matter is that the court ruled that defense counsel could argue the point in his closing argument to the jury in asking for a life sentence. Of course, this ruling reflects the court's own recognition that this type of evidence is directly relevant to the jury's decision in choosing between life and death.

Equally important, the Supreme Court's recent decision in *Kimbrough v. United States* (2007) 552 U.S. 85, speaks directly to the relevance of precisely this kind of evidence in determining an appropriate punishment. There, defendant was convicted of several offenses involving 56 grams of *crack* cocaine. At sentencing, the trial court considered "the nature and circumstances of the offense and [defendant's] history and characteristics." (*Id*. at p. 93.) In addition, however, the trial court also considered sentences imposed on other defendants who possessed 56 grams of *powder* cocaine. (*Ibid*.) Based on this factor the trial court imposed a lower term on defendant, ruling that a longer sentence would be "disproportionate." The Fourth Circuit Court of Appeals held

that the trial court's consideration of sentences imposed in other cases was improper. (*Ibid*.) The Supreme Court reversed, holding that the trial court "rested its sentence on . . . appropriate considerations" and properly considered the sentences imposed in other cases. (*Id*. at p. 111.)

Kimbrough is entirely logical. As both the district court and Supreme Court recognized, one factor relevant to selecting an appropriate punishment is the need to avoid disparities among defendants who have committed similar crimes. Indeed, even before *Kimbrough*, numerous states recognized that this type of evidence was so important that it had to be considered in every single capital case. Some states require the sentencer to consider this evidence. *See*, *e.g.*, Neb. Rev. Stat. § 29-2522(3). Other states by statute or case law required that -- at the very least -- the reviewing court consider this evidence. *See*, *e.g.*, Del. Code Ann tit. 11, § 4209(g)(2)(a); Idaho Code § 19-2827(c)(3); Ga. Code Ann. § 17-10-35 (c)(3); Mo. Rev. Stat. § 565.035(3)(3); N.J. Stat. Ann. § 2C:11-3(e); *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973) (Florida). These representative statutes and decisions show that evidence of sentences in other cases is widely viewed not only as relevant to the selection of a capital sentence, but so important that some jurisdictions require it to be considered in every single case.

The actual consideration of this evidence by trial and reviewing courts throughout the nation also shows how important this evidence is. In fact, Mr. Peterson has located at least 17 cases across the nation where evidence of death sentences imposed in other egregious cases has been held to have sufficient "mitigating value" to require "a sentence less than death."[61] (*See also* Baldus, Discrimination in the Administration of the Death Penalty, 81 Neb. L. Rev. 486, 514-519 (2002) [discussing the use of other-case evidence as mitigation by the sentencer under the Nebraska scheme].)

Taken together, these cases control the outcome here. After all, the question is whether defendant's proffered evidence was "of such a character that it *might* serve as a basis for a sentence less than death" or "*could* . . . [be] deem[ed] to have mitigating value." *Kimbrough* shows the relevance of this kind of evidence in the sentencing process generally. Cases showing that this exact kind of evidence *has* served as a basis for a sentence less than death, and *does* have mitigating value, answer this question

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[61] *See*, *e.g.*, *Sumlin v. State* (Ark. 1981) 617 S.W.2d 372, 375; *Johnson v. State* (Fla. 1998) 720 So.2d 232, 238-239; *Robertson v. State* (Fla. 1997) 699 So.2d 1343, 1347; *Morgan v. State* (Fla. 1994) 639 So.2d 6, 14; *Kramer v. State* (Fla. 1993) 619 So.2d 274, 277-278; *Clark v. State* (Fla. 1992) 609 So.2d 513, 516; *Penn v. State* (Fla. 1991) 574 So.2d 1079, 1083-1084; *Klokoc v. State* (Fla. 1991) 589 So.2d 219; *Nibert v. State* (Fla. 1990) 574 So.2d 1059, 1063; *Livingston v. State* (Fla. 1988) 565 So.2d 1288, 1292 (Fla. 1988); *Blakely v. State* (Fla. 1990) 561 So.2d 560, 561; *Caruthers v. State* (Fla. 1985) 465 So.2d 496, 499; *State v. Pratt* (Id. 1993) 873 P.2d 800, 824; *State v. Windsor* (Id. 1985) 716 P.2d 1182, 1193-1195; *Coleman v. State* (Miss. 1979) 378 So.2d 640, 649-650; *State v. Chaney* (Mo. 1998) 967 S.W.2d 47, 59-60; *State v. Papasavvas* (N.J. 2002) 170 N.J. 462.

beyond any doubt. That is all the Eighth Amendment requires; the other-case evidence offered here could have served as the basis for a sentence less than death and was, therefore, proper mitigation. The trial court's exclusion of this evidence violated the Eighth Amendment.

In making this argument, Mr. Peterson is aware that in *Pulley v. Harris* (1984) 465 U.S. 37, the Supreme Court held that on direct review of a death judgment, this Court was not required to consider factual evidence about "punishment[s] imposed on others convicted of the same crime." (*Id*. at p. 43.) Since *Harris*, this Court has repeatedly recognized that intercase proportionality review on appeal is not constitutionally required. (*See*, *e.g.*, *People v. Moon* (2005) 37 Cal.4th 1, 48; *People v. Gurule* (2002) 28 Cal.4th 557, 663; *People v. Lawley* (2002) 27 Cal.4th 102, 169.) Because a *reviewing court* need not consider other-case evidence, the state may argue that a trial court may also preclude the *sentencer* from considering such evidence if offered in mitigation.

This conclusion does not follow from *Pulley*. It reflects a fundamental misunderstanding about the completely distinct roles of sentencers versus reviewing courts in the capital sentencing process.

Mitigating evidence is, by its very nature, factual. That is true whether the mitigating evidence is good behavior in prison, a defendant's childhood or -- as in this case -- punishments imposed in other cases. Of course, the proper place to present such factual material in a capital case is to the capital sentencer during the penalty hearing. Especially in light of the institutional limitations of reviewing courts, it would be surprising indeed if the Eighth Amendment mandated that there was a particular type of mitigating evidence which reviewing courts had to consider afresh. Simply put, *Pulley*'s conclusion that the Constitution does not isolate other-case evidence alone for special appellate treatment says nothing at all about whether such evidence is admissible if offered at trial. The fact remains that if in a particular case such evidence "might serve as a basis for a sentence less than death" or "could reasonably [be] deem[ed] to have mitigating value," the evidence is mitigating and admissible. The decision in *Pulley* has nothing to do with the question at issue here. (*See People v. Marshall* (1996) 13 Cal.4th 799, 854 [noting that the rule in *Pulley* does not govern a claim that the trial court erred in precluding defense counsel from presenting evidence or argument on death sentences in other cases].)

Mr. Peterson is also aware that this Court has permitted trial courts to instruct a penalty phase jury that it may not "attempt to compare this crime, this murder, with any other murder." (*People v. Roybal* (1998) 19 Cal.4th 481, 529.) And the Court has upheld

rulings precluding counsel from making a penalty phase argument comparing the subject crime to other murders. (*People v. Marshall*, *supra*, 13 Cal.4th at pp. 854-855; *People v. Sanders* (1995) 11 Cal.4th 475, 554-555.)

