IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	**CAPITAL CASE**
Plaintiff and Respondent,	)	**S112691**
vs.	)	
DAVID A. WESTERFIELD,	)	
Defendant and Appellant.	)	

San Diego County Superior Court No. SCD 165805

The Hon. William D. Mudd, Judge

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPELLATE JURISDICTION

This case is properly before this Court on automatic appeal following a judgment of death. (§§ 1237, 1239(b).)[1]

STATEMENT OF THE CASE

In an information filed on March 22, 2002, the District Attorney of San Diego County accused David Westerfield of the murder (§ 187) of Danielle Van Dam. A special circumstance of murder in the course of kidnapping (§

[1] Unless otherwise indicated, all code references are to the Penal Code.

190.2(a)(17) was also alleged. In count two, Westerfield was charged with the substantive crime of kidnapping a child under the age of fourteen (§§ 207, 208(b)), and in count three, a misdemeanor for possession of pornographic material involving a person under the age of 18 (§ 311.11(a)). (1 CT 174-175.)

The case proceeded on a no-time-waiver basis. Pretrial motions, *in limine* motions, and jury selection were completed by June 3, 2002, and opening statements in the guilt phase were given to the jury on June 4. (14 CT 3422.) Closing arguments at the guilt phase began on August 6, 2002 (14 CT 3483), and the case was submitted to the jurors on the morning of August 8. (14 CT 3487.) Deliberations took place for the balance of the day, continued on for seven full court days thereafter. (14 CT 3489-3497.) On August 21, the jurors returned a verdict of guilt for first-degree murder, with a true finding of the special circumstance. (14 CT 3498-3500.) Verdicts of guilt for kidnapping and misdemeanor possession of illegal pornography were also returned. (14 CT 3501-3502.)

Penalty phase opening statements began on August 28, 2002. (14 CT 3506.) Closing arguments and submission of the penalty case to the jury occurred on September 4. (14 CT 3512-3513.) After five and a half court days of deliberation, the jurors returned a verdict of death. (14 CT 3520.) Judgment of death was imposed on January 3, 2003. (14 CT 3525.)[2]

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[2] Eleven years for the substantive crime of kidnapping was imposed and then stayed pursuant to Section 654. For the misdemeanor, the court imposed a term of 316 days in custody, for which Westerfield received credit for time served. (14 CT 3525.)

A. GUILT PHASE OF TRIAL

GUILT PHASE STATEMENT OF FACTS[3]

Introduction

On February 27, 2002, the badly decomposed body of a young white girl was discovered by volunteer searchers off the side of Dehesa Road in El Cajon in San Diego County. (11 RT 3440-3441, 3450, 3472-3474, 3477-3478, 3498-3503.) Through dental records, the body was identified positively as that of seven-year old Danielle Van Dam who had been missing from her home in the Sabre Springs neighborhood of San Diego since Saturday, February 2, and who had been the object of an intensive search ever since. (12 RT 3529, 3561-3562, 3627, 3629-3632; 13 RT 3834-3836; 15 RT 4244, 4247-4248, 4396, 4400-4401.) The body was on its back under an oak tree about twenty feet from the roadway up an embankment. (11 RT 3450-3451; 12 RT 3711.) The general area was dry, rugged, and desert-like, and appeared in common use as a convenient dumping ground for unwanted appliances, discarded junk, garbage, and even dead pets. (11 RT 3474, 3476-3477, 3481, 3500.) The state of the body made the autopsy difficult, and the cause of death could not be specified beyond homicide. The conclusion found support in such non-physiological factors as her youth, her apparent abduction, and the distance of her dead body from home. (12 RT 3754-3755.)

David Westerfield, suspected of this crime even before the body was found, was arrested on February 22, and would eventually be convicted in a trial in which the factual contest was intense and circumstantially detailed. The summary of the evidence must reflect this wealth of detail accordingly in order to provide an adequate foundation and understanding for the legal issues presented in this brief,

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[3] The Penalty Phase Statement of Facts is deferred until page 371, after all the guilt phase claims are presented in this brief.

and an introductory overview of the guilt phase of trial will provide the reader with the general structure that shapes the factual character of this case.

The case revolved around Mr. Westerfield's activities from Friday night February 1, when he was drinking at Dad's, a neighborhood bar, where Brenda Van Dam and her friends were having a "girls night out", to Monday morning, February 4 when Westerfield returned from a long weekend motorhome excursion, which had taken him from the Coronado shore on Saturday morning, to the desert on the Arizona border on Saturday night, and back to Coronado on Sunday night. The prosecution case sifted through this in detail, displaying even the smallest circumstance for whatever incriminating significance it suggested or implied, while the defense countered with witnesses to show that several matters were not even odd or unusual, let alone significant.

The keystone supporting the heavy circumstantial edifice of the respective cases for the prosecution and the defense was forensic evidence. Almost as soon as Danielle disappeared, the San Diego police department committed a large number of officers and technicians to the investigation and the collection of evidence, and an enormous amount of trace evidence was gathered in this case. The District Attorney brought in multiple outside experts and used outside laboratories to reanalyze carpet fibers, dog hairs, human hairs and stains. But of all the hundreds of tiny bits of residue, the cynosure of all this evidence was a small blood stain from the hallway carpet containing Danielle's DNA; a single hair with nuclear DNA, also belonging to Danielle, found in the sink of the motorhome bathroom; a fingerprint on a cabinet in the bedroom of the motorhome; and her DNA in a presumptive blood stain on a sportsman jacket recovered from Mr. Westerfield's dry cleaning.

The defense attacked the integrity of evidence gathered under circumstances apt for problems of cross-contamination, and contested its significance, insofar as the motorhome would be parked unlocked in front of Mr. Westerfield's house for long stretches of time and was accessible to the

neighborhood children. But the centerpiece for the defense was the testimony of three entomologists, one of whom in fact worked for the county of San Diego and was called into the investigation by the authorities as soon and Danielle's body was found. Based on entomological evidence, all three fixed the time of her death around the middle of February, when Mr. Westerfield, who was under continuous police surveillance from February 4, had the alibi of this surveillance to exculpate him. Even the prosecution's entomologist fixed the time of death within this alibi period, but differed only in discounting his entomological opinion as contingent and in deferring to the prosecution's forensic anthropologist, who was brought in on rebuttal to criticize the entomological conclusions.

This then is a summary of a lengthier summary, and does not even touch on the intricate and complicated factual sub-theme of the mostly adult, and some child, pornography recovered from the computers in Westerfield's home. The pornography evidence looms in importance for many if not all the legal issues raised in this case, including the penalty issues, and the nature and scope of this evidence is described in greater detail during the legal arguments regarding joinder of counts (see below, pp. 225 *et seq.*) and the admissibility of the pornographic evidence itself (see below, pp. 262 *et seq.*). But at some point an introduction ceases to introduce, and one must turn to the Statement of Facts itself.

Prosecution Case

a. The abduction of Danielle Van Dam

Danielle lived at 12011 Mountain Pass Road in Sabre Springs with her parents, 36 year-old Damon Van Dam, a software engineer at QUALCOMM, and 39-year-old Brenda Van Dam, a housewife. She had an older brother, Derek, who was 10, and a younger brother, Dylan, who was 5. Layla, the 6-month old Weimaraner puppy completed the household. (12 RT 3560-3565-3636; 13 RT 3775-3776.)

Danielle's absence was discovered on Saturday morning, February 2. Brenda was going to watch the Hennes children at 9 a.m. while their parents attended an organizational meeting for the T-ball league. Eight-year-old Christie Hennes was a friend of Danielle, and when Danielle still had not yet come downstairs by 9:30, Brenda went upstairs to wake her up. Danielle was not in her bedroom. (11 RT 3423-3424; 12 RT 3626; 13 RT 3832-3824.) A frantic search around the house and yard failed to find her. (12 RT 3627-3629; 13 RT 3834-3835.) Damon had been the last to see her when he put her to bed the night before at about 10:15 p.m. (12 RT 3595-3597.)

1. Friday night: "girls' night out"

The previous Friday evening began with the family eating their pizza dinner together, which Damon accompanied with two beers. (12 RT 3577-3578, 3584; 13 RT 3799-3801.) At about 8 p.m. Brenda's friends, Denise Kemal and Barbara Easton, arrived at the Van Dam house to meet Brenda for a planned "girls' night out" at a bar in Poway called Dad's, which was only about three miles away from the Van Dam house. Damon was going to stay home and watch the children. (12 RT 3588-3589, 3591; 13 RT 3912-3913, 3914.) The "girls' night out" had been only a contingent plan until Thursday when Damon, who had plans to leave for Big Bear on Friday night to go snowboarding with Derek, changed his departure to Saturday morning, allowing him to babysit that Friday. (12 RT 3574-3576, 3589; 13 RT 3799, 3913; 14 RT 4009-4010.)

Before they left for Dad's, the three women adjourned to the garage where they smoked marijuana and drank some beer, while Damon stayed in the house playing videogames with the boys. Danielle sat at the kitchen table writing in her journal. Damon went into the garage only briefly to get a "hit" of the marijuana. (12 RT 3589-3593, 3594, 3667; 13 RT 3801-3803, 3914-3915; 14 RT 4010-4012.) The women left at about 8:30 in Brenda's Ford Excursion, with Brenda as the designated driver for the evening. (12 RT 3594, 3667; 13 RT 3804, 3876; 14 RT 4013.) During the session in the garage, Kemal had received a cell phone call. To

get better reception she stepped outside through a side door where the trashcans were kept. Reception was still bad, so she returned to the garage, but without locking the door. (14 RT 4012-4013.)[4]

2. Friday night: Damon at home

Damon and the boys continued playing videogames while Danielle worked on her journal. At some point, Damon had another beer. At 10 p.m. he sent the kids upstairs to get ready for bed, coming up himself about ten minutes later to check on them. (12 RT 3595-3596.) He looked in on the boys, and actually went into Danielle's room, where he opened the blinds to let in some streetlight because Danielle's nightlight had burned out. (12 RT 3596-3597, 3600, 3603-3604.)

After checking on them, Damon left each child's door open a bit. As he headed back downstairs, he noticed that the light in the master bedroom was still on. (12 RT 3597, 3606.) He went back to turn it off, and in the bedroom noticed the remains of Layla's dog bed, which she had apparently pulled out and chewed up. He gathered the loose stuffing, repacked it, and brought the dog bed downstairs to the laundry room. He let Layla out into the backyard through the sliding glass door, through which the dog also returned when she had finished. (12 RT 3606-3608.) Damon then sat in the family room for a half hour before retiring to his bedroom where he watched some local news on the television before going to sleep. When he went upstairs, he brought Layla with him, closing the door of the bedroom to prevent her from wandering the house and urinating in some inconvenient place. (12 RT 3609, 3627-3629.)

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[4] It might be noted here that on the interior door leading from the garage to the kitchen, the Van Dams, as a precaution against children intruding on adult activity in the garage, had reversed the handle so that the door could be locked and unlocked only from the garage side and not from the kitchen side of the door. (13 RT 3915.) Thus an intruder who might have entered the garage through the exterior side door left open by Kemal had free ingress into the house through the interior of the garage. (See 42 RT 9380.)

He woke up at 1:45 a.m. to the sound of Layla's whimpering. He brought her downstairs and let her out again into the backyard. When she returned, he went back to his bedroom, leaving the dog downstairs to greet Brenda, whom he knew would be returning soon after Dad's closed at 2 a.m. Damon himself was waiting upstairs in bed when Brenda, her friends, and some men returned at just about 2 a.m. (12 RT 3609-3612.)

3. Friday night: Brenda at Dad's

The men, Keith Stone and Rich Brady, had encountered Brenda at Dad's. (13 RT 3813-3814; 14 RT 4017, 4097, 4138-4139.) Brady and Stone lived in Sabre Springs and knew the Van Dams. Brady, who ran his own business, was also the Van Dams' marijuana supplier. (12 RT 3668; 13 RT 3813-3814; 14 RT 4095, 4135-4136.)

The evening at Dad's was spent shooting some pool and drinking. At one point, Brenda, Kemal, and Easton went outside to sit in Brenda's SUV to smoke some more marijuana. Brady and Stone followed. Brady stood outside the driver's side talking to Brenda while Stone was standing on the passenger side, talking, flirting with, and kissing Easton. (13 RT 3813-3818, 3924; 14 RT 4019-4023, 4097-4098, 4103-4106, 4138-4139, 4141, 4146-4147.) The party returned to the bar where they danced and continued drinking until just before closing when they all left and headed for Brenda's house at her invitation. Brenda drove her friends while Stone and Brady left in separate cars. (13 RT 3818-3819, 3821, 3822-3823; 14 RT 4023-4024, 4026-4028, 4107-4109, 4144-4145, 4147, 4149-4150.)[5]

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[5] Brenda testified that she extended the invitation only because Stone expressed a sexual interest in Barbara Easton and asked her to "make it happen." (13 RT 3822, 3925-3927.) According to Stone and Brady, Brenda simply invited them over to have a beer. Stone denied saying anything about Easton to Brenda. In his statement to the police Stone said that it was Brenda making sexual innuendos to him, prompting him to declare that he was not interested in married women. (14 RT 4108, 4161-4163.) Later, in the defense case, witnesses would testify that

The self-assessed tally of alcohol consumption that evening for the prosecution witnesses from Dad's were: three vodka-cranberry cocktails and some tequila shots for Brenda (13 RT 3820)[6]; for Kemal, the same drinks in about the same quantities (14 RT 4068-4070, 4074); for Brady, some beer and maybe some tequila (14 RT 4103, 4108); and for Stone, beer, margaritas, and a shot of Jack Daniels. (14 RT 4148.)

4. Saturday morning: the gathering at the Van Dam's

When the party from Dad's returned to the Van Dam house, they were greeted by a flashing red light on the burglar alarm, indicating a breach in a door or a window. It was this door that was actually open when the party from Dad's returned to the Van Dam house to be greeted by a flashing red light on the burglar alarm, indicating a breach in a door or a window. (13 RT 3824-3826, 3933; 14 RT 4029-4030.) Brenda's testimony as to the homecoming was that she noticed the flashing red light, directed Kemal to look for the breach, and that Brenda herself ran upstairs to tell Damon that they were home and that Rich Brady and Keith Stone were with them. She imparted this information to Damon, asked how the kids' bedtime went, and then went down the hallway to shut their doors against the noise of the adult party. Returning downstairs she helped Kemal search for the opening, which turned out to be the side garage door that Kemal had opened earlier. (13 RT 3826, 3933-3935.) Kemal's version of the return differed. The three women went directly upstairs to use the master bathroom, after which

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Brenda, to whom they were strangers, invited them back to her house after closing, making sexually suggestive statements. (27 RT 7195-7199, 7226; 28 RT 7318-7319, 7321, 7346-7350; 28 RT 7412.)

[6] Before Dad's she had some mulled wine. (13 RT 3876.)

Brenda and Kemal went looking for the breached door or window, while Easton remained behind with Damon. (14 RT 4029-4031.)[7]

In either case, Easton remained upstairs alone with Damon as Damon himself testified. (12 RT 313, 3672-3673.) She lay down on the bed, and the two of them began "kissing and snuggling" (12 RT 3613-3673) until Brenda, prompted by Brady and Stone's suggestive jokes, returned to her bedroom to inform Easton and Damon that they were being rude and that they should come downstairs immediately to join the others. (12 RT 3614, 3673; 13 RT 3826-3827, 3935-3937; 14 RT 4081, 4150-4151.) Damon, in his "jockeys," got out of bed, put on his pants and he and Easton followed Brenda downstairs. (12 RT 3614, 3674; 13 RT 3826-3827, 3936-3937; 14 RT 4081, 4110, 4127, 4151.)[8]

The liberties Easton took with Brenda's husband in Brenda's bed, and Brenda's relative equanimity in discerning in all this little more than a minor breach of etiquette, were to be explained by previous intimacies. On at least two occasions, Easton had sex with Damon in the presence of Brenda, who in turn was having sex with Easton's friend, Skip Brauberger. (12 RT 3658-3660; 13 RT 3871-3873, 3889-3890; 14 RT 4049.) Kemal, herself, who could have used the downstairs bathroom on her return from Dad's, was also familiar with the master bedroom from three occasions of "spouse swapping" involving herself, her then husband Andrew, Brenda, and Damon, and included sex between Kemal and Brenda. (12 RT 3675, 3678-3679; 13 RT 3871-3875, 3889-3890; 14 RT 4040-4041, 4082.)[9]

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[7] Keith Stone, who was interested in Easton, had her going immediately up the stairs while Brenda and Kemal went directly into the kitchen. (14 RT 4150-4151.)

[8] In her statements to the police, Kemal said that Damon had not come downstairs at all, and that Easton had remained upstairs until she and Kemal were about to leave. (29 RT 7580-7581,7598-7601; 30 RT 7826-7828.)

[9] In his initial statements to the police, Damon omitted anything about marijuana use, about Easton in his bed, or open marriages. When he realized the gravity of

The gathering started to break up at about 2:30 a.m. when Easton and Kemal left, though Brady and Stone lingered a short while talking to Damon, until the latter announced that he and Brenda were tired and were going to bed. (12 RT 3615-3616; 13 RT 3829-3830; 14 RT 4032, 4112, 4153-4154.) Brenda locked the front door and also ascertained that the back sliding door was locked when she was about to let Layla out into the backyard. Brenda changed her mind when the dog calmed down and seemed not to want to go. (13 RT 3830-3831.)[10] Damon placed Layla in Derek's room, since the dog liked to sleep there on the lower bunk, and would cry through the night if she was excluded from everyone's room. (12 RT 3617.) The couple then went to bed. (12 RT 2617; 13 RT 3831.)

5. Saturday and Sunday, February 2 and 3

Sometime later – Damon estimated that it was between 3 and 4 a.m., since he glimpsed a "3" on the VCR clock – something woke him up. He was not sure whether he had to go to the bathroom or whether there was some noise. In any event, a red light was flashing on the alarm pad in the master bedroom. He went to check and found that the sliding glass door to the backyard was open about 6 to 10 inches. He closed the door without thinking anything of it, assuming that someone in Brenda's party had earlier gone out to have a smoke. The red light stopped, but he checked the garage again in any event, and, assured that the house

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the situation, he talked about the marijuana, but still held back on the other matters until he was told at 1:45 a.m. on February 3 that Easton had "let the cat out of the bag." (12 RT 3646, 3650-3652, 3655, 3693.) Brenda did not include these matters in her initial statements until the police asked her direct questions. (13 RT 3947-3950.)

[10] In a February 3 interview, Brenda told police that while the sliding glass door was closed, she was not sure that it was locked. (29 RT 7607-7608.)

was re-secured, he went back to bed. (12 RT 3617-3621A, 3624; 13 RT 3831-3832.)[11]

When later that morning at about 9:30 a.m., after the Hennes children arrived and Danielle was discovered missing from the house, Brenda telephoned 911. The police began treating the matter seriously almost immediately, keeping the Van Dams out of their house that day and overnight while a forensic investigation was conducted inside. (11 RT 3430-3432; 12 RT 3631-3632; 13 RT 3837-3839.) By Sunday, February 3, the Robbery Unit, which also investigated kidnappings and extortions took over the investigation. A motor home parked up the street from the Van Dam residence was used as a command post. (15 RT 4242-4243, 4350-4351.)

Detectives Johnny Keane and Mo Parga were assigned to canvass the neighbors on Mountain Pass, which they did that Sunday morning. The last house they approached was 11995 Mountain Pass, where the resident was not home. (15 RT 4244-4246, 4395-4397.) The house was only two addresses west of the Van Dams' on the same side of the street, but on the next block, on the corner formed by Mountain Pass and the cross-street Briar Leaf. (11 RT 3437; 12 RT 3566-3567.) Keene and Parga learned from an officer who had talked to a neighbor named Mark Rohr the day before that the house at 11995 belonged to a David Westerfield. (15 RT 4246, 4419-4420.) Westerfield would eventually be arrested in this case on February 22, even before Danielle's body was found on February 27. (30 RT 7931.)

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[11] Thus the sliding glass door presents itself as another possible path of ingress, egress, or both. No further evidence in this case bestows priority on this or on other possible paths for the intruder. (See above, p. 7, fn. 4.) Whatever the difficulties of a surreptitious abduction from a house full of people and a dog, the certain fact of this abduction nonetheless towers over the range of equivocal possibilities. (See 42 RT 9381.)

b. David Westerfield

Westerfield, a self-employed design engineer, ran his business, Spectrum Design, out of his Mountain Pass home. (15 RT 4354-4355, 4390-4391; 28 RT 7423-7424, 7426-7427; 30 RT 7906.) He had been divorced from his wife Jackie for about ten years and had two children. (28 RT 7499-7500; 35 RT 8432-8433, 8455.) The older one, a daughter named Lisa, lived with her mother in Poway. The younger one, Neal, a freshman at San Diego State, alternated every two weeks between his mother and father's house. (26 RT 6925; 35 RT 8432-8433.) Westerfield also had a long-term girlfriend named Susan, whom he had met sometime in 1998 or 1999. She had lived with him in the Mountain Pass house for two different extended periods of time, but by December 2001 or January 2002, the couple had broken up. (26 RT 6925-6926; 27 RT 7235, 72561; 30 RT 7868-7869, 7883-7884, 793, 7917.)

The Van Dams knew Westerfield only by sight and would waive in neighborly acknowledgement if they saw him on the street. (12 RT 3568; 13 RT 3778-3779.) Damon had chatted with him only once or twice. On one occasion, shortly after the Van Dams had moved in, Damon, strolling the neighborhood, noticed that Westerfield had a "dune buggy" in his garage. This prompted a conversation in which Damon learned about Westerfield's interest in desert vehicles and about his various possessions in that regard, which included not only the sand rail but a trailer to transport it. (12 RT 3567-3569.)[12]

Westerfield also owned a 33-foot Southwind motor home, which he bought sometime in 1999 or 2000 after having owned a smaller one for 12 or 13 years. (29 RT 7631-7632, 7641, 7649; 35 RT 8434-8435.) He parked his motor home periodically on the street by his house, and this drew complaints from people

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[12] A "sand rail" or "dune buggy" is a car-frame vehicle designed to drive on soft sand. (35 RT 8437.) By February 2002, Westerfield also owned two "quads," i.e., four-wheel motorcycles. (35 RT 8436-8437.) These types of vehicles are generically called "All Terrain Vehicles" (ATV's). (17 RT 4954.)

throughout the neighborhood. (12 RT 3570; 13 RT 3860-3861; 14 RT 4129-4130; 16 RT 4557; 26 RT 6950-6951.) Brenda herself, according to her testimony, had been irked by the vehicle's presence, and she noticed how Westerfield would simply shift the motor home a short distance when he reached the legal limit for parking. (13 RT 3861, 3863.) In any event, by November 2001, Westerfield found a permanent space for his motor home on a property on Sky Ridge Road in the High Valley area of Poway, about 8 or 9 miles from the Sabre Springs neighborhood. Keith Sherman, who owned this property and lived on it, rented Westerfield a space for $100 a month (15 RT 4254; 16 RT 4553-4557) and allowed Westerfield also to store the trailer used to haul the "sand toys." (15 RT 4316-4318, 4414; 16 RT 4560.)

1. The January 25 and 29 encounters

Brenda had a speaking encounter with Westerfield on Friday, January 25 at Dad's Bar, where Brenda was celebrating earlier "girl's night out" with Kemal and Easton exactly one week before the February 1 excursion to that same bar (13 RT 3793-3795.)[13] When Brenda entered Dad's that earlier Friday night, she recognized Westerfield as one of her neighbors. He approached, bought the three women a drink, made some small talk, and then rejoined his friend Garry Harvey. (13 RT 3795-3796, 3885, 3962-3964, 3971-3972; 14 RT 4176-4181.)

Kemal and Easton seemed to have made an impression in the bar on the January 25 Friday. Kemal testified that she and Barbara had drunk a lot; were "toasted" on wine, beer, and marijuana; and were both dancing in a sexually provocative manner. (14 RT 4043-4044, 4053, 4058-4059.) According to Brenda, Kemal and Easton were acting very "loose" around the men in the bar. Brenda felt

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[13] Both "girls' nights out" were intended as going-away parties for Kemal, a flight attendant, who was transferring to Baltimore. Her original moving date, January 27, occasioned the first celebration; the revised date, February 3, occasioned the second. Brenda's attendance on Friday, February 1, however, was, as noted above, contingent. (13 RT 3913; 14 RT 4002, 4009-4010; see above, p. 6.)

it necessary to admonish her friends that they were probably making everyone in the place "horny." (13 RT 3886-3887, 3912.)

The two women also made an impression on Westerfield, since he mentioned them the next time he encountered Brenda, which was four days later on Tuesday, January 29. Danielle was selling Girl Scout cookies door-to-door in the neighborhood, and Brenda, with Dylan in tow, was accompanying her. Westerfield's house was their last stop. The year before, Brenda and Danielle had been inside the house and sold Westerfield some cookies, and at that time Brenda had noticed that Westerfield's kitchen was being remodeled. So now, after Danielle made her sales pitch at the door, Brenda asked if she could come in to see how the remodeling came out. Westerfield invited them in. While he filled out the cookie order form in the kitchen, Danielle and Dylan asked if they could go outside to look at the pool. Westerfield said it was okay, and Brenda gave her permission. (13 RT 3779-3785, 3890.)

When the kids went outside, Westerfield brought up the encounter at Dad's the previous Friday. He expressed an interest in Brenda's friends, whom, he said, looked like a lot of fun. He was especially interested in Easton and asked Brenda to introduce him to her as Brenda's rich neighbor. Brenda answered that her friends were trying to get her to go to Dad's again on Friday. Since her husband was leaving to go snowboarding on Friday night, she would not be able to go unless she could get a babysitter. If she did, she would introduce Westerfield to her friends – a prospect that seemed to please him. (13 RT 3787, 3905-3906.)

Brenda at this point noted the embarrassment that she did not even know Westerfield's name if she were to make the introduction, whereupon he introduced himself, "Hi, I'm David Westerfield," and then gave her two of his business cards. (13 RT 3787, 3905-3906.) He also had her write her and her husband's name down on a piece of paper, mentioning that he sometimes had family barbecues and sometimes adult parties. (13 RT 3787, 3901.)

When the children came back in the house from outside, Dylan asked if he cold go upstairs. Westerfield did not object, but Brenda would not give her permission. Westerfield escorted the family outside. He and Brenda chatted while Danielle and Dylan played on the rocks on front of his house. Westerfield talked about the Wednesday night specials at a bar named In Cahoots, and he suggested that she bring her friends there. Brenda, as she took her leave, told him that she didn't go out on weeknights, or very often at all for that matter. (13 RT 3790, 3899.)

2. February 1 at Dad's

Westerfield was at Dad's on February 1 when Brenda and her friends arrived. The women at first lingered outside the bar talking to the doorman when Brenda noticed Westerfield inside the bar. She pointed him out to Easton, telling the latter that Westerfield wanted to meet her. Easton strode in ahead of the other two and introduced herself, expressing regret if she had appeared rude to him the week before. Brenda and Kemal soon followed. Brenda introduced Kemal to her neighbor "Dave," while Westerfield introduced the three women to his friend Garry Harvey. (13 RT 3806-3807, 3810; 14 RT 4014-4016.)

As the women sat down at the bar, Westerfield announced, " 'Ladies don't buy their own drinks,'" and he paid for a round. (13 RT 3807, 3929; 14 RT 4016.) In Westerfield's presence, Brenda talked about an upcoming family trip to Italy and about an upcoming father/daughter dance at school. (13 RT 3944.) But the semicircle the women formed with their bar stools and the intimacy of their familiar conversation tended to exclude Westerfield, who was standing slightly behind Brenda. At one point, Brenda felt the need to apologize for being rude, but explained that she had come there to be with her friends. Westerfield indicated that he took no offense. (13 RT 3811; 14 RT 4016-4017.)

In the course of the evening, Brenda and her friends, soon joined by Brady and Stone, took little note of Westerfield. Brenda and Kemal noticed him only once watching them playing pool. (13 RT 3816, 3821-3822, 3944; 14 RT 4020,

4026.) Neither Rich Brady nor Keith Stone noticed him again after they were briefly introduced. (14 RT 4907, 4107, 4138-4139.)[14]

Garry Harvey, Westerfield's friend, however, did notice that Westerfield was still at Dad's when Harvey left at midnight to pick up another friend, Yvette Wetli, who worked at a bar called O'Harley's, which was three minutes down the road in Poway. When Harvey and Wetli returned to Dad's sometime between 12:30 and 12:45 a.m., Westerfield was no longer there. (14 RT 4189-4193, 4207-4211.)

c. Two Interviews

After Danielle's disappearance, the police canvassed the neighborhood and talked to the residents of each house on the Mountain Pass. No one was home at 11995, which was Westerfield's, and when he appeared at his house on Monday morning, February 4, he was contacted by the police as he emerged to get his mail. From about 9:30 to 10 a.m., Detective Keene interviewed him on his doorstep. After the interview, and with Westerfield's consent , Keene and his partner Detective Parga did a walk-through search of the house and garage. (15 RT 4249-4250, 4286-4287, 4403, 4408.) Westerfield also consented to a search of his motor home in High Valley, and he accompanied the officers there in his own car. He was home by about noon, having to wait outside until the police finished conducting a dog search in his house. (15 RT 4302-4303, 4316, 4381-4382, 4461-4462; 26 RT 6999-7001.)

Later in the afternoon, Parga telephoned Westerfield to ask if he would submit to a more formal interview at the Northeastern Substation, to which the

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[14] At trial, Kemal claimed that Westerfield was "just looking and staring" while the women were playing pool, and that she thought to herself, "Wow, that's creepy that he's just standing and watching." (14 RT 4020.) However, in her statements to the police before there was any focus on Westerfield at all, she had mentioned only that she was introduced to the neighbor. She never said anything about him being "creepy," although she was asked to focus on anything she thought was suspicious. (30 RT 7826-7928, 7831, 7834.)

police had moved the command post for the Van Dam case, and which was only three miles away from the Sabre Springs neighborhood. Westerfield drove down there by himself, and the interview was conducted by Paul Redden, an "interrogation specialist" with the San Diego police. (15 RT 4248-4249, 4320, 4468-446, 4382, 4493.)

1. Weekend travel: Saturday, February 2

In both the morning interview with Keene and in the afternoon interview with Redden, Westerfield was asked to relate his weekend activities beginning with Saturday morning. He described how he woke up early that morning between 6:30 and 7 a.m. and left his house at about 7:45 a.m. in his Toyota 4-Runner, to retrieve his motor home on Sky Ridge Road. He had decided that morning to take trip to Borrego Springs and to spend the weekend in the desert. (15 RT 4254-4255; 8 CT 2014, 2106.)[15]

Leaving his Toyota parked on the Sky Ridge property, he returned to Mountain Pass in the motor home. After stocking it with groceries and filling the water tank with his hose, he started out on his trip sometime between 9:30 and 10 a.m. (15 RT 4255-4257; 8 CT 2016-2017.) As he was driving, he realized that he did not have his wallet with him, and that he must have left it at home or in the Toyota. This meant that he did not have enough money to buy gas to get to Borrego Springs. Instead of turning around and driving back to his house, he decided to go somewhere where the $80 he had in cash would be sufficient, and

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[15] The statement to Keene was related to the jury through Keene's testimony. (15 RT 4254 *et seq.*) The statements made to Redden were tape recorded and played to the jury. (15 RT 4488-4489.) The summary is a composite of both statements where they are more or less consistent with each other, or at least not inconsistent with each other.

this was Silver Strand, where the charge was only $12 a night. (15 RT 4258; 8 CT 2017-2018.)[16]

At Silver Strand, he filled out the registration, placed $24 in the envelope to cover the weekend, and then proceeded to find a space for his motor home. At some point, the ranger came by to tell him he had overpaid by $30, having placed $54 – a fifty-dollar bill and four singles – in the envelope. This surprised Westerfield, who thought he had only twenty-dollar bills, and he wondered whether the ranger might have confused Westerfield's payment with someone else's. (15 RT 4261-4262; 8 CT 2018-2019.)

In any case, he found the weather at the ocean cold and uncomfortable. He preferred the sun and decided he could still salvage the weekend by going to the desert, this time to Glamis, where he knew some of his friends would be. This was also more attractive to him because he was feeling somewhat lonely at the time, having just broken up with his girlfriend. So he left Silver Strand at about 3:30 or 4 p.m. in order to see if he could find his wallet back at the house, so that he could drive to Glamis. (15 RT 4261-4262; 8 CT 2019-2020.)[17]

When Westerfield drove into the neighborhood, Mountain Pass was filled with police cars and media vans. He could not find a space and had to park about a block away from his house. There were people gathered on the corner of Mountain Pass and Briar Leaf, and as he approached he saw his neighbor Mark among them. When he asked Mark what was going on, the latter told him that

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[16] Silver Strand was a beach state park running along the spit connecting the city of Coronado in the north to Imperial Beach and Palm Avenue in the south. According to Detective Keene, Silver Strand was about 31 miles south of Westerfield's house. (15 RT 4260; Ex. 40.)

[17] Glamis, in Imperial County, was near the Arizona border. (15 RT 4269; 19 RT 5415; Ex. 41.) The town itself consisted of little more than a store and a few businesses. The attraction was the sand dunes where campers could run their ATV's. (17 RT 4932, 4954.)

Danielle Van Dam was missing, and had either been abducted or had wandered off. (15 RT 4262-4264; 8 CT 2020-2021, 2023.)

Westerfield's first thought was to check to make sure the little girl had not wandered into his yard to fall into the pool. After the pool, he checked his house, first for the little girl and then for his wallet, neither of which was there. He locked up, went out to talk a bit to Mark again, and then left for High Valley to look for his wallet in the Toyota, where in fact he found it. He had not stopped to talk to the police back at Mountain Pass because he assumed that Mark could give the police Westerfield's name and address if there was any necessity to contact Westerfield. (15 RT 4265-4266; 8 CT 2023-2027.)

It was now about 5:30 p.m. and starting to get dark. He drove from High Valley to the Chevron Station on Ted Williams Way near Interstate 15. There he filled up with gas, after which he set off for Glamis, heading north on 15 and exiting at Escondido. From there he drove through Ramona toward Santa Ysabel, where he made a left to go "around the mountain," heading north toward Warner Springs. There he turned back southeasterly, going through Borrego Springs, then through Brawley, until he arrived at about 10:30 p.m. in Glamis. (15 RT 4266-4269; 8 CT 2027-2028; Ex. 41.)[18]

In Glamis, he looked for his friends Dave and Debbie, first in wash 3, and then in wash 6, which were places they usually camped. (15 RT 4270; 8 CT 2028-2029.)[19] They were not there, so he began driving up and down the other washes

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[18] This was, according to Keene, a 160-mile drive. (15 RT 4269.) Later testimony established that the itinerary described by Westerfield was the "scenic" route, commonly used by motor home enthusiasts from San Diego. (28 RT 7436, 7448; 29 RT 7837, 7840-7841, 7857-7858; Ex. 41.) The faster route from San Diego was to take Interstate 8 east to about Holtville, and then to head north toward Glamis. (29 RT 7837-7839; Ex. 41.)

[19] In Glamis, there was a dirt road running along the railroad tracks, which were raised on a slight embankment. At intervals, there were conduits running through the embankment for drainage. These opened up into "washes." Each conduit had

hoping to see Dave's distinctive rig in the dark. Sometime between 10:30 and 11 p.m., he pulled into wash 14 to spend the night, but because there was a group there making lots of noise, he drove farther out towards the sand dunes and got stuck. It was too late to do anything about it, so he settled down for the night and went to sleep. (15 RT 4270-4271; 8 CT 8029.)

2. Weekend Travel: Sunday, February 3

Waking up the next morning about 6:30 a.m., he began fruitlessly trying to dig his motor home out of the sand with a small shovel he had for camping trips. Eventually, some man offered to tow him out for $150. Westerfield was able to pay only $80, but wrote the man's name and address down and promised to send him the balance. It was about 2:30 p.m. before he was out of the sand. He decided that he was not going to find anyone he knew in Glamis, so he headed toward a place called Superstition, where he used to go with his ex-wife Jackie. He thought he might check it out for an upcoming three-day weekend he was going to spend with his son Neal. Superstition would also place him closer to home for his return on Monday. (15 RT 4271-4273; 8 CT 2029-2031.)[20]

Westerfield stayed only for about twenty minutes at Superstition. He did not like the place. It was rough and there was not a lot of sand. (15 RT 4273; 8 CT 2031.) He left Superstition, drove west a bit on Interstate 8 to Highway S-2, where he turned north toward Borrego. (15 RT 4272, 4273; 8 CT 2031.) It was sunny out when he arrived there. He took a little dirt road heading off into the hinterland, but again drove too far and got stuck in the sand. It took him two

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a number painted on it, and this was used as a reference point by campers, who would drive along the dirt road and then turn into the wash in which they intended to camp, driving no farther than the edge of the hardpan at which point the dunes and the soft sand began. (17 RT 4932-4934, 4954; 18 RT 4973-4974, 5039; 35 RT 8445-8446.)