Of course, these cases all precede the very clear, and very broad, definitions of mitigating evidence set forth by the United States Supreme Court in both *Tennard* and *Smith*, holding that mitigation is evidence which (1) "might serve as a basis for a sentence less than death" or (2) "tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*Tennard v. Dretke*, *supra*, 542 U.S. at pp. 284, 287; *Smith v. Texas*, *supra*, 543 U.S. at p. 44.) Moreover, these cases also precede the Supreme Court's decision in *Kimbrough* as well. Finally, none of these cases considered the impact of the fact that so many state statutes -- and so many cases -- explicitly look to exactly this type of evidence in assessing whether death is the appropriate sentence in a case. (*See People v. Gilbert* (1969) 1 Cal.3d 475, 482, n.7 ["It is axiomatic that cases are not authority for propositions not considered".].) The trial court's exclusion of this evidence was error.

C. The Trial Court's Exclusion Of This Entire Class Of Mitigating Evidence Requires A New Penalty Phase.

Capital defendants have a constitutional right to present to the sentencer any mitigating evidence demonstrating the appropriateness of a penalty less than death. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) The United States Supreme Court has never held that errors which prevent the jury from considering mitigating evidence can be found harmless by a reviewing court. (*See*, *e.g.*, *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296 [instructional error precludes full jury consideration of mitigating evidence at defendant's penalty phase; held, death sentence reversed without application of a harmless error test]; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 247-265 [same]; *Penry v. Johnson* (2001) 532 U.S. 782, 796-804 [same]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319-328 [same]; *Eddings v. Oklahoma*, *supra*, 455 U.S. 104 [sentencer refuses to consider evidence regarding defendant's childhood; held, death sentence reversed without application of a harmless error test]; *Lockett v. Ohio*, *supra*, 438 U.S. 586 [state statute precluded sentencer from considering mitigating evidence; held, death sentence reversed without application of a harmless error test].) Lower federal courts too have agreed that this type of error is not subject to harmless error review. (*See*, *e.g.*, *Nelson v. Quarterman* (5th Cir. 2006) 472 F.3d 287, 314.)

Penry is particularly instructive. In that case, defendant first contended that the state's use of a psychiatrist's report violated his Fifth Amendment rights. (532 U.S. at pp. 793-796.) The Supreme Court rejected the claim and, in an alternative holding, found any error harmless. (532 U.S. at p. 796.) As to defendant's second claim involving mitigating evidence, the Court agreed there was constitutional error and reversed without any harmless error analysis at all.

In making this argument, Mr. Peterson is aware this Court has charted a different course, applying harmless error analysis to such errors. (*See*, *e.g.*, *People v. Lucero*, *supra*, 44 Cal.3d at pp. 1031-1032.) Subsequent cases have reached the same conclusion, citing *Lucero*, and requiring the state to prove the error harmless beyond a reasonable doubt. (*See*, *e.g.*, *People v. Smith* (2005) 35 Cal.4th 334, 368; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117; *People v. Mickle* (1991) 54 Cal.3d 140, 193.)

In this case, there is no need to resolve the tension between these two lines of authority. Even assuming this Court applies harmless error analysis to the trial court's errors here, the state will be unable to carry its burden.

Defendant here was convicted of one count of first degree murder and one count of second degree murder. Although the circumstance of this crime were undeniably tragic,

the case does not present the type of unusually heinous crime the Court often sees giving rise to a death sentence. (See, e.g., *In re Carpenter* (1995) 9 Cal.4th 634 [defendant sentenced to death for five separate counts of first degree murder]; *People v. Bittaker* (1989) 48 Cal.3d 1046 [defendant sentenced to death for kidnaping, raping, sodomizing and murdering five teenage girls]; *People v. Bonin* (1989) 47 Cal.3d 808 [defendant sentenced to death after murdering ten people].) In contrast to these egregious cases, this case involves a single count of first degree murder, along with a second count of non-premeditated, second degree murder.

Nor does this case involve the type of particularly heinous defendant the Court often sees in death penalty cases. (*See*, *e.g.*, *People v. Ray* (1996) 13 Cal.4th 313, 330-331 [defendant had two prior murder convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 567 [defendant convicted of murder in 1985 had three prior murder convictions and had been on death row for these prior homicides]; *People v. Hendricks* (1987) 43 Cal.3d 584, 588-589 [defendant had two prior murder convictions].) Here, prior to the charged crimes, defendant had never been charged or even arrested for any criminal offense.

To the contrary, as ths mitigation case showed, prior to the charges here defendant was an upstanding and contributing member of society. Defendant presented extensive testimony n support of the mitigation case, not only from family members, but from

friends who had known him his entire life, teachers from grade school through college, employers from his teenage years onward, and neighbors from throughout his adult life. On this record, the exclusion of this mitigating evidence cannot be deemed harmless even if a harmless error standard is applied.

XVI. BECAUSE THE CALIFORNIA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS, MR. PETERSON'S DEATH SENTENCE MUST BE REVERSED.

In the capital case of *People v. Schmeck* (2005) 37 Cal.4th 240, the defendant presented a number of attacks on the California capital sentencing scheme which had been raised and rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (37 Cal.4th at p. 303.) This Court acknowledged that in dealing with these systemic attacks in past cases, it had given conflicting signals on the detail needed in order for a defendant to preserve these attacks for subsequent review. (37 Cal.4th at p. 303, n.22.) In order to avoid detailed briefing on such claims in future cases, the Court held that a defendant could preserve these claims by "(I) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (37 Cal.4th at p. 304.)

Mr. Peterson has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck*, Mr. Peterson identifies the following systemic (and previously rejected) claims relating to the California death penalty scheme which require a new penalty phase in his case:

(1) The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die. (120 RT 21693.) This aggravating factor was unconstitutionally vague in violation of the Eighth Amendment and requires a new penalty phase. This Court has already rejected this argument. (*People v. Ray* (1996) 13 Cal.4th 313, 358.) The Court's decision in *Ray* should be reconsidered.

(2) California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has already rejected this argument. (*People v. Schmeck*, *supra,* 37 Cal.4th at p. 304.) For the same reasons set forth by appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(3) Penal Code section 190.3, subdivision (a) -- which at the time of trial in this case permitted a jury to sentence a defendant to death based on the "circumstances of the crime" -- is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death. The jury in this case was instructed in accord with this provision. (120 RT 21692.) This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305.) For the same reasons set forth by appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(4) Under California law applicable to this case, a defendant convicted of first degree murder could not receive a death sentence unless a jury (1) found true one or more special circumstance allegations which rendered the defendant death eligible and (2) found that aggravating circumstances outweighed mitigating circumstances. The jury in this case was not told that the second of these decisions had to be made beyond a reasonable doubt. This violated Mr. Peterson's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(5) At the penalty phase, the trial court instructed the jury in accord with then-standard instruction CALJIC 8.85. (20 CT 6189-6190.) This

> instruction was constitutionally flawed in five ways: (1) it failed to delete inapplicable sentencing factors, (2) it failed to delineate between aggravating and mitigating factors, (3) it contained vague and ill-defined factors, (4) some mitigating factors were limited by adjectives such as "extreme" or "substantial," and (5) failed to specify a burden of proof as to either mitigation or aggravation. (20 CT 6189-6190.) These errors, taken singly or in combination, violated Mr. Peterson's Fifth, Sixth, Eighth and Fourteenth Amendment rights. This Court has already rejected these arguments. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13 Cal.4th at pp. 358-359.) The Court's decisions in *Schmeck* and *Ray* should be reconsidered.
>
> (6) Because California's death penalty law violates international law -- including the International Covenant of Civil and Political Rights -- Mr. Peterson's death sentence must be reversed. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

To the extent respondent argues that any of these issues is not properly preserved because Mr. Peterson has not presented them in sufficient detail to this Court, Mr. Peterson will seek leave to file a supplemental brief more fully discussing these issues.

CONCLUSION

For all these reasons, Mr. Peterson respectfully request that a new trial be granted as to both guilt and penalty.

DATED: _____

Respectfully submitted,

CLIFF GARDNER
CATHERINE WHITE
LAZULI WHITT

By _____
Cliff Gardner
Attorney for Appellant

Appendix A

Question 95 on the juror questionnaire asked prospective jurors if they had formed any "opinions about the guilt or innocence of the defendant, Scott Peterson." As of the date of the second venue change motion, more than 400 jurors admitted to having formed an opinion in the case.[1] Of the jurors who had formed an opinion on guilt or innocence,

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[1] 2 CT Hardship 156; 2 CT Hardship 178; 2 CT Hardship 201; 2 CT Hardship 224; 2 CT Hardship 247; 2 CT Hardship 270; 2 CT Hardship 293; 2 CT Hardship 41; 3 CT Hardship 316; 3 CT Hardship 339; 3 CT Hardship 385; 3 CT Hardship 408; 3 CT Hardship 431; 3 CT Hardship 454; 3 CT Hardship 477; 3 CT Hardship 523; 3 CT Hardship 546; 3 CT Hardship 592; 4 CT Hardship 638; 4 CT Hardship 730; 4 CT Hardship 753; 4 CT Hardship 776; 4 CT Hardship 845; 4 CT Hardship 891; 5 CT Hardship 1052; 5 CT Hardship 1075; 5 CT Hardship 1121; 5 CT Hardship 1167; 5 CT Hardship 937; 6 CT Hardship 1213; 6 CT Hardship 1236; 6 CT Hardship 1328; 6 CT Hardship 1489; 7 CT Hardship 1512; 7 CT Hardship 1558; 7 CT Hardship 1581; 7 CT Hardship 1650; 7 CT Hardship 1719; 7 CT Hardship 1765; 8 CT Hardship 1811; 8 CT Hardship 1880; 8 CT Hardship 1949; 8 CT Hardship 1995; 8 CT Hardship 2064; 9 CT Hardship 2133; 9 CT Hardship 2156; 9 CT Hardship 2180; 9 CT Hardship 2249; 9 CT Hardship 2318; 9 CT Hardship 2341; 9 CT Hardship 2365; 10 CT Hardship 2388; 10 CT Hardship 2457; 10 CT Hardship 2503; 10 CT Hardship 2549; 10 CT Hardship 2595; 10 CT Hardship 2641; 11 CT Hardship 2873; 12 CT Hardship 2988; 12 CT Hardship 3011; 12 CT Hardship 3057; 12 CT Hardship 3080; 12 CT Hardship 3103; 12 CT Hardship 3128; 12 CT Hardship 3151; 12 CT Hardship 3174; 12 CT Hardship 3243; 13 CT Hardship 3266; 13 CT Hardship 3334; 13 CT Hardship 3357; 13 CT Hardship 3403; 13 CT Hardship 3472; 13 CT Hardship 3495; 13 CT Hardship 3518; 14 CT Hardship 3564; 14 CT Hardship 3610; 14 CT Hardship 3633; 14 CT Hardship 3656; 14 CT Hardship 3794; 14 CT Hardship 3840; 15 CT Hardship 3886; 15 CT Hardship 3932; 15 CT Hardship 4001; 15 CT Hardship 4024; 15 CT Hardship 4070; 15 CT Hardship 4139; 16 CT Hardship 4162; 16 CT Hardship 4185; 16 CT Hardship 4208; 16 CT Hardship 4254; 16 CT Hardship 4300; 16 CT Hardship 4323; 16 CT Hardship 4346; 16 CT Hardship 4392; 17 CT Hardship 4462; 17 CT Hardship 4531; 17 CT Hardship 4577; 17 CT Hardship 4600; 17 CT Hardship 4623; 17 CT Hardship 4646; 17 CT Hardship 4669; 17 CT Hardship 4738; 18 CT Hardship 4761; 18 CT Hardship 4784; 18 CT Hardship 4807; 18 CT Hardship 4853; 18 CT Hardship 4876; 18 CT Hardship 4899; 18 CT Hardship 4945; 18 CT Hardship 5014; 18 CT Hardship 5037; 19 CT Hardship 5083; 19 CT Hardship 5175; 19

CT Hardship 5198; 19 CT Hardship 5221; 19 CT Hardship 5313; 20 CT Hardship 5382; 20 CT Hardship 5405; 20 CT Hardship 5474; 20 CT Hardship 5497; 20 CT Hardship 5520; 20 CT Hardship 5566; 20 CT Hardship 5589; 20 CT Hardship 5612; 21 CT Hardship 5681; 21 CT Hardship 5750; 21 CT Hardship 5773; 21 CT Hardship 5842; 21 CT Hardship 5888; 21 CT Hardship 5912; 22 CT Hardship 5958; 22 CT Hardship 6027; 22 CT Hardship 6120; 22 CT Hardship 6143; 22 CT Hardship 6166; 22 CT Hardship 6212; 23 CT Hardship 6258; 23 CT Hardship 6304; 23 CT Hardship 6350; 23 CT Hardship 6396; 23 CT Hardship 6442; 23 CT Hardship 6465; 23 CT Hardship 6534; 24 CT Hardship 6695; 24 CT Hardship 6742; 24 CT Hardship 6765; 24 CT Hardship 6788; 24 CT Hardship 6811; 25 CT Hardship 6926; 25 CT Hardship 6972; 25 CT Hardship 7087; 26 CT Hardship 7156; 26 CT Hardship 7202; 26 CT Hardship 7225; 26 CT Hardship 7340; 26 CT Hardship 7386; 27 CT Hardship 7432; 27 CT Hardship 7480; 27 CT Hardship 7503; 27 CT Hardship 7526; 27 CT Hardship 7572; 27 CT Hardship 7619; 27 CT Hardship 7642; 28 CT Hardship 7803; 28 CT Hardship 7849; 28 CT Hardship 7872; 28 CT Hardship 7895; 28 CT Hardship 7918; 29 CT Hardship 8010; 29 CT Hardship 8036; 29 CT Hardship 8060; 29 CT Hardship 8083; 29 CT Hardship 8152; 29 CT Hardship 8198; 29 CT Hardship 8267; 30 CT Hardship 8428; 30 CT Hardship 8451; 30 CT Hardship 8474; 30 CT Hardship 8566; 31 CT Hardship 8589; 31 CT Hardship 8750; 31 CT Hardship 8773; 31 CT Hardship 8819; 31 CT Hardship 8842; 32 CT Hardship 8911; 32 CT Hardship 8934; 32 CT Hardship 8981; 32 CT Hardship 9004; 32 CT Hardship 9073; 32 CT Hardship 9119; 32 CT Hardship 9165; 33 CT Hardship 9188; 33 CT Hardship 9234; 33 CT Hardship 9257; 33 CT Hardship 9280; 33 CT Hardship 9326; 33 CT Hardship 9349; 33 CT Hardship 9441; 33 CT Hardship 9464; 34 CT Hardship 9510; 34 CT Hardship 9602; 34 CT Hardship 9625; 34 CT Hardship 9648; 34 CT Hardship 9694; 34 CT Hardship 9740; 35 CT Hardship 10062; 35 CT Hardship 9809; 35 CT Hardship 9832; 35 CT Hardship 9878; 36 CT Hardship 10085; 36 CT Hardship 10108; 36 CT Hardship 10177; 36 CT Hardship 10223; 36 CT Hardship 10269; 36 CT Hardship 10292; 37 CT Hardship 10430; 37 CT Hardship 10499; 37 CT Hardship 10614; 38 CT Hardship 10300; 38 CT Hardship 10683; 38 CT Hardship 10754; 38 CT Hardship 10823; 38 CT Hardship 10846; 38 CT Hardship 10892; 38 CT Hardship 10915; 39 CT Hardship 11030; 39 CT Hardship 11076; 39 CT Hardship 11099; 39 CT Hardship 11125; 39 CT Hardship 11171; 39 CT Hardship 11194; 40 CT Hardship 11286; 40 CT Hardship 11516; 41 CT Hardship 11654; 41 CT Hardship 11677; 41 CT Hardship 11700; 41 CT Hardship 11818; 41 CT Hardship 11841; 42 CT Hardship 11864; 42 CT Hardship 11933;