[20] Superstition Mountain was west of Glamis, still in Imperial County, but just east of the San Diego County line. (15 RT 4272; Ex. 41.)

hours to dig himself out. He left Borrego, which was within the desert region of San Diego County, and headed out again on S-2 toward Borrego Springs. (15 RT 4273-4274; 8 CT 2032-2033.) In the Redden statement only, Westerfield describe how he pulled over to the side off the road on S-2 near Borrego Springs to eat, shower and rest after this exertion. In describing this rest stop, Westerfield stated to Redden: "this little place that we, where we were at was just a little small turn type place." (8 CT 2033-2034.)[21]

By this time, Westerfield's desert frustrations made him reconsider a return to the ocean, where he already had a space paid for at Silver Strand. He headed back to San Diego by the same route he headed out. In San Diego, he stopped at the same Chevron Station to refill his motor home with gas. From there, he drove back to Silver Strand. To Keene, Westerfield fixed his arrival at 7:10 p.m.; to Redden, he fixed it at 7:30 p.m. In either case, the gates at Silver Strand closed at 7 p.m. and he could not get back in. He therefore drove across the highway to the Coronado Cays, where, seeing no signs barring motor homes, he parked and spent the night. (15 RT 4274-4277; 8 CT 2034-2036.)[22]

3. The return: Monday, February 4

In his statement to Keene, Westerfield said he woke up at about 4 or 4:30 a.m. on Monday morning and decided it was time to go home. He drove back to the Sky Ridge property in High Valley, arriving about 7 or 7:15 a.m. Since it was too early and might disturb the residents, he pulled off nearby and napped for an hour before driving into the property. (15 RT 4277-4279.) In his statement to Redden, Westerfield said he woke up about 5:30 or 6 a.m. and arrived at the Sky

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[21] Mr. Dusek, the prosecutor, thought this use of the first-person-plural "we" was significant and he had Redden highlight it in a testimonial preview before the tape was played for the jurors. (15 RT 4888; see 42 RT 9437.)

[22] Coronado Cays was an expensive residential area across from Silver Strand. It was part of the city of Coronado, but had its own security post that greeted incoming and monitored outgoing traffic. (18 RT 5109-5110.) Across from the fire station there, there was a public parking lot. (18 RT 5112.)

Ridge property at 7:30 a.m. He parked his motor home and by 8:30 a.m. he was back in his house on Mountain Pass where he took a shower, began some laundry, and checked some mail. (8 CT 2037-2038.)

In the Redden statement alone, which took place in the afternoon, Westerfield related some of the events that occurred between the Keene and Redden interviews. Westerfield told Redden that when he finally finished with the police that morning, he sat down in his office to do some work. He noticed that he did not have his cell phone and supposed that he had left it in the motor home. He headed back, bringing with him some dry cleaning – a sweater and some pants --, which he dropped off on the way to Sky Ridge Road. At the motor home, he retrieved his cell phone and noticed that there was a call from Detective Parga. He could not call back immediately because the battery was almost dead, but he called her when he returned home. (8 CT 2039-2042.)

4. Previous encounters with Brenda

After pinning down the weekend from Saturday to Monday, both interviewers asked Westerfield about his previous encounters with Brenda. Westerfield described the meeting at Dad's on January 25, and then the Girl Scout cookie encounter on the 29th. (15 RT 4283-4284; 8 CT 2021-2022.) In the Keene interview, Westerfield related that while he was talking to Brenda, the children were running around his house. When asked if they went upstairs, Westerfield said that he did not remember for sure, but could not discount it. (15 RT 4285.)

These previous encounters also included the meeting at Dad's on Friday night, February 1. As Westerfield related to Keene, that evening after dinner, Westerfield went to Dad's to meet a friend named Garry. At some point he saw his neighbor Brenda Van Dam and two other females talking to two other males. He also saw Brenda and her friends drinking, dancing and playing pool. He did not speak with her however, until just before he left Dad's between 11 and 11:30 p.m. Brenda had related how her daughter Danielle had an upcoming

father/daughter dance. She noted that her husband, Damon, wasn't very excited about his little girl growing up so fast. (15 RT 4281-4282.)

To Redden, Westerfield related that he went to Dad's between 8 and 8:30 p.m. to meet Garry. He met him there, and about half hour later Brenda and her friends showed up. He bought them a round of drinks, and then watched when they went to play pool. (8 CT 2044.) He remembered dancing and had danced with the "littlest one," referring to one of Brenda's friends, who had dragged him on to the dance floor and insisted. He was drinking rum and coke that evening, and thought he was drunk. He did not even remember arriving home; "that's how bad it was." (8 CT 2045.) To the best of his knowledge, he left Dad's around 10:30 or 11 p.m., and went home straight to bed. (8 CT 2045-2046.)

5. Westerfield's perplexity

Detective Keene testified that, in the morning interview, when Westerfield mentioned the father/daughter dance, Westerfield, stopped, paused for a second, and then said, "I could have sworn she said she had a babysitter. I didn't know her husband was home with the kids." Keene testified that this statement was "out of the blue;" he had not asked Westerfield any question to occasion this reflection. (15 RT 4282.)[23]

Between the two interviews, Westerfield, standing in his driveway, waiting to be allowed back into his house while the police ran a dog search, was approached by a television reporter, who wanted an interview, sensing that the police were interested in Westerfield. (15 RT 4319-4320, 4446, 4459, 4461-4462; 26 RT 7000-7001; 8 CT 2008.) In the interview, Westerfield explained how he had seen Brenda on Friday night at Dad's in Poway. He did not see Brenda's

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[23] It will be recalled that during the Girl Scout cookie encounter on Tuesday, Brenda told Westerfield that for her to go to Dad's on Friday night, she would have to get a babysitter. (13 RT 3785-3786.) Brenda did not testify to saying anything at Dad's that Friday about the children being with a babysitter or with Damon. (See 42 RT 9406.)

husband there and thought he was on a business trip because she had to get a babysitter, adding, "But I don't know, that's just me, you know, I, ya, can't hear very well – old age." (8 CT 2009.)

In the Redden interview, Westerfield explained that he had read the Sunday paper and noticed a difference between Brenda's statements and his memory. He remembered her saying that she had a babysitter and was at Dad's with her friends while her husband was on a trip. In the paper it said that her husband was home all night. This surprised Westerfield, and the blaring of the music at the bar must have interfered with his hearing her correctly. (8 CT 2049.)[24]

d. Prosecution's Reconstruction of Westerfield's weekend, and Impeachment of Westerfield's statements

Using Westerfield's statements of February 4 as a baseline, the prosecution presented over thirty-two witnesses whose testimony was intended to highlight suspicions about his weekend peregrinations, and to impeach several of his representations to one degree or another.

1. Backyard light and shuttered house

Christina Hoeffs, who lived on Dapple Court immediately behind Westerfield's house, testified that when she went to bed at 10:30 p.m. on Friday, she noticed the glare of Westerfield's backyard lights through her bedroom

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[24] To add to the supposed incriminating oddity of Westerfield's remarks about the father being there instead of a babysitter, the prosecution scoured Westerfield's February 4 demeanor for all possible telltale signs. Keene and Parga testified that Westerfield sweated excessively in the cool 50 to 55 degree morning weather, as evidenced by the perspiration stains around the armpits of his grey knit shirt (15 RT 4252, 4287, 4403); that he cooperated over-eagerly during search of his house and his motor home, pointing out areas the officers had missed (15 RT 42876, 4297-4298, 4302, 4309-4310, 4403-4404, 4407, 4411-4412, 4414); and that during the television interview he talked easily with the reporter and even asked whether he looked better with his hat on or not – testimony implying that he displayed an inappropriate and frivolous insouciance under the circumstances. (15 RT 4319-4320; see 42 RT 9370.) Whatever the case may be as to his cooperation and supposed frivolity, his close friends and intimates testified that Westerfield had a sweating problem. (28 RT 7444, 7503; 30 RT 7881-7882.)

window. When she woke up at 2 a.m. she noticed that the backyard light was still on. She looked through her bedroom window and noticed that all his windows were shut and his blinds were down. She remembered thinking that she had never seen the house shut so tight, and she remembered hoping that he had not gone to the desert leaving the backyard lights on. (16 RT 4510-4515.)

2. Uncharacteristic spontaneity and haste in departure

Hoeffs' anxiety at 2 a.m. arose not from her personal acquaintance with Westerfield himself, whom she did not know by name (16 RT 4510), but from familiarity with his traveling habits. She and her neighbor on Dapple Court, Angela Elkus, had to drive past Westerfield's house to get to and from their own. In the case of Elks, she was a busy stay-at-home mother and would drive past Westerfield's house 8 to 10 times a day to run her errands. (16 RT 4519; 17 RT 4717-4719.) Both women testified that Westerfield always parked his motor home on Briar Leaf or Mountain Pass for a day or two before leaving on a weekend motor home trip. They would see him loading the motor home, and doing so sometimes with his son or with other adults; and his return would mirror this pattern of a day or two of parking in the neighborhood in order to unload. (16 RT 4517, 4532, 4535; 17 RT 4720-4721, 4726.)[25]

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[25] This evidence was intended to resonate with what might be called "the suspicious hose." When Detectives Keene and Parga were canvassing Mountain Pass on Sunday morning, February 3, they noticed, in Westerfield's front yard, the garden hose unrolled and stretched out across the lawn, but then doubled back sharply as though thrown. The hose was still there like that on Monday, and Westerfield himself pointed to the hose during the morning interview when he said he filled his tank with water before leaving for his desert trip. (15 RT 4256-4257, 4398.) The detectives thought the hose was notable not only because of the otherwise orderly and well-kept lawn, but in light of the later impression arising during the walk-through of Westerfield's house that he was generally neat and orderly. (15 RT 4257, 4287-4288, 4403, 4409-4410.) Westerfield himself complained to Redden that Keene and Parga "were giving me a hard time about not having rolled up my hose." (8 CT 2016.) Westerfield's immediate neighbors would later testify for the defense that it was not unusual to see his hose unrolled on the lawn and left unattended for a while. (26 RT 6956, 6974, 6992.)

By the terms of his own statement, Westerfield's preparation time was about an hour to an hour and a half (15 RT 4254, 4257; 8 CT 2017), considerably shorter than that claimed as usual by Hoeffs and Elks. The prosecution took pains to reduce it even further, presenting the testimony of other neighbors who were emerging for their Saturday morning jog or errands or commute. The testimony suggested that Westerfield did not arrive back at Mountain Pass with his motor home until some time between 8:30 a.m. and 9 a.m., and then left again at about 9:15 a.m. (16 RT 4592-4596, 4609, 4620-4624, 4632-4639; 26 RT 6985-6988; see 42 RT 9421.).)

Similarly, Keith Sherman, the owner of the Sky Ridge property where Westerfield parked his motor home and trailer, testified that he had never seen Westerfield come alone to retrieve the motor home. Someone, usually Westerfield's son, would drive Westerfield to Sky Ridge in the Toyota 4-Runner and drop him off. Westerfield, according to Sherman, also always hauled his "sand trailer" with the motor home when he went on a trip. (16 RT 4553-4554, 4570-4571.) Sherman, whose granddaughter Holly had actually seen Westerfield taking the motor home on Saturday morning at 8 a.m. (16 RT 4545-4548), testified that while the motor home was gone on Saturday, the sand trailer was still there. (16 RT 4563, 4571.)

3. Silver Strand

Based on the testimony from some of the campers at Silver Strand, Westerfield pulled in there sometime between 10 and 11 a.m. on Saturday morning. (17 RT 4871-4872, 4803, 4836, 4849-4850.) The weather was cool but sunny and, in the opinion of some of the witnesses, comfortable. (17 RT 4785, 4803, 4839.) Beverly Askey, at Silver Strand with her family, testified that as soon as Westerfield's motor home was parked, someone inside closed the inside curtains blocking the view through the windshield. (17 RT 4780-4781, 4783-

4784.) Another witness noticed that the side curtains on the Westerfield motor home were also closed. (17 RT 4849-4850.) These and other witnesses noticed that none of the customary inaugural acts, such as leveling the motor home, unfurling the awning, or setting out lawn chairs were performed. (17 RT 4786, 4800-4803, 4839, 4851.) Indeed, no one emerged from the motor home at all until sometime after 3 p.m. when Westerfield came out to talk to the ranger, who had knocked on his door. According to witnesses, Westerfield shut the door behind him and walked the ranger toward the front of the motor home. (17 RT 4786-4787, 4803-4805, 4851-4853.)

This was the return of the overpayment, as Westerfield had described to Keene and Redden. (See above, p. 19.) Olen Golden, the ranger who discovered the overpayment, and Brian Neill, the ranger who returned it to Westerfield, confirmed Westerfield's account. (17 RT 4860, 4867-4868, 4890-4898.) Neill testified that his encounter with Westerfield to return the money occurred some time between 3 and 3:20 p.m. because Neill had logged back into the main office at 3:35 p.m. (17 RT 4898.)

Not in Westerfield's account was an encounter with Donald Raymond, a retiree, who was doing work as a "volunteer camp host" at Silver Strand, and living there in his motor home. His job was to greet campers at the gate, hand them the registration envelope and a brochure about the park, and then twice a day to do a tour of the park taking down the license plate numbers on a listing sheet. (17 RT 4916-4917.) Raymond testified that at about 4 p.m. on Saturday, February 2, Westerfield walked up to Raymond in the camp host office and stated that the ranger had just brought some money that did not belong to Westerfield. He explained to Raymond that the ranger gave him change for a $50 bill, which seemed odd to Westerfield since he had just been to an ATM and had only twenty dollar bills. (17 RT 4917-4918.) According to Raymond, Westerfield appeared agitated and pulled out his wallet to show Raymond that there were only three or four twenty-dollar bills in it. (17 RT 4918-4919.)

4. Leaving the Strand and the drive to Glamis

That Westerfield returned to Mountain Pass between 3:45 and 4:30 p.m. on Saturday, looking for a place to park in a neighborhood crowded with onlookers, police cars, and media vans, was confirmed by witnesses from the neighborhood. (16 RT 4610-4614, 4648-4669, 4677, 4681-4784; 26 RT 6929-6930, 6954-6955.) Witnesses, including Mark Rohr, confirmed that Westerfield stopped and talked to Rohr. (16 RT 4613-4614; 26 RT 6931.)

Credit card and phone records also confirmed Westerfield's route to Glamis from Mountain Pass. At 5:26 p.m., Westerfield had filled his motor home with $65.20 worth of gas at he Mount Carmel Chevron Station in San Diego. (18 RT 5181-5184.)[26] At 5:31 p.m., he made a cell phone call relayed by a tower near the Chevron station (17 RT 4738-4739; 19 RT 5413-5414; Ex. 40); he made calls again around 6:15 p.m. relayed by a tower in the Ramona area just east of Escondido (17 RT 4739-4741; 19 RT 5414-5415; Ex. 41); and calls at 7:33 p.m. and at 10:26 p.m. from outside his designated home area, from somewhere in the Imperial Valley. (17 RT 4741-4742.)[27]

5. Glamis

It was Super Bowl weekend, and Glamis was relatively uncrowded. (18 RT 5011, 5041, 5067.) There were about four or five groups of campers in wash 14 in

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[26] Donald Raymond's claim to have seen Westerfield with a wallet was of course intended to impeach Westerfield's statement about not having his wallet at the Strand. It is not clear whether the evidence of the time of the gas purchase corroborated Donald Raymond's testimony in this regard, as it would if it were impossible to get from Mountain Pass to the Mount Carmel Station within a half hour to an hour while also stopping at Skyridge Road, where Westerfield said he had gone to look for his wallet. But not only was this possible, it is difficult to imagine why it would take between a half hour and an hour to go from Mountain Pass directly to the Mount Carmel Chevron without the stop. (See Ex. 40.)

[27] As to the timing of the drive, if the 10:26 p.m. call was made from Glamis, it was not implausible that it would take 5 hours to drive a motor home 160 miles at night through back roads. (See 28 RT 7448.)

an area that often contained 50 or 60 such groups out there to ride their ATV's (all terrain vehicles) in the dunes. (18 RT 4971-4973, 5011-5012, 5014.) Ryan Strathearn, one of the campers in wash 14, testified that when he went to sleep at about 11:30 p.m. on Saturday night, the area was quiet. (18 RT 5013-5014.) Similarly, another camper, Joseph Keomptgen, testified that when he went to bed about 11 p.m., there was no music or party noise from any of the campsites. (18 RT 4971-4976.)

The first time any of the campers in wash 14 were aware of Westerfield's presence was when they woke the next morning to see his motor home about 150 yards beyond the other campsites and stuck in the soft sand. (18 RT 4977-4978, 5015.) Westerfield had been shoveling out the sand from his back wheels and placing wood braces against the rear tires for traction. He thought he was ready for a tow and walked back to the wash to ask for help. Keomptgen declined because his truck was too small to pull the motor home, but Ryan Straethern and his friend Travis Hollins responded. However, they succeeded only in miring Hollins' own truck in the soft sand, from which Straethern had to pull Hollins out with Straethern's truck. (18 RT 4976-4980, 5017-5018.)

Eventually, a motorcyclist from Keomptgen's party was dispatched back to town to fetch Dan Concklin, who lived in Glamis, sold auto parts, and sold his services to tow out vehicles stuck in the dunes. (17 RT 4930-4931; 18 RT 4975, 5024.) Concklin drove out to wash 14, offered to tow Westerfield for $150 cash, and Westerfield agreed. Concklin then set about the preparatory work of digging out the back wheels and bracing them with plywood for traction. (17 RT 4934-4938.) In addition, Concklin used Westerfield's levelers. These were wooden planks, tiered for leveling a motor home – a process essential for the proper working of the refrigerator and for providing stability, especially in sand. (17 RT 4942.)

In the course of the morning, Westerfield had made various remarks to various people about his weekend. In an aside to Joseph Koemptgen, whom

Westerfield had first approached for help, Westerfield said he was having a bad weekend, which began with a flat tire on his trailer. Westerfield also mentioned that he was supposed to meet friends, but they had changed their campsite because of some loud campers nearby. He was unable to find his friends because his cell phone had gone dead. (18 RT 498-4981.) In asking Straethern for help, Westerfield prefaced the request by stating he had been looking for friends in wash 6 the night before but couldn't find them, so he came out to the farther washes to see if they were there. In the process, he got stuck in the sand. (18 RT 5015-5017.) Later, while Strathern was working to help Westerfield get out, the latter mentioned in passing conversation that his trailer had a blowout the previous night in El Centro, where he had left it to be repaired. (18 RT 5019.)[28]

In the course of the morning, ATV'ers from the other nearby washes would drive by on their morning ride and would offer to help or simply linger to watch. (18 RT 5037-5038, 5042-5043, 5068-5070, 5087-5089.) One of these, Chris Redden, engaged Westerfield in casual conversation while Concklin was working on the back wheels. Westerfield mentioned his bad weekend. He told Redden that he blew a tire on his trailer and left it either in El Centro or Brawley – Redden was not certain which one. Westerfield also said he had got stuck while looking for friends. Redden was not certain, but he thought that Westerfield said his friend were supposed to be in wash 2. (18 RT 5044-5046.)

Concklin in the meantime was ready to pull the motor home after about a half hour to an hour of preparatory work. He had Westerfield get into the cab and give the motor home a little gas while Concklin pulled it out with his truck. The motor home came out on the first pull. (17 RT 4940-4941.) As Concklin was unhooking the strap, Westerfield announced that he did not have enough cash. Conklin, who was not set up for credit cards, accepted Westerfield's $80 and agreed to wait for Westerfield to send the rest. Westerfield took Concklin's name

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[28] El Centro was off of Interstate 8 (18 RT 5019; Ex. 41) on the "non-scenic" route to Glamis. (See above, p. 20, fn. 18.)

and address. (17 RT 4937, 4940-4941.) Westerfield then drove off, leaving his levelers behind. This surprised Concklin, who thought perhaps Westerfield was waiting by the road along the tracks to retrieve his levelers, but when Concklin pulled onto that road, Westerfield was not there. Concklin took the levelers back to his place. (17 RT 4942-4943.)[29]

Joe Keomptgen, who returned from his own morning ride in the dunes in time to see Concklin pull Westerfield out, testified that Westerfield left immediately after Concklin removed the tow strap. (18 RT 4983-4984.) John Hoffman, a friend of Chris Redden, who watched Concklin pull out he motor home, also testified that Westerfield left immediately. By the time Hoffman was back at his own campsite at wash 12, he saw Westerfield's motor home driving down the road along the railroad tracks at a rate much faster than Hoffman himself would drive his own 30-foot motor home on such a rough dirt road. (18 RT 5038, 5046-5047.)

The times at which the various witnesses placed Westerfield's departure varied. Keomptgen estimated that it was between 10 and 10:30 a.m. (18 RT 4983.) Chris Redden estimated that it was somewhere between 10:30 and 11 a.m. (18 RT 5048.) John Hoffman estimated that it was around noon. (18 RT 5072-5073.) Debra Martinez, whose party was camped in wash 13, and who had seen the motor home stuck in the sand, had seen it driving out along the track road some time between 1:15 and 1:30 p.m. (18 RT 5084-5085, 5090, 5092.) Westerfield in his statement to Paul Redden, had estimated that it was about 2:30 p.m. when he was towed out of the sand. (8 CT 2030.)

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[29] Concklin, who appeared still to be disgruntled over the fact that he was never paid in full for the tow **, testified that while he was digging in the back of the motor home, he thought he heard Westerfield say something. When Concklin asked him what he said, Westerfield answered that he didn't say anything. (17 RT 4939.)

6. Back to Silver Strand

Westerfield's own timing for his return from Glamis to Silver Strand was vague. He had told Keene that after being stuck a second time in the sand for about an hour, he left Borrego at about 6 p.m. and showed up at Silver Strand at 7:10 p.m. with a stop for gas at the Mount Carmel Chevron. (15 RT 4274-4276.) To Redden he said that he got to Borrego about 3 p.m., took two hours to dig himself out, stopped for a shower and rest, stopped again for gas at the Mount Carmel Chevron, and arrived back at the Strand at 7:30 p.m. (8 CT 2032-2036.) Westerfield's credit card records showed that at 7:12 p.m. he was purchasing $83.91 worth of gas at the Mount Carmel Chevron, which was over thirty miles from Silver Strand. (15 RT 4260; 18 RT 5185; 19 RT 5413-5414; Ex. 40.) About fifteen minutes later, at 7:33 p.m., he made a cell phone call relayed from 9750 Miramar Road, near Interstate 15, further south and closer to Silver Strand, but still some distance away. (17 RT 4743; 19 RT 5415; Ex. 40.)

7. Coronado Cays

Michael Britton, a Coronado police officer, whose "beat" in the early morning hours of February 4, 2002 included the Coronado Cays, testified that at about 2:34 a.m. he received a call about an illegally parked vehicle in the public parking lot in the Cays. There were signs posted there prohibiting overnight parking. (18 RT 5105-5108, 5112.)

Britton arrived at the Cays at about 2:46 a.m. He saw a large motor home and small truck parked in violation of the posted signs. When Britton knocked on the door, a middle aged man named Cecil Halterman answered. Halterman, whose vehicles had Iowa plates, apologized and explained that he had arrived too late to get into Silver Strand. He said he did not notice the signs prohibiting overnight parking. Britton let Halterman leave without a citation. There was no other vehicle parked in that restricted lot that night, and David Westerfield, as far as Officer Britton had seen, had not been there. (18 RT 5114-5119.)

8. Return home

Keith Sherman's neighbor, Sandra Delong, saw Westerfield's motorhome at about 7:20 a.m. heading up the hill toward Sky Ridge Road, as she herself was heading down the hill on her way to work in Escondido. She recognized the motor home as the one that was usually parked on Keith Sherman's property. (16 RT 4586-4590.) Keith Sherman himself saw Westerfield at the Sky Ridge property at about 7:30 a.m. and talked to him. Sherman testified that Westerfield seemed a little tired, but noticed nothing unusual. (16 RT 4571-4573.) Kelly Bellom, who worked at Twin Peaks Dry Cleaners in Poway, and began work at noon on February 4, testified that at about 1:40 p.m., Westerfield drove into the lot in his Toyota 4-Runner, and then came in to drop off a sweater and pair of pants for dry cleaning. (18 RT 5156-5159.)

Westerfield, who had told Redden about his afternoon stop at the dry cleaners (8 CT 2042), did not mention a morning stop there as well. Julie Mills, who also worked at Twin Peaks Dry Cleaners, and who started at 6:30 a.m., saw a motor home pull in front of the store sometime between 7 and 7:30 a.m. Westerfield came in. He was a regular customer but, according to Mills, was dressed unusually wearing only a T-shirt, very thin boxer-type or jogging-type shorts, and was barefoot. (18 RT 5127-5132, 5133.) In past encounters, according to Mills, Westerfield was pleasant, always smiling, and chatty. This morning he appeared tired and distant, unwilling to talk or even look her in the eyes. (18 RT 5132.) It was also unusual for Westerfield, who normally drove some sort of dark-colored SUV to come in a motor home. (18 RT 5133.) At that time, Westerfield, according to the receipts issued by Mills, dropped off a jacket, two comforters, and two pillowcases. (18 RT 5134-5138.)[30]

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[30] Detective Keene testified that when he searched the motor home later that morning, the bed in the motor home had only a sheet and no comforter on it. (15 RT 4312-4313.)

e. Forensic Evidence

As noted above, the forensic investigation began almost immediately with technicians poring over the Van Dam house beginning on February 2. (19 RT 5214, 5224, 5235-5236.) After a warrant was obtained in the early morning hours of February 5, the investigation turned toward Westerfield's house and his vehicles – the motor home and the Toyota 4-Runner – which were impounded that day. (19 RT 5246, 5363-5365, 5390-5391; 20 RT 5455-5456.) With the discovery of Danielle's body on February 27, there were intense forensic searches of the Dehesa road site, and then the next day forensic evidence was collected at the autopsy. (19 RT 5252, 5303-5305.)

1. Nuclear DNA and fingerprints

i. The jacket. The jacket that was among the cleaning dropped off with Julie Mills on the morning of February 4 was examined at the crime lab. An inch and a quarter stain on the right shoulder tested positive as presumptive blood. (18 RT 5168-5169; 21 RT 5694-5703, 5735.) DNA testing was done first at the San Diego crime lab, and then later at Orchid Cellmark in Germantown, Maryland. Both results established that the profile derived from that stain was consistent with Danielle's DNA profile at statistical frequencies sufficient to indicate an individual identification. (21 RT 5751, 5775-5776, 5779-5780, 5784-5785, 5825, 5833-5834, 5838-5839; Ex. 119.)[31]

ii. The fingerprint. The head of the bed in Westerfield's motor home ran along the back wall of the vehicle. On the driver's side, about a foot above the bed, there was a cabinet. At the bottom of this cabinet, evidence technicians

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[31] The frequencies calculated at the San Diego lab were 1/670 quadrillion for Caucasians; 1/14 quintillion for blacks; and 1/31 quintillion for Hispanics. (21 RT 5784-5785.) At Orchid Cellmark, where the jacket stain was retested, the frequencies were calculated as 1/57 quadrillion for Caucasians; 1/1.1 quintillion for blacks; and 1/29 sextillion for Hispanics. (21 RT 5838-5839.) There is an estimated global human population of 6 billion persons. (21 RT 5815; 24 RT 6472.)

developed latent prints that belonged to Danielle. Specifically, one of the latents contained the inside of her middle finger just at mid-knuckle, and the inside of her ring finger just above mid-knuckle. (20 RT 5518-5519, 5600-5601, 5589-5592, 5598, 5656, 5666; Ex. 96.)

iii. The carpet stain. On the blue carpet covering the hallway that connected the kitchen in the motor home with the bedroom, the evidence technicians discovered a ¼ inch stain located toward the driver's side and toward the kitchen end of the hallway. The presumptive test for blood was positive. (21 RT 5761, 5763, 5819-5820, 5827-5828; Ex. 96.) The stain was cut out and later tested for DNA, both at the San Diego lab and at Bode Technology. It yielded a profile that matched Danielle's at a statistical frequency establishing an individual identification. (21 RT 5780; 24 RT 6451,6467-6470; Ex. 151.)[32]

iv. Hair in the bathroom sink. At the autopsy, the evidence technicians took a sample of Danielle's hair. (19 RT 5256.) From this known sample, the criminalists developed a criteria for selecting potential trace evidence: they began looking for hair that was naturally light brown to blond in color, and between 1.18 and 8.46 inches long. (22 RT 5980-5981, 5984-5985; Ex. 126.) Among the hairs recovered from the sink in the motor home, there was a single 8 1/4 inch strand that met these criteria. (20 RT 5514-5516; 22 RT 5972; Ex. 126.) Because there was a sufficient root on this hair to produce nuclear DNA, a profile was developed that matched Danielle's with a statistical frequency constituting an individual match. (24 RT 6466-6467, 6469-6470; Ex. 151.)[33]

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[32] The actual frequencies obtained in the San Diego lab were the same as for the jacket. (21 RT 5780.) The frequencies estimated at Bode Technology, where the stain was retested were 1/660 quadrillion for Caucasians; 1/14 quintillion for blacks; 1/31 quintillion for Southwester Hispanics; and 1/52 quintillion for Southeastern Hispanics. (24 RT 6467-6470; Ex. 151.)

[33] The numbers, developed at Bode Technology, were: 1/25 quadrillion for Caucasians; 1/340 quadrillion for blacks; ½ quadrillion for Southwestern

2. Mitochondrial DNA for human hair

For all other human hair presented as evidence in this case, the prosecution resorted to mitochondrial DNA, because there either were no roots on the trace hairs recovered or insufficient root to produce nuclear DNA results. By contrast, mitochondrial DNA existed along the hair shaft, and could also yield result at lower quantities than nuclear DNA could. (21 RT 5852-5853; 22 RT 6113-6114; 24 RT 6458-6459.) However, the use of mitochondrial profiles were limited in two related ways: first, mitochondrial DNA matches included all persons in the maternal line, and secondly, the statistical frequencies could not be extrapolated from small data bases, as they could with nuclear DNA, but could be measured only in reference to the actual number of profiles in the testing lab's data base. Thus, an individualized identification was not possible with mitochondrial DNA. (21 RT 5850-5851, 5865-5867; 24 RT 6476, 6481-6482.)

i. The hallway carpet. After the ¼ inch bloodstain was cut out of the blue hallway carpet, evidence technicians cut out all five or six feet of this carpet to be examined for trace evidence. Among the hairs and fibers found on it, the criminalists discovered a single, 1.5-inch strand meeting the criteria for Danielle's known hair sample. (20 RT 5512-5513; 22 RT 5970-5971, 5981-5986; Ex. 126.) The hair yielded a mitochondrial profile consistent with Danielle's maternal profile. This profile did not match any others contained in the 4021-person database maintained by Bode Technology where the hair was tested. (24 RT 6477, 6481-6482; Ex. 124.)

ii. The bathroom rug. The motor home bathroom was on the driver's side of the hallway connecting the kitchen to the bedroom. Inside, there was a rug that was seized. (20 RT 5525; Ex. 96.) At the lab, criminalists removed a single 6-inch strand of natural blond hair, which was tested at the FBI lab and which yielded a mitochondrial DNA profile consistent with Danielle's maternal line.

Hispanics; and 1/200 quadrillion for Southeastern Hispanics. (24 RT 6469-6470; Ex. 151.)

The profile did not match any other profile in the FBI's 5071 person database. (21 RT 5861, 5863-5866; 22 RT 5973, 5981-5982, 5987; Exs. 124, 126.)

iii. The laundry. In the February 5 search of Westerfield's house, his laundry was seized by the police. (20 RT 5484-5490.) In the batch taken from the washing machine, the criminalists found a single 8-½ inch blond hair. (22 RT 5956-5957; Ex. 126.) Among the laundry taken from inside the dryer, a single 6-inch blond hair was found on a pair of boxer shorts. (22 RT 5959, 5980-5982; Ex. 126.) Both hairs were tested at Bode Technology and yielded a mitochondrial profile consistent with Danielle's maternal line. (24 RT 6480, 6481-6482; Ex. 124.)

iv. The bedding. From the sheets and pillowcases collected from the master bedroom at Westerfield's house, the criminalists removed six hairs meeting the screening criteria for Danielle's: an 8 ½-inch strand found on a pillow case; a 6-inch and 6 1/3-inch strand found on the fitted sheet; and an 8-inch and two 5 1/2-inch strands found on the flat sheet. (20 RT 5494-5497; 22 RT 5988-5959; Ex. 127.) All these hairs yielded profiles consistent with the Van Dam maternal mitochondrial profile. (24 RT 6480-6481; Ex. 124.)

v. Dryer lint from trash in garage. The police took the garbage bag from the trash receptacle in Westerfield's garage. Among the trash there was dryer lint, from which the criminalists were able to tease out three human hairs (1 ½ inches, 3 ¾ inches, and 4 inches) meeting the criteria for Danielle's head hair. (20 RT 5497-5500; 22 RT 5963-5965; Ex. 126.) At Bode, the hair yielded a profile consistent with the Van Dam maternal profile. (24 RT 6480-6481; Ex. 124.)

3. Mitochondrial DNA and animal hair

There were animal hairs among the trace evidence recovered at various scenes. The ones selected for DNA testing were chosen based on their consistency with the characteristics of known samples plucked from Layla, the Van Dam Weimaraner. The criteria were gray/brown for color; length between .5 and 1.3 centimeters; and, on the shaft of the hair, microscopically visible pigmentation

granules that were large and ovoid in shape. (19 RT 5243-5244, 5407-5409; 22 RT 6002-6004; Ex. 130.)[34] None of these hairs sent on for testing yielded nuclear DNA results (22 RT 6112-6113), but some of them yielded mitochondrial DNA results.

i. The comforter from the dry cleaner. There were two comforters among the dry cleaning dropped off at Twin Peaks Dry Cleaner. (18 RT 5134-5138.) On one of the comforters, the criminalists found two animal hairs in two separate tape lifts. (22 RT 5977-5978.) These hairs were tested at Quest-Gen, a lab specializing in animal DNA, and yielded a partial mitochondrial DNA profile consistent with Layla's maternal line. It was also consistent with 55 profiles in Quest-Gen's database of 267 dogs. (25 RT 6868-6869, 6877-6878; Ex. 155.)

ii. The hallway carpet. In the same piece of motor home carpet containing the ¼ inch stain and the single strand of human hair consistent with Danielle's, the criminalists found two hairs consistent with the selection criteria for Layla's hair. (22 RT 6001; Ex. 130.) These hairs yielded a mitochondrial profile consistent with Layla's maternal line and with 23 profiles in the Quest-Gen database. (25 RT 6875; Ex. 155.)

iii. The bathroom rug. In the same motor home bathroom rug containing single hair consistent with Danielle's, there was also one animal hair meeting the criteria for Layla's. (22 RT 5978-5979, 6005; Ex. 130.) At Quest-Gen, a mitochondrial profile consistent with Layla's maternal line was found. (26 RT 6868, 6875; Ex. 155.)

iv. The laundry. Among the laundry collected from the top of Westerfield's dryer, there was a white towel containing a single animal hair consistent with the selection criteria for Layla's. (22 RT 5960, 6001-6004; Ex.

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[34] On February 6, Hopi, a golden rust colored Viszlas, had been released into the motor home to do a dog search. (24 RT 6494-6495, 6508-6509.) A sample of Hopi's hair was taken. (23 RT 6164.) Layla's hair was not consistent with Hopi's, and thus none of the questioned hairs consistent with Layla's were consistent with Hopi's. (22 RT 6002, 6003-6004.)

130.) However, at Quest-Gen, the hair yielded no mitochondrial results. (26 RT 6865; Ex. 155.)

v. Dryer lint from trash can in garage. In addition to the three blond hairs teased out of the lint from the trash in the garage, the criminalists also obtained 18 animal hairs meeting the criteria for Layla's. (22 RT 5965.) At Quest-Gen, the results established only that these hairs could not be excluded as having come from a dog in Layla's maternal line. (26 RT 6872-6874; Ex. 155.)

4. Fibers consistent with Danielle's bedroom carpet

Fibers were plucked from the carpet in Danielle's bedroom. (19 RT 5245.) They were tan polyester fibers with a trilobal cross-sectional shape and a length of 32.5 micrometers. (22 RT 5989-5990, 5993, 5996, 5999; Ex. 127.) However, because carpet fibers are manufactured in hundreds of thousands of yards at a time (23 RT 6217-6218), and because in the newer housing developments, of which Sabre Springs was one, the contractors usually gave the buyer a limited selection of carpeting to choose from (22 RT 6084-6085), any correspondences could establish only the possibility of the same manufacturing source. (22 RT 6001, 6101-6201.)[35]

Of the fibers recovered from the trace evidence in this case, three fibers were found in the motor home hallway carpet that were tan and polyester, but were 35 micrometers. (22 RT 5994, 6001; Ex. 127.) In the bathroom rug in the motor home there was a single tan polyester fiber that was, however, 37.5 micrometers in length. (22 RT 5978-5979, 6001; Ex. 127.) Finally, in a tape lift taken from the carpet in the motor home bedroom, there was one tan polyester fiber that was 32.5 micrometers long. (20 RT 5510-5511; 22 RT 5994-5995, 6001; Ex. 127.)

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[35] The criminalist attempted to find out from Shaw Industries, the manufacturer of the questioned fibers, how many miles of carpet fiber Shaw produced, but no one from Shaw called her back and she did not press the matter. (22 RT 6083-6084.)

5. Corresponding fibers unconnected to a known source

Among the laundry seized from Westerfield's house, the criminalists began to notice a relatively large quantity of long, orange acrylic fibers and short blue-gray nylon fibers. (22 RT 5956-5962; 23 RT 6171-6176, 6191, 6199; Ex. 133.) Specifically, there were 20 to 30 orange acrylic fibers and 7 blue-gray nylon fibers in the laundry from the washing machine; 50 to 100 orange acrylics and one blue-gray nylon in the laundry from the dryer; and 10 to 20 orange acrylics in the bedding from the master bedroom. (23 RT 6193-6195; Ex. 133.)