42 CT Hardship 11979; 42 CT Hardship 12002; 42 CT Hardship 12025; 42 CT Hardship 12094; 42 CT Hardship 12140; 43 CT Hardship 12163; 43 CT Hardship 12209; 43 CT Hardship 12232; 43 CT Hardship 12278; 43 CT Hardship 12301; 43 CT Hardship 12324; 43 CT Hardship 12347; 43 CT Hardship 12394; 43 CT Hardship 12417; 43 CT Hardship 12440; 44 CT Hardship 12486; 44 CT Hardship 12509; 44 CT Hardship 12555; 44 CT Hardship 12624; 44 CT Hardship 12647; 44 CT Hardship 12670; 44 CT Hardship 12693; 44 CT Hardship 12716; 44 CT Hardship 12739; 45 CT Hardship 12853a; 45 CT Hardship 12944; 45 CT Hardship 12967; 45 CT Hardship 12990; 45 CT Hardship 13013; 46 CT Hardship 13059; 46 CT Hardship 13196; 46 CT Hardship 13242; 46 CT Hardship 13265; 46 CT Hardship 13288; 46 CT Hardship 13334; 47 CT Hardship 13380; 47 CT Hardship 13449; 47 CT Hardship 13472; 47 CT Hardship 13518; 47 CT Hardship 13564; 47 CT Hardship 13587; 48 CT Hardship 13679; 48 CT Hardship 13702; 48 CT Hardship 13772; 48 CT Hardship 13841; 48 CT Hardship 13864; 48 CT Hardship 13910; 48 CT Hardship 13933; 49 CT Hardship 14050; 49 CT Hardship 14073; 49 CT Hardship 14096; 49 CT Hardship 14142; 49 CT Hardship 14165; 49 CT Hardship 14211; 50 CT Hardship 14257; 50 CT Hardship 14487; 50 CT Hardship 14533; 51 CT Hardship 14556; 51 CT Hardship 14602; 51 CT Hardship 14694; 51 CT Hardship 14717; 51 CT Hardship 14809; 51 CT Hardship 14832; 52 CT Hardship 14924; 52 CT Hardship 14993; 52 CT Hardship 15016; 52 CT Hardship 15039; 52 CT Hardship 15108; 52 CT Hardship 15131; 53 CT Hardship 15154; 53 CT Hardship 15200; 53 CT Hardship 15246; 53 CT Hardship 15338; 53 CT Hardship 15384; 53 CT Hardship 15430; 54 CT Hardship 15499; 54 CT Hardship 15522; 54 CT Hardship 15545; 54 CT Hardship 15591; 54 CT Hardship 15614; 2 CT Hovey 109; 2 CT Hovey 17; 2 CT Hovey 247; 2 CT Hovey 270; 2 CT Hovey 40; 3 CT Hovey 293; 3 CT Hovey 339; 3 CT Hovey 362; 3 CT Hovey 385; 3 CT Hovey 454; 3 CT Hovey 500; 3 CT Hovey 546; 4 CT Hovey 592; 4 CT Hovey 638; 4 CT Hovey 661; 4 CT Hovey 707; 4 CT Hovey 753; 4 CT Hovey 776; 4 CT Hovey 799; 4 CT Hovey 845; 5 CT Hovey 1006; 5 CT Hovey 1029; 5 CT Hovey 1098; 5 CT Hovey 960; 5 CT Hovey 983; 6 CT Hovey 1190; 6 CT Hovey 1236; 6 CT Hovey 1259; 6 CT Hovey 1466; 6 CT Hovey 1328; 7 CT Hovey 1512; 7 CT Hovey 1581; 7 CT Hovey 1650; 7 CT Hovey 1673; 7 CT Hovey 1719; 8 CT Hovey 1856; 8 CT Hovey 1903; 8 CT Hovey 1949; 8 CT Hovey 2064; 8 CT Hovey 1810; 9 CT Hovey 2087; 9 CT Hovey 2248; 9 CT Hovey 2271; 9 CT Hovey 2317; 10 CT Hovey 2386; 10 CT Hovey 2409; 10 CT Hovey 2432; 10 CT Hovey 2524; 10 CT Hovey 2547; 11 CT Hovey 2731; 12 CT Hovey 2961; 12 CT Hovey 3007; 12 CT Hovey 3030; 12 CT Hovey 3122; 12 CT Hovey 3168; 13 CT Hovey 3237; 13 CT Hovey 3260; 13 CT

only 1% believed Mr. Peterson was innocent while 99% (all but 5 prospective jurors) believed he was guilty.[2] Of the hundreds of prospective jurors who concluded Mr. Peterson was guilty, 364 answered question 98, which asked whether they could set aside the views they had already formed. Less than half of the jurors said they were willing to

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Hovey 3283; 13 CT Hovey 3306; 13 CT Hovey 3375; 13 CT Hovey 3398; 13 CT Hovey 3421; 13 CT Hovey 3513; 14 CT Hovey 3536; 14 CT Hovey 3743; 15 CT Hovey 3903; 15 CT Hovey 3926; 15 CT Hovey 3949; 15 CT Hovey 3972; 15 CT Hovey 4018; 16 CT Hovey 4133; 16 CT Hovey 4386; 17 CT Hovey 4409; 17 CT Hovey 4455; 17 CT Hovey 4501; 17 CT Hovey 4662; 18 CT Hovey 4731; 18 CT Hovey 4754; 18 CT Hovey 4777; 18 CT Hovey 4961; 18 CT Hovey 4984; 19 CT Hovey 5007; 19 CT Hovey 5077; 19 CT Hovey 5100; 19 CT Hovey 5261; 20 CT Hovey 5330; 20 CT Hovey 5353; 20 CT Hovey 5376; 20 CT Hovey 5422; 20 CT Hovey 5514; 21 CT Hovey 5629; 21 CT Hovey 5745; 21 CT Hovey 5840; 22 CT Hovey 5909

[2] 6 CT Hovey 1328; 20 CT Hovey 5514; 3 CT Hardship 339; 17 CT Hardship 4462; 31 CT Hardship 8750

set aside their view that Mr. Peterson was guilty.[3] More than half -- 51% -- refused to set

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[3] 2 CT Hardship 42; 2 CT Hardship 179; 2 CT Hardship 248; 2 CT Hardship 294; 3 CT Hardship 317; 3 CT Hardship 409; 3 CT Hardship 524; 3 CT Hardship 547; 3 CT Hardship 593; 4 CT Hardship 731; 4 CT Hardship 777; 4 CT Hardship 846; 5 CT Hardship 1053; 5 CT Hardship 1122; 5 CT Hardship 1168; 6 CT Hardship 1329; 7 CT Hardship 1766; 8 CT Hardship 1812; 8 CT Hardship 2065; 9 CT Hardship 2157; 9 CT Hardship 2250; 9 CT Hardship 2219; 9 CT Hardship 2366; 10 CT Hardship 2389; 12 CT Hardship 2989; 12 CT Hardship 3012; 12 CT Hardship 3058; 12 CT Hardship 3152; 13 CT Hardship 3267; 14 CT Hardship 3634; 14 CT Hardship 3657; 14 CT Hardship 3795; 15 CT Hardship 3887; 15 CT Hardship 4140; 16 CT Hardship 4163; 16 CT Hardship 4209; 17 CT Hardship 4578; 17 CT Hardship 4624; 17 CT Hardship 4647; 18 CT Hardship 4762; 18 CT Hardship 4900; 18 CT Hardship 4946; 18 CT Hardship 5015; 18 CT Hardship 5038; 19 CT Hardship 5084; 19 CT Hardship 5176; 19 CT Hardship 5222; 20 CT Hardship 5383; 20 CT Hardship 5406; 20 CT Hardship 5498; 20 CT Hardship 5613; 21 CT Hardship 5774; 21 CT Hardship 5843; 22 CT Hardship 6028; 22 CT Hardship 6167; 23 CT Hardship 6305; 23 CT Hardship 6351; 23 CT Hardship 6397; 23 CT Hardship 6535; 24 CT Hardship 6696; 24 CT Hardship 6743; 25 CT Hardship 6927; 25 CT Hardship 6973; 25 CT Hardship 7088; 26 CT Hardship 7226; 26 CT Hardship 7387; 27 CT Hardship 7433; 27 CT Hardship 7481; 27 CT Hardship 7504; 27 CT Hardship 7573; 28 CT Hardship 7804; 29 CT Hardship 8011; 29 CT Hardship 8061; 29 CT Hardship 8199; 29 CT Hardship 8268; 31 CT Hardship 8774; 31 CT Hardship 8820; 31 CT Hardship 8843; 32 CT Hardship 8912; 32 CT Hardship 8935; 32 CT Hardship 8982; 32 CT Hardship 9005; 32 CT Hardship 9074; 32 CT Hardship 9120; 32 CT Hardship 9166; 33 CT Hardship 9235; 33 CT Hardship 9258; 33 CT Hardship 9281; 33 CT Hardship 9327; 33 CT Hardship 9350; 33 CT Hardship 9465; 35 CT Hardship 10063; 36 CT Hardship 10109; 36 CT Hardship 10293; 37 CT Hardship 10431; 37 CT Hardship 10500; 38 CT Hardship 10801; 38 CT Hardship 10893; 38 CT Hardship 10916; 39 CT Hardship 11031; 39 CT Hardship 11077; 39 CT Hardship 11172; 39 CT Hardship 11195; 40 CT Hardship 11287; 40 CT Hardship 11517; 41 CT Hardship 11819; 42 CT Hardship 11865; 42 CT Hardship 11934; 42 CT Hardship 12026; 42 CT Hardship 12141; 43 CT Hardship 12210; 43 CT Hardship 12233; 43 CT Hardship 12395; 45 CT Hardship 12968; 45 CT Hardship 13014; 46 CT Hardship 13060; 46 CT Hardship 13197; 46 CT Hardship 13243; 46 CT Hardship 13335; 47 CT Hardship 13565; 47 CT Hardship 13588; 48 CT Hardship 13680; 48 CT Hardship 13773; 48 CT Hardship 13842; 48 CT Hardship

aside their views.[4]

13865; 48 CT Hardship 13911; 49 CT Hardship 14051; 49 CT Hardship 14143; 49 CT Hardship 14166; 49 CT Hardship 14212; 50 CT Hardship 14534; 51 CT Hardship 14557; 52 CT Hardship 15040; 52 CT Hardship 15109; 53 CT Hardship 15247; 54 CT Hardship 15500; 54 CT Hardship 15523; 54 CT Hardship 15592; 2 CT Hovey 110; 2 CT Hovey 271; 3 CT Hovey 294; 3 CT Hovey 386; 3 CT Hovey 547; 4 CT Hovey 593; 4 CT Hovey 639; 4 CT Hovey 662; 4 CT Hovey 754; 5 CT Hovey 984; 5 CT Hovey 1007; 5 CT Hovey 1099; 7 CT Hovey 1513; 7 CT Hovey 1582; 7 CT Hovey 1651; 7 CT Hovey 1720; 8 CT Hovey 1811; 8 CT Hovey 1857; 8 CT Hovey 1904; 8 CT Hovey 1950; 8 CT Hovey 2065; 9 CT Hovey 2249; 9 CT Hovey 2318; 10 CT Hovey 2410; 10 CT Hovey 2548; 12 CT Hovey 3008; 12 CT Hovey 3031; 12 CT Hovey 3169; 13 CT Hovey 3307; 13 CT Hovey 3399; 14 CT Hovey 3537; 15 CT Hovey 3927; 15 CT Hovey 4019; 16 CT Hovey 4134; 17 CT Hovey 4663; 18 CT Hovey 4755; 18 CT Hovey 4778; 19 CT Hovey 5008; 19 CT Hovey 5078; 20 CT Hovey 5354; 21 CT Hovey 5746; 22 CT Hovey 5910

[4] 2 CT Hardship 157; 2 CT Hardship 202; 2 CT Hardship 225; 3 CT Hardship 386; 3 CT Hardship 478; 4 CT Hardship 892; 5 CT Hardship 1076; 6 CT Hardship 1214; 6 CT Hardship 1237; 6 CT Hardship 1490; 7 CT Hardship 1513; 7 CT Hardship 1559; 7 CT Hardship 1582; 8 CT Hardship 1881; 8 CT Hardship 1950; 8 CT Hardship 1996; 9 CT Hardship 2342; 10 CT Hardship 2504; 10 CT Hardship 2596; 10 CT Hardship 2642; 11 CT Hardship 2874; 12 CT Hardship 3129; 12 CT Hardship 3175; 12 CT Hardship 3244; 13 CT Hardship 3335; 13 CT Hardship 3358; 13 CT Hardship 3404; 13 CT Hardship 3473; 13 CT Hardship 3519; 14 CT Hardship 3565; 14 CT Hardship 3611; 15 CT Hardship 3933; 15 CT Hardship 4002; 15 CT Hardship 4025; 15 CT Hardship 4071; 16 CT Hardship 4186; 16 CT Hardship 4255; 16 CT Hardship 4324; 16 CT Hardship 4347; 16 CT Hardship 4393; 17 CT Hardship 4532; 17 CT Hardship 4601; 17 CT Hardship 4670; 18 CT Hardship 4785; 18 CT Hardship 4808; 18 CT Hardship 4854; 18 CT Hardship 4877; 19 CT Hardship 5199; 20 CT Hardship 5521; 20 CT Hardship 5567; 20 CT Hardship 5590; 21 CT Hardship 5751; 21 CT Hardship 5913; 22 CT Hardship 6121; 22 CT Hardship 6213; 23 CT Hardship 6259; 23 CT Hardship 6443; 23 CT Hardship 6466; 24 CT Hardship 6766; 24 CT Hardship 6789; 24 CT Hardship 6812; 26 CT Hardship 7203; 26 CT Hardship 7341; 27 CT Hardship 7527; 27 CT Hardship 7620; 27 CT Hardship 7643; 28 CT Hardship 7873; 28 CT Hardship 7919; 29 CT Hardship 8037; 29 CT Hardship 8084; 30 CT Hardship 8429; 30 CT Hardship 8475; 30 CT Hardship 8567; 31 CT Hardship 8590; 33 CT Hardship 9189; 33 CT Hardship 9442; 34 CT