These fibers were not attributable to any possible or even hypothetical source, but they corresponded to fibers found in items connected to Danielle's person. Entangled in a plastic curlicue necklace recovered at the autopsy, there was a single long orange acrylic fiber, identical in appearance with the orange acrylic fibers in Westerfield's laundry and bedding. In Danielle's head hair taken at the autopsy, there was a single blue-gray nylon fiber, and one such fiber was also found in the vegetal material scraped from her lower buttocks at the autopsy. Finally, in the white sheet used to transport her body from the Dehesa site to the Medical Examiner's Office, criminalists recovered 19 blue-gray nylon fibers. (19 RT 5252-5253, 5256-5260, 5262; 23 RT 6173, 6179, 6186-6187, 6195-6196, 6199-6201; Ex. 133.)

Once this correspondence was made, the lifts from the motor home were re-examined and revealed 11 blue-gray fibers from the headboard of the bed; 31 from the kitchen bench seats; 1 from the front passenger seat; and 3 from the couch. (29 RT 7699-7713; Ex. 164.) The lifts from the Toyota 4-Runner yielded one orange fiber from the front passenger seat; two orange fibers from the back driver's seat; 4 orange fibers from the rear passenger armrest; three from the rear passenger seat; and ten orange fibers from a towel found inside a laundry bag that was in the rear cargo area of the Toyota. (29 RT 7753-7763; Ex. 165.)

6. Dog-scent Evidence

On the morning of February 6, Jim Frazee, a volunteer canine handler for the Sheriff's Department brought his dogs Hopi and Cielo to the impound lot. Hopi was a "trailing dog," trained to follow a specific scent. Cielo was a "search dog," trained to find any missing human being. A dog certified as a search dog, could obtain a specialized certification as a "cadaver dog," trained to find human remains or body fluids. Cielo, whom Frazee obtained in October 1999, when the dog was eight weeks old, was certified for search in April 2000, and for cadaver search in November 2000. The certification body was the California Rescue Dog Association (CARDA), which was recognized by the Governor's Office of Emergency Services. (24 RT 6493-6495, 6499, 6503, 6504-6505, 6507, 6509-6510.) Cadaver dogs were trained to give an "alert" when they found what they were trained to find. Cielo's "alert" was to sit down in front of Frazee, make eye contact with him and bark. (24 RT 6499.)[36]

That morning Frazee scented Hopi to find Danielle Van Dam's scent. The dog was allowed inside the motor home, but without result. (24 RT 6511-6513.) After this, Frazee worked Cielo. Frazee began by directing Cielo to the tires and fenders. This was a test to see if Cielo would be distracted by dead animal scent, since vehicles sometimes run over dead animals. Assured that the dog was not

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[36] A "search dog" was trained by having it released by a stranger to find its handler; the process was then reversed so that the handler released the dog to find the stranger. Success was awarded with food or some sort of toy. (24 RT 6500-6501.) For "cadaver dog" training, the handler began by exposing the dog to cadaver scent, and then bestowing some sort of gratification on the dog to create a sense in the dog of pleasurable association with this otherwise morbid scent. Using such items as human blood, cerebrospinal fluid, portions of placenta, or even cremated human remains, the handler required the dog to find these items. For certification as a "cadaver dog", training records had to show the dog's success in finding such items in various situations – above ground, buried, hanging, or in a building, -- and the discovery had to be out of the sight of the handler, whom the dog fetches and leads back to the finding. (24 RT 6504-6506.) Since Cielo's certification in November 2000, he had located remains in a real-life search on two occasions. (24 RT 6507.)

distracted, Frazee proceeded to the seam between the passenger door and the exterior compartment. The intensity and duration of the dog's sniffing increased a little. As Frazee moved the dog to the other end of this compartment, there was a further increase in Cielo's sniffing. As he moved to the next compartment, Cielo swung around, sat, made eye-contact with Frazee, and barked. This was the cadaver alert and meant that he had detected a cadaver scent. (24 RT 6513-6515.)

With this, Frazee continued around the motor home, again to make sure that Cielo had not been distracted by animal scent. The dog continued to sniff, but showed no interest and made no further alerts. (24 RT 6515.) Frazee then had the police open the door to the compartment where Cielo alerted. Cielo showed an interest by sniffing for extended periods two articles inside that compartment: a folded up lawn chair, and a shovel. (24 RT 6515.)[37]

7. Computer Evidence

During the February 5 search of Westerfield's office, computer forensic examiners, one from the San Diego police and one from the FBI, examined the computers and computer related material in the home office on the second floor of Westerfield's house. (21 RT 6282-6284, 6289.) On a shelf near the computer table, the examiners discovered two CD's and three zip-disks. The CD's were marked "Spectrum," which was the name of Westerfield's business. On these disks, the examiners, using their equipment, viewed "questionable" material, i.e., pornographic material involving minor females under the age of 18. (21 RT 6300-6302, 6306-6307.) These were seized (20 RT 5495-5497) and examined in greater detail in the computer forensics lab. (21 RT 6303.) On these media, there were 15

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[37] Rosemary Reddit, a lieutenant in the volunteer canine unit was present as an observer. She witnessed Cielo stopping at the exterior storage bin on the passenger side of the motor home. The dog sat, looked at Frazee, and barked. (26 RT 6830-6831.) As to the "interest" shown by Cielo in the lawn chair and shovel, she testified merely that the dog placed his paws in the open compartment and sniffed, until Frazee recalled him. (26 RT 6831-6832.)

to 17 images appearing to involve a female under the age of 18, some of which were possibly pornographic. These were shown to the jury. (21 RT 6311-6315; 24 RT 6414; see 42 RT 9397; see also Exs. 136 and 139.) In addition, from all the computers seized in the house, about 8000 pornographic images were recovered, consisting of adult pornography, animated pornography, and about 68 other questionable images of possible child pornography. (24 RT 6390-6398, 640-6408; 14 CT 3489; Exs. 144-148.)[38]

Defense Case

a. Alibi

From 8:50 a.m. on February 4, Westerfield was almost constantly in the presence of the police. Even after he left the Northeastern substation at 11:30 p.m., he was followed back to his house, and kept outside by officers securing the residence pending the issuance of a warrant. At 2 a.m., a tracker was placed on his vehicle, and from that time until his arrest on the afternoon of February 22 he was under continuous police surveillance. (26 RT 6999-7002; 30 RT 7814-7819, 7923-7927, 7931.) Also during that time period, the media followed Westerfield around wherever he went. (30 RT 7938-7939.) This constituted an alibi based on the entomological evidence, which established that Danielle's body could not have been placed at the Dehesa Road site before February 14 or 16. (30 RT 7968-7969; 33 RT 8116-8117.) February 16 was the earliest date determined by forensic entomologist David Faulkner, who had been called in by the police to the autopsy on February 28, and who collected the insect evidence both there and later that day from the Dehesa Road site. (30 RT 7940, 7945-7948.)

Faulkner, in addition to teaching forensic entomology, had been the assistant curator and head of the Entomology Department of the Natural History Museum in San Diego form 1975 until 1993, and from 1997 to 2001, he was the

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[38] A full account of the materials shown and described to the jurors is given below. (See pp. 227-229, 258-259, 263-265, 284-285.)

collection manager in that department. (30 RT 7941-7942.) His current research was involved the determination of the abundance and distribution of various insect species in San Diego County. (30 RT 7943-7944.) He had done forensic work in both civil and criminal cases. He had worked for local law firms, for the San Diego Police, and for the District Attorney's Office and had even testified for the specific prosecutor in this case. (30 RT 7943-7944.) His primary experience was with the prosecution in criminal cases, having been retained 196 times by that party compared with the 39 time by the defense. (30 RT 7944-7945.)

The importance of forensic entomology was in assessing the time of death based on the development of the insects found on a dead body. Within a very short time after the availability of a dead body, certain species of flies, especially the species calliphora or blow flies, will have deposited eggs – an event technically denominated as "oviposition." To reach adulthood, the hatched insect had to go through a larval and pupal stage. These stages lasted various amounts of time as established both in the literature and in the experience of the forensic entomologist. The latter, after obtaining a sufficient sample of larval or pupal maggots from the body, and after identifying the appropriate species, could then infer the amount of time between oviposition, which should correspond to when the body was available for fly activity, to the time the body was found. (30 RT 7950-7956, 7960-7965, 7969-7970.)

Faulkner testified that insofar as he was called in at the autopsy and had full access to the site of recovery of the body, as well as police help in conducting his study, this case had presented to him the most ample opportunity he had ever had to do a thorough forensic entomological investigation. (30 RT 7948-7949, 7979.) Once he had gone through the appropriate steps and collected the appropriate information, he concluded that February 27, the date of the body's recovery, was ten to twelve days after the first infestation of flies and their oviposition. This meant that the body was first available for insect activity between February 16 and 18. (30 RT 7968-7969.) This finding was supported by the beetles of various

species he found on the body. They were all adults, and there were no non-adults or grubs. This meant that beetle oviposition, which happens only two weeks after a dead body is available for insect activity, had not yet occurred, and the elapsed time between February 16 and February 27 was less than two weeks. (30 RT 7973-7974.)

The only complication in this case was the weather conditions. Unusual weather conditions could affect the availability of flies. The actual weather throughout February, 2002 was warmer than usual. There had also been no significant rainfall that year. The fly populations were definitely low that year compared to previous years. Nonetheless, this did not change Faulkner's conclusions. First, there was a housing development about a mile up the road. The availability of water and food in such a setting would sustain significant fly populations to compensate for the weather conditions. Secondly, in February, 2002, Faulkner had actually been doing work in the area just above where the body was found and he was very familiar with the insect environment there. In his opinion, even considering weather conditions, there was no entomological way to explain the availability of the body for ovipostion to be any earlier than February 16. (30 RT 7968, 7974-7979.)

Neal Haskell, a forensic entomologist, who had done forensic work for law enforcement and prosecutorial agencies across the United States and in Canada (33 RT 8110-8115) examined the insect evidence collected by Faulkner, Faulkner's report, the autopsy report, a transcript of Faulkner's testimony, photographs and crime scene narratives. He examined the Dehesa site in person the day before he testified, and he also studied the hourly climate data from Brown Field, which was 16 miles from the Dehesa site. (33 RT 8094, 8116-8117.) His conclusion, which he considered consistent with Faulkner's, was that oviposition occurred sometime between February 14 and February 23. February 12 or 13 was possible, but unlikely; anything before February 12 was impossible. (33 RT 8117-8118.)

b. Forensic evidence

With Westerfield's alibi, which was heavily dependent on forensic entomology, the case became a competition with the forensic sciences. The prism through which the prosecution's physical evidence could be reconciled with the defense's physical evidence depended on the following principles: fingerprint identification cannot establish when or under what circumstances a print was made (20 RT 5620, 5569); biochemical analysis cannot determine how or when a biological fluid was deposited (21 RT 5735, 5830-5831, 5843); and, trace evidence of fibers and hairs are highly mobile, easily transferred, and need not indicate a direct contact, but might only be evidence of a derivative contact. (19 RT 5269-5270; 22 RT 5948-5949, 6087; 23 RT 6212, 6242-6243.) These were the forensic principles around which the defense presented circumstantial evidence to explain the fingerprints, the DNA, and the hair and fiber evidence.

1. Accessibility of house and motor home

Regarding the hairs found in the house itself, it will be recalled that Danielle Van Dam was actually in Westerfield's house on Tuesday, January 29, and that she may even have gone upstairs. (15 RT 4285; see above at pp. 15-16, 23.) That her hair was found in the house was not remarkable in light of the fact that humans shed about 50 to 100 head hairs a day. (22 RT 6012.) Furthermore, Brenda Van Dam and her son Dylan were present in the house, and the identification of the hairs recovered there were based on mitochondrial DNA, which allowed only for a generalized profile of the maternal line, and not an individualized identification. (See above, p. 37.)

Regarding the evidence recovered from the motor home, including the nuclear DNA and fingerprint evidence, it will be recalled that before Westerfield found a space at Keith Sherman's property, he parked his motor home in the neighborhood, near Danielle's house, either on Mountain Pass or Briar Leaf, and still did so for lengthy periods of time before or after a trip in order to load or unload. (See above, pp. 13-14, 26.) The Sabre Springs neighborhood had lots of

children of elementary school age. They were often out on the streets, whether walking to or from school, or playing. (16 RT 4520; 17 RT 4726-4727; 26 RT 6956, 6976-6977; 30 RT 7876.) Inevitably, children would walk by the motor home, as Mark Rohr, Westerfield's across-the-street neighbor, had actually witnessed. (26 RT 6927-6928.) Danielle L., the daughter of Susan L., Westerfield's former girlfriend, testified that one time when they were unloading the motor home on a return from the desert the neighborhood children gathered to watch. (29 RT 7675.)

Moreover, the evidence established that when the motor home was parked in the neighborhood, Westerfield left its door unlocked for substantial periods of time. Janet Rohr, Mark's wife, testified that she had witnessed Westerfield going into and out of the motor home on several occasions without having to unlock the door. (26 RT 6956.) Susan L. testified that whenever they were loading or unloading the motor home before or after a trip, they would leave the door actually open. (30 RT 7875.) Stephanie Escadero, a friend of Susan L., once attended a barbeque at Westerfield's house. The motor home was parked on the street and he gave her a tour of it. They entered without him having to use a key and exited without him locking the door. (29 RT 7652-7653.)

As for Danielle Van Dam and her brothers, Damon testified that they were allowed play in front of the house and could go up the hill on the same side of the street, which was the side of the street for Westerfield's house as well. According to Damon, however, the Van Dams were strict about this, and if they had to cross the street, they had to first obtain permission. Furthermore, most of the time, either he or Brenda was with them when the children were playing in front of the house. (12 RT 5372-5373.) There was evidence, however, casting some doubt on whether the professed rigor of this regimen was invariable and inflexible. Brenda herself testified that she sometime let Danielle and Derek walk to school. (13 RT 3776-3777, 3858.) From time to time, Brenda allowed Danielle to go with

neighbor children to play in the park at the end of Mountain Pass, past Westerfield's house. (13 RT 3858.)

There was more evidence of Brenda and Damon's laxness from the very Friday of the crucial weekend in this case. On Friday afternoon, February 1, Brenda went shopping with Danielle at Mervyn's to buy some clothes. Derek and Dylan accompanied them, and Brenda allowed the boys to go by themselves next door to "The Toy Depot" to shop for a birthday present. When she went to pay for the purchase at "The Toy Depot," Brenda sequestered Danielle into a dressing room at Mervyn's and told her to wait until Brenda returned. (13 RT 3903-3904.) After this shopping trip, when they arrived home, Brenda, knowing Damon would soon be home from work, did not wait, but left the children alone so that she could pick up the family's pizza dinner from Dominoes. (13 RT 3799-3801.)

There were also witnesses who testified at trial to seeing the Van Dam children outside their house without a parent in the vicinity. Janet Rohr had recently seen the youngest boy playing ball in front of his house. When the ball rolled across the street, Janet stopped traffic for him to retrieve it. She did not see the parents around. (26 RT 6956.) Angela Elkus had seen Danielle and her brother playing outside (17 RT 4727), and Barbara Crum had, on occasion, seen Danielle on her bicycle riding near Crum's house, which was around the corner on Briar Leaf. (16 RT 4616.)

2. Ease of Transferability of Trace evidence

As noted above, trace evidence is highly mobile and easily transferred. This is a fixed premise of forensic science and is called the "Locard" principle. (20 RT 5532-5533; 22 RT 5948, 6085-6086; 23 RT 6212.) The import of the Locard principle is that trace evidence found in a foreign environment did not necessarily establish direct contact between the first carrier of evidence and the location where the evidence was found. (22 RT 6087.)

Thus, tan, trilobal fibers found in the motor home (see above, p. 40) did not establish direct contact between the motor home and Danielle's home. Moreover,

most carpet fibers were trilobal. (22 RT 6089.) Furthermore, as noted above, carpet fibers were manufactured in large lots, and in newer subdivisions, like Sabre Springs, contractors tended to offer a limited range of carpeting for the newly built houses. (22 RT 6084-6085; 23 RT 6217-6218.)

As for the orange acrylic fibers and the blue nylon fibers, which, again, could not be connected to a specific source, the exclusive uniformity of orange in the SUV and the exclusive uniformity of blue in the motor home conferred a random quality to their presence rather than a significant one. (See above, p. 41.)

Further, there was also evidence of direct, but non-incriminating contact between Westerfield's "environment" and the Van Dam "environment." Quite apart from the presence of Brenda, Danielle, and Dylan at Westerfield's house on Tuesday, January 29, several witnesses present at Dad's on February 1 had seen Westerfield and Brenda dancing together. (27 RT 7192, 7200-7201, 7224-7225, 7228-7229, 7236-7237; 28 RT 7304-7306.) One witness, Patricia LePage, testified that Brenda seemed to be "rubbing herself all over him" with her hips and her bosom. She characterized it as "dirty dancing." (28 RT 7322-7324.) Duane Blake, another witness described their dancing as "huggie huggie." (28 RT 7369-7373.) In this connection, witnesses at Dad's on February 1 had Brenda wearing a red sweater or shirt (13 RT 3974; 14 RT 4086; 27 RT 7321), and red fibers were also numerous in the laundry seized from Westerfield's house. (23 RT 6216-6232.) Further, dyed blond hair, such as Brenda's, was found in the motor home and in the bedding from Westerfield's house. None of these were examined or tested for similarity to Brenda's hair because they did not fit the criteria for Danielle's. (22 RT 6069-6072, 6078-6079.)

3. Significant absence of incriminating forensic evidence

The intense effort to recover fingerprints, hairs, fibers, and biological residue failed to establish anything from Westerfield inside the Van Dam house. Three hundred and fifty-eight latents were developed; 122 prints were identified; none of them belonged to Westerfield; and Westerfield was specifically excluded

from several, including prints developed on the patio table in the backyard, on the sliding glass door into the house, on the door handle for Danielle's bedroom, and on the adjacent dry wall. (19 RT 5225-5226, 5235, 5290-5301, 5333; 20 RT 5609-5612; 29 RT 7611-7615.)

A serious question also arose regarding the absence of DNA, which is contained not only in blood, but in saliva and in perspiration. (22 RT 5919, 5928-5929, 5945.) In this regard, Detectives Keene and Parga noted Westerfield's excessive perspiration during the morning interview on February 4. (15 RT 4252, 4287, 4403; see above, p. 25, fn. 24.) Westerfield's close friends, David and Debra Lapisa further testified that Westerfield had a sweating problem on his neck and underarms (28 RT 7444, 7503), while Westerfield's former girlfriend, Susan L., testified that the problem manifested itself on his head, face, and armpits, even when the weather was cold. (30 RT 7881-7882, 7911.) The police did collect several items from Danielle's bedroom in a quest for biological evidence: a pair of pajamas, which were on the floor and were turned inside out; a shirt turned inside-out; a bean bag chair; and her bed cover. (19 RT 5227-5231; 5237-5238; 21 RT 5706-5711; 22 RT 5911-5916.) These items either produced no DNA results or results that excluded Westerfield. (22 RT 5913-5920; 24 RT 6463-6464.)

In regard to fibers and hairs, if the police found and collected any foreign fibers from the Van Dam house, the prosecution produced no testimony about it. The only hair attested to was one that was collected in the side yard near the exit gate. (19 RT 5232.) This turned out to be an animal hair. (23 RT 6153-6154.)

In regard to Danielle's body, her fingernails were examined for biological evidence. In the scrapings there was even recovered a small flake of some sort of tissue. The DNA results obtained from these scrapings produced profiles and partial profiles consistent with Danielle's DNA, but inconsistent with Westerfield's. (19 RT 5255-5256; 21 RT 5821-5823, 5830; 23 RT 6160-6163; 24 RT 6464-6466.) Swabs taken from Danielle's neck and body, including oral,

vaginal, and rectal swabs, produced no evidence of semen and yielded no DNA results. (19 RT 5256-5257; 21 RT 5823.)

4. Computer forensics

A defense expert on computer forensics examined the two Hewlett Packard computers from Westerfield's home office as well as a Gateway Computer and a laptop belonging to Westerfield's son Neal. The expert discovered that on the two Hewelett Packard computers, there were emails sent to Dnwest at Hotmail.com, -- Neal's address, -- from pornography sites that were accessed around the time the emails were received. (27 RT 7032-7033, 7038-7041, 7058-7077, 7090-7092; 35 RT 8465-8471, 8473-8474.) The expert also examined the loose media containing the "questionable images." Based on a forensic examination, he concluded that some of the pornographic files on Neal Westerfield's Gateway had been downloaded from the loose images on December 17, 2001. (27 RT 7094-7095.)

Neal himself, called in the prosecution's rebuttal case, testified that he used his father's computers for Internet access, which included not only his email but occasional forays to pornographic sites. (35 RT 8473-8474.) He in fact did copy onto his Gateway the pornography folders from a CD he found on his father's bookshelf, but, according to Neal, the pornography was already on that CD. (35 RT 8485-8486.)[39]

5. Dog-scent evidence

Cielo, Jim Frazee's dog, who had, according to Frazee, given an alert for cadaver scent at the impound yard on February 6, had also been used on February 4, when the police went up to Skyridge Road with Westerfield to examine the motor home. Cielo, circuiting the exterior of the vehicle, detected no scent on that

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[39] Apart from the question of who possessed the pornography that was on the loose media from Westerfield's office, there was a factual issue of whether the "questionable images" represented actual minors. The defense expert testified that in his experience, pornographic sites offering images of teenagers never used teenagers under 18. Oftentimes, apparent child pornography involved the use of actors and actresses. (27 RT 7076, 7169-7170.)

occasion, according to Frazee, but did show an interest in the mudflaps and tires by sniffing them longer than he did other places. (26 RT 6818-6820.)

As to the February 6 alert, Frazee had told no one about it until February 22. (26 RT 6806-6808.) Detective Tomsovic, who was in charge at the impound lot that day, wrote a report simply noting that the dog was taken around the motor home. There was no mention of an alert, and Frazee did not say anything to Tomsovic. (26 RT 6913-6917.) He also said nothing to Rosemary Reddit, who, as a volunteer lieutenant in the Sheriff's Search and Rescue Canine Unit, was present on February 6 as an observer, and who knew Jim Frazee. (26 RT 6827-6828, 6832.) However, on February 22, Frazee revealed the alert to Cielo's breeder Maria Zucconi, boasting about it in an email he sent after the news of Westerfield's arrest was broadcast. (24 RT 6530-6531; 26 RT 6808-6809.)

In the first paragraph Frazee prefaced the announcement with, "I could get in trouble for telling you this, but I'm kind of bursting with pride over Cielo, and I have to tell somebody besides Jan [his wife] what he did." (26 RT 6802-6803.) However, in the email, he related that "I wasn't sure but I thought Cielo was giving me his cadaver sign. I thought he might have been doing these behaviors just to please me. So I took him around the rest of the motor home but got no further alerts." (26 RT 6809-6810.) But then, according to Frazee's email, Frazee asked that the compartment prompting Cielo's alert be opened, whereupon Frazee saw a sight that was "quite chilling." Frazee testified that he used this phrase because the compartment contained a shovel, which Frazee simply assumed Westerfield had used to bury the body. (26 RT 6810-6811.) The email ended with this paragraph:

> "Reminiscent of his water find, I didn't know what to make of what Cielo did and had to leave the scene wondering. Today, however, came news of the suspect's arrest. And it was revealed that they had found a body in the motor home. (I'm sorry.) Found blood in the motor home. Notwithstanding my sympathy for the

little girl and her family, this was pretty cool, given that it backs up Cielo's alert." (26 RT 6893-6894.)

Reddit, an experienced dog handler and trainer, testified that an "alert" was supposed to be so clear, unequivocal, and unambiguous as to leave no doubt in the handler's mind that an "alert" had been given. (26 RT 6836, 6844.)[40]

c. Defense evidence bearing on Dad's and on the weekend trip

The defense presented various witnesses to undermine the prosecution's claim that various details of the weekend's events were incriminating. Glenn Seebrush testimony established that Westerfield was planning a weekend motorhome trip at least on Friday afternoon, February 1. Seebruchs was the engineering manager at Nokia, on whose behalf he contracted with Westerfield for some design work. He also lived on Sky Ridge Road not far from Keith Sherman, on whose property Westerfield parked the motor home. (28 RT 7423-7424.) On February 1, 2002, at about 1:45 p.m., Westerfield telephoned Seebruchs from the lobby of Seebruchs' building. He wanted to tell Seebruchs that he had dropped off some parts. The discussion turned personal and Westerfield talked about his plans for the weekend, saying that he planned to go to the desert to do some ATV'ing. (28 RT 7245.) He mentioned that he could not find anyone to go with him, which Seebruch took to be an implied invitation that Westerfield was extending to Seebruch. Seebruch, however, had to cut the conversation short because someone had come into his office. Seebruch told Westerfield he would call him back later, but he forgot to do so. (28 RT 7426.)

In regard to whether or not Westerfield had the physical capacity to effect an undetected kidnapping of a little girl from a fully occupied house, Glennie Nasland, a friend of Westerfield, who had introduced him to his former girlfriend,

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[40] Redditt, who testified that she had witnessed Cielo's alert on February 6 (see above, p. 43, fn. 37), had herself told no one about it until June 28 (26 RT 6834), well into trial, and after Frazee's credibility was challenged.

Susan L., testified that she was at Dad's on Friday night February 1 and had seen him leaving at midnight. She had said goodbye to him, and, according to Nasland, Westerfield was drunk. When she asked him where he was going, he said he was going home. (27 RT 7234-7235, 7241, 7251-7252, 7285-7286; 28 RT 7301-7303.)

In reference to Christina Hoeffs' claim that it was unusual for Westerfield to have his backyard lights on (see above, pp. 25-26), Paul Hung, who lived next door to Westerfield on Mountain Pass, gave a different opinion. He testified that it was not unusual for Westerfield to leave his backyard lights on all night and even into the day time. (26 RT 6971-6972, 6977.)

Regarding the wallet, Susan L., Westerfield's former girlfriend, who had dated him for several years, testified that she often went camping with him. According to Susan L., Westerfield kept only his credit cards in his wallet. Cash he kept separately in his pocket, and they would often stop at Union Bank before a trip to get cash. (30 RT 7867-7869, 7877.) Donna Boes, the operating assistant at Union Bank, where Westerfield kept his account, testified that the ATM machine issued only twenties. (28 RT 7433-7434.)

Susan L. also testified that there were times they started out going to Silver Strand, staying only an hour or two and then leaving for the desert because of the bad weather. When going to Silver Strand, Westerfield did not bring his ATV trailer. (30 RT 7872-7873.) Danielle L., Susan's 16-year old daughter, and Danielle's friend, Jennifer L., remembered a specific motor home trip in which they went to Silver Strand for a short while and then left because the weather was cold. This trip occurred sometime around the beginning of 2001. (29 RT 7670-7675, 7690-7691, 7694-7695.) Donald Raymond, the volunteer camp host at Silver Strand, who testified that he had seen Wethersfield pull out a wallet to show Raymond that he had only twenties (17 RT 4918; see above, p. 28), had not told the police about the wallet until a second interview. Between the two interviews he had found out something about Westerfield on television and in the

newspapers. (17 RT 4928-4929.) Indeed, when Raymond was first interviewed on Tuesday morning February 5, he could not identify Westerfield's photograph as the person he had encountered on Saturday. (29 RT 7550-7552.)

In regard to the back-country route Westerfield took Glamis, Dave Lapisa, Westerfield's long-time friend and fellow ATV'er, testified that the route was the scenic, and often used by motor homers coming from the San Diego area and heading to Glamis. (28 RT 7435-7436, 7445-7448.) Eugene Yale, a San Diego attorney unconnected with either party to the case, and an experienced motor homer who often went to Glamis, came forward to confirm this. (29 RT 7836-7837, 78407841, 7857-7858; Ex. 41.)[41]

Regarding Westerfield's claim to have gone to Glamis to look for his friends, Lapisa and his wife also testified that they had certain days each year when they traditionally took family trips to Glamis; Westerfield was familiar with these days, one of which was Super Bowl Sunday, when the crowds then were sparser at Glamis. According to the Lapisas, there were times that Westerfield met them in Glamis without prearrangement. (28 RT 7439-7442, 7502-7503.) In regard to other aspects of Westerfield's account of his time at Glamis, Lapisa and Susan L. attested that it was not uncommon to get stuck in the sand while motor homing in the desert. (28 RT 7442-7443; 30 RT 7879.) Moreover, in a motor home that had electronic levelers, which Westerfield's did, the wooden levelers were used only for traction, and it was common to abandon them as Westerfield had, since a motor home could not stop in the sand without getting stuck again once it obtained some traction. (28 RT 7458-7459; 30 RT 7879.)

Finally, in regard to Officer Britton's failure to spot Westerfield at Coronado Cays, Heather Mack, a security worker there testified that she was working on patrol on February 3 on the 4 p.m. to midnight shift. At one point, she

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[41] In the prosecution's rebuttal case, Neal Westerfield testified that he thought their usual route to Glamis was by Interstate 8. However, Neal, usually busy with video games, did not pay much attention. (35 RT 8444-8445.)

was asked to relieve a guard at the security gate for fifteen minutes so he could take his lunch. (28 RT 7519-7521.) At this time, someone in a motor home drove in. The driver looked directly at her, smiled, and waved. She waved back. When she saw the television coverage later, she recognized Westerfield as the driver she had seen. (28 RT 7518-7522, 7574.) After having relieved the guard, she returned on patrol, but did not see that motor home again. However, the Coronado Cays were 14 square miles. Furthermore, it was her experience that motor homes turned away or excluded from the Strand did come to the Cays to park, and sometimes parked in the yacht club, which was not part of the patrol area. (28 RT 7575-7576.)

Prosecution Rebuttal

The prosecution brought in Madison Goff, a forensic entomologist, who was head of the Forensic Science Department at Chaminade University in Honolulu. He had a PhD. in entomology form the University of Hawaii in Manoa. (38 RT 8942.) Goff reviewed the reports of Faulkner and Haskell, but not the insect samples themselves. Based on their qualifications, Goff trusted their identifications as competent. (38 RT 8958.) He did his own calculations, however, based on a wider range of temperature data – an important factor since ambient temperature could accelerate or retard the development of the blowfly larvae. (38 RT 8964.) Based on his calculations and judgments, Goff could not say that Danielle Van Dam was not dead from February 1 through February 12, which, in the earlier range militated against the alibi defense. (38 T 8094) On cross-examination, Goff conceded that in his opinion insect activity began on February 9. (38 RT 9021-9022.) But as to the actual time of death, Goff testified that he would have to defer to the forensic pathologist and the forensic anthropologist. (38 RT 8094.)

In this regard, Dr. Blackbourne, the medical examiner, had testified in the case in chief that based on the condition of the body, he could only give a "ball

park" estimate that Danielle had died anywhere from 10 days to six weeks before the autopsy on February 28. (12 RT 3751.) But for the rebuttal case, the prosecution hired William Rodriguez, a forensic anthropologist, who worked for the Department of Defense, but who also did private consulting for $300 an hour. (36 RT 8641-8643.)

The expertise of a forensic anthropologist was making inferences of identification and time of death from the break-down of remains. This was known as "taphonomy." Although Rodriguez was not an entomologist, entomology played a role in his expertise. Although he was not a medical doctor, physiology also played a role. (36 RT 8645-8646, 8664.)

In Rodriguez's opinion, the entomological evidence had to be discounted because of the mummification or drying-out of Danielle's body. The examination of the autopsy photos and the weather data indicated that her epidermal skin dried out rapidly. This would slow down blow fly colonization of the body because the mouth of the fly was unable to penetrate the dried tissue, and colonization would have to proceed more slowly through any orifices exposed. If the onset of insect activity did not coincide more or less with the time of death, then the entomological evidence would be inaccurate in that regard. The time would also be affected if the body was in a contained area that was inaccessible to flies. (36 RT 8666-8669, 8675-8678, 8698-8699.) In Rodriguez's opinion, science cannot attain to any greater accuracy in this case than to give a window of four to six weeks prior to the autopsy for the time of death. The primary factors in his consideration were the mummification of Danielle's body and the ideal conditions in temperature for rapid mummification. (36 RT 8704-8705.)[42]

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[42] Rodriguez had considered Blackbourne's estimate of 10 days to six weeks. He also considered the report of Cyril Wecht, a forensic pathologist with an international reputation. Wecht estimated a time of death between 10 days and four weeks. (36 RT 8705, 8710-8711.) Rodriguez denied that the poles of his range were merely the maximums given by the two pathologists. (36 RT 8745.)

Defense Surrebuttal

Robert Hall, the Vice Provost for research at the University of Missouri, an entomologist with a PhD. in entomology from Virginia Polytechnic and a J.D. from the University Missouri, was also a forensic entomologist with consulting experience with the FBI and the Army's criminal division. He had also taught courses in forensic entomology for quite some time. (39 RT 9076-9079.) He had reviewed the various reports and the insect data in this case. He had also reviewed the temperature data, the relevant testimonies, and the insects themselves. (39 RT 9079.) Based on all this, his opinion was that blow fly oviposition did not occur in this case any later than February 23 and no earlier than February 12, 2002. (39 RT 9082.) Hall knew William Rodriguez professionally. Rodriguez was not a forensic entomologist and his estimate of a four to six week window for time of death was not consistent with the entomological evidence. (39 RT 9085.)

Although Hall himself was not an expert on mummification, in every experiment he had been involved or with or with which he was associated, there was always some degree of mummification present in the corpse or cadaver, and this had little effect on blow fly colonization of the body. (39 RT 9089.) Even if the body in this case had been in a contained area for a day or two, this would not change his conclusion that oviposition occurred no earlier than February 12 and that it occurred fairly quickly after death. (39 RT 9090-9091.)

He also disagreed with Wecht's recommendation of a forensic entomologist for a more accurate range of time of death. (36 RT 8742-8744.)

GUILT PHASE ARGUMENT ON APPEAL

I.
APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE ON FOURTH AMENDMENT GROUNDS WAS IMPROPERLY DENIED

Introduction

Before trial, the defense filed a motion to suppress the evidence obtained pursuant to five search warrants. (3 CT 505.) The trial court denied the motion, finding that the warrants were supported by probable cause, and that in any event, the first search, on whose results the justification for the subsequent four were predicated, was consensual. (5E RT 1920-1922; 5F RT 1970; 5 RT 2054.)[43] This ruling was erroneous. As appellant will elaborate in the following argument, the first warrant, whose validity *vel non* determined the validity of all the subsequent warrants (see *Wong Sun* v. *United* States (1963) 371 U.S. 471), was based, at best, on reasonable suspicion – a level of proof insufficient to establish probable cause (*Alabama* v. *White* (1990) 496 U.S. 325, 331; see also *Florida v. Royer* (1983) 460 U.S. 491, 498;); further, the warrant was not otherwise justified by the good faith reliance of the police on the magistrate's endorsement of the warrant (see *United States* v. *Leon* (1984) 468 U.S. 897, 922); and finally, Mr. Westerfield's consent to the search in question was not freely given. (See *Bumper* v. *North Carolina* (1968) 391 U.S. 543, 548-549.)

The basic predicate of the claim of a Fourth Amendment violation here is that a suspect's failure to pass a polygraph examination provides no evidentiary

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[43] Throughout this brief, subvolumes of the reporter's transcript, indicated by a letter following a volume number, refer to proceedings that had originally been closed to the public and whose transcripts were sealed. Most of these has been unsealed, either by Judge Mudd shortly after judgment (71 RT 10706-10711), or recently, pursuant to proceedings in the Superior Court to perfect the record. (45 CT 10724-10726, 10761-10769.) The citations in this brief are only to currently unsealed transcripts.

weight, and has no consequence, for the determination of probable cause. For Mr. Westerfield's failure of a polygraph examination was part of the warrant application for the first warrant, and indeed, was its most striking feature, without which, as will be argued, there was insufficient evidence of probable cause. The legal premise informing this contention is that, just as polygraph evidence is barred for use at trial in almost every jurisdiction in the United States, so it is not competent for Fourth Amendment purposes, which require that information submitted in support of a warrant have some inherent reliability. (See *Alabama* v. *White*, *supra*, 496 U.S. 325, 330.)

The Fourth Amendment competency of polygraph evidence, the question of probable cause, the good faith exception to the warrant requirement, and consent *vel non* to search will require, of course, more elaborate legal argument and, especially in regard to the question of consent, an examination of the factual details developed in the pretrial evidentiary hearings. But since a motion to quash a warrant is determined from the sufficiency or insufficiency of the information contained within the four corners of warrant and its supporting affidavits (see *United States* v. *Anderson* (9th Cir. 1971) 453 F.2nd 174, 175; see also *People* v. *Costello* (1988) 204 Cal.App.3rd 431, 451), it is advisable to set forth a summary of the five warrant applications at issue.

A.
The Warrants

1. Warrant No. 27818

The first warrant was obtained telephonically from Judge Bashant at about 2 a.m. on Tuesday February 5, not quite three days after the discovery of Danielle Van Dam's disappearance. The supporting information was provided by Detective Alldredge, who testified under oath, under the questioning of Deputy District Attorney David Lattuca. (4 CT 746-747.) The transcript of this testimony

was attached to the warrant and was certified by Judge Bashant herself. (4 CT 767.)[44]

After describing Mr. Westerfield's house and vehicles, Detective Alldredge listed the types of items sought pursuant to the warrant: items of children's clothing, including Danielle's necklace and Mickey Mouse earrings; a wide range of items for purposes of developing trace evidence and biological evidence; evidence contained in photographs, videotapes, and the like, all of which might be relevant to "juvenile abduction" or to sexual preferences for juveniles; biological evidence from Westerfield himself; and finally, evidence of dominion and control of the premises. (4 CT 747-748.)

Detective Alldredge described his own experience: He had been an officer for 11 years, and a detective for 6 of those years. He had assisted other detectives in other abduction and child abuse cases, and had attended post-police-academy training on abductions and child abuse. (4 CT 749.) The information he was providing in this case had been obtained from discussion with San Diego police officers, from reading official reports, and from personal involvement in the investigation of the missing juvenile, Danielle Van Dam, "now considered to be abducted, San Diego PD case No. 02-008101." (4 CT 749.)

According to Alldredge, the "kidnap occurred" on February 2, 2002. Danielle Van Dam was taken "possibly" from her house at 1200 Mountain Pass Drive (*sic*) sometime between 10 p.m. and 3:30 a.m. She was discovered missing by the family about 9 a.m. The parents telephoned the police, who responded and did a door-to-door search looking for "the victim." Most of the immediate neighbors were at home and contacted. However, the neighbor living at 11995 Mountain View Drive (*sic*), identified as David Westerfield, was not at home. (4 CT 749-750.) On February 3, there was a second canvass of the neighborhood by the police, and Westerfield was still not home. (4 CT 752.)

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[44] The warrants and relevant documents were submitted by the prosecution as exhibits. (4 CT 744 *et seq.*; 5 CT 1060 *et seq.*)

As part of the investigation, Alldredge himself had interviewed the victim's mother, Brenda Van Dam, for two hours on February 2. Van Dam related her outing to a local bar on February 2 (*sic*). She and two girlfriends had arrived there sometime around 8 p.m. They encountered two male friends there, and all of them started to play pool. David Westerfield, her neighbor, approached and started playing pool with them. (4 CT 750.). When Alldredge questioned her about her relationship to Westerfield, she recounted having seen him at the same bar a week earlier on Friday, January 25. She noticed him looking at her and believed him to be a neighbor, and they exchanged hellos. (4 CT 750.)

On January 30, 2002 (*sic*), Brenda Van Dam was walking Danielle and Danielle's brother, Dillon (*sic*), through the neighborhood selling Girl Scout cookies. When Westerfield answered the door, Van Dam recognized him from the previous Friday. In the course of their contact, he referred to that occasion and asked, "'Hey, why didn't you introduce me to your friends the other night at the bar?'" to which Van Dam responded, "I didn't even know your name." Westerfield then introduced himself: "Hi, my name is David Westerfield, your neighbor." (4 RT 750-751.) Westerfield gave Van Dam his business card and told her he sometimes had adult parties and barbecues at his house. He invited her to call him and bring her husband to the next party. According to Van Dam, she was at Westerfield's house for about 10 or 15 minutes before leaving to sell other cookies. (4 CT 751.)[45]

On February 4, at about 8 a.m., as Alldredge testified, the San Diego police were watching and waiting for Westerfield to arrive home. He arrived sometime around 8:30 a.m. The officers contacted him, told him about the missing girl, and

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[45] The encounter at Dad's Bar was, of course, on February 1, not February 2. The Girl Scout Cookie encounter was January 29, not January 30. (13 RT 3890.) Discrepancies between the testimony in support of the warrant and the evidence at trial are pointed out not as legally significant for the issue of probable cause, but in order to keep the reader of this brief oriented to the facts properly established at trial and to avoid a distorting conflation of trial evidence and warrant evidence.

obtained his written permission to search his house and motor home, which was parked 30 miles away on Skyridge Road in Poway. (4 CT 752.)[46] A general search of the house failed to discover the missing girl. (4 CT 752.) A search of the motor home produced the same negative result (4 CT 754), but during that search, Westerfield, according to Alldredge, "displayed an unusual amount of cooperativeness by opening drawers, lifting cushions, and pointing out . . . areas missed by detectives." (4 CT 753.)

After this initial search of the house and motor home to locate Danielle, a search and rescue dog named Hopi was released into the house. Alldredge himself knew nothing about the qualifications of Hopi and his handler, but had been told by Detective Keene that the handler was a private citizen, and that Hopi was a "scent" dog who had been involved in several search and rescue operations. (4 CT 752, 760.)[47]

In the house, Hopi showed an "interest" in the garage door. However Hopi's handler stated that this "interest" was not "an alert." The handler walked Hopi away from the location, returned, and again Hopi showed an "interest" but not an "alert." (4 CT 752.)[48] Later in the evening of February 4, around 8 p.m. Hopi was taken to the Skyridge property where the owner had given permission for a search. Hopi was taken around the exterior of the motor home and did not

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[46] The Skyridge Road property was between 8 and 9 miles from the Sabre Springs neighborhood. (15 RT 4254.)

[47] Alldredge's times were loose and inaccurate. As noted in the statement of facts, after the police contacted Westerfield coming out of his house at about 8:30 a.m., Detectives Keene and Parga responded. Keene interviewed Westerfield on his doorstep, after which Keene and Parga searched the house, and then traveled to the motor home to search that. It was after the return from the motor home that there was a dog search. (See above p. 24.)

[48] In an *in limine* foundational hearing on dog-scent evidence, it was established that Hopi's handler, Jim Frazee, could only speculate as to what Hopi's various reactions meant, and the evidence of the dog's reactions were excluded as unreliable for purposes of trial. (10A RT 3302-3303.)

even display an "interest." However, according to Alldredge, it had been discovered earlier during an interview with Westerfield that Westerfield had just completed a 250-mile trip in his motor home. According to Alldredge, the freeway wind could have removed any scent of the victim from the exterior. (4 CT 754.)

The earlier interview in which Westerfield told the police about the trip was with Detective Keene. Westerfield also confirmed the earlier encounters with Barbara (*sic*) Van Dam. In regard to the Girl Scout Cookie meeting, Westerfield stated that Danielle and her brother had run all over the house, including the garage. According to Alldredge, Westerfield offered this as a possible explanation for Hopi's "interest." (4 CT 752-753, 754-755.) When Alldredge had interviewed Brenda Van Dam on February 2, however, she said that the children never went into the garage or upstairs in the house. Alldredge sent a detective to ask her again on February 4, and she confirmed this. (4 CT 752-753.)[49]

Westerfield had also told Keene that at Dad's on Friday, February 2 (*sic*) Van Dam talked about her daughter Danielle and an upcoming father/daughter dance at school. Van Dam related how she had bought Danielle a new blouse for this event and how Danielle's father was concerned about how fast his little girl was growing up. (4 CT 755.) When Alldredge had interviewed Brenda Van Dam on February 2, she said she did not discuss her family with anyone at the bar, including Westerfield. She did remember telling some unknown male that she had three children. The man told her she did not look like a mother, which remark

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[49] Alldredge's source of his claim that Westerfield had offered a theory for Hopi's reaction is unclear. Nowhere is this otherwise attested. Keene, in the hearing on the motion to traverse, testified that Mr. Westerfield never said anything about children running in the garage (5A RT 1137-1139), and in any event, the dog search was *after* Keene's interview. (5A RT 1094-1097, 1099.) In regard to whether Westerfield maintained that the children went upstairs, Keene's testimony and the evidence of Westerfield's actual statements, showed that Westerfield offered this tentatively, maintaining that he was not really paying attention to the children. (5A RT 1137-1139; 15 RT 4285; 48 CT 11307.)

struck Van Dam as a "pick-up line." (4 CT 751-752.) When Alldredge had a detective re-contact Van Dam on February 4, the latter stated that the only persons aware of the father/daughter dance were immediate family members and one next-door neighbor. (4 CT 755.)[50]

Finally, Keene reported that "out of the clear blue sky during the interview" Westerfield "stated, 'She said a baby sitter was watching her children, not her husband.'" According to Alldredge, "Keene was aware Danielle's father was watching the children, but that was not common knowledge. In fact, on Friday nights, Brenda and Damon, D-A-M-O-N Van Dam will have a baby sitter watch the children while they go out for the evening." (4 CT 756.)

In regard to the trip, Westerfield reported to Keene that it began at 7:30 a.m. on February 2, when Westerfield drove his 4-Runner to Skyridge and returned with the motorhome to his residence, where he loaded it with food and water. The detectives noted that the hose used for this purpose was still unfurled on Westerfield's front lawn. This apparent carelessness contrasted with the immaculate condition of the house. This contrast, according to Alldredge, indicated "that someone was in a hurry to leave." (4 CT 756.)

In addition to the hose, "it should be noted," continued Alldredge, "that although Westerfield told Detective Keene that he had drove [*sic*] to the location of the motor home on 2/2/02, a neighbor the night prior noticed the motor home parked next to his residence." The neighbor noted this because the parking of the motor home in the neighborhood had drawn many complaints, which in fact was the reason appellant found a different place to park it. That night the neighbor in question had to swing wide to get around the motor home. (4 CT 757.)[51]

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[50] In her testimony at trial, Van Dam testified that she indeed did talk about the father/daughter dance in Westerfield's presence. (13 RT 3944.) Alldredge found this out sometime between February 11 and 15. (5E RT 1799-1800.)

[51] The neighbor in question never testified at trial, and there were no other witnesses who attested to the motor home's presence in the Sabre Springs neighborhood on Friday, February 1.

Westerfield told Keene that the trip started at Silver Strand in Coronado where Westerfield paid for several nights of camping. However, as Alldredge noted, Westerfield later told Keene that he, Westerfield, had forgotten his wallet and was low on gas. In any event, at The Strand, the ranger knocked on the camper door at about 2 p.m. to return an overpayment Westerfield had made. The ranger knocked several times for several minutes before Westerfield answered. When he finally did answer the door, he immediately stepped outside and closed it. The ranger noticed also that the blinds of the motor home were closed. After the ranger had given Westerfield the money and drove off, Westerfield lingered outside the motor home. The ranger, according to Alldredge, thought that Westerfield's actions were suspicious. (4 CT 756-757.)

Westerfield told Keene that it was too cold at the beach at Silver Strand, and he returned home to retrieve his wallet. He arrived there some time around 3:30 p.m. He saw several police cars and a police trailer in the neighborhood. Unable to find parking close to his house, he parked down the street, walked back toward his house, and encountered a neighbor, who told him about the missing child. Westerfield responded by mentioning that Danielle had been in his house earlier in the week and had been interested in his pool. Westerfield then went to check the pool for the child. (4 CT 757-758.)

After this, Westerfield left the area, realizing that he had left his wallet in the 4-Runner where the motor home had been parked. He drove there, retrieved his wallet, and then decided to go to Glamis, a dune area just west of the Arizona border, and about 120 miles east of San Diego. There, he got stuck in the sand and spent the night in the dunes. He was eventually pulled out of the sand, went to a second location in the desert, and eventually ended up in Borrego Springs, where his motor home got stuck again. Westerfield stated that after he had dug his motor home out, "we drove back to Silver Strand." Alldredge noted that Westerfield had

used "we" as if someone else was in the motor home. Nonetheless, when he was questioned about that, Westerfield stated that "we' was just a slip. (4 CT 758.)[52]

Alldredge related to Judge Bashant what was learned from a conference call at 2 p.m. on February 4 with FBI profilers from Quantico. According to Alldredge, who participated in the call, the profilers were provided with a "complete" synopsis of the case. Although the profilers were unable to provide a specific type of person to look for, they did acknowledge it to be "a distinct action of a person involved in abductions to want to help or display overly amount of cooperativeness." (4 CT 753.) They further noted that according to a 10-year study, most abductions of children older than five were for sexual purposes. Most abductors were males, who were usually either acquainted with the victim's family or who lived close by the victim's residence. According to Alldredge, the profilers thought it was highly unlikely the abduction in this case was committed by a stranger "because of the high risk of entering an unknown residence to take a victim." The profilers believed that the abduction was committed by someone familiar with the interior of the residence. As Alldredge noted, Westerfield's residence was similar to the victim's house. (4 CT 754.)[53] In regard to the qualifications of the profilers, they were supposed to fax him the information, but had not yet done so. (4 CT 759.)

Finally, as Alldredge related, on February 4 Westerfield completed a polygraph test administered by Paul Redding (*sic*) of the San Diego Police, who reported that Westerfield failed the test.[54] Redden had been a polygrapher since

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[52] The impression from Alldredge was that this statement was made to Keene. However, whether true incrimination or simple pronominal laxity, the statement occurred in the interview with Paul Redden. (15 RT 4888; 8 CT 2034.)

[53] Alldredge did not include information he had obtained from Brenda Van Dam, *viz.*, that Westerfield had never been in her house. (5E RT 1806-1807.)

[54] Alldredge was referring to Paul Redden, who had interviewed appellant at the Northeastern Station beginning around 3 p.m. on February 4. (5A RT 1168; 15

1981, had completed over 6000 polygraph tests, and had testified in court many times as an expert. He had asked Westerfield several "controlling questions" to which Westerfield answered no. The test indicated that Westerfield was being deceptive. (4 CT 758.) Tim Hall, another polygrapher with the San Diego police, checked Redden's findings and concurred. (4 CT 758-759.)

Judge Bashant's only questions were in regard to the polygraph test. She wanted to know what the polygraph questions were. Alldredge answered from Redden's notes:

> " 'Q. Are you involved in any way in the disappearance of Danielle Van Dam?'
>
> "And the answer was 'no."
>
> " 'Q. Are you in any way responsible for Danielle Van Dam missing?'
>
> "And the answer was 'no.'
>
> " 'Q. In the respect of the disappearance of Danielle Van Dam, do you know for sure where her whereabouts – where her whereabouts is?'
>
> "The answer was 'no.'
>
> "There was a second set of questions. Let's see if I can get through this.
>
> " 'Q. Are you involved in the disappearance of Danielle Van Dam?'
>
> "And the answer was 'no.'
>
> " 'Q. Do you know the location of Danielle Van Dam?'

RT 4493.) The polygraph portions of that interview were, of course, excluded at trial. (Evid. Code, § 351.1.)

"And the answer was 'no.'

" 'Q. Are you involved in any way in the disappearance of Danielle Van Dam?'

"I think I read that one before, and the answer was 'no.'

"And according to the notes, it says he was deceptive in all of the above listed questions. And again, these are just rough notes that I have, and I'm not sure if they are exactly the way the questions were put to him. But to the best of my knowledge that's what I'm reading through these notes."

"JUDGE BASHANT: Okay, thank you. That's the only question I have." (4 CT 761-763.)

With this, Judge Bashant authorized the issuance of the warrant, allowed for night service and for sealing, and authorized Detective Alldredge to sign her name on it on her behalf. (4 CT 763-765.)

2. Warrant No. 27802

During the search pursuant to the first warrant (warrant no. 27818), Westerfield's office computers were secured by two forensic computer examiners, Jim Youngflesh of the FBI, and James Watkins with the San Diego Police. Securing involved the "imaging" of the hard drives with special equipment. (5D RT 1713-1717, 1726-1730, 1752.) However, in order to examine the content of the hard drive, Detective Alldredge sought a separate warrant at about 1 p.m. on February 5. (4 CT 770-772.)

Alldredge's affidavit, presented to Judge Jessop, recited how the police had executed a search warrant issued by Judge Bashant that day. In addition, as Alldredge represented, Westerfield had signed a consent-to-search form that included any "letters, papers, materials contraband or other property" in his home. (4 CT 773.) While securing the computers, Jim "Flesh" (*sic*) "saw in plain view" loose media marked with the letter "X" or the letters "XO". In previous

investigations, Youngflesh and Watkins had seen this type of marking on disks storing both adult and child pornography. With their forensic equipment, the two examiners viewed the diskettes and discovered possible child pornography, with minors engaged in sexual activity with each other or with adults. (4 CT 774.) Based on this, the examiners expressed the opinion that additional evidence of child pornography would be found on the computers. Alldredge agreed with this conclusion. (4 CT 775.)[55]

3. Warrant No. 27809

This was issued by Judge Bashant on February 6. Detective Thrasher was the affiant. The search was aimed at Westerfield's cell phone records. (4 CT 782.) Thrasher recited Westerfield's statements from the various interviews of February 4 in which he indicated that he had used his cell phone to plan his activities. (4 CT 789.) She also recited Westerfield's failure of the polygraph that day, and the results of the search of February 5, which discovered possible child pornography. (4 CT 789-790.) The first and second warrant, warrants 27818 and warrant 27802, were incorporated and attached. (4 CT 790, 794-799.)

4. Warrant No. 27813

This was issued on February 7, 2002 by Judge Bashant to authorize the seizure of Westerfield's laundry from Twin Peaks Cleaners in Poway. The affiant

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[55] There was a factual dispute regarding the loose media. Youngflesh testified that while looking for passwords on the book shelf, the loose media marked "X" and "XO" were in plain sight if you were looking at the bookcases; he also noted that nothing had to be moved to get at them. (5D RT 1738-1739.) According to Watkins, Youngflesh told him that he, Youngflesh, found the items behind the bookcase. (5D RT 1755.) Detective Tomsovic testified that Watkins showed him where the items were found, and based on what Watkins told him, Tomosovic noted in his report that they were "well hidden." (5D RT 1770-1772.) Alldredge testified that he was at the house and Watkins told Alldredge that the items were in plain view, and both Youngflesh and Watkins showed him where they were. (5E 1815-1816.) The court acknowledged the factual conflict, but found that because of Alldredge's good faith, the warrant could not be traversed if Youngflesh was wrong. (5E RT 1850-1851.)

was Detective Torgerson. Again, the warrants 27818 and 27802 were incorporated and attached. (4 CT 801-806, 812-813.) Torgerson represented that during the February 5 search of Westerfield's house, Detective Howie had found two dry cleaning receipts. Torgerson tried to find the establishment that day, but was not successful until the next day, February 6, when Detective Ott said that the receipts looked like ones from Twin Peaks Cleaners. (4 CT 806.) Torgerson went there, and confirmed that the receipts were from there and were for dry cleaning Westerfield had left there on February 4. (4 CT 807.)

5. Warrant No. 27830

This was issued by Judge Bashant on February 13, 2002. (4 CT 818) The affiant was Detective Hegenroather, who incorporated warrants 27818, 27802, and 27813. (4 CT 821-822, 832-834.) This fifth warrant aimed at a return trip to Westerfield's house for more evidence. (4 CT 818-821.) Hergenroather's own showing included results of the first search of the house, and the results of the search of Westerfield's computers and loose media. (4 CT 832-828.)[56]

B.
Validity of the first Warrant, Warrant No. 27818, From Which All Ensuing Warrants Depended

The standard of review for assessing the validity of a search warrant is well known. A reviewing court must determine whether there was a substantial basis for the magistrate to find probable cause to issue the warrant. (*Illinois* v. *Gates* (1983) 462 U.S. 213, 238-239; *People* v. *Kraft* (2000) 23 Cal.4th 978, 1040.) "Probable cause" consists in a "fair probability" that a crime has occurred and that

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[56] Hegenroather also recited in his affidavit statements made by Westerfield to Detectives Ott and Keyser during a trip they took on February 5 with Westerfield to retrace his route in the desert over the weekend. (4 CT 823.) However, all statements made by Westerfield after Ott and Keyser took over the case were found by Judge Mudd to have been involuntary under the Fifth Amendment. (5E RT 1890-1891.) They were therefore excised from the affidavit. (5E RT 1894.)

evidence of it will be uncovered in the person or place to be searched. (*Gates*, *supra*, at238; *Bailey* v. *Superior Court* (1992) 11 Cal.App.4th 1107, 1111.)

The determination of probable cause is to be made on the basis of "the totality of the circumstances" presented in the information conveyed to the magistrate in the application for the warrant (*Gates*, *supra*, at 233; *People* v. *Carrington* (2009) 47 Cal.4th 145, 161), and, as may be seen in the summary of the first warrant, Mr. Westerfield's failure of the polygraph examination stood out as a supposedly clear and unequivocal beacon of incrimination. However, as noted in the introduction, the claim here is that polygraph evidence is incompetent for Fourth Amendment purposes. Fourth Amendment probable cause "is dependent upon *both* the content of information possessed by the police *and its degree of reliability*." (*Alabama* v. *White*, *supra*, 496 U.S. 325, 330, emphasis added; *People* v. *Bennett* (1998) 17 Cal.4th 373, 387.) Polygraph evidence does not qualify under this constitutional standard, and the impeachment of the warrant may begin with the examination of this issue.

1. Polygraph Evidence and Probable Cause

a. Survey of existing law governing the use of polygraph evidence

The forbidden status of polygraph examination results as *trial* evidence is fairly notorious and well established. Forty-six states impose a per se bar on the use of polygraph evidence or restrict its admissibility to situations in which the parties have stipulated in advance that the examination results will be admitted at trial. (*State* v. *A.O.* (N.J. 2009) 965 A.2nd 152, 162; *State* v. *Porter* (Conn.1997) 698 A.2nd 738, 773-774.) Only New Mexico allows polygraph evidence without stipulation. (*State* v. *A.O.*, *supra*, at p. 162; *Lee* v. *Martinez* (N.M.2004) 96 P.3rd 291, 306-307.) Four states, after extensive experimentation with the admission of such evidence, rejected it in favor of a return to the traditional rule of inadmissibility. (*State* v. *A.O.*, *supra*, at p. 162; *Commonwealth* v. *Mendes* (Mass.1989) 547 N.E.2nd 35, 41; *State* v. *Dean* (Wis.1981) 307 N.W.2nd 628, 653;

State v. *Geier* (N.C.1983) 300 S.E.2nd 351, 359-360; *Fulton* v. *State* (Okla.Crim.App.1975) 541 P.2nd 871, 872.)

The federal circuits had uniformly raised a per se bar to polygraph evidence at trial until relatively recently, when per se exclusions of *any* expert or scientific evidence was abrogated. (*United States* v. *Scheffer* (1993) 523 U.S. 303, 310-311 and fn. 7.) Under the rule of *Frye* v. *United States* (D.C. Cir.1923) 293 F. 1013, which, incidentally, was the first case to examine the competence of polygraph evidence and found it wanting, the test is whether the science or expertise in question has found acceptance in the relevant expert or scientific community. Now, under *Daubert* v. *Merrill Dow Pharmaceuticals* (1993) 509 U.S. 579, the trial court is vested with discretion to determine, in the specific case, whether the evidence in question is simply relevant and reliable. Nonetheless, even under *Daubert*, there is "no new enthusiasm" for polygraph evidence (*United States* v. *Cordoba* (9th Cir.1997) 104 F.3rd 225, 228), and "even when presented with an opportunity to admit polygraph evidence, most [federal] district courts are decidedly reluctant to do so." (*State* v. *Porter*, *supra*, 698 A.2nd 739, 776-777.)

In California, before the enactment of the Evidence Code, polygraph evidence was assessed under the *Frye* standard and its California equivalent, *People* v. *Kelly* (1976) 17 Cal.3rd 24, and was barred from use at trial absent a stipulation. (*People* v. *Wilkinson* (2004) 33 Cal.4th 821, 844.) In 1983, in response to one court of appeal's flirtation with allowing the trial court to entertain the possibility of admitting polygraph evidence on a proper showing of relevance and probative value (*Witherspoon* v. *Superior Court* (1982) 133 Cal.App.3rd 24, 30-35), the Legislature enacted Evidence Code section 351.1, reinstating the per se bar on the use of polygraph evidence at trial absent a stipulation. (*People* v.

Espinoza (1992) 3 Cal.4th 806, 817-818; *People* v. *Kegler* (1987) 197 Cal.App.3rd 72, 89-90.)[57]

The United States Supreme Court, in *United States* v. *Scheffer*, *supra*, 523 U.S. 303, has held that state and federal jurisdictions not governed by the federal rules of evidence are free of any federal constitutional restraint to impose a per se bar on polygraph evidence because of its unreliability. (*United States* v. *Scheffer*, *supra*, 523 U.S. 303.) This Court, following *Scheffer*, has upheld Evidence Code section 351.1 as constitutional, justified by the unreliability of polygraph evidence (*People* v. *Wilkinson*, *supra*, 33 Cal.4th 821, 850; *People* v. *Maury* (2003) 30 Cal.4th 342, 414) -- a conclusion it had reached even in advance of *Scheffer*. (*People* v. *Espinoza*, *supra*, 3 Cal.4th 806, 817.) Only just recently this Court has emphasized that the bar against the use of this type of evidence at trial is categorical: "The state's exclusion of polygraph evidence is adorned with no exceptions and its stricture on admission of such evidence has been uniformly enforced by this court and the Court of Appeal." (*People* v. *McKinnon* (2011) 52 Cal.4th 610, 663.)

In regard to Fourth Amendment probable cause, there is, it seems, an incipient trend toward acceptance of polygraph evidence, especially in the federal courts (see *Cervantes* v. *Jones* (7th Cir.1999) 188 F.3rd 805, 813, fn. 9) and in a scattering of state courts. (*State* v. *Henry* (Kan.1997) 947 P.2nd 1020, 1027-1028; *State* v. *Clark* (Wash.2001) 24 P.3rd 1006, 1015; *Johnson* v. *State* (Tex.App.1988) 751 S.W.2nd 926, 929.) One state, Illinois, has expressly barred the use of polygraph evidence for all purposes, including that of establishing probable cause.

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[57] Evidence Code section 351.1(a) provides: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results."

(*Cervantes* v. *Jones*, *supra*, 188 F.3rd 805, 813, fn. 9; *People* v. *McClellan* (Ill.App.1992) 600 N.E.2nd 407, 415; *People* v. *Booker* (Ill.App.1991) 568 N.E.2nd 211, 218; *People* v. *Haymer* (Ill.App.1987) 506 N.W.2nd 1378, 1384.) But perhaps as a testament to an instinctive restraint in the use of polygraph evidence, there are simply not many cases from around the country from which to generalize a consensus.

In California, there is only the dictum – a rather pale dictum at that – in *People* v. *Lara* (1974) 12 Cal.3rd 903. In *Lara*, this Court suggested that polygraph results can be used for purposes of probable cause. (*Id.*, at p. 909.) *Lara* was a second capital appeal after remand and retrial of the penalty phase. (*Id.*, at p. 905.) The defendant nonetheless re-raised the guilt phase issue of lack of probable cause, proffering a new argument that the investigating officer should not have been allowed to testify at the suppression hearing that a material witness to probable cause had passed a "lie detector test," which substantiated this witness's credibility for the officer. (*Id.*, at p. 909.) This Court's initial reaction was to doubt whether the issue was properly raised: "Although there is considerable question whether defendant may properly make these points in the present proceeding [citation], we need not resolve the matter because the points themselves are without merit." (*Ibid.*) On the merits, "whatever may be the rule on admissibility of the results of a polygraph test as evidence of guilt – a question we do not reconsider today – we are cited to no authority holding such collateral use of the test for investigative purposes to be improper." (*Ibid.*) In any event, *Lara* went on, in the first appeal, this Court had "placed no reliance on the foregoing testimony in determining [in the first appeal that] there was probable cause for the defendant's arrest. [Citation.]." (*Ibid.*)

If one may sum up the discussion of this issue in *Lara*: there was no authority to support a contention that was probably not even properly before the Court in the instant appeal, and whose factual predicate was irrelevant to the Court when the matter had been properly before it in a previous appeal. This can hardly

be deemed a serious examination of the question. Some dictum is so casual that it is obviously not intended to provide future guidance or authority. (See *People* v. *Lozano* (1987) 192 Cal.App.3rd 618, 632-633.) When the dictum is issued by the very Court that provides supreme guidance and authority to the other courts in this state, then there is no substantial reason for *not* re-examining the question properly and in detail.[58]

b. Polygraph evidence, if unreliable, is unreliable for purposes of probable cause.

The rationale for justifying the use of polygraph evidence in a Fourth Amendment context has been formulated as follows:

> "The fear that a jury may overestimate the probative value of such evidence when considering an individual's guilt or innocence -- the factor that led some courts to preclude and other courts to limit the use of polygraph exams as evidence at trial -- is absent when a magistrate relies on such an exam to determine whether there is probable cause to issue an arrest warrant. Unlike a lay jury, a magistrate possesses legal expertise; when determining probable cause, he is unlikely to be intimidated by claims of scientific authority into assigning an inappropriate evidentiary value to a polygraph report or to rely excessively on it.
>
> "A magistrate, moreover, may determine probable cause from evidence inadmissible at trial to determine guilt. [fn. omitted.] The preliminary nature of the probable-cause determination, as well as the magistrate's expertise in evaluating the evidence to reach that decision, permits the issuance of an arrest warrant on 'much less evidence' than is required to convict an individual. [Fn. omitted.] Thus, 'probable cause may be founded upon hearsay' or 'upon information received from informants' -- evidence circumscribed at trial -- if 'the information put forth is believed or appropriately accepted by the affiant as true.'" (*Bennett* v. *Grand Prairie* (5th Cir.1989) 883 F.2nd 400, 405.)

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[58] Along the same lines, if *Lara* can be deemed a "ruling," this Court has the power and authority to reconsider it in any event.

Thus, there are two basic reasons for allowing polygraph results for establishing probable cause. The first is that an experienced magistrate, as opposed to a lay juror, will not be misled or overmatched by the aura of scientific competence emanating from the claims for polygraph evidence. The second is that probable cause requires less rigorous evidence than the standards of proof and evidentiary competence used at trial. A rebuttal, then, must address both rationales. The question whether or not there is any specific legal expertise that enables a judge or lawyer to penetrate the ever unresolved dispute as to the *scientific* competency of polygraph results will be discussed below; but first, it will be useful to demonstrate the fallacy of the rationale based on the lesser burden of proof required for probable cause determinations.

It will be helpful to begin with a clear idea of what the probable cause standard is. As with many other elemental concepts, the meaning of "probable cause" becomes clearer with a negative gloss as to what it is not: it is *not* suspicion, or even a reasonable suspicion such as would warrant further investigation. (*Alabama* v. *White*, *supra*, 496 U.S. 325, 331; *People* v. *Huggins* (2006) 38 Cal.4th 175, 242; *People* v. *Bennett*, *supra*, 17 Cal.4th 373, 387.) Rather, it is a level of proof that renders it "*substantially* probable" that the suspect is guilty of a crime or that evidence of this will be found in the premises to be searched. (*People* v. *Carrington*, *supra*, 47 Cal.4th 145, 161, emphasis added, internal quotation marks omitted.)

Probable cause, as already noted, is a matter not merely of a certain *quantum* of evidence; it is a matter of the *quality* of that evidence, which means its inherent reliability. (*Alabama* v. *White*, *supra*, 496 U.S. 325, 330.) Reliability, like other evidentiary qualities, such as substantiality or credibility, either inheres in a piece of evidence to some extent or degree or it is completely absent. In other words, what is insubstantial is not substantial to any extent or degree; what is

incredible is not credible to any extent or degree; and what is unreliable is not reliable to any extent or degree. Indeed, the absence or lack of these evidentiary qualities constitute a deficiency *regardless* of the standard of review that is applied. (See *Sabbah* v. *Sabbah* (2007) 151 Cal.App.4th 818, 823 ["A reviewing court applies the substantial evidence standard or review to a trial court's factual findings, 'regardless of the burden of proof at trial.'".]; see also *Otonoye* v. *United States* (E.D.N.Y.1995) 903 F.Supp.357, 363, fn. 8 ["Because of the serious question of plaintiff's credibility in this case, my findings would not change regardless of the burdens of proof and persuasion applied."].)

Thus, if polygraph evidence were in any way reliable, there would be no objection to admitting it as evidence at a trial, even if the overall standard governing the proceeding is the rigorous and demanding proof beyond a reasonable doubt:

> " . . . The relevancy of proffered proof in a criminal case depends upon whether or not it tends to sustain a legitimate hypothesis of guilt [or innocence] of the defendant and, generally speaking, an incidental fact is relative to the main fact in issue when, in accord with the ordinary course of events and common experience, the existence of the incidental fact, standing alone or when considered in connection with other established facts, tends *in some degree* to make the main fact in issue more certain. It is not necessary that the incident fact should bear directly upon the main fact in issue, for it will suffice as a pertinent piece of proof if it can be said to constitute a link, *however small*, in a chain of evidence, and tends thereby to establish the existence of the main fact in issue." (*People* v. *Billings* (1917) 34 Cal.App. 549, 552-553, emphasis added; see also *People* v. *Torres* (1964) 61 Cal.2nd 264, 266.)

Without some probative value "however small", evidence is not fit for use whether the standard is proof beyond a reasonable doubt or proof enough to establish probable cause.[59]

But if logical analysis refines a question, it does not answer it, and whether or not polygraph evidence is at all reliable must be resolved by a resort to experience and reality. As seen from the foregoing there is indeed a good deal of judicial experience to draw upon in resolving this question, and it has not been favorable to the use of polygraph evidence in regard to trial. To explain clearly why this same distrust is warranted in the realm of probable cause, one must first give a summary of the theory and practice of polygraph technique.

The polygraph machine records certain physiological responses such as blood pressure, pulse rate, respiration, and flow of electrical current through the body, which are measured by a cardiosphygmograph, a pneumograph, and a galvanometer, respectively. (*State* v. *Porter*, *supra*, 698 A.2nd 739, 759; *State* v. *Dean*, *supra*, 307 N.W.2nd 629, 632; see also *People* v. *Kegler*, *supra*, 197 Cal.App.3rd at p. 86, fn. 2.) "There is no question that a high quality polygraph is capable of accurately measuring the relevant physical characteristics." (*State* v. *Porter*, *supra*, at p. 760.) But whether and what correlation there is between a physiological response and deception is highly problematical. Indeed, "there is no reason to believe that lying produces distinctive physiological changes that characterize it and only it. . . . There is no set of responses – physiological or

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[59] This is undoubtedly why there is little discussion in the Illinois cases about the reasons polygraph evidence is barred in that state for purposes of probable cause: the matter is taken for granted from the general rule that polygraph evidence is inadmissible at trial. (See *People* v. *McClellan*, *supra*, 600 N.E.2nd 407, 415; *People* v. *Booker*, *supra*, 568 N.E.2nd 211, 218; *People* v. *Haymer*, *supra*, 506 N.E.2nd 1378, 1384.) Indeed, it is worth noting that New Mexico, the only state that allows polygraph evidence at trial solely within the discretion of the trial judge, cites as one of the reasons the fact that polygraph evidence can be used for purposes of establishing probable cause. (*Lee* v. *Martinez*, *supra*, 96 P.3rd 291, 306.) This too represents a self-consistent position.

otherwise – that humans omit only when lying or that they produce only when telling the truth . . . . No doubt when we tell a lie many of us experience an inner turmoil, but we experience similar turmoil when we are falsely accused of a crime, when we are anxious about having to defend ourselves against accusations, when we are questioned about sensitive topics --- and, for that matter when we are elated or otherwise emotionally stirred." (*Ibid.*, internal quotations omitted.)

Thus, it is incumbent on the examiner to design and implement the test in such a way that it is properly linked to the subject's deceptiveness, and not just to his nervousness or other unrelated emotional responses. (*Ibid.*) The "control question test" is the technique most often used in criminal investigations to facilitate this goal. (*Ibid.*) It operates on the theory that fear of detection causes psychological stress. The procedure followed in this type of testing goes roughly as follows: In a pretest interview, the accuracy and reliability of the polygraph is emphasized in order to aggravate the deceptive subject's fear of detection and to calm the innocent subject. The exam questions are reviewed to minimize the effect of surprise. And then the actual control test occurs, consisting of a sequence of ten to twelve questions repeated several times. There are three types of questions to be answered yes or no: neutral; relevant; and control. (*Id.* at pp. 760-761.)

The "neutral" question seeks an affirmation or negation on such anodyne matters as the examinee's name, date of birth, and the like. The "relevant" question is accusatory and seeks an affirmation *vel non* on a matter directly related to the crime in question and is tailored to remove any ambiguity: "Did you take that diamond ring from a desk in the Behavioral Sciences Building on July 1?" A control question seeks affirmation *vel non* of a generalized question that in fact is difficult to affirm or deny: "During the first twenty-four years of your life, did you ever take something that did not belong to you?" (*Id.*, at pp. 760-762.)

The supposed effectiveness of the "control question technique" lies in the difficulty of the "control question" for even an innocent subject. The technique

requires "that the examiner, during the pretest interview, manipulate the subject into both (1) lying on the control questions, out of fear that he examiner will otherwise react negatively to the subject's prior antisocial conduct, and (2) fearing that this same deception will taint the entire exam." (*Id.*, at p. 761, fn. 42.) Thus, whether the subject is innocent or not, he or she will exhibit stress, but the innocent will exhibit more stress in response to the control question while the guilty will exhibit more stress in response to the relevant question. (*Id.*, at p. 761-762; see also *Commonwealth* v. *Mendes*, *supra*, 547 N.E.2nd 35, 39.) This removes the need for some absolute correlation between a subject's physiological response and his supposed veracity or mendacity. "The art of the polygrapher lies in composing control and relevant questions that elicit the appropriate relative responses from truthful and deceitful parties." (*State* v. *Porter*, *supra*, 698 A.2nd at pp. 761-762.)[60]

In speaking of the "art of the polygrapher", however, something more than technical competence appears to be required:

> "The examiner's training, competence, integrity and conduct during the test is as critically important to the reliability of the polygraph as the machine and the examinee. The examiner must obtain background information on the crime and the examinee; must screen out the psychologically or biologically unsuitable examinee; must conduct a pre-test interview; must prepare the test questions; must supervise the environment of the test to eliminate distortive influences; must ask the questions during the examination; must conduct a post-test interview; and must interpret the results of the test. A crucial part of the testing and of the interpretation of the physiological data is the examiner's evaluation of the examinee's

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[60] There are other techniques such as the "guilty knowledge" test, which measures cognitive reactions of a subject supposed to possess concealed knowledge of the crime (*Id.*, at p. 763, fn. 45), and the relevant-irrelevant technique, which is the "control technique" without the control, and which is fairly unanimously rejected in the literature, although some polygraphers use it. (*Id*, at p. 762, fn. 43.)

visible behavior, such as squirming, coughing, sniffing, and hesitancy. . . .