Hardship 9603; 34 CT Hardship 9626; 34 CT Hardship 9649; 34 CT Hardship 9695; 34 CT Hardship 9741; 35 CT Hardship 9810; 35 CT Hardship 9833; 36 CT Hardship 10086; 36 CT Hardship 10178; 36 CT Hardship 10224; 36 CT Hardship 10270; 37 CT Hardship 10615; 38 CT Hardship 10684; 38 CT Hardship 10755; 38 CT Hardship 10824; 38 CT Hardship 10847; 39 CT Hardship 11100; 39 CT Hardship 11126; 41 CT Hardship 11655; 41 CT Hardship 11678; 41 CT Hardship 11701; 42 CT Hardship 12003; 42 CT Hardship 12095; 43 CT Hardship 12164; 43 CT Hardship 12279; 43 CT Hardship 12302; 43 CT Hardship 12325; 43 CT Hardship 12348; 43 CT Hardship 12418; 43 CT Hardship 12441; 44 CT Hardship 12510; 44 CT Hardship 12556; 44 CT Hardship 12648; 44 CT Hardship 12671; 44 CT Hardship 12694; 44 CT Hardship 12717; 45 CT Hardship 12854; 45 CT Hardship 12945; 46 CT Hardship 13266; 47 CT Hardship 13381; 47 CT Hardship 13450; 47 CT Hardship 13473; 47 CT Hardship 13519; 48 CT Hardship 13703; 48 CT Hardship 13934; 49 CT Hardship 14074; 49 CT Hardship 14097; 50 CT Hardship 14258; 50 CT Hardship 14488; 51 CT Hardship 14603; 51 CT Hardship 14718; 51 CT Hardship 14810; 52 CT Hardship 14994; 52 CT Hardship 15017; 52 CT Hardship 15132; 53 CT Hardship 15155; 53 CT Hardship 15201; 53 CT Hardship 15339; 53 CT Hardship 15385; 53 CT Hardship 15431; 54 CT Hardship 15546; 54 CT Hardship 15615; 51 CT Hardship 14557; 52 CT Hardship 15040; 52 CT Hardship 15109; 53 CT Hardship 15247; 54 CT Hardship 15500; 54 CT Hardship 15523; 54 CT Hardship 15592; 2 CT Hovey 18; 2 CT Hovey 248; 3 CT Hovey 340; 3 CT Hovey 363; 3 CT Hovey 455; 3 CT Hovey 501; 4 CT Hovey 708; 4 CT Hovey 777; 4 CT Hovey 846; 5 CT Hovey 961; 5 CT Hovey 1030; 6 CT Hovey 1191; 6 CT Hovey 1237; 6 CT Hovey 1260; 6 CT Hovey 1467; 7 CT Hovey 1674; 9 CT Hovey 2088; 9 CT Hovey 2272; 10 CT Hovey 2387; 10 CT Hovey 2433; 11 CT Hovey 2732; 12 CT Hovey 2962; 12 CT Hovey 3123; 13 CT Hovey 3238; 13 CT Hovey 3261; 13 CT Hovey 3284; 13 CT Hovey 3376; 13 CT Hovey 3422; 13 CT Hovey 3514; 14 CT Hovey 3744; 15 CT Hovey 3950; 15 CT Hovey 3973; 16 CT Hovey 4387; 17 CT Hovey 4410; 17 CT Hovey 4456; 18 CT Hovey 4732; 18 CT Hovey 4962; 18 CT Hovey 4985; 19 CT Hovey 5101; 19 CT Hovey 5262; 20 CT Hovey 5331; 20 CT Hovey 5377; 20 CT Hovey 5423; 21 CT Hovey 5631; 21 CT Hovey 5841

Appendix B

Question 95 on the juror questionnaire asked prospective jurors if they had formed any "opinions about the guilt or innocence of the defendant, Scott Peterson." After the date of the second venue change motion, 259 jurors admitted to having formed an opinion in the case.[1] Of the jurors who had formed an opinion on guilt or innocence, only 1%

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[1] 22 CT Hovey 5909; 22 CT Hovey 6001; 22 CT Hovey 6070; 22 CT Hovey 6139; 23 CT Hovey 6162; 23 CT Hovey 6208; 23 CT Hovey 6346; 23 CT Hovey 6369; 23 CT Hovey 6438; 24 CT Hovey 6484; 24 CT Hovey 6507; 24 CT Hovey 6576; 24 CT Hovey 6599; 24 CT Hovey 6622; 24 CT Hovey 6645; 25 CT Hovey 6806; 25 CT Hovey 6898; 25 CT Hovey 6921; 25 CT Hovey 6944; 25 CT Hovey 6967; 25 CT Hovey 7013; 26 CT Hovey 7128; 26 CT Hovey 7151; 26 CT Hovey 7174; 26 CT Hovey 7197; 26 CT Hovey 7289; 27 CT Hovey 7335; 27 CT Hovey 7473; 27 CT Hovey 7519; 28 CT Hovey 7634; 28 CT Hovey 7657; 28 CT Hovey 7750; 29 CT Hovey 7957; 29 CT Hovey 8026; 29 CT Hovey 8141; 29 CT Hovey 8187; 29 CT Hovey 8210; 30 CT Hovey 8233; 30 CT Hovey 8371; 30 CT Hovey 8394; 55 CT Hardship 15752; 55 CT Hardship 15775; 55 CT Hardship 15821; 55 CT Hardship 15867; 55 CT Hardship 15890; 55 CT Hardship 16005; 56 CT Hardship 16120; 56 CT Hardship 16143; 56 CT Hardship 16212; 56 CT Hardship 16235; 56 CT Hardship 16281; 56 CT Hardship 16304; 57 CT Hardship 16350; 57 CT Hardship 16465; 58 CT Hardship 16649; 58 CT Hardship 16672; 58 CT Hardship 16718; 58 CT Hardship 16741; 58 CT Hardship 16787; 58 CT Hardship 16810; 58 CT Hardship 16833; 58 CT Hardship 16879; 58 CT Hardship 16925; 59 CT Hardship 17017; 59 CT Hardship 17063; 59 CT Hardship 17086; 59 CT Hardship 17109; 59 CT Hardship 17132; 59 CT Hardship 17224; 60 CT Hardship 17270; 60 CT Hardship 17293; 60 CT Hardship 17316; 60 CT Hardship 17339; 60 CT Hardship 17385; 60 CT Hardship 17431; 60 CT Hardship 17523; 61 CT Hardship 17615; 61 CT Hardship 17752; 62 CT Hardship 17890; 62 CT Hardship 17913; 62 CT Hardship 17959; 62 CT Hardship 18051; 62 CT Hardship 18074; 62 CT Hardship 18097; 63 CT Hardship 18143; 63 CT Hardship 18189; 63 CT Hardship 18235; 63 CT Hardship 18258; 63 CT Hardship 18304; 63 CT Hardship 18327; 63 CT Hardship 18396; 64 CT Hardship 18442; 64 CT Hardship 18465; 64 CT Hardship 18557; 64 CT Hardship 18580; 64 CT Hardship 18603; 64 CT Hardship 18672; 64 CT Hardship 18695; 65 CT Hardship 18741; 65 CT Hardship 18856; 65 CT Hardship 18902; 65 CT Hardship 18925; 65 CT Hardship 18948; 65 CT Hardship 18971; 65 CT Hardship 19017; 66 CT Hardship 19063; 66 CT Hardship 19109; 66 CT Hardship 19132; 66 CT Hardship 19178; 66 CT Hardship 19224; 66 CT Hardship 19247; 66 CT Hardship 19293; 66 CT Hardship 19316; 67 CT Hardship 19362; 67 CT Hardship 19454; 67 CT Hardship 19477; 67 CT Hardship 19500; 67 CT Hardship 19523; 67 CT Hardship 19569; 67 CT Hardship 19615; 68 CT Hardship 19638; 68 CT Hardship 19661; 68 CT Hardship 19799; 68 CT Hardship 19822; 68 CT Hardship 19845; 68 CT Hardship 19868; 68 CT Hardship

believed Mr. Peterson was innocent while 99% (all but two prospective jurors) believed

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19891; 69 CT Hardship 19960; 69 CT Hardship 19983; 69 CT Hardship 20052; 69 CT Hardship 20098; 69 CT Hardship 20121; 69 CT Hardship 20190; 69 CT Hardship 20213; 70 CT Hardship 20235; 70 CT Hardship 20351; 70 CT Hardship 20374; 70 CT Hardship 20420; 70 CT Hardship 20489; 71 CT Hardship 20558; 71 CT Hardship 20604; 71 CT Hardship 20650; 71 CT Hardship 20673; 71 CT Hardship 20765; 71 CT Hardship 20788; 72 CT Hardship 20834; 72 CT Hardship 20857; 72 CT Hardship 20880; 72 CT Hardship 20903; 72 CT Hardship 20926; 72 CT Hardship 20972; 72 CT Hardship 20995; 72 CT Hardship 21041; 72 CT Hardship 21110; 73 CT Hardship 21225; 73 CT Hardship 21248; 73 CT Hardship 21294; 73 CT Hardship 21317; 73 CT Hardship 21340; 73 CT Hardship 21386; 73 CT Hardship 21409; 74 CT Hardship 21432; 74 CT Hardship 21501; 74 CT Hardship 21547; 74 CT Hardship 21570; 74 CT Hardship 21593; 74 CT Hardship 21616; 74 CT Hardship 21639; 74 CT Hardship 21685; 74 CT Hardship 21708; 75 CT Hardship 21731; 75 CT Hardship 21800; 75 CT Hardship 21823; 75 CT Hardship 21846; 75 CT Hardship 21869; 75 CT Hardship 21938; 75 CT Hardship 21984; 76 CT Hardship 22030; 76 CT Hardship 22214; 77 CT Hardship 22328; 77 CT Hardship 22374; 77 CT Hardship 22420; 77 CT Hardship 22443; 77 CT Hardship 22512; 77 CT Hardship 22535; 77 CT Hardship 22581; 78 CT Hardship 22627; 78 CT Hardship 22650; 78 CT Hardship 22719; 78 CT Hardship 22765; 78 CT Hardship 22811; 78 CT Hardship 22903; 79 CT Hardship 22926; 79 CT Hardship 22949; 79 CT Hardship 22972; 79 CT Hardship 22995; 79 CT Hardship 23064; 79 CT Hardship 23087; 79 CT Hardship 23179; 79 CT Hardship 23202; 80 CT Hardship 23271; 80 CT Hardship 23317; 80 CT Hardship 23340; 80 CT Hardship 23386; 80 CT Hardship 23432; 81 CT Hardship 23524; 81 CT Hardship 23546; 81 CT Hardship 23661; 81 CT Hardship 23730; 81 CT Hardship 23753; 81 CT Hardship 23776; 81 CT Hardship 23799; 82 CT Hardship 23822; 82 CT Hardship 23891; 82 CT Hardship 23937; 82 CT Hardship 23983; 82 CT Hardship 24006; 82 CT Hardship 24029; 82 CT Hardship 24098; 83 CT Hardship 24121; 83 CT Hardship 24167; 83 CT Hardship 24190; 83 CT Hardship 24213; 83 CT Hardship 24236; 83 CT Hardship 24259; 83 CT Hardship 24282; 83 CT Hardship 24351; 84 CT Hardship 24443; 84 CT Hardship 24489; 84 CT Hardship 24627; 84 CT Hardship 24696; 85 CT Hardship 24719; 85 CT Hardship 24742; 85 CT Hardship 24788; 85 CT Hardship 24995; 86 CT Hardship 25064; 86 CT Hardship 25110; 86 CT Hardship 25179; 86 CT Hardship 25225; 86 CT Hardship 25248; 86 CT Hardship 25271; 87 CT Hardship 25317; 87 CT Hardship 25363; 87 CT Hardship 25386; 87 CT Hardship 25409; 87 CT Hardship 25432; 87 CT Hardship 25455; 87 CT Hardship 25478; 87 CT Hardship 25501; 87 CT Hardship 25547; 87 CT Hardship 25570; 87 CT Hardship 25593; 88 CT Hardship 25662; 88 CT Hardship 25685; 88 CT Hardship 25731; 88 CT Hardship 25777; 88 CT Hardship 25800; 88 CT Hardship 25869; 88 CT Hardship 25892.

he was guilty.[2] Of the 257 prospective jurors who concluded Mr. Peterson was guilty, 229 answered question 98, which asked whether they could set aside the views they had already formed. Less than half of the jurors said they were willing to set aside their view

[2] 67 CT Hardship 19362; 83 CT Hardship 24190

that Mr. Peterson was guilty.[3] More than half -- 50.2% -- refused to set aside their views.[4]