"The determination of truth or deception cannot be made directly from the examinee's verbal responses or from the recordings of the machine but rather depends on the examiner's interpretation and analysis of the physiological changes measured and recorded on the charts. The analysis of the chart requires establishing timing between stimulations and responses, accounting for idiosyncrasies of the examinee as well as usual or unusual physiological responses due to anger, anxiety or other emotions. The examiner's analysis of the charts is not based merely on the recorded physiological measurements but on the examiner's subjective impressions of the outward behavior of the examinee. Thus while the polygraph is enveloped in an aura of scientific precision and objective measurement of body responses, in large measure the result of the polygraph is dependent on the opinion of the examiner, and that opinion is drawn from a process which is almost completely in the control of the examiner." (*People* v. *Kegler*, *supra*, 197 Cal.App.3rd 72, 87, fn. 2, quoting *State* v. *Dean*, *supra*, 307 N.W.2nd 628, 632-633.)

Indeed, the ideal attributes of a competent polygrapher have been described in rather non-technical terms as those of a person of some social standing, well adjusted in his work, experienced in the ways of the world, and graced with affable manners: he or she "must be an intelligent person, with a reasonably good educational background – preferably a college degree. He should have an intense interest in the work itself, a good practical understanding of human nature, and suitable personality traits which may be evident from his otherwise general ability to 'get along' with people and to be well liked by his friends and associates. No amount of training or experience will overcome the lack of these necessary qualifications." (*Id.*, at p. 633, fn. 4, quoting Reid & Inbau, Truth and Deception 304-305 (2nd ed. 1977.).)

The severe doubts as to the reliability of the mechanical, technical, and scientific aspects of the polygraph examination to correlate with human

truthfulness and deception, have led to the conclusion that the accuracy of the polygraph is nothing more than the talent of the polygrapher reading the demeanor and intuiting the credibility of the subject he or she is directly able to observe under probing questions:

> " . . . [W]e do not dispute that polygraphers may often reach a correct conclusion regarding a subject's guilt or innocence. [Fn. omitted.] We conclude, however, that this fact, in and of itself, is irrelevant. As illustrated in part II B 2 of this opinion, the ability of the polygraph technique to tell whether a subject is lying or telling the truth is still highly questionable. Thus, one cannot say with any degree of certainty that a polygrapher's ultimate conclusion about a subject's veracity is in fact based upon the polygraph machine – that is, based upon science. It is just as likely, if not more likely that a polygrapher's conclusion will be based either on chance or on his or her general impressions of the subject's credibility. An assessment of witness credibility based simply on chance or on intuition is not, however, admissible at trial. [Citation.] Indeed, forming impressions and intuitions regarding witnesses is the quintessential jury function; moreover, to the extent possible, luck should be excluded from the assessment process altogether." (*State* v. *Porter*, *supra*, 698 A.2nd 739, 771.)

Thus, extra-mechanical human judgment cannot be separated from the polygraph results nor can the polygraph results be shown to be independent of that human judgment. In short, the polygrapher does little more than humanly assess the subject's demeanor. If jurors or judges in a trial do also do this (see *People* v. *Adams* (1993) 19 Cal.App.4th 412, 438), their impressions are conjoined to evidence carefully screened to remove hearsay and all that is irrelevant and misleading. The polygrapher's hunches or suspicions, or even articulable suspicions, predicated on observations or statements by the subject during the interview do not exist in such an evidentiary context. They either emanate from,

or are measured against, his machines and his convoluted system of test questions. There is in all this a false certitude that exceeds the level probable cause, while, in reality, the hunches and suspicions of the polygrapher are in themselves insufficient to meet even that standard. (*Florida* v. *Royer*, *supra*, 460 U.S. 491, 498; *People* v. *Dolly* (2007) 40 Cal.4th 458, 463.)

c. Special competence of magistrate to assess polygraph evidence.

What, then, of the supposed ability of a judicial officer to see through polygraph evidence as a second rationale for submission of such evidence to a magistrate in a warrant application? If the "expertise" of the magistrate amounts to his or her having been schooled in the law's attitude toward polygraph evidence, one might well question whether this perspicuity is confined to lawyers and judges, since it seems widely known that polygraph evidence is not admissible in court. In any event, this distrust does not provide the magistrate or judge or lawyer with any positive standard by which to judge polygraph evidence in general or in a specific case. How could it possibly do so, when "the scientific community remains extremely polarized about the reliability of polygraph techniques" (*United States* v. *Scheffer*, *supra*, 523 U.S. 303, 309; see *Collier* v. *Reese* (Okla. 2009) 223 P.3rd 973, fn. 18), and has been so for the 87 years since the *Frye* decision in 1923? The experience under the *Daubert* standard in the federal courts is not leading to any significant change in the situation.

The terms of this impenetrability has been well-rehearsed in the case-law. A distillation of the literature that purports to study the matter "scientifically" has reached the level of legal stereotype:

> "The contentions of respondent and the dissent notwithstanding, there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. [Citation.] Some studies have concluded that polygraph tests overall are accurate and reliable. See, e.g., S. Abrams, The Complete

> Polygraph Handbook, 190-191 (reporting the overall accuracy rate from laboratory studies involving the common 'control question technique' polygraph to be 'in the range of 87 percent'). Others have found that polygraph tests assess truthfulness significantly less accurately – that scientific field studies suggest the accuracy rate of the 'control question technique' polygraph is 'little better than could be obtained by the toss of a coin,' that is, 50 percent. See Iacono & Lykken, The Scientific Status of Research on Polygraph Techniques: The case Against Polygraphy Tests, in 1 Modern Scientific Evidence . . . ." (*United States* v. *Scheffer*, *supra*, 523 U.S. 303, 309-310; see also *People* v. *Wilkinson*, *supra*, 33 Cal.4th 821, 850-851; *Commonwealth* v. *Mendes*, *supra*, 547 N.E.2nd 35, 39.)

The 87 percent number, which represents the number advanced by proponents favorably disposed to polygraph evidence, refers to the rate of accuracy for those found deceptive, which leaves a 13 percent false positive rate, i.e., subjects found truthful who are deceptive. (*State* v. *Porter*, *supra*, 698 A.2nd 739, 764-766.) Even more disturbing, however, is the 41 percent false negative rate, i.e., innocents found deceptive. (*Id.* at p. 766; see also *Commonwealth* v. *Mendes*, *supra*, 547 N.E.2nd 35, 39 ["The experts in this case agreed that the rate of innocents misidentified as guilty is roughly twice the rate of guilty subjects who pass the test."].)

Is 87 percent accuracy for guilty subjects, or 59 percent accuracy for innocent subjects – numbers found overwhelmingly wanting for purposes of trial -- good enough for probable cause? It is difficult to see how they can be. Even these dismal percentages do not fully reveal the deficiencies of the polygraph approach, because an accuracy rate in the form of a percentage or number presupposes an independent way to assess credibility in order to verify the result of a polygraph examination, and there is no such tool available. The proponents of the use of polygraph evidence acknowledge that field studies are preferable in this regard, but admit that they are beset with the difficulties of determining actual guilt *vel non* of an actual subject. They put their faith, however, in what they

deem to be laboratory studies well designed to approximate field conditions. (*State* v. *Porter*, *supra*, 698 A.2nd 739, 764-765.) Critics of this argue that laboratory simulation is almost completely invalid. The accuracy of the polygraph depends on the subject having the "right" emotional responses, and these cannot be assured where there is no real threat or punishment at stake for the volunteer subject in the lab, who is likely to view the matter as an "interesting game." (*Id.*, at p. 766.)

If the question remains impenetrable to *scientific* expertise, what specifically does legal expertise add to the issue, whether in general or in a specific case? How will a magistrate, who operates under far more pressing circumstances than a trial judge or juror, assess the value of a specific polygraph test based on a hearsay *ex parte* showing, when the impossibility of doing so in a more leisurely adversarial setting has led to the prevalence of a per se bar, whether *de jure* or *de facto*, of this evidence in almost all jurisdictions? Even if the magistrate's probable cause determination is subject to a less stringent standard than the jury's credibility determination, that does not mean that the magistrate is relieved of applying any standard at all. And, as indicated above, there simply is no valid standard of reliability in the polygraph context. The impenetrability of polygraph evidence is what it is, and the magistrate, in reality having no better tools to assess the polygraph evidence than a jury, either rejects the polygraph evidence as meaningless for purposes of probable cause or accepts it as establishing probable cause *ipso facto*. If he imagines that he is using the polygraph evidence carefully in some subordinate or corroborative role to other information, he is adding a false weight that will defy any possibility of meaningful review. The conclusion is clear: there is no adequate rationale for the

use of polygraph evidence for probable cause that vouchsafes that evidence under the Fourth Amendment.[61]

The polygraph issue is but an example of the recurring question of the ability of science to quantify the qualitative aspect of evidence of human action and interaction. For if it can be done, then even 59 percent should be good enough for admissibility at trial, even when the burden is proof beyond a reasonable doubt, since, as noted above, a discrete fact in a case does not require much weight in itself. (*People* v. *Billings*, *supra*, 34 Cal.App. 549, 552-553; see also *People* v. *Torres*, *supra*, 61 Cal.2nd 264, 266.) But if one were to draw the proper inference from the previous judicial experience with polygraph evidence, it is that one simply cannot attach a significant number to what is not susceptible to number, and that the errors of polygraph science confirm this fact. What used to be denominated as "moral evidence" (*Victor* v. *Nebraska* (1994) 511 U.S. 1, 11), i.e., evidence whose significance reveals itself "in light of human experience" (*People* v. *Adamson* (1946) 27 Cal.2nd 478, 485), is suffused with "the countless nonmathematic variables that exist in reality" (*People* v. *Cella* (1983) 139 Cal.App.3rd 391, 406) – a reality that includes the unquantifiable and enduring experience of "human error" and "falsification." (*People* v. *Collins* (1968) 68 Cal.2nd 319, 330-331.) Although the debate over polygraph evidence is conducted in terms of technical considerations based on scientific assumptions, this does not mean that those terms and assumptions meaningfully illuminate matters that the

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[61] One also wonders how much "experience" regarding polygraph examination is to be garnered in a legal or judicial career in a country where polygraph evidence is disfavored or barred per se. The instant case is fodder for skepticism in this regard. Judge Bashant indeed queried Detective Alldredge regarding the polygraph questions asked by Redden. Although Redden used the "control" technique, Alldredge's version of what Redden asked allowed only for the conclusion that Redden had used the universally rejected "relevant-irrelevant" question technique of polygraph examination. (*State* v. *Porter*, *supra*, 698 A.2nd at p. 762, fn. 3; see above p. 82, and fn. 60.) That anyone even lightly versed in the polygraph controversy passed over this without comment is remarkable.

judicial system always has treated, and will continue to treat (as the widespread rejection of polygraph evidence for trial shows), as subject to the rational judgment of mature and autonomous citizens. Any supposed mechanization of the process is not only averse to the premises of a trial, but to those of the Fourth Amendment, which require a "fair probability" that a crime has occurred and that evidence of it will be uncovered in the person or place to be searched. (*Illinois* v. *Gates*, *supra*, 462 U.S. 213, 238-239; *People* v. *Kraft*, *supra*, 23 Cal.4th 978, 1040.) As is evident from the preceding description of the judicial analysis of polygraph science, and particularly from the 41% false negative rate for innocent persons, polygraph evidence is very far from supporting a "fair probability." If there was probable cause to support the issuance of the first warrant in question, then it had to exist apart from Mr. Westerfield's failure of the polygraph examination.

2. Probable Cause for Warrant No. 27818, without Polygraph Evidence

A reviewing court must determine whether there was a substantial basis for the magistrate to find probable cause to issue the warrant. (*Illinois* v. *Gates*, *supra*, 462 U.S. 213, 238-239; *People* v. *Kraft*, *supra*, 23 Cal.4th 978, 1040.) Again, "probable cause" consists in a "fair probability" that a crime has occurred and that evidence of it will be uncovered in the person or place to be searched. (*Gates*, *supra*, at p. 238; *Bailey* v. *Superior Court, supra,* 11 Cal.App.4th 1107, 1111.) It is not, again, mere suspicion, or even such reasonable suspicion that would provide a warrant for further investigation. (*Alabama* v. *White*, *supra*, 496 U.S. 325, 331; *People* v. *Huggins*, *supra*, 38 Cal.4th 175, 242; *People* v. *Bennett*, *supra*, 17 Cal.4th 373, 387.) Without the polygraph information, what in the balance of Detective Alldredge's telephonic affidavit to Judge Bashant supports a finding of probable cause in this case?

Alldredge's application for the first warrant has been summarized in full detail. Westerfield caught the special attention of the police because of the

coincidence of his absence and of Danielle Van Dam's disappearance. But apart from the coincidence, a weekend absence betokens nothing so remarkable as a vacation. But Mr. Westerfield's vacation, as he related it to the police, was somewhat eccentric and turned out not to be what most people would find leisurely paced for relaxation. But vacations go wrong; different people travel differently; and however far from home one goes, one's idiosyncrasies go too.

There was the further coincidence of Westerfield's presence at Dad's when Brenda Van Dam and her friends were there on the eve of Danielle's disappearance. But this was a neighborhood bar on a Friday night – or as Alldredge had it, on Saturday night.[62] The coincidence was augmented by the mid-week encounter with Brenda and Danielle, who was canvassing the neighborhood to sell Girl Scout cookies, and by the encounter with Brenda at Dad's where she had gone with the same set of friends the previous Friday. Did Westerfield seek out these encounters?

There was a sense in Alldredge's telephonic affidavit that these coincidences required fortification even at the low standard of probable cause. He therefore seemed to emphasize following details:

> 1) When police contacted Westerfield, he was "unusually" cooperative in helping them search his house – a search that did not turn up any suspicious or incriminating evidence (except for Westerfield's "unusual" cooperation). FBI profilers, who were not able to provide a profile, nonetheless assured Alldredge that over-cooperation is something that occurs among nervous kidnappers or abductors who are investigated by the police. (4 CT 753.)
>
> 2) The dog Hopi showed "interest" in Westerfield's garage door, but did not give an "alert." (4 CT 752, 760.)

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[62] One wonders whether Judge Bashant noticed the incoherence of the dates and corrected it from what she knew through the pervasive media coverage.

3) Westerfield, to explain the "interest" of Hopi, speculated that Danielle may have gone into the garage when she was there for the Girl Scout cookies, while Brenda Van Dam was certain that Danielle had not gone into the garage. (4 CT 752-753, 754-755.)

4) Westerfield related to the police that Brenda, at Dad's, had talked about Danielle's upcoming father/daughter dance, while Brenda denied that she had ever mentioned it to anyone outside the family. (4 CT 751-752, 755.)

5) In his interview on the morning of February 4, Westerfield spontaneously stated to Detective Keene, that Brenda had said that a baby sitter, and not her husband, was watching the children, which , according to Alldredge was not common knowledge. (4 CT 756.)

6) Westerfield's hose, which he had used to fill his motor home on Saturday morning before leaving on his driving trip, was unfurled on the front lawn, although Westerfield, as evidenced by the condition of his house, was meticulously neat otherwise. (4 RT 756.)

7) Although Westerfield had related how he drove up to Skyridge on Saturday morning to retrieve his motor home, a neighbor had told the police that Westerfield's motor home was parked by Westerfield's house on Friday night. (4 CT 757.)

8) At Silver Strand, the blinds on Westerfield's motor home were drawn shut; Westerfield did not answer the door immediately when the ranger knocked to return the overpayment; Westerfield stepped outside the motor home, closing the door behind him, to deal with the ranger; and Westerfield lingered outside to watch the ranger drive off after the latter had completed his errand. (4 CT 756-757.)

9) Westerfield, in relating his return to San Diego from Borrego Springs, used the first person plural pronoun to say "we drove back to

Silver Strand," though this usage was pointed out to him, he deprecated it as a simple slip of the tongue. (4 CT 758.)

10) The FBI profilers who had been unable to come up with a profile also assured Alldredge that most abductors are males, who are usually acquainted with the victim's family or who live nearby the victim's residence. Alldredge himself added in this regard that Westerfield's house was similar to that of the Van Dams. (4 CT 754.)

If this list seems at first glance to be impressive for its length, closer examination reveals that it is little more than a garrulous quantity of suspicious, quasi-significant, and insignificant information. The supposed over-cooperation of a householder with no criminal record, confronted the first thing in the morning with a large number of police officers at his doorstep, or his unfurled hose on a neatly kept lawn, are virtually meaningless; the dog Hopi, who could not be questioned, showed an "interest" but not an "alert" in the vicinity of where Danielle Van Dam had been only a few days earlier when she was selling Girl Scout cookies; Westerfield's rendering of a speculative explanation in the face of police officer at least impliedly demanding an accounting from him is completely unremarkable; the rather unremarkable insights of the FBI profilers were given a good deal of room in the application, yet they could not even come up with a profile. All this, combined with Westerfield's unusual activity over the weekend, or even his (perhaps) false statements as to when he obtained his motor home, or his use of "we" at one point in his narrative may have provided suspicion, but none of this, taken singly or all together in the totality of the circumstances, provided a substantial basis on which to find probable cause. (See *Florida* v. *Royer*, *supra*, 460 U.S. 491, 507.)

Some measure of the deficiency of the showing here may be derived from an examination of other cases in which courts have rejected the finding of probable cause under circumstances in which the coincidences and suspicious facts were much more pressing than those presented here.

In *Miley* v. *State* (Ga. 2005) 614 S.E.2nd 744, the dead body of Ashley Neves was found on May 21. A warrant for the search of Miley's house recited that Miley was identified as the last person seen with Neves on May 20. The killer had removed some of her clothing from the scene, and Miley had been seen with a book bag in the area in which the murder had been committed. Miley had told police he was willing to bring the book bag out to them, but refused to consent to their entrance into his house to retrieve it and to conduct a search. (*Id.*, at pp. 744-745.) The Georgia Supreme Court found this insufficient to establish probable cause. First, the refusal to consent to a search had no evidentiary weight as a matter of law, since such a refusal was a valid exercise of a constitutional right. (*Id.* at p. 745.) As to Miley's being the last person seen with Neves on the date, time, and place of her death, and that he had a book bag at that time:

> "These assertions were insufficient to show probable cause to believe Miley was the perpetrator, because they failed to detail how close to the time of the murder's commission Miley had been seen with the victim, because they failed to describe the circumstances under which Miley and the victim had been seen together, and because an innocent person could have had a book bag at the unspecified scene of the murder." (*Id.*, at p. 745.)

If having a book bag is more seemingly innocent than an unusual driving trip or the use of the first person plural pronoun, the trip and the pronoun were simply a bit unusual, and more than compensated for by the fact that here Mr. Westerfield, unlike Mr. Miley, was not the last person seen with Danielle Van Dam around the time of her disappearance. If it is objected that that was because he took pains to hide her from sight, this is a circular speculation that applies to Miley, who, if he was the murderer, took pains to hide this fact.

People v. *Dace* (Ill.App. 1987) 506 N.E.2nd 332 is also instructive. In *Dace*, the body of Roseleen Kilcoyne was found on the floor of Rudy's 700 Club in Joliet, Illinois on February 21, 1985 at 7:40 a.m. (*Id.*, at p. 333.) A warrant was issued to take teeth impressions from defendant to see if they matched the bite marks on the victim's arm. (*Id.* at p. 335.) To support the issuance of the warrant, it was stated in the affidavit that the defendant was the last person known to be present with the victim at the club while she was still alive in the early morning hours of February 21. Further, defendant had been interviewed on February 28, and he told police that he was in fact the last person in the club besides the victim, and that while he was there he entertained thoughts of having sex with her. (*Id.* at pp. 335-336.) The Court in *Dace* rejected the lower court's finding of probable cause for the warrant. The fact that defendant was the last person with the victim in the early morning hours of February 21, and that he may have contemplated having sex with her, "may have given the police reason to suspect that he was involved in the homicide," but "suspicion . . .does not constitute probable cause." (*Id.*, at p. 337.)

Dace seems to establish an even stronger connection between the suspect and the crime than the facts in *Miley* did, and even if, in *Dace*, one might disagree with the court's conclusion regarding whether these facts do rise to the level of probable cause or not (see *id.* at p. 338, Heiple, J., dissenting), nonetheless this ambivalence that makes *Dace* difficult is still illustrative of what makes this case easier. Mr. Westerfield was not the last person seen with Danielle Van Dam; there was no information establishing a particular relationship between Mr. Westerfield and Danielle Van Dam; and there was no evidence of a motive that could be imputed to Mr. Westerfield for abducting Danielle Van Dam. In sum, both *Dace* and *Miley* provide an illuminating measure of the deficiency of the application for the first warrant in this case to establish probable cause.

3. Probable Cause for the Remaining Four warrants

With the failure of the first warrant, the others fall if they were derivative of this initial illegality, or, in the words of the metaphorical legal cliché, if they were the "fruit of the poisonous tree." (*Wong Sun* v. *United States, supra,* 371 U.S. 471.) There can be little doubt that they were.

The second warrant, aimed at a search of Westerfield's computers, was issued on the basis of what was discovered in "plain view" during the entry made possible by the first warrant. (4 CT 773-775.) The third warrant, to search Westerfield's cell phone records, incorporated the applications for the first and second warrants, and recited information derived from the searches conducted under those warrants. (4 CT 790, 794-799.) The fourth warrant, for Westerfield's dry cleaning at Twin Peak Cleaners, also incorporated the applications for the first two warrants, and specifically relied on dry cleaning receipts discovered during the execution of the first search warrant. (4 CT 789-790, 794-799.) Finally, the fifth warrant incorporated the applications and results of the first two warrants and searches to justify a second search of appellant's house. (4 CT 821-822, 832-834.) As is apparent from their respective incorporations, warrants 2 through 5 were entirely derivative of the first warrant, and the items seized pursuant to these warrants should also have been suppressed.

C.
The Good Faith Exception to the Exclusionary Rule Does not apply

The lack of probable cause to support the warrants is not, of course, the last word in the enforcement of the exclusionary rule. The Fourth Amendment exclusionary rule does not bar the use of evidence procured by officers acting in good faith reliance on a search warrant issued by a detached magistrate even if ultimately the warrant is found to be unsupported by probable cause. (*United States* v. *Leon, supra*, 468 U.S. 897, 922; *People* v. *Willis* (2002) 28 Cal.4th 22, 31.) This does not mean that the exclusionary rule is abrogated *ipso facto* by the

warrant's approval by the magistrate. The exception does not apply where the issuing magistrate had wholly abandoned his judicial role; or where "the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (*Id.*, at p. 32, internal quotation marks omitted; *People* v. *Camarella* (1991) 54 Cal.3rd 592, 596.)[63]

It is this last category that is pertinent here. The determination, of course, depends on the specific facts of the case, and the burden is on the government to establish that the reliance of the officers on the magistrate's finding of probable cause was objectively reasonable. (*People* v. *Willis*, *supra*, at p. 32.) Here, because of the finding of probable cause, the government was not called on to meet this burden below, but will have to meet it here on the appellate record. As with the issue of probable cause itself, the question of reasonable reliance resolves itself into two parts: 1) without the polygraph evidence, was the information presented sufficiently colorable to render the magistrate's finding of probable cause dispositive for the reasonable officer; and if not, 2) was the magistrate's implied approval of polygraph evidence to support probable cause sufficiently colorable to save the warrant under the good-faith exception to the exclusionary rule?

In discussing probable cause absent the polygraph evidence, appellant listed the ten salient points from Alldredge's testimony before Judge Bashant and demonstrated that none of them individually nor taken as a whole emerged from the murk of even reasonable suspicion into the relative light of probable cause.

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[63] Another category of exemption from the good-faith rule coincides with the standard for traversal of a warrant, whereby the magistrate issuing the warrant had been intentionally or recklessly misled by the affiant as to key facts presented in support of probable cause. (*United States* v. *Leon*, *supra*, 468 U.S. at p. 923; see also *Franks* v. *Delaware* (1978) 438 U.S. 154.) There was in this case a motion to traverse the warrant based on several falsehoods existing in Detective Allredge's testimony in support of the first warrant. (3 CT 559, 562-564.) The court denied the motion after a hearing on the ground that there were no intentional falsehoods or any made with reckless disregard for the truth. (5E RT 1850.)

The deficiencies were both serious and obvious. Westerfield's supposedly unusual cooperation, the inarticulate "interest" of the dog Hopi coupled with his equally inarticulate disinterest in the motor home, the FBI profilers, who were unable to come up with a profile, except in terms of a rather anodyne generalization about male abductors familiar with the child, the wayward water hose, and Westerfield's pronominal solecism in using the first person plural "we" for the singular "I" – all of these easily explicable facts, none of them of any real significance, apparently provided the background feeling of indiscriminate urgency on the part of the police forcing them to invoke quantities of obscurely equivocal "facts" in lieu of probable cause.

But were the unusual driving trip and Westerfield's supposedly unexplained knowledge indicia of probable cause, whether alone or combined with the information contemned in the previous paragraph? The unusual driving trip coincides in time with the disappearance of Danielle Van Dam, but, given the lack of any direct evidence showing the presence of Danielle Van Dam in the motor home or Westerfield house, or of Westerfield in the Van Dam house, this only rises to the level of, at most, suspiciousness. What of Westerfield's knowledge of the father/daughter dance? Alldredge strained to assert that this information could only come from Danielle, and this was based on Brenda Van Dam's characterization of this as some sort of family secret – a characterization patently absurd when talking about a public event at a local grammar school.

And what of Westerfield's expression of mild surprise that Damon was babysitting? If one ignores the media attention to this case, one cannot discount the fact that Brenda Van Dam was in a crowded neighborhood bar without her husband on Friday night, drinking, playing pool, and dancing. That some friend or acquaintance might ask her, or Barbara Easton, or Denise Kemal, where Damon was was hardly unlikely; nor was it unlikely that this information would be overheard by, or subsequently percolate to some extent among, other people in the bar who knew her well, or casually, or even slightly.

This leads to the question of the polygraph. The record in this case establishes in this regard that what Judge Bashant failed to see as a matter of law, the police grasped intuitively and reasonably from the fact that the evidence is deemed unreliable to use in court: that polygraph evidence is unreliable to use for probable cause. "The record" referred to is the evidence and testimony adduced in the combined evidentiary hearing on both Fourth and Fifth Amendment suppression in this case.[64]

One of the witnesses at this hearing was Paul Redden, the polygrapher. On cross-examination of Redden, defense counsel was attempting to establish, for *Miranda* and voluntariness purposes, the indicia of custody surrounding the three hours Redden was with Mr. Westerfield, interviewing him and conducting the polygraph test. There is one passage in that cross-examination that bears on the present issue:

> "Q. . . . And you communicated into the room [i.e., where the other officers were gathered] to all of the individuals your opinion, is that correct?
>
> "A. My opinion of the exam, yes, sir, that he had failed my test.
>
> "Q. Okay.

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[64] The Fourth Amendment suppression issues were not only the motion to quash the warrants, which is the subject of this argument, it also included a motion to traverse the warrants for the use of false information in the affidavits. (3 CT 505, 556.) The Fifth Amendment suppression issues consisted of a claimed violation of *Miranda* (*Miranda* v. *Arizona* (1966) 384 U.S. 436) and actual involuntariness. (2 CT 487.) The focus of the hearing was appellant's almost continuous encounter with the police from 8:30 a.m. on Monday, February 4, 2002 until the morning of February 6, with the trial court suppressing as involuntary all statements made by appellant after Detectives Ott and Keyser came onto the case at about 2 a.m. on February 5. (5B RT 1273; 5E RT 1890-1891.) The motion to traverse, as pointed out above (see fn. 63), was denied on the ground that the falsehoods in the affidavit were not intentional or reckless. (5E RT 1850.)

"And your opinion that, therefore, he may have been a suspect in the case.

"A. I did not say a suspect. My opinion was that he had failed my test. I did not state that he was a suspect.

"Q. What was the purpose in giving the exam, sir?

"A. Was to determine whether or not he had any involvement or knowledge about the disappearance of Danielle Van Dam.

"Q. And if he would have passed the test, that would have been the end of it, correct?

"A. That would have been the end of it.

"Q. But since he didn't pass the tests, he then became a suspect, isn't that right?

"A. He could not be eliminated, that's for sure, yes.

"Q. One of the purposes of the polygraph as your agency uses it is as an investigative tool, isn't that right?

"A. Yes, sir.

"Q. And one of the things you're trying to develop or may develop as a result of the administration of the polygraph could be probable cause, isn't that right?

"A. *Generally probable cause, the polygraph is generally not used as probable cause.*" (5A RT 1180-1181, emphasis added.)

The last answer is italicized because it seems to establish the existence of a policy or practice *not* to use polygraph evidence to establish probable cause. Further evidence bears this out.

One of the detectives sent in to guard or interrogate Westerfield after Redden completed his polygraph exam and left was Jody Thrasher of the robbery

unit. (5A RT 1103-1104.) As will be seen in more detail below, once Westerfield failed the polygraph test, he became concerned that his relations with the police were now adversarial and was uncertain about his rights. To allay his fears, Thrasher assured him that he could not be arrested on the basis of the polygraph evidence alone. (48 CT 11144-11145.) After Thrasher left, Detective Parga returned with Detective Cramer. (5A RT 1129-1130.) Cramer, trying to interrogate Westerfield, who instead kept focusing on his failure on the polygraph test, assured him that the police did not rely very much on the polygraph test, and that it was "not something that could be used in court." (48 CT 11155.) But the most telling evidence comes from Sergeant Holmes, the head of the homicide unit.

Although Westerfield was allowed to go home at 11:30 p.m. on February 4, long after the polygraph test had ended, he found himself barred from his house by officers who had secured it pending the issuance of a search warrant. (5A RT 1105; 5B RT 1361-1363.) As appellant was discovering the restrictions on his homecoming, the homicide unit was being called in to take the case over from the robbery unit. The homicide detectives were briefed, and after the briefing, Sergeant Holmes dispatched Detectives Ott and Keyser to interview Mr. Westerfield. (5A RT 1193-1194; 5C RT 1542, 1549-1550; 5D RT 1699.) The following was the testimony of Sergeant Holmes:

> "Q. When you indicated that Mr. Westerfield was a potential suspect at that initial briefing, what do you mean by that?
>
> "A. Well the information we were given at the briefing, the trip to the desert seemed not to make a lot of sense. The Silver Strand trip where he went down there originally going to the desert, then the Silver Strand, then he left the Strand because it was cold, and drove back home to the desert, all that didn't seem to make a lot of sense. And then the fact that he failed the polygraph on being involved in Danielle Van Dam's disappearance.

". . . .

"Q. Did you indicate to your two detectives, Ott and Keyser, that they were supposed to place Mr. Westerfield under arrest?

"A. *No, sir. We didn't have enough to arrest him.*" (5D RT 1705-1706, emphasis added.)

The question "Why not?" presents itself with urgency in the present context. Probable cause to arrest and probable cause to search require precisely the same quantum of evidence (*Greene* v. *Reeves* (6th Cir.1996) 80 F.3rd 1101, 1106), and although the question whether the person has committed the crime and the question whether evidence of a crime will be found can be different (*ibid.*, *United States* v. *Henderson* (9th Cir. 2000) 241 F.3rd 638, 648), sometimes they are identical. (*People* v. *Temple* (1995) 36 Cal.App.4th 1219, 1228; *Filitti* v. *Superior Court* (1972) 23 Cal.App.3rd 930, 934.) Here, probable cause to search the motor home was predicated precisely on the presence of probable cause to believe Westerfield had kidnapped Danielle Van Dam.

Holmes's testimony is particularly significant in this context. He was an officer in a position of responsibility. He referred to the inadequacy of probable cause based not only on the polygraph but also on the information conveyed in the briefing, which was taking place more or less at the same time Alldredge was obtaining the warrant from Judge Bashant. In addition to this, by the time the homicide unit became involved, the District Attorney's Office was already actively involved in this case, and undoubtedly commenting on the sufficiency of the aggregating evidence. (5A RT 1140-1141; 5E RT 1799-1800.)

Again, it is respondent's burden to establish the objective reasonableness of reliance on the magistrate's approval of the warrant. (*People* v. *Willis*, *supra*, 28 Cal.4th 22, 32.) In doing so, he will have to address the points and considerations raised in the foregoing argument, which includes a refutation that the official position of law enforcement itself was that there was a lack of probable cause as of

the early morning hours of February 5, 2002 to arrest, and therefore (by necessary implication) to search. This, respondent cannot do. The application of the exclusionary rule is not prevented here by the good-faith exception.

D.
Under the Totality of Circumstances, Appellant's Consent to Search was not Consensual

"[T]he search of property, without warrant and without probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment." (*United States* v. *Matlock* (1974) 415 U.S. 164, 165-166; *Florida* v. *Royer*, *supra*, 460 U.S. 491, 498; *People* v. *Panah* (2005) 35 Cal.4th 395, 466.) It was noted above that when the homicide unit took over the case after midnight on February 5, Sergeant Holmes sent Detectives Ott and Keyser to Westerfield's house to interview him. But that was not the only reason. He sent them to obtain from him a consent to search his house, his vehicles and the motor home. (5A RT 1195-1196, 1202-1203; 5C 1567-1568; 4 CT 900-902.) This was the consent that Judge Mudd found to be knowing, intelligent and voluntary, and that justified that first search of Westerfield's house even if the warrant was defective. (5E RT 1921-1922.)

However, Judge Mudd made another ruling that seems irreconcilable with this one. In holding that all of Westerfield's statements made after Ott and Keyser appeared had to be suppressed on Fifth Amendment grounds (5E RT 1888-1890), Judge Mudd found that Westerfield was effectively in custody and, as a reasonable person, would not feel free to leave: "When Detectives Ott and Keyser come along, they know he's not free to leave. They give lip service to it, but that's all it is. Why do we know that. Number one, he can't go in his house. Number two, he can't stay in his car 'cause it's the subject of the warrant. He can't use his motor home. He can't use his trailer." (5E RT 1888.) In short, Judge Mudd found that Keyser and Ott used custodial coercion to produce an involuntary statement, and,

as noted in the above paragraph voluntariness *vel non* is the touchstone to determine whether or not a consent to search was consensual.

The standard by which a waiver of constitutional rights is measured as free and voluntary is uniform, regardless if the right is grounded in the Fourth or in the Fifth Amendment. (*Schneckloth* v. *Bustamonte* (1973) 412 U.S. 218, 227; *Ohio* v. *Robinette* (1996) 519 U.S. 33, 40; *People* v. *Zamudio* (2008) 43 Cal.4th 327, 342.) A detailed examination of the record is necessary in order to understand how Judge Mudd could justify a ruling regarding the validity of the search that was so obviously dissonant with his ruling regarding the voluntariness of Westerfield's statements, as such reasoning is not obvious. The matter will, unfortunately, be no more obvious, after such an examination, and the examination will reveal the error of his ruling regarding the validity of the search.

The following is an account of the almost continual contact between Mr. Westerfield and the police from the morning of February 4 through the contact with Ott and Keyser in the early morning hours of February 5, when Westerfield signed a consent to search form. The facts presented at the combined evidentiary hearings on Fourth and Fifth Amendment suppression motions will show that Westerfield's exposure to the police, to their implied show of force, to their air of authority and control over him, at some point began to take its toll, and he began to show only a grudging willingness to cooperate. When Ott and Keyser appeared, Westerfield's willingness to cooperate was so attenuated that his signing of the consent-to-search form at that point was little more than an expression of helpless acquiescence and submission to the apparent authority of an inevitable search warrant that he had been informed was on its way. The facts will be summarized in accord with the segments of that day.

1. 8 a.m. to noon, February 4, 2002

As noted in the statement of facts (see above, p. 17), Westerfield was interviewed on Monday morning, February 4, on his doorstep by Detective Keene

from the robbery unit. Before that, at about 8 a.m., the Special Investigations Unit (SIU), whose assignment was surveillance and assistance to other units, had been dispatched to detain Westerfield for questioning by the Robbery Unit. (5A RT 1023-1026; 5B RT 1393-1395.) Sergeant Wray, the head of the SIU team that was sent, was there, along with four other detectives from his team, and they all arrived in separate cars, which they parked in the front and side of his house. The SIU detectives then lingered around the driveway in front of Westerfield's house, and this was the sight that greeted Westerfield when he emerged from his house that morning to retrieve the mail and was accosted by Sergeant Wray. When Keene and Parga arrived, the SIU detectives still lingered in the driveway while Keene was interviewing Westerfield. The interview's purpose, of course, was to have Westerfield account for his weekend activity, but before Keene's formal interview, more than one of the SIU detectives engaged Westerfield in casual questioning in this regard. (5A RT 1025-1026, 1028-1033, 1066-1068, 1070; 5B RT 1396-1397, 1399-1400, 1411, 1419-1420, 1428-1424, 1450-1451, 1453-1456.)

After the doorstep interview by Keene, Westerfield signed a written consent to allow the detectives to search his house and motor home. Westerfield was completely cooperative and showed no hesitancy or reluctance in giving his consent. (5A RT 1071, 1087-1088; 5B RT 1457; 4 CT 895-897.) Westerfield guided them through the house, and after a ten minute search, he led a motorcade, consisting of one car with Keene and Parga in it, and then four other cars each containing one SIU detective, on a twenty minute drive to Skyridge Road where the motorhome was parked. (5A RT 1089-1092; 5B RT 1404-1405.)

After fifteen minutes of searching the motorhome, again with Westerfield's cooperation, they all left, with the SIU detectives veering off to go to lunch, while Westerfield drove back to the house by a different route than that taken by Keene and Parga, who arrived there before he did. It was now around noon, and Westerfield consented to a dog search of the house, which displaced him for about fifteen minutes, during which he gave an interview to the media gathered outside.

According to Keene and Parga, Westerfield appeared to enjoy talking to the press. (5A RT 1092-1099, 1146; 5B RT 1408-1409, 1456-1458, 1461-1466, 1499.)

2. 2:30 p.m. to 7 p.m., February 4, 2002

Keene and Parga, who had left Westerfield's house to go to lunch, returned to Westerfield's house shortly after 2:30 p.m. to ask if he would come to the station to take a polygraph test. Keene said that the reason for the test was because some parts of Westerfield's story did not make "a whole lot of sense." Westerfield hesitated, expressing some diffidence because he did not know how a polygraph machine worked. Keene did not know, but said that the polygrapher could explain it. With this, Westerfield agreed, but asked the detectives if they thought he needed an attorney. Parga told him he was not under arrest and was free to take the test or not. Keene told him that he, Keene, could not advise him one way or the other, but assured Westerfield that he was free to consult an attorney. Westerfield gave the matter a moment's thought, and then agreed to come down to the station, which he did in his own car. (5A RT 1099-1102; 5B RT 1466-1467; 5C RT 1500-1501.)

At the station, Westerfield was introduced to Paul Redden, who was to conduct the test. Redden explained how the polygraph worked, assured him that it was "very accurate," and would discover whether or not he was involved in the disappearance of Danielle Van Dam. Redden told Westerfield that the test was voluntary, and that he could stop it at any time. Westerfield acknowledged that he understood this and signed the consent form. (5A RT 1168-1171; 4 CT 989-899; 46 CT 10835-10838.) After further explanations, Westerfield expressed some hesitancy about the test and asked Redden what the latter thought Westerfield should do; Redden answered that he, Redden, would take the test if he were Westerfield. (45 CT 10881.)

In the course of eliciting some background information and talking further about polygraph tests, Westerfield explained how difficult the day had been for him and how the stress affected his memory. "Yeah," he explained to Redden,

"you're standing out in your front yard, I don't know if you've gone through this. But I was standing on my front yard, these two guys walk up, bigger than me, which is good, but um, then all of a sudden two more guys joined them. It was like the squads of cars came . . . . And it was like, oh shit, what's going on, you know." (46 RT 10891.)

The pre-test interview proceeded with Redden eliciting from Westerfield an account of the weekend. (46 RT 10893-10933.) After this the preparatory questions for the test were given; the appropriate sensors were attached to Westerfield's body; and the test was administered. (46 CT 10941-10963.) At the end of the test, Redden told Westerfield that he did not pass, and that he was, according to Redden "somehow involved in the disappearance of Danielle Van Dam." (46 RT 10966.) Westerfield expressed his surprise, insisted that he was not, and offered to take the test over again. Redden ignored the request and showed him "the charts," which, according to Redden showed a probability of deception greater than 99 percent overall, and 100 percent for the question " 'Did you have anything to do with the disappearance of Danielle Van Dam'", and 100 percent for the question " 'Are you personally responsible for Danielle Van Dam's disappearance.'" (46 CT 10966-10968.) Westerfield was still chagrined and puzzled by the results. He offered theories as to what had happened on the test and offered to take it over, all of which Redden either deprecated or ignored. Finally, Westerfield announced, "Well if I failed the test, I should get a lawyer, don't you think?" Redden told him that he, Redden, could not advise him. Redden's only concern was to "get this little girl back and I need your help on that." (46 CT 10976.)

This went on for a little while more with more questioning from Redden. Westerfield again talked about needing a lawyer, needing someone on "his side," since the test must have been flawed. He knew he was innocent. (46 CT 10986-10988.) At this point, about 7 p.m., Redden left the room to see if anyone else had any questions for Westerfield. He informed the detectives in the conference room

that Westerfield had not passed the polygraph test, and then Detective Parga went into the interview room. (5A RT 1172-1175; 5B RT 1468; 46 CT 10989.)

3. 7 p.m. to 11:00 p.m., February 4, 2002

Parga questioned him a short while, with Westerfield responding and again asking Parga whether he should get a lawyer or not. Parga left, and Detective Thrasher came in simply to watch Redden's equipment. (5C RT 1519-1520; 48 CT 11125-11132, 11135.) Westerfield told Thrasher he would like to call his 18-year-old son, who should be at his house by now, to tell him what going on. When Thrasher told him to wait until she found out what was going on, Westerfield complained that "someone else" was deciding whether he could call or not, whereupon Thrasher protested that she did not say he could not make a call, and offered to make a the call for him. (48 CT 11125-11139.)

At this point Westerfield complained that no one would give him an honest answer whether the polygraph results were valid and about whether he needed a lawyer. Thrasher said she herself could not tell him about the polygraph, but as for a lawyer, Westerfield was not under arrest. (48 CT 11141.) After Westerfield asked again about a call to his son, and Thrasher promised to check on it (48 CT 11143), Westerfield asked, "Well, if they are conducting an investigation and I'm not under arrest . . . can I leave?," to which Thrasher answered, "Ah, not right now." Westerfield then said, "Okay, so they're deciding whether I'm going to be under arrest based on this test." Thrasher answered that she was only a "worker bee" here and did not know where the process stood at this time. (5C RT 1526; 48 CT 11144.)

Parga returned with Detective Cramer, who was introduced as wanting to hear Westerfield's side of the story. When Westerfield asked to call his son, who would be expecting him to be home and who would worry, Parga and Kramer put him off. (48 CT 11149-11152.) When he complained about the polygraph, Cramer told him not to worry about it, that was between him "and Paul." Westerfield was now here with "Cassie [Cramer], okay." (48 CT 11161.) For

Cramer, Westerfield again recited the events of the weekend. (48 CT 11162-11174.) Another request to call his son was stalled, but soon afterward a phone was brought in; however, his call did not go through. (48 CT 11174-11177.)

The account continued. (48 CT 11180-11243.) As the detectives began asking, to his embarrassment, what Mr. Westerfield liked to do sexually with his recent girlfriend Susan, Keene entered the room. (48 CT 11243-11245.) Westerfield asked Parga if Keene knew about the polygraph failure, and Parga answered that she had told him. This initiated the following exchange with Parga:

> "WESTERFIELD: So see, it's proliferating. I told you it was proliferating.
>
> "PARGA: But you know what, what I want you to understand. 'Cause you know, I've been together with you all day and we've got a pretty good rapport going. But I want you to know whatever happens here tonight, you're going home, okay. I want you to understand that.
>
> "WESTERFIELD: Well you know it . . .
>
> "PARGA: I'll give you a soda, give you water, whatever.
>
> "WESTERFIELD: I'm bending, I'm bending over as far as a I can. The only thing I'm upset about is not being able to get ahold of Neil because . . .
>
> "PARGA: Yeah. You want to try calling him again.
>
> "WESTERFIELD: I, I asked for that again, so . . .
>
> "PARGA: Okay, well listen, I got a phone for you . . .
>
> "WEsTERFIELD (Unintel) if the phone works okay.
>
> "PARGA: "Yeah. But I just want you to understand that you're going home tonight, okay.
>
> "WESTERFIELD: Well, okay." (48 CT 11245-11246.)

With Keene present, Cramer continued questioning Westerfield about his sex life. Keene took over to go over the time line of the weekend again. Westerfield answered this lengthy course of questioning (48 CT 11247-11311), when Keene himself turned to the subject of the polygraph and asked Westerfield why he thought he had not passed. Westerfield said he was "totally astounded" and "at a loss" to explain. (48 CT 11311.) He tried various conjectures, but Keene announced that he, Keene, agreed with Redden that Westerfield was lying because Westerfield had failed so badly. (48 CT 11313-11314.)

4. 11 p.m. February 4 to 3:30 a.m. February 5, 2002

It was now 11 p.m. As Keene and Kramer pressed the accusation that Westerfield had something to do with the little girl's disappearance, Westerfield complained again that they would not tell him if he needed an attorney. (48 CT 11314, 11319-11320.) Westerfield noted that it was now close to 11:15 p.m. and that "at some point this has to stop because it's not . . . I'm not doing something, I didn't do anything and . . . but I'm sitting here. Now tell me what I need to do. What are my rights? I've been in here since what time, 4:00? I don't, I don't remember what time we came over." (48 CT 11322.)

Westerfield continued in this vein:

> "WESTERFIELD: I'm being lost. Well, I understand that but we keep, we've been doing it what . . . nine hours now? At what point does it stop? Tell me where are my rights about that? It's been nine hours now. I'm not trying to be defensive. I've been nice. You met me the first time, we went through the house, I was very positive about everything that was going on. I failed this test, I don't know why I failed it, and all of a sudden I'm the bad guy, quote. I understand. I have no problem with that. But I have sit, sat, here again you know for nine and a half hours. I'm guessing. At what point do I have . . . We're not getting anywhere. You're trying to convince me I did something and I didn't do something. You're

trying to get information from me specifically that I don't have knowledge of. So just tell me when is this going to stop?

"KRAMER: You're here. . .

"WESTERFIELD: Moe [i.e., Parga] te . . . Moe tells me I'm going home.

"KRAMER: You're here on a voluntary basis aren't you?

"WESTERFIELD: I'm not allowed to make a phone call.

"KRAMER: You were allowed to make a phone call.

"WESTERFIELD: If I wanted . . . I asked to make a phone call and . . .

"KRAMER: And we got up how many times?

"KEENE: And Moe, and Moe opened the door and said, 'Let's go make a phone call.' And you said, 'Wait a minute, let's do this, there's some discrepancy, let's go through it.' It was your choice not to go make a phone call right then.

"WESTERFIELD: Okay, if that's what you remember, that's fine." (48 CT 11323-11324.)

This discussion continued with Westerfield asking to take the test again. Keene told him that he could not, but that it was not only the test. Westerfield's "body language" indicated that he was lying. He had his arms and legs crossed during almost the entire interview this evening. Westerfield was incredulous: "Is, is this a bad way to sit?" And when Keene and Kramer insisted it was significant, Westerfield answered, "Um, it doesn't mean . . . that doesn't mean anything to me." (48 CT 11325-11326.) Once the topic of body language was exhausted:

"WESTERFIELD: Okay, so tell me what else is there? Now I'm being defensive. And I haven't been all night, okay.

"KEENE: So why start now?

"WESTERFIELD: Because I'm getting angry. You guys are on the attack. Neither of you believe what I've, I've, I've said . . . um, you're, you're being abrasive in your conversations with me and so I'm sitting here like this and you're sitting there like this. You know, you're sitting forward on our seat, and I'm not doing that. Talk about body language.

"KRAMER: Um hum.

"WESTERFIELD: Okay. All I need is the spotlight and a rubber hose. Tell me what . . . where are we gonna go. What . . . it's, now it's 11:30. I, I. . .

"KRAMER: You're watching your watch, which you didn't before.

"WESTERFIELD: Ah, because I want to go home, okay. . . ." (48 CT 11326-11327.)

As the detectives pressed a little more, Parga came back into the room. (48 CT 11328.) Westerfield observed that the polygraph obviously made him the focus. (48 CT 11329.) The other matters they were throwing in his face were "trivial." (48 CT 11330.) He told his story several times; he told it willingly to every policeman that talked to him. He could not help them any more. (48 CT 11330)

At this point Parga told him he was free to leave and could go home. When he asked to take the polygraph test, she said no, that he was tired, and that maybe he could take it again after a night's rest. In response to his question as to whether there was anything else he could do to help, she suggested he might show the police tomorrow his route through the desert. He said he would be glad to do that, but noted that he did run his own business and had work to do. (5A RT 1105; 5C RT 1505-1506; 48 CT 11331-11335.) When he asked if he was going to be

charged, Parga said no. As she had told him, he could go home. (48 CT 11138.) She escorted Westerfield out of the station to the parking lot, and Westerfield left in his own car. (5B RT 1470; 5C 1506-1507.)

Throughout the time Westerfield was in the interview room at the Northeastern Substation, the briefing room was the center of activity for Alldredge to collect information and to debrief the other detectives with a view to obtaining a search warrant. The officers at the Northeastern Substation were all generally aware of this, and were even briefed on Alldredge's efforts. (5A RT 1164-1165; 5C RT 1510-1512, 1529; 5E RT 1796-1797.) At about 9:30 or 10 p.m., Detectives Maler, Thrasher, and Borquez from the Robbery Unit were dispatched to Westerfield's house to secure the premises pending the issuance of a warrant, and to intercept Westerfield if he attempted to enter the house. (5B RT 1358-1360; 5C RT 1526-1528, 1536-1537.)

Followed by two police cars, Westerfield pulled into his driveway shortly before midnight, but as the garage door was rising, Maler stepped in front of the car and placed his hands up to stop Westerfield. Then Maler, Thrasher, and Borquez approached the driver's window. Maler told Westerfield that he could not enter the house. When Westerfield asked why, Maler stated that "a search warrant was being secured." Westerfield, according to Maler, seemed disappointed, saying he had done everything the police had asked and had been cooperative. He wanted to go inside the house, but Maler said that he could not. (5B RT 1361-1363, 1381-1382; 5C RT 1527-1528, 1551.)

When Westerfield asked if he at least could talk to his son, Maler obtained permission from his supervisor to summon the son, but to warn the latter that if he left the house, he would not be let back in, and that if he wanted to leave in a car, the police were in the process of obtaining a vehicle warrant. Maler, after relaying this information to Westerfield, who wanted his son to stay with his ex-wife in Poway, knocked on the door to tell Neal for Westerfield that his father wanted him to leave. Neal talked briefly with his father while Maler did a consensual search

of Neal's car. After this, the boy left. (5B RT 1365.) Westerfield also left for about forty-five minutes. When returned he parked on Briar Leaf and went to sleep in his car. (5B RT 1366-1367.)

Back at the substation, the Homicide Unit was being briefed to take over the case. Detectives Ott and Keyser were assigned as the lead investigators. They were told of the progress of the investigation, including Westerfield's failure of the polygraph test. At that time, as Ott and Keyser were told, Westerfield was parked outside his house, barred from entering, because the Robbery Unit was in the process of obtaining a warrant. Ott and Keyser's assignment was to go to Westerfield's house and interview him. In addition, they were to obtain from him a consent to search his house and his vehicles. (5A RT 1193-1196; 5C RT 1542-1543, 1549-1551, 1568.)

The two homicide detectives arrived at the house at about 2 a.m. Maler took them over to Westerfield's car, tapped on the window, and introduced the two detectives when Westerfield stepped out. Because it was cold, Keyser suggested that they talk inside the car. With Ott in the front passenger seat and Keyser sitting in the rear, Westerfield picked up a Styrofoam container, noting that this was his lunch, and handing it back to Keyser to place on the floor in the back. (5A RT 1198-1200; 5C RT 1551, 1562, 1570.) Within about a minute, the two detectives announced that they believed Westerfield had something to do with Danielle Van Dam's disappearance. According to Ott, this was said calmly, but during the fifteen minute interrogation in the car, Ott, who considered himself an aggressive officer, conceded that he probably raised his voice and used profanity. It was during this 15 minute period that Westerfield signed a consent-to-search form. (5A RT 1202-1203; 5C RT 15673-1568; 4 CT 900-902.) When he signed it, Westerfield expressed some concern that they had to do this again since the detectives and the dogs had already been through the house and could not find anything. (5A RT 1206.)

During the interrogation in the car, Westerfield stated that he had gas receipts and a receipt to confirm that he had been towed out of the sand in Glamis. The three men then went inside to retrieve them, and Ott directed Westerfield to sit down in the kitchen., while Ott collected the paperwork on the counter. (5C RT 1566-1569.) At about this point, at 2:30 a.m., Detective Tomsovic knocked on the door and handed the warrant to Ott, who then announced to Westerfield that there was now a warrant. Westerfield expressed some alarm, exclaiming something to the effect of, "A search warrant?" Ott handed it to him to read. (5ART 1207-1208; 4 CT 746.) When Westerfield asked how they got the warrant, Ott explained to him the technicalities. After reviewing the papers, Westerfield said that he wanted to stay in the house while it was searched. Ott and Keyser deflected the question and began talking about a trip to the desert, urging him to show them where Danielle was. "We know you took Danielle," said Keyser, "All we want to know is where she's at. We need to bring her back to her family." (5A RT 1208-1209.)

Westerfield eventually agreed to take them and retrace his weekend route. After obtaining permission for this from Sergeant Holmes, their team leader, Keyser and Ott prepared to leave with Westerfield, who first asked permission to change his shirt. Accompanied by Ott and Keyser, Westerfield went upstairs, changed his shirt, and brushed his teeth. (5A RT 1209-1213; 5D 1661-1662.) By 3 a.m., the actual search of the house had begun under the direction of Detective Tomsovic. (5D RT 1769.) By about 3:30 a.m., Ott and Keyser left with Westerfield to go on their excursion in Ott's vehicle, with the first stop being the Northeastern Substation to get gas. (5A RT 1213; 5D RT 1593.)

This then is an account not only of the encounter with Ott and Keyser but of all of Westerfield's contact with the police that day through the final encounter. Although there is no contention that Westerfield's statements and actions up to the

encounter with Ott and Keyser were involuntary in the legal sense, it is clear that subjectively he felt more and more restricted as evidenced not only by his increasing reluctance to cooperate, his increasingly constant queries about custody and attorneys, and by his later expressions of exasperation and fatigue in the midst of what was, objectively, an increasingly, and unremittingly, accusatory atmosphere. When he finally left the police station to go home, he was met with the unwelcome news from Detective Maler that he could not go into his house because the police were in the process of obtaining a search warrant. It was after this that Ott and Keyser came on the scene to accuse him even more bluntly, to interrogate him, and to obtain his signature on a consent-to-search form, which he gave unwillingly.

It must be kept in mind that when Maler barred Westerfield from his own house, informing him that a warrant was being obtained, there had been an entire day of what felt like police constraint even if it was not, legally, custodial restraint. That constraint became increasingly coercive, and a reasonable man would have understood Maler's announcement to mean that there was no contingency to the issuance of a warrant. As seen from the above, this warrant that was soon to issue, was invalid and without probable cause, and Westerfield's signing of the consent-to-search form presented to him thereafter cannot be deemed voluntary. (*Bumper* v. *North Carolina, supra,* 391 U.S. 543, 546-549.) The Fourth Amendment problem here cannot be obviated by a claim that Westerfield in any event consented to the search of his house that resulted in [describe].

E.
Concluding summary

One may sum up the previous argument. Without polygraph evidence, the first warrant obtained by the police on February 5, 2002 was without probable cause, and all subsequent warrants obtained in this case were the fruit of that poisonous tree. As to the polygraph evidence, it was shown that neither logic, legal precedent, or experience could justify its use as sufficiently reliable

information to support probable cause in accord with the standards of the Fourth Amendment. It was further demonstrated that the good faith exception to the requirement of probable cause did not apply here because the San Diego police were indeed aware of the deficiencies of the warrant and the unreliability of polygraph evidence. Finally, on the issue of consent, which Judge Mudd invoked as an alternative ruling on the Fourth Amendment suppression issue, it was demonstrated that, with respect to the [clarify which warrant/search/evidence this applies to], on the totality of the circumstances that Westerfield did no more than acquiesce to a show of false and coercive authority.

All this of course means that the evidence seized pursuant to the warrants issued in this case should have been suppressed. There is no need to catalogue the vast array of this evidence, but it includes the items which provided the DNA evidence, the trace evidence, and the computer evidence. Without this there was no case against Westerfield except for his statement to Detective Keene and to Paul Redden neither of which statement provided anything like sufficient evidence to convict him. There is no reasonable doubt that the Fourth Amendment error in this case was prejudicial, which of course means necessarily that respondent cannot show beyond a reasonable doubt that it was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) Westerfield's convictions must be reversed.

II.
WITHOUT THE ADDITIONAL PEREMPTORY CHALLENGES, AS REQUESTED BY THE DEFENSE IN THIS CASE, APPELLANT WAS NOT REASONABLY LIKELY TO HAVE OBTAINED A FAIR AND IMPARTIAL JURY, AND THE DENIAL OF THE DEFENSE REQUESTS IN THIS REGARD CONSTITUTED A VIOLATION OF DUE PROCESS

A.
Introduction: Nature of the Claim And its Federal Constitutional Status

Jury selection began on May 17, at which time questionnaires were distributed to 263 prospective jurors. (14 CT 3413; 5 RT 2113-2115, 2165; 5H RT 2178, 2187-2188.) At that time, defense counsel, Mr. Feldman, noting that a large number of those summoned for that day had failed to appear, requested that the number of peremptory challenges be increased in proportion to the number of truants. Judge Mudd denied the request, certain that there was a sufficient cross-section of the community present for purposes of this case. (5 RT 2142-2144.)

Later in the case, after the Jury Commissioner had gathered the precise statistics for the May 17 summons, the defense was allowed to make a record in connection with the request for more peremptory challenges. The 263 veniremen were the remainder of 5625 prospective jurors actually summoned: of the 5625, 530 had legally postponed their jury service; 3331 had legal excuses submitted in advance; 611 persons actually appeared, and of these, 347 were released for hardship excuses; 1268 prospective jurors summoned had simply ignored the summons and failed to appear. (40 RT 9254-9256.) This failure-to-appear rate was 22.5 percent. (40 RT 9258.) Thus, in terms of Mr. Feldman's request for a proportional increase in peremptories, this would mean 4 or 5 more peremptory challenges beyond the statutory 20 (Civ. Proc. Code, § 231) for selection of a petit

jury, and 1 or 2 more over the statutory 6 for the selection of 6 alternates. (Civ. Proc. Code, § 234.)

In any event, voir dire began on May 28, and by May 30 the defense had exhausted its twenty challenges. Before the jurors were sworn, co-counsel, Mr. Boyce, registered the defense dissatisfaction with the panel as constituted. He noted the multitude of defense challenges for cause denied by the court, and he requested, again, additional peremptory challenges. Judge Mudd also denied this request. (14 CT 3415, 3417; 6 RT 2215-2218; 8 RT 2951.)

The next day, during the voir dire of alternates, Mr. Boyce made a supplemental record to specify that the defense was particularly dissatisfied with Jurors Number 2, 4, 6, 11, and 12. (9 RT 3106.) Judge Mudd responded that if this was a third request for further peremptory challenges, the panel had already been sworn. Nonetheless, he declared that even if Mr. Boyce's supplemental representation had been timely, he still would have denied the request for additional challenges. (9 RT 3106.)

At issue, then, is the denial of the defense requests for additional peremptory challenges -- one made at the beginning of jury selection, and one made after the defense had exhausted its peremptory challenges in the voir dire of the petit jury.[65] It may be appropriate here to emphasize this as the nature of the claim; for one might recognize, at least in the second request for additional peremptories, the elements of a claim for erroneous denial of challenges for cause: namely the citation to unsuccessful challenges for cause; the exhaustion of peremptory challenges; the expression of dissatisfaction with the sitting panel; and

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[65] Mr. Boyce's supplemental record specifying which jurors the defense found unsatisfactory was in fact a belated part of the request for additional peremptory challenges made before the jury panel had been sworn the day before. *If* such specification is deemed to be a procedural requirement for preservation of the instant issue, it is clear from Judge Mudd's statements that a timely representation of which jurors the defense found unsatisfactory would have been futile. (See *People* v. *Abbaszadeh* (2003) 106 Cal.App.4th 642, 648; see also *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.)

the request itself for additional peremptory challenges to remove the unsatisfactory jurors. (*People* v. *Bittaker* (1989) 48 Cal.3rd 1046, 1087-1088; *People* v. *Raley* (1992) 2 Cal.4th 870, 904-905; *People* v. *Hamilton* (2009) 45 Cal.4th 863, 891-892.)

The two issues indeed overlap insofar as the erroneous denial of for-cause challenges forces the aggrieved party to resort to the expenditure of peremptory challenges, whose exhaustion then leaves the party without resources to remove an unsatisfactory juror. (*People* v. *Bittaker*, *supra*, 48 Cal.3rd at pp. 1087-1088; *People* v. *Yeoman* (2003) 31 Cal.4th 93, 114.) But the exhaustion of the statutory limit of twenty peremptory challenges can impose the same restrictive dilemma independently of whether or not any challenge for cause has been improperly denied; and a simple claim that the defendant should have received some peremptory challenges beyond the statutory limit is independently cognizable. (See *People* v. *Bonin* (1988) 46 Cal.3rd 659, 679; *People* v. *DePriest* (2007) 42 Cal.4th 1, 23-24; and *People* v. *Lewis* (2008) 43 Cal.4th 415, 490, 496.) The focus in this argument is on the independent impropriety of, and prejudice from, the denial of additional peremptory challenges, while in the next argument (see below p. 158), this denial of additional peremptories will be a subordinate part of the claim that for-cause challenges were improperly denied.

Further, the claim here of a due process violation in the denial of peremptory challenges also requires some prefatory explanation and emphasis, because the proposition that the erroneous denial of a peremptory challenge is without federal constitutional consequence is almost a jurisprudential cliché. (*Stilson* v. *United States* (1919) 250 U.S. 583, 586; *Ross v. Oklahoma* (1988) 487 U.S. 81, 88-89; *United States* v. *Martinez-Salazar* (2000) 528 U.S. 304, 307; *Rivera v. Illinois* (2009) 129 S.Ct. 1446, 1450.) Nonetheless, the incidence of external factors in a specific case can transfigure the constitutional balance to such an extent that the proposition must be qualified: "[T]he mistaken denial of a state-

provided peremptory challenge does not, *without more*, violate the Federal Constitution." (*Id.*, at p. 1454, emphasis added.)

This slight, two-word qualification reflects an important dividing line between state and federal concerns in jury selection procedures. The Fourteenth Amendment indeed accords broad deference to the States to set their own procedural rules regarding jury selection; it accords broad deference to the trial courts to apply or adjust these rules to the specific conditions of a given case; but federal constitutional intervention is appropriate when the procedures or their application threaten the fairness of the proceedings – a matter that is the concern of the Fourteenth Amendment. (*Ham* v. *South Carolina* (1973) 409 U.S. 524, 526; *Mu'min* v. *Virginia* (1991) 500 U.S. 415, 424-426; see also *Fay* v. *New York* (1947) 332 U.S. 261, 294 ["[T]he function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ."].)

In regard to the peremptory challenge as a procedure in general, its historical pedigree and modern universality in all Anglo-American jurisdictions has induced the United States Supreme Court to concede that at least "[o]ne could plausibly argue . . . that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges". (*Holland* v. *Illinois* (1990) 493 U.S. 474, 482, emphasis in original.) One cannot therefore seriously deny that in a specific set of circumstances, the peremptory challenge, or as here, the addition of peremptory challenges beyond the limited statutory number, may be necessary to assure the selection of a fair and impartial jury in accord with due process. (See *Skilling* v. *United States* (2010) 130 S.Ct. 2896, 2918, fn. 21.) Again, it is the "something more" that confers actual federal constitutional status on the peremptory challenge.

The "something more" can of course be the pretrial publicity surrounding the case. When that is the circumstance that raises the issue of due process in

regard to peremptory challenges, the question then becomes whether the record establishes that, unless the defendant received additional peremptory challenges, he was "reasonably likely to receive an unfair trial before a partial jury." (*People* v. *Bonin*, *supra*, 46 Cal.3rd 659, 679.) As will be seen from the following examination of the progress of events, from the disappearance of Danielle Van Dam at the beginning of February 2002 through the completion of jury selection at the end of May, the attendant, contemporaneous publicity was intense, was reflective of, and was provocative of a correspondingly intense public interest in this case to such an astonishing degree as to indeed raise the "reasonable likelihood [of]...an unfair trial before a partial jury" that warranted the grant of additional peremptory challenges.

B.
Pretrial Publicity

Media attention began within a day or two of Danielle Van Dam's disappearance. (15 RT 4323-4324, 4345-4345.) The case drew volunteers from all over San Diego to help with the search. (11 RT 3440-3441, 3445-3446, 3472-3474.) The public interest in this case certainly did not abate after Westerfield was arrested on February 22 or by the time he was arraigned on the criminal complaint on February 26 – the day before Danielle's body was discovered. (1 CT 1; 1 RT 1-2; 11 RT 3440, 3450.) On February 25, requests were filed by several local television stations for permission to broadcast the arraignment. An additional request was filed by the television show "America's Most Wanted", while permission to photograph the arraignment was sought not only by the local San Diego Union Tribune, but by AP, Reuters, and Agence France-Presse. (1 CT 4-19.)

On the day of arraignment, the defense made an oral motion for a protective order, or "gag order," because of problems arising from media attention and intrusions, such as a media request that the search warrants and supporting

affidavits, chock full of inadmissible evidence, be unsealed and made public. At that point, Judge Deddeh was not prepared to issue such an order. (2 RT 2-5.)

On February 27, 2002, the day Danielle's body was found, Judge Bashant, who had issued the main search warrant , granted the motion of the attorneys for The Copley Press, and ordered all of the warrants unsealed. In the face of vigorous objection from the defense, however, she agreed to keep the supporting affidavits themselves confidential and to allow the defense time first to submit further authorities and argument. (2 RT 9-12, 28, 30.) In the course of this ruling, Judge Bashant made a statement that opens a window on the intensity of the community's emotions surrounding this case.

As Ms. Cummins, the attorney for The Copley Press, invoked the First Amendment and argued that the "public should not be delayed in obtaining information" about this case (2 RT 30), Judge Bashant expressed her sympathy:

> "And I understand your point, and I agree that it is very important, particularly in criminal proceedings. The cases discuss the community therapeutic value, and I can't think of another case that has more community therapeutic value in San Diego than this one." (2 RT 30.)

Although ultimately Judge Bashant had to give some deference to the demands of due process over any doctrine of public catharsis inhering in the First Amendment (2 RT 30-31), the judge's remarks nonetheless provide a vivid measure of the public pressure impinging on the court proceedings in this case.[66]

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[66] As it turns out, the warrants were not unsealed, at least pretrial. The defense filed a writ against Judge Bashant's order on March 4, 2002, and although the Court of Appeal upheld the order in a written decision issued on May 3, this Court, pursuant to the defense petition for review filed on May 7, stayed the Court of Appeal decision. Although review was eventually denied by this Court,

On March 5, the defense filed a written request for a gag order, and attached to the motion a number of newspaper articles and reports on the case. (1 CT 47.) Like Judge Bashant's statement, these articles too provide a window into the nature of the community interest in this case, not merely because the facts of the case were being reported, but also because, and perhaps especially because, anonymous government officials seemed drawn to the notoriety like moths to a flame.

An article from the San Diego Union Tribune spoke about how other jail inmates were harassing Mr. Westerfield. The article explained, "Even among the criminal population, suspected pedophiles and child-killers are held in contempt and officials frequently separate them from other prisoners to prevent physical attack." When Mr. Westerfield arrived in jail, "he was greeted with shouted threats and curses." While being escorted to a third-floor jail cell, he had to run a gauntlet of verbal abuse from other inmates. "Sources in the Sheriff's Department," the article went on to report, "said some of the inmates held up copies of The San Diego Union Tribune containing his picture. On some of the papers, inmates had drawn a noose around Westerfield's neck. Other inmates scrawled messages on Westerfield's photograph describing how much they wanted to see him die." (1 CT 66.)

The article reported that Westerfield was taken aside, and it was explained to him, as "one Sheriff's Official said," that "'cows eat their own cud' . . . and that

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this occurred on June 26, which was well into the prosecution's case-in-chief, which presented problems related to the issue of jury sequestration. (See below, pp. 198-199.)

In denying review, this Court ordered the Court of Appeal decision depublished. The procedural information in the preceding paragraph is available partly on the record of appeal in the instant case (see 5E RT 1864; and 14 CT 3451), and is fully set forth in court records in case number D039640 in the Court of Appeal, and in case number S106505 in this Court. It is requested that this Court take judicial notice of these records. (Evid. Code, §§ 452(d)(1) and 459(a).)

accused killers of children are considered the cud. 'When you have an inmate like that, if that guy gets sentenced to life imprisonment, it could be worse than death,' one official said. [¶] 'He would be living on pins and needles the rest of his life. There is honor among thieves. And child-killers are considered the lowest of the low even in jail.'" (1 CT 66.)

Another article from the Union Tribune recounted the details of the police investigation beginning with the first 911 call on February 2. The article related Westerfield's version of his travels. "'His time line never made any sense, the inconsistencies were glaring,' a detective said." (1 CT 67.) From the article one also learned that Westerfield was cooperative "[a]t first"; that the Van Dams passed the lie detector test, as "[a]uthorities said"; but that "they [also] said" that "Westerfield failed . . . ." (1 CT 67.) The article described further how the police were certain that the blood on the clothes seized from the cleaners was that of Danielle Van Dam. (1 CT 67.)

Still another article from the Union Tribune had the headline: "Kidnap case opens doors to a secret world built on sexual fantasy." These were the first two paragraphs:

> "David Westerfield is a twice-divorced design engineer who was little noticed in his suburban Sabre Springs neighborhood except when he washed his motor home or repaired his cars in his driveway.
>
> "Yet, prosecutors say, Westerfield had another side that none of his neighbors knew about. Police searching his home in connection with the disappearance of 7-year-old Danielle Van Dam say they found child pornography. Official say Westerfield kidnapped Danielle for sexual purposes, then killed her." (1 CT 68.)

The rest of the article reported the results of the author's consultation with experts on the question of pedophilia. The author's high-minded purpose was to answer

the question for the public: "Could Westerfield, 50, have been a pedophile who hid his sexual interest in children for years?" (1 CT 68.)

There were further articles attached to show the extent of the public interest in the case. Between February 23 and March 1, 2002, there were six stories about the case in the New York Times (1 CT 69); five stories in the Chicago Tribune (1 CT 71); five stories in the Sacramento Bee (1 CT 73); several stories in the San Francisco Chronicle (1 CT 76); several stories in the Orange County Register (1 CT 77); stories in the Los Angeles Times (1 CT 99); and stories broadcast by MSNBC, CNN, and Fox News. (1 CT 93, 95, 97.)

Judge Domnitz, who was assigned to handle the preliminary hearing, was indeed bothered by the leaking of inadmissible evidence, such as the lie detector results, and did issue a gag order on March 8. (1 CT 142-144; 3 RT 57-59; 1 PX RT 10.) "There has been," he recounted in the order, "substantial pretrial publicity in this case. There have been media reports, allegedly from law enforcement sources, detailing clearly inadmissible evidence, giving conflicting and confusing reports of the 'evidence,' and discussing the defendant's guilt or innocence in detail. If allowed to continue it would violate defendant's Sixth Amendment rights and prevent him from receiving a fair trial." (1 CT 143.) However, Judge Domnitz also issued an order allowing the preliminary hearing to be televised. (1 CT 140-141; 14 CT 3377.)

The preliminary hearing took three days, March 11, 12, and 14. (14 CT 3378, 3380-3381.) An information was filed on March 22. (1 CT 174-175.) On March 28, 2002, the case was assigned for all purposes to Judge Mudd, and a trial date of May 17 was set. (3 RT 602.) On April 2, 2002, the defense filed a "Pitchess" motion[67], seeking personnel records of the various detectives involved in the detention and questioning of Mr. Westerfield. (1 CT 193-219.) The filing of this motion generated a surge of frenzy in the media. As Judge Mudd described

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[67] *Pitchess* v. *Superior Court* (1974) 11 Cal.3rd 531.

it a week later on April 9, when Mr. Dusek, the prosecutor, himself felt obliged to calendar an in camera meeting to discuss sealing all future motions (4 RT 609-610), because "the media has just been going ballistic." (4 RT 610.) His proposal to seal future motions found no opposition. (4 RT 610-612, 614-616, 631.) Judge Mudd also ordered that Judge Dominitz's gag order continue. (4 RT 616.)[68]

In open court on April 18, the attorneys for the media were allowed to argue against the protective orders issued by Judge Mudd. In regard to the sealing of motions, Judge Mudd abided in his decision. The right of both sides to a trial conducted in this community by a fair and impartial jury outweighed any public right or interest in the records that were to be sealed. (4 RT 701-702.) Judge Mudd adduced the *Pitchess* motion as a good example of what was happening. Such a motion was a simple and straightforward procedure; but as soon as it was filed by the defense, "almost a celebration, in which numerous, I will refer to them as talking heads in our community became involved, and a simple *Pitchess* motion became an extensive debate regarding everything from the conduct of Mr. Westerfield to the conduct of the police. And this is all done before the People even have a chance to file a response." (4 RT 702.)

Judge Mudd continued:

> "This overriding interest supports conditionally sealing the pretrial motions until the start of the hearing on May 6th. And I want to emphasize the fact that this is a conditional sealing in that they are only being sealed until the start of the hearing on May 6th, when they

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[68] But the leaks continued also. The defense, on April 3, had filed a writ in the Court of Appeal to obtain court-appointed status for Mr. Feldman and Mr. Boyce. (See *Harris* v. *Superior Court* (1977) 19 Cal.3rd 786.) The writ had been filed under seal, and a decision granting court-appointed status issued on April 10, 2002, under the caption of "Doe v. Superior Court". On Saturday, April 13, 2002, a front-page article appeared with the headline: "Westerfield to receive public aid," and the informant was from the county administration. (4B RT 663-671; 4C RT 689-690.) Appellant requests judicial notice of the court records in Court of Appeal case number D039797. (Evid. Code, §§ 452(d)(1) and 459(a).))

will be made available. At that time, however, the motions and the responses will both be available, so that if the media wants to fairly report the two sides, they are welcome to do that. But as I learned and as counsel learned from the filing of the Pitchess motion, that is not what is going to happen. What is going to happen is every time a motion is filed, it's going to be plucked, reported, and the talking heads are going to go out there and comment.

". . . .