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[3] 56 CT Hardship 16121; 56 CT Hardship 16282; 58 CT Hardship 16719; 58 CT Hardship 16834; 59 CT Hardship 17225; 60 CT Hardship 17340; 60 CT Hardship 17386; 60 CT Hardship 17432; 60 CT Hardship 17524; 61 CT Hardship 17616; 61 CT Hardship 17753; 62 CT Hardship 17960; 62 CT Hardship 18075; 63 CT Hardship 18144; 63 CT Hardship 18259; 63 CT Hardship 18305; 63 CT Hardship 18328; 63 CT Hardship 18397; 64 CT Hardship 18443; 64 CT Hardship 18466; 64 CT Hardship 18604; 65 CT Hardship 18903; 65 CT Hardship 18949; 66 CT Hardship 19110; 66 CT Hardship 19133; 66 CT Hardship 19179; 66 CT Hardship 19248; 67 CT Hardship 19524; 68 CT Hardship 19662; 68 CT Hardship 19823; 68 CT Hardship 19869; 68 CT Hardship 19892; 69 CT Hardship 20053; 69 CT Hardship 20099; 69 CT Hardship 20214; 70 CT Hardship 20236; 70 CT Hardship 20490; 71 CT Hardship 20651; 72 CT Hardship 20996; 72 CT Hardship 21042; 73 CT Hardship 21295; 73 CT Hardship 21341; 74 CT Hardship 21502; 74 CT Hardship 21594; 74 CT Hardship 21640; 74 CT Hardship 21709; 75 CT Hardship 21732; 75 CT Hardship 21801; 75 CT Hardship 21847; 75 CT Hardship 21870; 76 CT Hardship 22215; 77 CT Hardship 22329; 77 CT Hardship 22421; 77 CT Hardship 22444; 77 CT Hardship 22582; 78 CT Hardship 22651; 78 CT Hardship 22720; 78 CT Hardship 22766; 79 CT Hardship 22927; 79 CT Hardship 22950; 79 CT Hardship 22996; 79 CT Hardship 23065; 80 CT Hardship 23272; 80 CT Hardship 23387; 80 CT Hardship 23341; 80 CT Hardship 23433; 81 CT Hardship 23547; 81 CT Hardship 23731; 81 CT Hardship 23754; 81 CT Hardship 23777; 82 CT Hardship 23823; 82 CT Hardship 23984; 82 CT Hardship 24007; 82 CT Hardship 24099; 83 CT Hardship 24122; 83 CT Hardship 24237; 83 CT Hardship 24260; 83 CT Hardship 24352; 84 CT Hardship 24628; 84 CT Hardship 24697; 85 CT Hardship 24743; 85 CT Hardship 24996; 86 CT Hardship 25065; 86 CT Hardship 25111; 86 CT Hardship 25226; 86 CT Hardship 25272; 87 CT Hardship 25410; 87 CT Hardship 25433; 87 CT Hardship 25571; 87 CT Hardship 25594; 88 CT Hardship 25732; 88 CT Hardship 25801; 88 CT Hardship 25893; 22 CT Hovey 5910; 22 CT Hovey 6002; 22 CT Hovey 6071; 22 CT Hovey 6140; 24 CT Hovey 6508; 24 CT Hovey 6600; 25 CT Hovey 6899; 25 CT Hovey 6968; 25 CT Hovey 7014; 26 CT Hovey 7129; 26 CT Hovey 7152; 26 CT Hovey 7175; 26 CT Hovey 7198; 27 CT Hovey 7336; 27 CT Hovey 7520; 28 CT Hovey 7635; 28 CT Hovey 7658; 29 CT Hovey 8027; 29 CT Hovey 8188; 29 CT Hovey 8211; 30 CT Hovey 8395.

[4] 55 CT Hardship 15753; 55 CT Hardship 15776; 55 CT Hardship 15868; 55 CT Hardship 15891; 55 CT Hardship 16006; 56 CT Hardship 16144; 56 CT Hardship 16213; 56 CT Hardship 16236; 56 CT Hardship 16305; 57 CT Hardship 16351; 58 CT Hardship 16650; 58 CT Hardship 16673; 58 CT Hardship 16742; 58 CT Hardship 16788; 58 CT Hardship 16811; 58 CT Hardship 16880; 58 CT Hardship 16926; 59 CT Hardship 17018; 59 CT Hardship 17064; 59 CT Hardship 17087; 59 CT Hardship 17110; 59 CT Hardship

17133; 60 CT Hardship 17271; 60 CT Hardship 17317; 62 CT Hardship 17891; 62 CT Hardship 17914; 62 CT Hardship 18052; 62 CT Hardship 18098; 63 CT Hardship 18190; 63 CT Hardship 18236; 64 CT Hardship 18558; 64 CT Hardship 18581; 64 CT Hardship 18673; 64 CT Hardship 18696; 65 CT Hardship 18742; 65 CT Hardship 18857; 65 CT Hardship 18926; 65 CT Hardship 18972; 65 CT Hardship 19018; 66 CT Hardship 19064; 66 CT Hardship 19317; 67 CT Hardship 19455; 67 CT Hardship 19478; 67 CT Hardship 19501; 67 CT Hardship 19570; 67 CT Hardship 19616; 68 CT Hardship 19639; 68 CT Hardship 19846; 69 CT Hardship 19961; 69 CT Hardship 19984; 69 CT Hardship 20122; 70 CT Hardship 20352; 70 CT Hardship 20375; 70 CT Hardship 20421; 71 CT Hardship 20559; 71 CT Hardship 20605; 71 CT Hardship 20789; 72 CT Hardship 20835; 72 CT Hardship 20858; 72 CT Hardship 20881; 72 CT Hardship 20904; 72 CT Hardship 20927; 72 CT Hardship 20973; 73 CT Hardship 21226; 73 CT Hardship 21249; 73 CT Hardship 21318; 73 CT Hardship 21410; 74 CT Hardship 21548; 74 CT Hardship 21571; 74 CT Hardship 21617; 74 CT Hardship 21686; 75 CT Hardship 21824; 75 CT Hardship 21939; 76 CT Hardship 22031; 77 CT Hardship 22375; 77 CT Hardship 22513; 77 CT Hardship 22536; 78 CT Hardship 22628; 79 CT Hardship 23088; 79 CT Hardship 23203; 80 CT Hardship 23318; 81 CT Hardship 23662; 81 CT Hardship 23800; 82 CT Hardship 23892; 82 CT Hardship 24030; 83 CT Hardship 24168; 83 CT Hardship 24214; 83 CT Hardship 24283; 84 CT Hardship 24490; 86 CT Hardship 25180; 86 CT Hardship 25249; 87 CT Hardship 25318; 87 CT Hardship 25364; 87 CT Hardship 25387; 87 CT Hardship 25456; 87 CT Hardship 25479; 87 CT Hardship 25502; 87 CT Hardship 25548; 88 CT Hardship; 25686; 88 CT Hardship 25778; 88 CT Hardship 25870; 23 CT Hovey 6163; 23 CT Hovey 6209; 23 CT Hovey 6347; 23 CT Hovey 6370; 23 CT Hovey 6439; 24 CT Hovey 6485; 24 CT Hovey 6577; 25 CT Hovey 6807; 25 CT Hovey 6922; 26 CT Hovey 7290; 27 CT Hovey 7474; 28 CT Hovey 7751; 29 CT Hovey 8142; 30 CT Hovey 8234; 30 CT Hovey 8372

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule 8.360(b), I certify under penalty of perjury that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 98,891 words in the brief.

Dated: _____ _____

Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Avenue, Berkeley, CA 94606. I am not a party to this action.

On July 5, 2012 I served the within

APPELLANT'S OPENING BRIEF

upon the parties named below by depositing a true copy in a United States mailbox in Oakland, California, in a sealed envelope, postage prepaid, and addressed as follows:

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I declare under penalty of perjury that the foregoing is true.

Executed on July 5, 2012, in Berkeley, California.

_____
Declarant