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

The reasoning was the same as that supporting the gag order. Noting that the trial, like the preliminary hearing, was to be televised, Judge Mudd saw no prejudice to the media from the continuation of this order: "The pervasive and I've referred to it as a tsunami of media attention to this case, makes it very unique to this community. And as a result, I find no prejudice to the media, and we are certainly not depriving the public or the media or anyone else of access to the courtroom when the trial is conducted. But until that time, the order remains in effect." (4 RT 707-708.) Indeed, on the request of the defense, Judge Mudd extended the order to include county employees and Judge Mudd's own staff. (4 RT 713.) (See above, fn. 68.)

Judge Mudd then re-affirmed that there would be no cameras allowed in the courtroom pre-trial and extended the ban to the hallways as well:

"In addition to that, I have to admit that I have had what is probably the most unpleasant experience this Court has ever had

with media on the day I was assigned this case. I was in trial. I had a jury and alternates; I had a witness on the stand. I was called off the bench to be advised that I was being assigned this case, and my marching orders were basically when the lawyers came down, please recess your trial, do your scheduling work and go back.

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

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

On April 30, in in camera proceedings, the defense brought to Judge Mudd's attention the publicity generated by the story of another child abduction case. The Van Dams were in the news relating the new case to their personal experiences. This, in the view of the defense, was a violation of the gag order. Judge Mudd was not certain whether talking about emotions was such a violation, but asked the prosecutor to contact the family and relay to them that the Court was concerned about them being in the public eye. The prosecutor, Mr. Dusek, agreed to do this. (4I RT 869-871.)

Earlier, on April 25, the defense had filed a request that the motions remain sealed beyond the May 6 date and that the hearings on these motions also be closed to the media and public until it was determined that the evidence at issue in these motions was ruled to be relevant and admissible. (3 CT 652 *et seq.*; see also 4H RT 833-836.) Judge Mudd, on May 7, agreed that this was appropriate, despite the protests of Ms. Cummins, the attorney for the media, in response to whom, Judge Mudd stated:

"All right.

"Well, I intend to do it. I've explained this before. But I think I have a perfect example in this community. I mentioned in passing a motion that would be kept under seal, and that motion dealt with lifestyles.[69] I left the community to go to San Jose for a weekend, and on my return, in Sunday's paper, on the front page is an article about swinging and lifestyles and how it's going to be an issue in the Westerfield case. Yesterday on the evening news swingers are being interviewed about their lifestyle and their way of life.

"The media in this community apparently cannot exercise restraint is my humble opinion. The two lawyers or the two sides in this court are going to attempt to find twelve citizens and six alternates of this community to try this case in this community where they want it tried by citizens who can try it based only on the evidence presented in this courtroom.

"And the only way that I have been able to make some modicum of effort to keep that is to keep under seal certain issues that it appears to the court may never see the light of day in trial, one of which may very well be the issue that has been bandied about for the last two days in the media to some great glee." (5 RT 993-994.)

For the next two weeks, in camera hearings on the various motions proceeded. (14 CT 3400-3410.) On May 15, two days before the venire was to gather in court, it was decided, in response to media inquiries (5B RT 1413-1415), that while jury selection would be public, the proceedings would not be televised

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[69] This was a motion filed by the prosecution on April 15 to prevent the defense from introducing evidence regarding the Van Dams' "lifestyle" in trading sexual partners. (2 CT 318-321.) On May 2, in open court, Judge Mudd announced that one of the motions to be kept under continued seal was one filed by the People entitled "'Points and Authorities in Support of Motion to Preclude Cross-examination About Lifestyles.'" (4 RT 932.)

or even photographed, and the prospective jurors would be allowed anonymity through the use of numbers instead of names. (5 RT 2053-2060.)

This then was the public atmosphere in which jury selection, and, as will be seen, the entire trial, took place. The defense accordingly took measures to protect itself under the circumstances, beginning with a motion entitled "Motion to Sequester Jury After Panel is Sworn In Lieu of Motion for a Change of Venue" (3 CT 581), which the parties and court agreed could be deferred pending actual voir dire (5 RT 974-977); there was a defense motion for discovery of juror information possessed by the prosecution, which information the prosecutor agreed to share to the extent he himself used it (5 RT 977-978); and then there was the request made by Mr. Feldman on May 17 to increase the number of peremptory challenges in proportion to the number of failures-to-appear, and the request by Mr. Boyce for more peremptory challenges just before the panel of twelve jurors was sworn. (See above, pp. 117-118.)

This account of the progress of the case gives some idea of the community tensions impinging on the court proceedings because of the intense interest they provoked. It remains to examine the actual jury selection itself to see how the public atmosphere actually manifested itself there and justified the defense claim that additional peremptory challenges were necessary.[70]

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[70] It may be appropriate here to briefly address an objection some may have conceived in reading this account of pretrial publicity: that the solution to the problems arising from such publicity was a change of venue or a waiver of time, or both. The response, which may be elaborated if respondent adopts this point, is that a defendant in a criminal case is not required to surrender any of his federally guaranteed constitutional rights in order to vindicate another federally guaranteed constitutional right. (*Simmons* v. *United States* (1968) 390 U.S. 377, 393-394; *McGautha* v. *California* (1971) 402 U.S. 183, 213.) The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ." To require immediate trial in San Diego before a fair and impartial jury is not a case of having one's cake and eating it.

C.
Quantitative and Qualitative Survey of Venire in Relation to Pretrial Publicity

1. Quantitative assessment

In examining the voir dire, one may usefully begin with the numbers to see in a general sense how the case affected the venire. (See *People* v. *Bonin*, *supra*, 46 Cal.3rd 659, 675.) Of the 263 veniremen given questionnaires (5H RT 2178-2188), 261 filled them out.[71] Of the 261 remaining veniremen, only three, or 1 percent, claimed to have no awareness whatsoever about this case. (19 CT 4767, 4769; 26 CT 6479, 6527.) One of these was dismissed for cause because of her opposition to the death penalty and her declared inability to impose this penalty. (19 CT 4771-4776; 6 RT 2462.) The second was dismissed for cause because of language problems. (26 CT 6476-6477; 9 RT 3128.) And the third was dismissed for cause because she had a four-year-old daughter and "it's kind of hard to be a fair person for this case for me, speaking as I am a mom, and it's really hard to look at things like that and not see your own child's face." (9 RT 3142, 3143.). The remaining 258 veniremen, or between 98 and 99 percent, were all aware of the case, and many were aware in great detail. This means of course that *all* the veniremen who were eventually sworn as jurors and alternates knew about the case.

Juror number 1 had watched Brenda Van Dam on television testifying at the preliminary hearing. She[72] had seen news about the case on television, in the Union Tribune, had heard about it on radio and on talk radio shows, and had talked about the case herself with her coworkers. (15 CT 3541; 6 RT 2218-2219.)

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[71] One prospective juror refused to fill out the questionnaire in protest against the death penalty and was dismissed for cause (20 CT 4806; 6 RT 2471); the other had simply stopped at question 32 on the 123-question-questionnaire (30 CT 7503-7518), but jury selection ended before he could be called up for voir dire.

[72] In referring to sworn jurors and alternates, the proper gender of any pronoun used has been determined circumstantially from the record, since the names have remained confidential.

What she knew about the case was "the arrest, the search, the mother's testimony," which she knew from watching the preliminary hearing on television. (15 CT 3541.) Juror number 2 had seen television news about the case and had heard about it on the radio. He recognized Mr. Westerfield and trial counsel from television. (15 CT 3626, 3635, 3637.) Juror Number 3 had heard about the case on television, on radio, and had read about it in the Union Tribune, and in the New Yorker. (15 CT 3685.) Juror Number 4 had heard about the case on television, had read about it in the newspaper, and had chatted about it with friends. (15 CT 3589.) Juror Number 5 recognized Westerfield and Mr. Dusek from television. (15 CT 3563.) She had heard about the case on radio and on the talk radio shows, and she might have had conversations about it at work. (15 CT 3565.) Juror Number 6 recognized Westerfield from television. Six had heard about the case on television, knew that the little girl was abducted from her home and found dead, and that the neighbor was accused. (15 CT 3779, 3781.)[73],

Juror Number 7 had heard about the case on television and had read about it in the newspaper and in Newsweek. (15 CT 3661.) Juror Number 8 recognized Mr. Westerfield from television. (15 CT 3611.) She had seen news about the case on television, heard it on the radio, and had talked about the case with family and co-workers. She knew that a girl was taken from her home and that a neighbor was being charged with her murder. (15 CT 3613.) Juror Number 9 heard about the case on television and had talked about it with friends and family members. (15 CT 3733.) Juror 10 recognized Westerfield from television, had heard about the case on television and on radio talk shows, and had talked about it with co-workers. The girl had been kidnapped in North County, killed, and then her body was dumped in El Cajon. (15 CT 3803, 3805.) Juror Number 11 recognized

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[73] In the transcript of jury selection, the prospective jurors were designated by their number in the venire. Here, appellant refers to them by their ultimate number as an empaneled juror or alternate juror. There is a conversion chart at 40 CT 9873. One might note that Juror Number 1 was also, by coincidence, Venireman Number 1.

Westerfield and his counsel from television and had heard about the case on the local news. (15 CT 3707, 3709.) He stated that he did not know a lot about the case, but it was clear from what he listed as known that he was familiar with the sum and substance of the prosecution's case: "Westerfield is charged w/murder based on DNA evidence found in his RV? Clothes? Some porn. Watched PX on TV." (15 CT 3709.) Juror Number 12 recognized appellant and his attorney from television, had learned about the case from television and radio, and had talked about the case with his wife. (15 CT 3635, 3637; 7 RT 2776.)

Alternate number 13 learned about the case from television, hearing friends giving their opinions, and overhearing other people's discussions about the case. (15 CT 3829.) Alternate number 14 recognized everyone from the newspaper and television, where he also learned about the case. He also heard "water cooler type talk" about it. (15 CT 3947, 3949.) Alternate Number 15 heard about the case on television and read about it in the newspaper. (15 CT 3925.) Alternate number 16 learned about the case from the television, radio, newspaper, and from "watercooler conversations" he overheard. (15 CT 3901.) Alternate number 17 recognized Westerfield from television, learned about the case on television, radio, on radio talk shows, from newspapers, and from co-workers. (15 CT 3875, 3877.) Finally, Alternate number 18 had seen Westerfield on television and had read about him in the newspaper. (15 CT 3851, 3853.)

This brief survey simply confirms the universal awareness of the case, remarkable only insofar as this was achieved in a large metropolitan area like San Diego where one would expect to find at least a substantial minority of persons exhibiting that healthy oblivion that attends people minding the salutary business of their own lives. But what is more striking and remarkable here is not simply the result of media saturation of the community, but the community's reciprocating interest in the case as manifested by the number of sworn jurors and alternates who had not merely read or heard about the case, but talked about it with other individuals in the community. Of the sworn panel of twelve, six (nos.

4, 5, 8, 9, 10, and 12) had either talked to others about the case or had heard others talk about the case. Of the six alternates, four (nos. 13, 14, 16, and 17) had talked about the case with others.

If one examines the remaining venire of 240 persons (258 minus the 18 sworn jurors and alternates), the questionnaires reveal that multiple media sources were the rule for knowledge about this case; and where there was only a single source, it was most commonly television. Furthermore, of these 240 veniremen, 136 had talked about this case with others. This constitutes 57 percent of the venire without the sworn jurors, and when one tallies up the percentage of the total venire of 261, adding in the 6 jurors and 4 alternates noted above, the percentage comes down only one point to 56 percent. Again, this is not merely the percentage of people who had heard about the case, --- that figure is between 98 and 99 percent, -- but it is the percentage of people who had been *talking* about the case. If the venire represented a cross-section of the community, then the intensity of community interest in the case was clearly in proportion to the intensity of the media attention, which, as Judge Mudd described it, was a "tsunami."[74]

Who were the people to whom prospective jurors in the community were talking? They were talking to their spouses, their families and relatives, their

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[74] Record citations to the veniremen who had talked about the case are as follows: **16 CT**: 3973, 4021. **17 CT:** 4118, 4167, 4191, 4215, 4239. **18 CT:** 4337, 4409, 4505, 4529. **19 CT** 4721. **20 CT** 4937, 4961, 5033. **21 CT:** 5057, 5081, 5105, 5153, 5178, 5226, 5298. **22 CT:** 5322, 5346, 5419, 5467, 5515, 5539; **23 CT:** 5587, 5661, 5685, 5759, 5783. **24 CT:** 5879, 5975, 6023, 6047. **25 CT:** 6095, 6119, 6143, 6191, 6311. **26 CT:** 6359, 6431, 6455, 6551. **27 CT:** 6599, 6623, 6671, 6695, 6719, 6743, 6767, 6791. **28 CT:** 6887, 6911, 6935, 7031. **29 CT:** 7079, 7103, 7127, 7175, 7247, 7271. **30 CT:** 7389, 7413, 7437, 7461, 7485, 7535, 7559. **31 CT:** 7607, 7655, 7679, 7751, 7822, 7846. **32 CT:** 7870, 7907, 7966, 8038, 8086, 8158, 8182, 8206. **33 CT:** 8278, 8327. **34 CT:** 8375, 8423, 8447, 8495, 8567, 8591. **35 CT** 8639, 8663, 8687, 8711, 8735, 8783, 8807, 8831. **36 CT:** 8927, 9047, 9095, 9119. **37 CT:** 9143, 9167, 9191, 9215, 9288, 9312, 9336, 9360. **38 CT:** 9481, 9529, 9577, 9601, 9625. **39 CT:** 9649, 9769, 9793, 9817. [CHECK AGAIN]

friends and neighbors, their co-workers and customers.[75] They talked to "just about everybody" they "kn[e]w"[76], or to "no one in particular."[77] They talked about the case to waitresses in restaurants[78] and to strangers on the bus.[79] They talked on the golf course[80], at church[81], and in school to their professors and classmates.[82] They talked to the repairman[83], the babysitter[84], to their roommates[85], to their kids' teachers[86], to "Stephanie" and "Tod"[87], and to "Bob".[88] In short, this

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[75] **16 CT** 3973, 4021; **17 CT** 4167, 4191, 4215, 4239; **18 CT** 4337, 4409, 4481, 4505, 4529; **19 CT** 4721; **20 CT** 4937, 4961; **21 CT** 5057, 5081, 5105, 5153, 5178, 5226, 5298; **22 CT** 5322, 5346, 5419, 5467, 5515, 5539; **23 CT** 5587, 5685, 5759, 5783; **24 CT** 6023, 6047; **25 CT** 6095, 6119, 6143, 6191, 6311; **26 CT** 6359, 6431, 6455, 6551; **27 CT** 6559, 6623, 6671, 6695, 6719, 6743, 6767, 6791; **28 CT** 6887, 6911, 7031; **29 CT** 7079, 7103, 7217, 7175, 7247, 7271; **30 CT** 7389, 7413, 7437, 7461, 7485, 7535, 7583; **31 CT** 7607, 7655, 7679, 7751, 7822, 7846; **32 CT** 7870, 7966, 8038, 8086, 8158, 8182; **33 CT** 8206, 8278, 8327; **34 CT** 8375, 8423, 8447, 8495, 8567, 8591; **35 CT** 8663, 8687, 8711, 8735, 8783, 8808, 8831; **36 CT** 8927, 9095, 9119; **37 CT** 9143, 9167, 9191, 9215, 9288, 9312, 9336, 9360; **38 CT** 9481, 9529, 9577, 901, 9625; **39 CT** 9649, 9769, 9793, 9817.

[76] 24 CT 5879

[77] 20 CT 5033; 23 CT 5661; 24 CT 5975; 30 CT 7559.

[78] 31 CT 7655.

[79] 28 CT 6935.

[80] 27 CT 6695.

[81] 26 CT 6551.

[82] 25 CT 6311; 30 CT 7461; 35 CT 8639.

[83] 32 CT 7907.

[84] 21 CT 5081

[85] 23 CT 5587; 36 CT 9047

[86] 30 CT 7485

was not a case whose publicity provided vaguely entertaining background noise to the serious day-to-day business of people's lives; it was a case that engendered interest and provoked emotion if not reflection.

If one stays with numbers, it is useful to count the number of for-cause challenges granted to the parties in the actual course of voir dire. Of a venire of 263 people, the court granted 13 challenges for cause issued by the defense[89], and 27 sua sponte or stipulated dismissals for cause.[90] This is a total of 40 for-cause dismissals or about 15 percent of the venire. If one adds in the 4 challenges granted on the prosecution's motion[91], the figure becomes 16 to 17 percent. Thus, about a sixth of the venire manifested biases so apparent as to appear hopelessly prejudiced to the court and at least one of the parties, if not both.

But the more realistic number must take into account the *denied* challenges for cause. For the purposes of gauging the temperament of the venire, these denied challenges cannot be denigrated as mere partisan expressions. Although the trial court represents neutral interests, the resolution of such challenges is never clear cut (*United States* v. *Martinez-Salazar*, *supra*, 528 U.S. 304, 319, Scalia, J. conc.), and often involves "shades of gray." (*Id.* at p. 316, maj. opn.)

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[87] 23 CT 5612

[88] 16 CT 3973

[89] 6 RT 2291, 2324; 7 RT 2538-2539, 2590, 2692-2693, 2709, 2775; 8 RT 2842, 2866, 3038, 3054, 3082; 9 RT 3128.

[90] 6 RT 2266, 2299, 2309, 2315, 2406, 2411, 2412, 2445-2446, 2462, 2470, 2471; 7 RT 2490, 2533-2534, 2766; 8 RT 2797-2798, 2887; 8 RT 3030-3031; 9 RT 3143, 3158.

[91] 7 RT 2559; 8 RT 2831; 8 RT 3012; 9 RT 3163.

Thus, it is appropriate to take into consideration the fact that another 17 challenges for cause issued by the defense were denied by the court[92], as well as the 8 denied challenges issued by the prosecution.[93] This brings the percentage up to about 26 percent as representing those with which one party or another was dissatisfied in this case.

One is also justified in taking into account the number of peremptory challenges exercised. For these are the means by which the parties themselves are given the power to eliminate " 'the extremes of partiality' " short of cause, yet inimical to a fair trial. (*Holland* v. *Illinois*, *supra*, 493 U.S. 474, 484.) Thus, if one adds in the twenty peremptories the defense had exhausted in choosing the petit jury in this case, and the 18 exhausted by the prosecution, as well as the 5 and 6 exhausted by the defense and prosecution, respectively, in choosing alternates (see 9 RT 3108-3111, 3174-3175), this brings the total challenges (peremptory and for-cause) to 118, or about 45 percent of the venire, or almost half.

2. Qualitative assessment

But the real story is never, or never completely, in numbers. One must also take a sampling of the attitudes expressed during jury selection by the prospective jurors themselves. It will be useful to begin with examples of those who openly declared their bias and regarded it as fixed and immoveable. Although they were all dismissed for cause, they help illuminate the character of the rest of the venire. For when one considers that most people do not see themselves as unfair or biased (see *People* v. *Riggins* (1910) 159 Cal. 113, 120), those who do declare themselves as such represent a kind of extreme that helps define where the *relative* mid-point lies. If this relative point is too far from the equitable mid-point, then there is a problem that needs remedy.

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[92] 6 RT 2248, 2257-2258, 2307, 2335-2336, 2398-2399, 2405, 2422, 2428; 7 RT 2566-2567, 2602, 2732, 2753; 8 RT 2876, 2895, 2929, 2940, 3060.

[93] 6 RT 2299, 2393, 2436, 2445; 7 RT 2523-2524, 2532-2533, 2583-2584, 8 RT 2849.

Venireman 24 was a 42-year-old married woman with a three-year-old daughter. (18 CT 4494-4495.)[94] Both she and her husband worked, and she had held her job with the county for fourteen years. (18 CT 4494, 4496.) When asked on the questionnaire whether her attitudes toward the criminal justice system *in general* would influence her in favoring the prosecution or defense, she wrote, "prosecution – physical evidence is huge -- & he sounds like he is a sick person." (18 CT 4500.) She then checked off her disagreement with the proposition that "[a] defendant arrested for murder is presumed innocent" (18 CT 4500) and that "[a] defendant is innocent until the State proves guilt beyond a reasonable doubt." (18 CT 4501.) Later in the questionnaire, she wrote that "kiddie porn" could affect her ability to be impartial in this case. (18 CT 4504.) She stated also that she believed that Westerfield was guilty and that she could not put this opinion aside. (18 CT 4505-4506.) She confirmed her bias in court during group voir dire, openly renouncing the presumption of innocence in this case in front of others who pledged the more commonplace loyalty to it. (6 RT 2366.) She was excused by the court sua sponte. (6 RT 2406.)

Number 25 was a 48-year-old single man. He had graduated college with a B.A. in sociology, had been a helicopter mechanic in the Navy, and was now working for the city. (18 CT 4518-4522.) He too gave a specific answer about his general attitude toward the criminal justice system: "I believe there is already strong evidence of guilt or there probably would be [*sic*] a trial to begin with. Physical evidence is powerful." (18 CT 4524.) He registered his agreement with the presumption of innocence and proof beyond a reasonable doubt. (18 CT 4524-4525.) He had a negative view of pornography, but it did not provoke any strong prejudice in him. (18 CT 4528.) Nonetheless, in the section on publicity, Number 25 also wrote, "I already think he's guilty because of the blood in his mobile home. I think he's guilty of possessing child pornography found on computers."

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[94] The sex of the prospective juror is determined from the tables in CT 40.

(18 CT 4529.) In voir dire, he said he had heard a good deal about the case, and that the news media had led the public to believe that Westerfield was guilty. "And I feel," he said, "he'll have to prove his innocence because he's already been shown to be guilty based on what the news media had reported." (6 RT 2368-2369.) Venireman number 25 was excused by the court. (6 RT 2407.)

Number 69 was a 56-year-old engineer, had been married for 33 years, and had a grown, married daughter. (22 CT 5432-5433.) On the questionnaire he registered his agreement with the presumption of innocence and proof beyond a reasonable doubt (22 CT 5438-5439), to which he was "philosophically" committed (22 CT 5442); nonetheless, he thought "that in high profile/high publicity crimes (especially) and murders, arrests are made only after detailed info gone over by police systems/leadership + DA leadership to insure can go to trial." (22 CT 5438.) Thus, later he wrote in the publicity section of the questionnaire: "I think Westerfield is guilty based on published inaccuracies in his story and alibi and due to circumstantial/physical evidence (hair, blood, DNA)." (22 CT 5443.) When asked if he could put aside this opinion, Number 69 wrote, "I already have formed the opinion that he is guilty of murder and should be given the death penalty." (22 CT 5443.) 69 was removed by stipulation. (7 RT 2487, 2635.)

Before proceeding to more examples, some comment is appropriate at this point. This Court once observed: "One of the striking instances of the frailty of human nature is the fact that a prejudiced person usually believes himself fair-minded and impartial." (*People* v. *Riggins*, *supra*, 159 Cal. 113, 120.) This apothegm into which so much judicial experience has been compacted seems to find some refutation in these examples. The moderate and restrained tones in which the prospective jurors expressly declared their preconceived notions to be immoveable and fixed seem to betoken an unusual insight into one's own biases and prejudices – but this is not the case. What it betokens is more the likelihood that these prospective jurors believe that their biases and prejudices *are* the fair and impartial position. What is disturbing in this, from the point of view of a

party choosing a jury from the remaining venire, is the lack of any feeling of pressure to qualify or restrain the admission that an actual trial was superfluous. In other words, there was, among some veniremen in this case, no feeling of public or, as it were, cultural pressure to at least acknowledge their preconception as a prejudice at odds with the most basic guarantees of the criminal justice system, and this insouciance could only have been nurtured in a public atmosphere that was broadly interested in the case and broadly hostile to Mr. Westerfield.

Not every preconception was moderately expressed. Venireman 43, a 19-year-old single woman, between jobs and schools (20 CT 4878-4880), registered "strong" disagreement with the presumption of innocence, though she conceded agreement with proof beyond a reasonable doubt. (20 CT 4884-4885.) Her questionnaire, however, exuded indignation and strong emotion. "He is guilty. No ifs, ands or buts," she wrote in response to the question of whether she had any prejudice that might influence her ability to be impartial. (20 CT 4887.) When asked if she could return a guilty verdict facing the defendant in open court, she answered, "I would love to see his face when he is proven guilty." (20 CT 4888.) "HE IS GUILTY!" was the answer to whether she could return a not-guilty verdict if the state had failed to prove its case beyond a reasonable doubt. (20 CT 4888.) "He is guilty, guilty, guilty!" she wrote when asked if she had formed any opinion from the publicity in this case. (20 CT 4889.) In regard to the death penalty, Venireman 43 stated, "I think only people who should die are murderers. Slow and painfully." (20 CT 4891.) Needless to say, Venireman 43 was dismissed by stipulation of the parties. (7 RT 2487, 2490.)

Then there were those who admitted preconceptions or strong biases, but who declared they could put them aside to judge the case fairly and impartially based on the evidence.

Number 78, a 34-year-old married woman, was one of these. (23 CT 5600-5601, 5612-5614.) She registered "strong" agreement with both the presumption of innocence and proof beyond a reasonable doubt. (23 CT 5606-5607.) But she

admitted that she had a preconceived belief in Westerfield's guilt because of his involvement with child pornography, and she was released for cause by the stipulation of the parties. (23 CT 5609-5611; 7 RT 2763-2766.) Number 13, a 42-year-old married woman with three children from ages 10 to 17, who worked as a paralegal (17 CT 4228-4229), was another who declared herself capable of fairness and impartiality, though she conceded that "it would be difficult." (17 CT 4239-4241.) She was strongly influenced by Westerfield's involvement in pornography (17 CT 4238) and "strongly believe[d] defendant is guilty." (17 CT 4239.) She was released for cause on the stipulation of the parties, but the consolation the defense might derive from the prosecutor's agreement that she could be dismissed is somewhat offset by the fact that Number 13 had also declared: "I am Catholic + do not believe in the death penalty." (17 CT 4238.)

Number 81, a 40-year-old patent agent for a large law firm, whose husband was a molecular biologist, and who had a five-year-old daughter (23 CT 5650-5653), registered "strong" agreement with the presumption of innocence and proof beyond a reasonable doubt (23 CT 5656-5657), and declared herself capable of suspending judgment pending the presentation of proper evidence in court. (23 CT 5661-5662.) But number 81 could not think about this case "without crying because of the injury to the young girl" (8 RT 2826-2827; 23 CT 5659), and she was released by a stipulation (8 RT 2831), --- a stipulation also perhaps made possible by her opposition to the death penalty. (8 RT 2829-2830.)

The prosecution's motive is perhaps more clear-cut in the case of Number 72. Number 72 wrote, "Based on the blood stain and hair found at the mobile home, and based on the trip Westerfield made during she was [*sic*] missing, seems he's guilty." (22 CT 5491.) Number 72 said she could nonetheless place this opinion aside and discharge her duty as a juror in a fair and impartial manner. (22 CT 5492.) The "*seems* he's guilty" gave the prosecutor a fighting chance to save this juror, but he stipulated to her release nonetheless. (7 RT 2620, 2635.) "I am a

Christian," she wrote, "I disagree with death penalty because I feel no one should be accounted for another person's life." (22 CT 5490, 5493.)

For the most part, with the exception perhaps of venireman 43, these examples strongly suggest a venire in which there would have been an abundance of well-qualified jurors in a normal case, and certainly even in a high-profile case of the usual kind (i.e., one garnering an occasional headline, but receding relatively quickly into quiescence and perhaps even into obscurity). This is apparent also in the closer calls, in which some of the veniremen were dismissed for cause and some were not. These are "the shades of gray" (*United States* v. *Martinez-Salazar*, *supra*, 528 U.S. at p. 316) whose contrasts, again from the perspective of those trying to choose an impartial jury, are disquieting.

Number 68, who was released on a defense challenge for cause (7 RT 2709), wrote on his questionnaire that he was "not sure" he could be fair. (22 CT 5419, 5420.) He repeated this at voir dire, and explained that he had been on a jury before in a criminal case involving assault on a police officer. In that case, he had no reservations at all about his ability to be fair and impartial in evaluating only the evidence presented in court. But in the instant case, he indeed had serious reservations. (7 RT 2706-2707, 2709.)

Venireman 3, on the other hand, stated in his questionnaire that pornography "is sick" (16 CT 3996), and at voir dire found it difficult to say whether he could be fair or not in light of the pornography evidence to be presented. (6 RT 2251.) Judge Mudd denied a defense issued challenge for cause, and the defense exercised a peremptory challenge to this juror. (6 RT 2557, 2473.)

Similarly, Venireman 6 expressed doubt about whether he could be fair and impartial in the face of the pornography evidence. (6 RT 2298.) In this instance, the *prosecutor* issued the challenge for cause, though citing the pornography problem, which one would have thought was the concern only of the defense. The

court denied this challenge (6 RT 2299), and the prosecutor removed the venireman with a peremptory challenge. (6 RT 2472.)

Venireman 19 was a principal at a school in the San Diego Unified School District. She lived in Poway. In her questionnaire, she stated, "I cannot abide crimes against children. This might color my objectivity, although I consider myself fair." (18 CT 4383.) Later in the questionnaire she stated, "Children have been my life for 37 years. I do not think I could be fair and impartial in this instance." (18 CT 4383.) At voir dire, she affirmed these sentiments, adding that she had spent a great deal of her time as a school principal protecting children from abuse. (6 RT 2331-2332.) However, she ended up saying, "I honestly believe I am fair and impartial in this particular case. I'm not sure that my beliefs wouldn't color the case." (6 RT 2335.) Because of this, it seems, the defense challenge for cause was denied (6 RT 2335-2336), and she was eventually removed by a defense peremptory. (7 RT 2625.)

Venireman 28, on his questionnaire, when asked if he would like to be a juror in this case, answered no. He wrote in explanation, "I have children at home and was devastated at what happened to the little girl." (19 CT 4599.) In regard to his feelings about the death penalty, he wrote, "I have never participated directly in this matter, but if you kill children – well – eye for an eye." (19 CT 4603.) At voir dire, he asserted that the killing of a child is "horrendous" and deserves the death penalty. (6 RT 415.) He would, however, do his best to follow the law, but would still have a hard time being impartial. (6 RT 2416-2417.) A defense-issued challenge for cause was denied. (6 RT 2422.)

Venireman 73 represents a slight departure from the previous two examples, in that she was firm and clear that she could base her decision only on evidence presented in court, although there was quite a bit of "published evidence" against Westerfield. (22 CT 5515.) However, as she also revealed, she was the mother of a 19-month-old son. When news broke of Danielle Van Dam's kidnapping, Number 72 became afraid for her son, and she immediately drove

from her home in the Scripps Ranch area to Sabre Springs to see how far away it was. (7 RT 2725; 22 CT 5515.) She admitted that she probably favored the prosecution because of the "published information" (7 RT 2727); and she thought that crimes against children were especially appropriate for the death penalty. (7 RT 2728.) The defense challenge for cause was denied. (7 RT 2732.)

It becomes clear then, and would have been clear in the actual course of jury selection, that latent bias and prejudice were problems under the unusual circumstances presented by this case. The next two examples are almost paradigmatic for this problem and perhaps sum up the urgency of the matter.

Venireman 98 was a 48-year-old mother of three grown children, and married to a man of public prominence. (24 CT 5988-5989.) She "strongly" agreed with the presumption of innocence and proof beyond a reasonable doubt. (24 CT 5994-5995.) She had been on two juries in the past and was impressed with the fairness and good faith with which the jurors approached the task of making a judgment. (24 CT 5996.) The prospect of pornographic evidence provoked strong emotion in her, however. "I think it is disgusting and sick," she wrote. (24 CT 5998.) She asked rhetorically "Why would anyone have child pornography?" and then answered, "They must have something wrong with them." (24 CT 5997.) When asked if she could place her opinions to the side and be a fair and impartial juror, she wrote, "I think I could because I would like to think of myself as a fair person even though it might be hard." (24 CT 5999-6000.) But what was hard about it was not, as she affirmed in voir dire, the pornography. (8 RT 2928-2929.) Rather, as she wrote in answer to the question of whether or not she could return a not-guilty verdict if the state had failed to prove its case beyond a reasonable doubt, "Yes I could, but it might be hard *considering public pressure*." (24 CT 5998, emphasis added.) Thus, Venireman 98, married to a public figure, registered the public mood as demanding judgment and punishment of Mr. Westerfield. Judge Bashant had also perceived it in this way in her remarks on public catharsis. (See above, p. 122.) How many other members of the venire

felt it, whether consciously or not? Number 98 survived a defense-issued challenge for cause. (8 RT 2929.)

The final example is Venireman number 109, who personifies the problem of latent prejudice and juror self-deception, as well as the degree of serendipity involved in the discovery of such matters. He was a Viet Nam veteran with combat experience. At the time of trial, he had been married for thirteen years, and had a six-year-old daughter. (25 CT 2652-6253, 6256.) He had been employed by the same company for 22 years. (25 CT 6254.) He described his attitude toward law enforcement as "respectful" (25 CT 6257) and he was "strongly" committed to the presumption of innocence as well as the Fifth Amendment right against self-incrimination. (25 CT 6258-6259.)

He believed he could be an impartial juror, and wrote, "I delay decisions until I hear the whole story, then I try to cross-reference data." (25 CT 6260.) Asked about his feelings about jury service, he wrote, "It is an important duty, and a serious duty, especially in this particular case." (25 CT 6260.) He had previously been on two criminal juries, one in 1985, and one in 1995, and found the experience "favorable." "The deliberations," he wrote, "were tough but fair and thorough." (25 CT 6260.) When asked if he would like to be a juror in this case, he checked "Yes" and wrote, "I feel it is important to find the truth in this case." (25 CT 6261.) He did not have strong feelings about pornography nor would it affect his ability to be fair and impartial. (25 CT 6262.) If the state was unable to prove its case beyond a reasonable doubt, he could return a not-guilty verdict. "It will not," he explained, "serve Danielle or those who know her, to punish someone who might be innocent." (25 CT 6262.)

In regard to publicity, he knew something about the case in "outline" but not the details of the evidence. (25 CT 6263.) His family had attended one of the public memorials for Danielle. As he explained, "I feel sorrow, but this only makes it more important to find the truth." When asked if he had formed an opinion about the case, he wrote, "I open [*sic*] to arguments, but I feel Danielle's

death was not accidental. Beyond that I am undecided." When asked if he could decide the case on the evidence rather than on the publicity, he wrote, "First, I don't trust the media to give a full, accurate account, and rumors are reported, too. I can make my own conclusions based on the trial." (25 CT 6263, 6264, underscoring in original.) In regard to the death penalty, he declared that "[I]t's necessary, ultimate punishment in extreme cases." But he could "support" life without parole, "if that's called for." (25 CT 6265.) In response to the question, "Is there anything else that you feel the court should know about your qualifications as a juror?" he wrote, "I am committed to finding the truth, be it for or against the defendant." (25 CT 6270.)

On May 30, during voir dire, the prosecutor Mr. Dusek informed the court and the parties that he had received a call from Brenda Van Dam. While she was ice skating with her children in a public rink, a man came up to her, expressed his sympathies, and said he was a prospective juror in the case. Later she received from him a memorial contribution of $100. The man's name was on the check, and it belonged to Venireman 109. (8 RT 2790.)

When it was 109's turn that afternoon for voir dire, Judge Mudd asked him why he violated the admonitions not to become involved in the case. 109 explained that he had seen Brenda Van Dam at an ice skating rink and talked to her about a memorial contribution. (8 RT 3030-3031.) Judge Mudd asked him pointedly, "Well, I think it's safe to say that you can't be fair and impartial in this case, can you?" (8 RT 3031.) 109 denied this, asserting that although he may have violated the letter of the court's admonition, he did not violate its spirit "because a memorial is not related to the case" to which Judge Mudd replied, "I don't think this discussion is worth anything. It's not going anywhere." (8 RT 3031.) Venireman 109 was then released by stipulation. (8 RT 3031-3032.)

D.
Comparison with Other High-Profile, High Publicity Cases

The foregoing examination of the record attempted to recreate the public atmosphere surrounding this case from February through May of 2002, and to gauge the temperament of the venire summoned from the very public that contributed to, and was influenced by, this atmosphere. Does, then, this record establish that without the additional peremptory challenges requested, there was a reasonable likelihood of an unfair and partial jury? (*People* v. *Bonin*, *supra*, 46 Cal.3rd 659, 679; see also *Sheppard* v. *Maxwell* (1966) 384 U.S. 333, 363.) The affirmative answer to this question becomes apparent in a recapitulation that draws together from a broader perspective all the detailed elements set forth above.

A seven-year-old girl was taken from her bedroom at night while her brothers and parents were asleep in the house located in a middle class residential neighborhood full of young families who moved there to raise their children and to take advantage of good schools and relatively safe streets. The little girl became the object of an intense and highly publicized three-week search, while a male, divorced, middle-aged neighbor, who had taken an odd weekend motor home trip at the time the girl had disappeared, was the prime object of suspicion. At the end of the three-week search, the little girl was found dead, her body left in a kind of rural garbage dump. One must add to these provocative features of the crime, the further reports that that the little girl's mother was at a local bar on a "girl's night out" drinking and dancing with the man who would soon kidnap her daughter, and that there was hovering over all of this a background of suburban sexual promiscuity and spouse-swapping.

This case was clearly something more than the run-of-the-mill crime story that appears frequently in the "metro" section of the newspaper and provokes in the reader little more than a passing mental note to be a bit more alert and vigilant. Rather, it is the kind of case that made it "really hard to look at things like that and

not see your own child's face" (9 RT 3143), as one of the prospective jurors declared in court – one of the few who had known nothing about the case until summoned for jury duty. (See above, p. 131.) It was the kind of case that roused Venireman 73 to immediately get in her car to see how far Sabre Springs was from her house where she lived with her 19-month-old son. (See above, at p. 143.) It was the kind of case that made Venireman 109 seek out Brenda Van Dam to express his deepest sympathies, to do so in violation of a court admonition, and to asseverate all the while that he could be fair and impartial to the utmost. (See above, pp. 145-146.) It was the kind of case, which, as noted by Venireman 98, was generating public pressure for a guilty verdict (and death verdict) against Mr. Westerfield in advance of trial. (See above, p. 144.) And it was the kind of case that prompted Judge Bashant to perceive a need for some sort of massive metropolitan catharsis, and a case that engendered such a blast of media frenzy that Judge Mudd likened it to a "tsunami." (See above, pp. 122, 127.)

One might be forgiven for belaboring this argument, as the burden on the appellant is heavy to the extent that the claim is unusual and depends on extraordinary circumstances. A further measure of the solidity and merit of his claim may be derived from a comparison – a negative one – with other high-publicity cases that have fallen short of the standard that is met here.

People v. *Bonin*, *supra*, 46 Cal.3rd 659 involved the so-called Freeway Killer, convicted of killing 14 people on the freeways of Los Angeles and of Orange County. (*Id.*, at p. 668.) On his automatic appeal from the Orange County capital conviction, defendant claimed that his request for additional peremptory challenges should have been granted. (*Id.*, at p. 679.) This Court first found that the claim was procedurally barred because defendant, when he requested more, had not yet exhausted his full statutory complement of peremptory challenges – at that time, 26 – and did not renew his request for more after he had. (*Ibid.*) Nonetheless, this Court proceeded to rule on the merits, and referred the reader

back to the analysis of the rejected claim that defendant's motion for a change of venue was improperly denied. (*Ibid.*)

The relevant facts, as set forth in the decision, were the following: The defendant in *Bonin* was arrested in connection with the "freeway killings" in June of 1980. He was charged in both Los Angeles County and in Orange County, but the Los Angeles action proceeded first, starting in October 1981. The four Orange County murders were introduced as evidence at the Los Angeles trial to establish identity. In January 1982, defendant was found guilty in Los Angeles of 10 counts of special circumstance murder, and in March 1982 he was sentenced to death for each count based on the jury's finding of punishment. (*Id.* at p. 673.) As this Court noted, "[t]he news coverage relating to defendant and to the 'Freeway Killer' and the 'freeway killings' was extensive." (*Ibid.*)

In July 1982, at the commencement of the Orange County action, defendant moved for a change of venue based on pretrial publicity. An extensive hearing was held, and in November 1982, the trial court denied the motion. (*ibid.*) Jury selection began in March 1983. (*Id.*, p. 675.)

Invoking the same "reasonable likelihood" standard to be used in the question of additional peremptory challenges (*id.*, at pp. 672-673), this Court affirmed the rejection of the change of venue motion, quoting extensively from the trial court's lengthy and considered ruling on the matter, but summing up the factors that rendered the claim deficient against the standard. Although the charges were serious and the publicity surrounding the case was extensive and sensational, "[t]he potentially prejudicial effect of the news coverage here must be presumed to have diminished." For, "[a]s the trial court observed, the coverage had been minimal since imposition of sentence in the Los Angeles action. 'That time soothes and erases is a perfectly natural phenomenon, familiar to all.' [Citation.]" (*Id.* at pp. 677-678.) This, combined with the large size of the community, the defendant's lack of any particular status within that community,

the lack of status similarly of the victims, all warranted the denial of the change of venue motion made at the outset of trial before jury selection had begun. (*Ibid.*)

But there was a second change of venue motion at issue in *Bonin*, which motion was made after the voir dire and after the defendant had in fact exhausted his peremptory challenges. In describing the proceedings up to the second motion, this Court described a jury selection with numbers somewhat similar to, though less egregious than, those in the instant case:

> " . . . . A total of 204 prospective jurors were subjected to voir dire. Of this number, 174 had been exposed in some degree to pretrial publicity either directly or indirectly, including 60 who had been exposed to news coverage relating to the Los Angeles action; of the 204 prospective jurors 39 were excused because of bias. In the course of the selection process, but before he had exhausted the 26 challenges allotted to the defense, defendant moved for 8 to 10 additional peremptory challenges. The court denied the motion without prejudice to renewal later in the process. Subsequently, defendant exhausted his peremptory challenges but did not renew his motion. Twelve jurors and four alternates were eventually selected. Ten of the jurors and all the alternates had been exposed to pretrial publicity, including three jurors and one alternate who had come upon news coverage relating to the Los Angeles action. Most of these persons, however, had been exposed to such publicity indirectly and to a minimal degree.
>
> "In June 1983, after selection of the jury was completed, defendant renewed his motion for change of venue in light of the record of voir dire. He argued, in substance, that practically all the jurors and alternates had been exposed to pretrial publicity and that their memories would be refreshed by evidence introduced at trial. The court denied the motion. . . ." (*Id.*, at pp. 675-676.)

This Court affirmed this ruling as well, concurring with the trial court's determination that any apprehension that the evidence in this case would trigger more extensive memories of the prejudicial Los Angeles case was only a "possibility" and based not on evidence, but on conjecture. (*Id.* at p. 676, 678.)

Again, the change-of-venue analysis in *Bonin* was deemed the same one applicable to the claim that the defendant in that case was entitled to more peremptory challenges. (*Id.*, at p. 679.) Just as there were change of venue motions in *Bonin* made before and after voir dire, so here there were requests for increased peremptories made before and after voir dire. Again, the quantitative assessment of the venire in *Bonin* yielded numbers not dissimilar to the numbers at issue in this case. What then distinguishes *Bonin* from the instant case so as to require a different result here?

One need not parse atrocities to determine whether the murder of a child of tender years, kidnapped from the very asylum of her own home, is more emotionally compelling than random murder on the freeway. But one might not be off the mark in suggesting that while the "Freeway Killer" might be viewed as pathologically aberrant, -- a circumstance that places a kind of consolatory distance between the normal citizen and the emotional horror of the crimes --, the horror of the instant case only increases to the extent that it was accompanied by all the accouterments of normal middle class life.

But placing this calculus aside, the time-frame at issue in the instant case was much shorter than that involved in *Bonin*. In *Bonin*, jury selection in the Orange County case occurred about a year after the Los Angeles trial had ended, and about three or four years after the crimes themselves. The publicity had been minimal by the time the second trial started. Here the emotional intensity of the case was still prevalent when jury selection began only three months after Danielle Van Dam disappeared, and, as demonstrated by the facts set out above, the case proceeded forward in the very heart of a community still roiling with the publicity and media attention.

In regard to the jury selection itself, if the numbers in *Bonin* were *somewhat* comparable, they were not the same. In *Bonin*, ten of the twelve jurors were minimally aware of the case; in the instant case, all of the jurors were aware of the case and for the most part extensively so, and this was true of the *entire* venire of

263 people, except for three, all of whom were excused for cause. Further, the emotional intensity provoked by the case did emerge in the voir dire itself and was reflected not only in the numbers but also in the qualitative and substantive answers that were given by the prospective jurors during voir dire. Finally, it should be noted, that while the jury selection in *Bonin* took three months, from March 1983 to June 1983 (*id.*, at p. 675), the jury selection in the instant case took three days, from May 28 2002 to May 31, 2002. *Bonin* is thus distinguishable and corroborates the conclusion here that an increase in the number of peremptory challenges was an appropriate remedy for the publicity and the communal emotion pervading the atmosphere surrounding this case.

Another case commanding comparable notoriety is *Skilling* v. *United States*, *supra*, 130 S.Ct. 2896. This case involved one of the federal criminal convictions arising from the collapse of Enron – an event that received nationwide publicity for a lengthy period of time. (*Id.*, at p. 2907.) In that case, the United States Supreme Court rejected *Skilling*'s claim that the trial was vitiated by any implied or actual bias on the part of the jurors created by pretrial publicity. In *Skilling*, however, the case involved corporate bankruptcy, embracing the arcane subject of financial and accounting intricacies, none of which is provocative of the emotional arousal stirred by almost any other violent crime. (See *id.* at pp. 2908-2909.) The news reports surrounding the case tended to be confined to factual matters; the time between Enron's bankruptcy and defendant's trial was four years, by which time the publicity had abated considerably; and the venue for the trial, Houston, had a metropolitan area population of 4.5 million. (*Id.*, at pp. 2914-2916.) Finally, there was nothing in the actual voir dire that reflected an actual problem with pretrial publicity, and indeed, the District Court in *Skilling* had in fact granted the defendant two additional peremptory challenges. (*Id.* at p. 2918 and fn. 21.) By contrast in the instant case, publicity was intense at the very time of jury selection; the case involved a violent crime with easily assimilated facts of

a provocative nature; the emotional intensity surrounding the case *was* reflected in the voir dire; and the defendant received no additional peremptory challenges.

Skilling and *Bonin*, then, provide a kind of negative measure of what the instant record affirmatively shows: a reasonable likelihood that a fair and impartial jury was not obtained in this case. If the claims in those cases were to be rejected, the claim in the instant case, subject to the same standard, cannot be. The failure of the court to grant the defense any additional peremptory challenges constituted a violation of due process. The only question remaining is that of prejudice; but that question does not require any further factual exposition, for the standard for establishing the error itself is also the standard for reversal.

E.
Prejudice

In *United States* v. *Harbin* (7th Cir.2001) 250 F.3rd 532, the Court found a due process error in granting the prosecution a mid-trial peremptory challenge against an alternate who was called in to replace a sitting juror, which, in effect, denied defendant an equal number of peremptory challenges. (*Id.* at pp. 540-542.) The Court in *Harbin* analyzed the appropriate standard of prejudice as follows:

> " . . . . The Supreme Court has stated that 'if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.' [Citations.] Here, however, the error calls into question the impartiality of the jury because it cripples the device designed to ensure an impartial jury by giving each party an opportunity to weed out the extremes of partiality. Therefore, the presumption is inapplicable. The right to an impartial jury is the sort of right that requires automatic reversal when denied. As with other such errors, however, the 'nature, context, and significance' of a violation may determine whether automatic reversal or harmless error analysis is appropriate. Minor or technical errors that do not significantly undermine the constitutional right do not require automatic reversal. [Citations.]

> Where the error is substantial enough to undermine the constitutional right, however, automatic reversal is required. We have such an error here. Unlike *Patterson*, this is neither an insignificant nor a technical error. See *United States* v. *Polichemi*, 219 F.3d 698, 705 (7th Cir. 2000) (distinguishing *Patterson*, in which the error did not call into question the impartiality of the jury ultimately selected, from *Underwood*, where the entire process of jury selection was infected with ambiguity). The error here adversely impacted the ability of the peremptory challenge device to fulfill its purpose of ensuring an impartial jury, and therefore reversal is necessary without engaging in a harmless error inquiry." (*Harbin, id.*, at p. 548.)

The court in *Harbin* found that reversal per se was the only standard appropriate to deal with the type of error at issue, which defied any reasonably certain detection of its effects.

> " . . . . Are we to say that reversal is inappropriate in those instances because the jury that actually sat was impartial, based on the fiction that the challenges for cause eliminated all biased jurors and that peremptory challenges are a statutory creation not constitutionally-required? Although they are not constitutionally-required, the Supreme Court has long recognized that the right of peremptory challenges is one of the most important of the rights secured to the accused. They are a tool for achieving the constitutional mandate of an impartial jury, by allowing each party to eliminate those jurors with real or suspected biases. [Citation.] Although challenges for cause eliminate presumptively biased jurors, peremptory challenges weed out the extremes of partiality on both sides. [Citation.] Thus, a system that grants the right to only one party threatens that goal of an impartial jury by skewing the jury towards the favored party. This is different from an error that impedes the ability of a defendant to maximize the strategic use of his peremptory challenges, or that affects the number of peremptory challenges available in a technical sense." (*Harbin, id.*, at p. 549.)

Here, the need for additional peremptory challenges was generated by the intense pretrial publicity that occurred in this case. This takes the issue out of the

arena of a technical challenge to the number of peremptory challenges at issue, and the provenance of the claim is in something much more serious than partisan jockeying for advantage. Moreover, since the publicity was overwhelmingly adverse to the defense, the prosecution, like the prosecution in *Harbin*, was at an undue advantage. If the *Harbin* analysis is correct, which it is, then once a reasonable likelihood of an unfair and partial jury is established, then the case must be reversed.

The analysis in *Harbin* has been confirmed by implication in this Court's pronouncements in *People* v. *Bittaker*, *supra*, 48 Cal.3rd 1046. In *Bittaker*, the defendant objected to the denial of five of his challenges for cause. He used five peremptory challenges to dismiss the prospective jurors in question, exhausted his full complement of 26, and then expressed dissatisfaction with the remaining jurors then sitting on the panel. The trial court, though satisfied that its ruling on the challenges for cause was correct, nonetheless gave both parties two more peremptories, which the defense exhausted, but the prosecution did not use. (*Id.*, at p. 1087.) Before this Court, defendant renewed his claim that his challenges for cause were improperly denied, and contended that even the erroneous denial of one challenge required reversal of the conviction. (*Ibid.*)

This Court did not disagree with the principle:

> "The denial of a peremptory challenge to which defendant is entitled is reversible error when the record reflects his desire to excuse a juror before whom he was tried. [Citation.] Since the erroneous denial of a challenge for cause compels the defense to use a peremptory challenge, a similar analysis applies to denial of a challenge for cause. [Citation.] Defendant must show that the error affected his right to a fair and impartial jury.
>
> "Thus, defendant must show that he used a peremptory challenge to remove the juror in question, that he exhausted his peremptory challenges [citation] or can justify his failure to do so [citation], and that he was dissatisfied with the jury as selected. But

> if he can actually show that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different. [Citations.]" (*Id.* at pp. 1087-1088.)

The Court disagreed only with *Bittaker*'s numbers. Because he had received two additional peremptory challenges, he had to show at least three erroneous denials of a challenge for cause. (*Ibid.*)

Thus, in *Bittaker*, this Court conceived of the prejudice from an erroneous denial of a challenge for cause as inhering in the loss of a peremptory challenge, which loss is reversible per se if the peremptory was actually used to dismiss the prospective juror who should otherwise have been dismissed for cause. That this was the thrust of *Bittaker* is confirmed by the fact that this Court examined only the prospective jurors who were peremptorily challenged without considering the quality of those who remained on the panel. (*Id.* at pp. 1088-1089.) The case was not reversed, however, because this Court found only two erroneously denied challenges for cause. (*Ibid.*)[95]

Both *Harbin* and *Bittaker* take their cue from the nature of the error and the nature of its effect. It is almost never possible on appellate review of a jury voir dire to ascertain with a high degree certainty the ills and debilities that only a peremptory challenge can cure, and the importance of a peremptory challenge to the selection of a fair and impartial jury is incontestable. It is also incontestable that a fair and impartial jury is the *sine qua non* of a fundamentally fair trial. When the circumstances show, as they do in this case, that without additional

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[95] For purposes of this argument, it does not matter if *Bittaker* is ultimately correct about where the prejudice from an erroneous denial of a challenge for cause lies. (See *People* v. *Yeoman* (2003) 31 Cal.4th 93, 114.) The point is that when the error consists, as here, of an uconstitutional impingement on the right to a peremptory challenge, independent of the status of any challenge for cause, reversal per se is appropriate and necessary.

peremptory challenges there is a reasonable likelihood that a fair and impartial jury could not be, and was not, obtained, then the conviction proceeding from that jury must be reversed.

III.
THE ERRONEOUS DENIAL OF A DEFENSE CHALLENGE FOR CAUSE ISSUED AGAINST VENIREMAN 19 RESULTED IN PREJUDICIAL ERROR UNDER THE FEDERAL AND STATE CONSTITUTIONS

The contention in the previous argument was that the request for additional peremptory challenges, beyond the statutorily prescribed twenty, was warranted as a matter of due process under the circumstances of a case attended by intense publicity and community interest. As noted in the previous argument (see above, pp. 118-119), the issue was independent of whether or not there were erroneous denials of defense-issued challenges for cause; but these denials were nonetheless at least implied in the background of the issue since one of the functions of peremptory challenges in California is to redress the trial court's error, or perceived error, in denying a challenge for cause. (*People* v. *Gordon* (1990) 50 Cal.3rd 1223, 1248, fn. 4; *People* v. *Yeoman* (2003) 31 Cal.4th 93, 114.) In the instant argument, the background comes to the foreground, and the question of the denial of challenges for cause is the question.

Also as noted above also (pp. 118-119), the procedural requirements to preserve this issue have been met: the defense 1) used a peremptory challenge to remove a juror that it had unsuccessfully challenged for cause; 2) exhausted the allotted complement of peremptory challenges; and 3) expressed dissatisfaction with the jury as actually constituted. (*People* v. *Mills* (2010) 48 Cal.4th 158, 186; *People* v. *Bonilla* (2007) 41 Cal.4th 313, 339; see also *People* v. *Bittaker* (1989) 48 Cal.3rd 1046, 1087-1088.) All this occurred here. (8 RT 2951; 9 RT 3106.)

But in addition to preservation of the claim, it is necessary to show prejudice in a specific form: the loss of a peremptory challenge to correct an improper denial of a challenge for cause must result in a petit jury that is vitiated by the presence of an incompetent juror, who not only was subject to an

improperly denied for-cause challenge, but also could have been removed by the peremptory challenge that was otherwise wasted on a juror who also should have been removed for cause. (*People* v. *Yeoman*, *supra*, 31 Cal.4th 93, 114; *People* v. *Carter* (2005) 36 Cal.4th 1114, 1179; *People* v. *Farley* (2009) 46 Cal.4th 1053, 1096-1097.) In effect, this means that appellant must show at least *two* erroneous denials of challenges for cause: one to a prospective juror who must be removed peremptorily, and one to an actual juror, who could not be removed because of the forced dearth of a peremptory challenge. At issue here is the challenge for cause issued to Venireman 19, who was removed by the expenditure of a peremptory challenge, and Veniremen 34, who, eventually, became Juror 4. (40 CT 9855.) Focusing on these two should not be deemed a concession that the trial court was correct in the denial of the other fourteen defense-issued challenges for cause in this case. One must keep in mind that reviewing courts defer broadly to the trial court's wide discretion on the question of for-cause challenges (*People* v. *Holt* (1997) 15 Cal.4th 619, 655-656, 779), and the principle of selection in this argument is dictated by this imposing burden. But, as stated in the previous argument, the trial court's determination, in actuality, is hardly ever clear-cut and is subject to subtle nuances interpretable in different ways. (*United States* v. *Martinez-Salazar* (2000) 528 U.S. 304, 316, maj. opn., and at 319, Scalia, J. conc.)[96]

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[96] There is a third juror at issue as well. Venireman 51, who became Juror 2 (40 CT 9855), had also been the object of an unsuccessful challenge for cause issued by the defense. (8 RT 2566-2567.) However, the challenge was based on 2's views on the death penalty, and the propriety of his retention is thus better raised with the penalty phase issues to be addressed if this Court deems none of the guilt phase improprieties to be error or reversible error. (See *People* v. *Tate* (2010) 49 Cal.4th 635, 666-667; see below, pp. 430 *et seq.*)

A.

The reference to "cause" and to the "incompetence" of a juror refers of course to juror bias, and more specifically to actual bias. There are indeed other grounds for the disqualification as a juror, but actual bias, as defined in the governing statute, is "a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Civ. Proc. Code, § 225(b)(1)(C).) This bias is disqualifying even when it is informed more by a prejudice against the type of charge than by a prejudice against the parties directly and personally. (*People* v. *Harrison* (1910) 13 Cal. App. 555, 558; *People* v. *Compton* (1971) 6 Cal.3rd 55, 59.) This last point is pertinent in the case of Venireman 19.

As may be recalled from the previous argument (see above, p. 143), Venireman 19 was a 58-year-old elementary school principal. She lived in Poway, near Sabre Springs, and had worked for the San Diego Unified School District for 36 years, 15 of which she had been a principal. (18 CT 4374-4376.) In response to question 77 on the questionnaire, which asked, "Would you like to be a juror in this case?", she checked off "No" and wrote in the explanation: "I cannot serve on a case where the victim was a child." (18 CT 4383.) Question 78 stated: "Everyone has biases, prejudices or preconceived notions. Do you have any that would affect the way you decide this case? [¶] Explain." She wrote: "I cannot abide crimes against children. This might color my objectivity, although I consider myself fair." (18 CT 4383.) Question 80 stated: "In the course of this trial, you may be expected to view and discuss photographs of the deceased which will graphically depict her decomposed body. Will you be able to do so?" Number 19 checked off "No", and then checked off "Yes" to the sub-question: "Will this affect your ability to be fair and impartial?" In explanation she wrote,

"Children have been my life for 37 years. I do not think I could be fair and impartial in this instance." (18 CT 4383.)

In regard to publicity, she obtained her information about this case from the Union Tribune, and, as she described it, she knew "the basic information—missing child, parents 'occupied,' death of child, neighbor arrested." (18 CT 4385.) She checked off "Yes" when asked if she had formed an opinion: "Parents are guilty of neglecting their responsibilities. The defendant acted strangely with driving to beach, then desert." She believed that she could base her decision on the evidence presented in court, and commented, "This is the work I do each day – listening impartially before making a decision." (18 CT 4385.) She could place that opinion aside, follow court instructions, and be fair to both sides. (18 CT 4386.) At the very end of the questionnaire, she checked "No" when asked in question 123, "Is there any reason you would not be a fair juror in this case?" (18 CT 4392.)

This stark schizophrenia continued ten days later when Number 19 appeared for voir dire on May 28. She was examined by defense counsel, Mr. Feldman, as follows:

> "Q. Ma'am, on your questionnaire you indicated several concerns about your ability to be fair and impartial. Specifically, I think you told us, quote: I cannot serve on a case where the victim is a child, end quote, is that right?
>
> "A. That's correct. You told us, quote, I cannot abide crimes against children. This might color my objectivity;' Is that right?
>
> "A. Yes.
>
> "Q. And that children have been your life for 37 years and so you could not be fair and impartial in this instance; is that right?
>
> "A. I believe I would not be fair and impartial.

"Q. So are you telling us that in this case, and I appreciate your honesty, you could not be fair and impartial because the crime involves an allegation of murder of a child?

"A. I would – that would color my feelings.

"Q. Well you're using the word 'color' but in your questionnaire you used words like 'I cannot serve' and that's –I don't know, feels to me a little stronger.

"Can you tell me what do you mean by that, please?

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

"Q. I think you told us you have 15 years as a principal. Is that in San Diego County?

"A. San Diego Unified.

"Q. I think you reside in an area that's close to Sabre Springs. That's right, isn't it?

"A. I live in Poway.

"Q. Yes. And so all things considered – and in addition you have professional obligations; is that right?

"A. I do.

"Q. So sitting as a juror for two to three months would create a hardship for you?

"A. A great deal.

"Q. What – the hardship would prevent you from doing your job?

"A. There would not – they would not get a replacement for me. I would have to do the job of a juror during the day and the job of a principal in the evening.

"Q. And since I guess the schools don't go in the evenings, you wouldn't be able to attend to your duties during the day, right?

"A. Well I'd be doing the paperwork. That's all I'd be doing.

"Q. So for reasons of personal bias and hardship, you can't sit, is that a fair statement?

"A. I believe I cannot.

"MR. FELDMAN: Thank you." (6 RT 2331-2333.)

Mr. Dusek, the prosecutor, then undertook the rehabilitation:

"Q. You've been a principal for how long?

"A. This is my 15th year.

"Q. Are you required to be fair and impartial in that type of work?

"A. Always.

"Q. Are you?

"A. Yes.

"Q. How do you do it?

"A. Listen, listen very carefully, question.

"Q. And when you have to impose discipline at school are there times when you like the kids and maybe some of the other kids aren't your favorites?

"A. Of course.

"Q. On those situations where they're not your favorites, can you still be fair?

"A. Absolutely.

"Q. In your questionnaire you told us, sir [*sic*] – a question was asked 'do you feel you can be an impartial juror?' and you said yes.

"What did you mean by that?

"A. You didn't ask me if I could be an impartial juror in this case but –

"Q. I just did.

"A. Because I have an ability to listen and judge and do an awful lot of judging in my line of work I have to be impartial.

"Q. Do you understand how important that is in this case?

"A. Yes.

"Q. That's something you can do?

"A. In this case?

"Q. Yeah.

"A. I can't answer that question. I don't know if I can be fair and impartial.

"Q. Let me ask you this.

"If you were told that you had to make you decisions based upon the evidence that came forward in this case and only that evidence, could you do that?

"A. Yes.

"Q. If you found that you couldn't, would you let us know.

"A. Yes.

"MR. DUSEK: Thank you, ma'am." (6 RT 2333-2334.)

The court itself felt it necessary to continue the voir dire:

"BY THE COURT:

"Juror Nineteen, you're sort of a rare breed. In reading your questionnaire you're obviously very educated and so forth, but you give what I will describe, as a judge, conflicting messages.

"Counsel have each asked you questions from their perspective, and I'm going to ask you point blank and direct.

Knowing everything that you know about yourself, and what you've seen and heard to this point in this case, do you believe you can be fair and impartial to both sides in this case?

"A. I honestly believe I am fair and impartial in this particular case. I'm not sure that my beliefs wouldn't color the case.

Q. Okay.

"A. I don't know what else to tell you.

"Q. And I appreciate that. You're just not sure?

"A. Yeah.

"Q. You're not sure. Okay. Just wait right outside." (6 RT 2334-2335.)

Mr. Dusek passed for cause, but the defense issued a challenge. (6 RT 2335.) The Court rejected it: " . . . [M]y own notes show what a dilemma she is. Because of her experience and her training, she has made it quite clear that she's very objective and she's a very fair individual. The answers she's given do not

indicate an extreme bias or prejudice that would prohibit her from doing her job. I'll note the challenge to nineteen, and it will be denied." (6 RT 2335-2336.) The next day, defense counsel filed a written motion urging the Court to reconsider its denial of the for-cause challenge to Venireman 19. (7 CT 1752.) After the Court rejected the motion, the defense used its fifth peremptory challenge to remove 19, who would otherwise have become juror 12. (7 RT 2611, 2625.)[97]

What then was before Judge Mudd in regard to Venireman 19? She expressed two clearly delineated attitudes anchored in her 37-year professional experience: children were her vocation; fair and impartial judgment was her job. The former, in her own estimation, disqualified her as a juror in this case; the latter, in her estimation, qualified her as a juror in this case. She never retreated from the strong expression of her bias, while she did retreat from her strong expression of her fairness and impartiality, by telling Mr. Dusek that she did not know if she could be fair and impartial, and by telling the judge that she was not sure. It is difficult to see how the trial judge could possibly conclude that 19's bias was not extreme, and that it was outweighed by any professional experience in resolving grade-school disputes – matters not quite commensurate with the steadiness required to resolve guilt *vel non* for child-murder.

In *People* v. *Bittaker*, *supra*, 48 Cal.3rd 1046, this Court found error in a denial of a for-cause challenge to "Juror Staggs" with the following analysis:

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[97] The written motion was aimed expressly at Venireman 19, correctly describing her as a school principal (7 CT 1754), but incorrectly imputing to her a friendship with a person who had a daughter in Danielle Van Dam's class at Creekside Elementary. (7 CT 1752.) This, however, described Venireman Number 8, whose friend had a daughter at the same school, but not in the same class. (6 RT 2287-2288; 17 CT 4111.) Number 8 was in fact removed for cause. (6 RT 2291.) One might note that the written motion was prepared by an attorney who was not present at during jury selection (7 CT 1756; 14 CT 3415), and who undoubtedly received a hurried account from the trial attorneys in the midst of preparation for the next day's voir dire. In any event, it was impossible that the Court was in any way misled by the mistake.

"Juror Staggs had heard something about the case on television and in the newspaper. She recalled that the case involved people being picked up and raped in a van and also that pictures were taken of the people who were killed. Staggs told the judge that she had worked at a rape crisis center, and did not believe she would be impartial in a case involving charges of rape. [Fn. omitted.] Her voir dire presents no unqualified statement that she actually felt that she could be fair and impartial in the penalty phase of this case.

"Defense counsel asked Staggs if it was her position that, because of 'your strong feelings about victims of rape, that you would be unable to really fairly and impartially judge and evaluation such a situation?' She responded with an unqualified 'yes.' The prosecutor, attempting to rehabilitate her, could obtain only a statement that she would act impartially at the guilt phase. The judge asked if she would be willing to listen to the evidence and be a fair and impartial juror; she said that 'I could try, but I believe it would be difficult. . . . [One] of the questions I do remember was listening to gruesome testimony. And I think I would have a tendency to have a saturation point perhaps below what other people – an anger point, perhaps, or something to that effect. So that I wouldn't be listening wholly to the evidence.'

"In short, Juror Staggs said she did not think she could be impartial at the penalty phase, and when asked if she would listen to the evidence and judge fairly, replied that she might not be able to listen to all the evidence. On this record, we conclude that the trial court erred in denying the challenge for cause." (*Id.*, at pp. 1089-1090.)

Although not identical, the points of similarity here are striking. Staggs worked at a rape trauma center and never unqualifiedly said she could be fair and impartial at the penalty phase of trial, while here Number 19 never said unqualifiedly that she could be fair and impartial *at all*. In short progression, Number 19 told Mr. Feldman she could not be fair and impartial; she told Mr. Dusek she did not know if she could be fair and impartial; and she told Judge

Mudd that she could be fair and impartial but was not sure. One might further note, that her expression to Judge Mudd came after the pressing observation by him that number 19's contradictions were unworthy of her education. (6 RT 2334.) In *Bittaker*, Skaggs indicated that she might not be able to consider all the evidence, while here 19 expressed her complete aversion to viewing photographs of a decomposed body of a young child, and linking this to her attitude of horror at the charges. (18 CT 4383.) If it was error to deny a challenge of cause for Juror Skaggs in *Bittaker*, it was error *a fortiori* to deny a challenge for cause for Venireman 19 in the instant case.

B.

The next question is whether Venireman 34, who became Juror number 4 (40 CT 9873), was disqualified from serving on the jury because of bias. In the initial voir dire, Number 4 was passed for cause by both sides. (6 RT 2460.) Nothing in her questionnaire or the voir dire itself stood out as a warning. She was a 65-year-old woman, born and raised in Germany, whose second language was English, but who said she had no difficulty understanding it. (15 CT 3578, 3586-3587.) She did not want to be a juror in this case because "I don't feel qualified to make a death or life recommendation." (15 CT 3587.) She knew very little about the case, but she could decide it on the basis of evidence presented in court, could place to one side her opinions, could be fair and impartial to both sides, and could follow the court's instructions. (15 CT 3589-3590; 6 RT 2455-2457.) She supported the death penalty as well as life without possibility of parole, and despite her reluctance to judge, she could make a decision in this case. (6 RT 2459.) After the defense exercised its fourth peremptory challenge, she was called to take seat number 4. (6 RT 2476-2477.)

The next day, May 28, she sent Judge Mudd a note claiming a hardship:

> "After given [*sic*] more tough [*sic*] to this mater [*sic*] I have to tell you that it will be impossible for me to serve on a lenthily [*sic*] trial. My husband, who is 74 years of age, has been having continues [*sic*] health-problems [*sic*]. His blood-pressure [*sic*] goes out of control at times it is so high that he has to be hospitalized. Three weeks ago he had another episode where he had to be hospitalized, it is very scary to both of us. Since there are only the two of us, I am the one who takes care of him. So far he hasn't recuperated well form his last ordeal. If something should happen while I am on jury-duty [*sic*] I would have to excuse myself from the case." (40 CT 9924; 7 RT 2615.)

The doctor's phone number was given at the bottom of the note. (40 CT 9924.)

Juror 4 was called in, and Judge Mudd clarified that she was not available if her husband had a relapse, but was if he did not. (7 RT 2616.) Out of her presence, both the prosecution and defense were willing to stipulate to her release, but Judge Mudd ruled that she would be retained on the understanding that if her husband had a relapse she would be excused. (7 RT 2616-2617.)

The next day Judge Mudd received another note from Juror 4:

> "On the Courts [*sic*] questionnaire
>
> "I misunderstood the question about friend or relatives in law enforcement. I though [*sic*] the question only applied to police officers. I have a close personal friend whose husband is a retired deputy district attorney. We see each other on a regular basis socially and I have talked to him about the criminal justice system. As a result of this relationship I have formed opinions which are favorable towards prosecutors." (40 CT 9923; 8 RT 2935.)

The question she was referring to *did* ask only for relationships to police or police-type officers. (15 CT 3582.)[98] But a few questions later, it was asked, "Are

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[98] Question 47 was: "Do you have any friends or relatives involved in law enforcement (for example, F.B.I., D.E.A., C.I.A., San Diego Sheriff's Department,

you personally acquainted with any judges, prosecuting attorneys, or criminal defense attorneys?" and she checked off "No." (15 CT 3583.) In any event, Judge Mudd felt there was no need to act on the note or conduct any further voir dire, but nonetheless acceded to defense counsel's request that she be questioned. (8 RT 2935.) Number 4 was called in:

> "THE COURT: Ma'am, thank you very much for your candor and your recollection. [
>
> "Yes, Mr. Feldman. Very briefly.
>
> "MR. FELDMAN: Ma'am, you just provided us a letter. Thank you very much. But the letter indicated that at least as I recollect just reading it that you might as result of your personal acquaintance or friendships favor the prosecution –
>
> "VENIREMAN NUMBER 34: Yes.
>
> "MR. FELDMAN: -- in this case.
>
> "As a result of that belief, do you feel that you can no longer be completely, one-hundred percent objective.
>
> "VENIREMAN NUMBER 34: Yes sir.
>
> "MR. FELDMAN: So as a result of your acquaintance with the prosecutors in your view, you have a bias such that it would prevent you from being a fair juror in this case?
>
> "VENIREMAN NUMBER 34: I would think so, yes.
>
> "MR. FELDMAN: Thank you." (8 RT 2936.)

Judge Mudd, who had initially felt there was no need for voir dire at all, changed its mind:

San Diego Police Department, California Highway Patrol, local police, military police) or employees of any such agency?" (15 CT 3582.)

"THE COURT: Ma'am, what made you change your mind? These relationships existed even though you didn't put it in your questionnaire and you didn't even come close to answering a question like you have today. What changed overnight?

"VENIREMAN NUMBER 34: What it is I saw my friend last night, and he was surprised I was still on the jury. And he asked me if I was – if I had given you the information. I said no, I didn't realize I had to.

"THE COURT: Ma'am, you hadn't given us the information. But what about that changes from I can be fair to both sides and I'm going to favor the prosecution? You knew these people when you filled out the application, I mean when you filled out the questionnaire. I want to know what overnight changed you from being a fair and impartial juror to one that's going to favor the prosecution and can't be fair to both sides. Please explain that to me.

"VENIREMAN NUMBER 34: Okay. My feeling on this is I didn't realize that before. See, I'm not familiar with the justice system the way everybody else seems to be

"THE COURT: No. You know what fairness is, though, don't you? You know in your heart whether you can be fair. Now you can't be fair, is that what you are telling us?

"VENIREMAN NUMBER 34: I'm not a hundred per cent sure. But it seems like I have to explain this to you that I have this connection, and we have talked about the judicial system. So that's all I'm trying to say here.

"THE COURT: No. You've said more than that. You have told Mr. Feldman that you can't be fair to both sides now. That is dramatically different than what you have told us up to this point throughout this process." (8 RT 2936-2937.)

Judge Mudd then handed the inquiry over to Mr. Dusek:

"MR. DUSEK: Who's the friend?

"VENIREMAN NUMBER 34: It's a former District Attorney from Los Angeles.

"MR. DUSEK: How old is he?

"VENIREMAN NUMBER 34: He's retired. He's sixty-three I think.

"MR. DUSEK: How long have you know him?

"VENIREMAN NUMBER 34: Four years.

"MR. DUSEK: And he told you that you should let us know about knowing him?

"VENIREMAN NUMBER 34: Yes, sir, he did. Yes. He said otherwise I would perjure myself.

"MR. DUSEK: And you've told us about him.

"VENIREMAN NUMBER 34: Yes.

"MR. DUSEK: Did he tell you which way you should vote or anything like that.

"VENIREMAN NUMBER 34: Absolutely not.

"MR. DUSEK: Did he tell you about being fair?

"VENIREMAN NUMBER 34: He said I would perjure myself if I would not disclose this.

"MR. DUSEK: Okay. So you have told us about it.

"VENIREMAN NUMBER 34: Right.

"MR. DUSEK: Do you think you would still be able to be fair to both sides even though –

"VENIREMAN NUMBER 34: I think --

"MR. DUSEK: You knew of him yesterday, didn't you?

"VENIREMAN NUMBER 34: Yes. I think I can be fair, but the thing is I don't – I did not tell you about this gentleman because I wasn't aware that this is required of me.

"MR. DUSEK: Okay.

"Now that you've told us and you said you think you can be fair even though you still know the guy.

"VENIREMAN NUMBER 34: Yes.

"MR. DUSEK: Okay.

"THE COURT: Ma'am, you just told Mr. Feldman you couldn't be fair. I mean are you not understanding the questions or what about this process are you not understanding? I have to make a call as to whether or not you can be fair and impartial to both sides. Mr. Feldman has asked you a series of questions to which you told him you couldn't be fair and impartial, that you would be pro prosecution. And now I ask you, Mr. Dusek has asked you, and you've told Mr. Dusek you can be fair and impartial. Now, what is it, Ma'am? Can you be fair and objective to both sides or not?

"VENIREMAN NUMBER 34: I don't see why I can't be, but I am thoroughly confused at this point.

THE COURT: So you don't know any reason you can't be fair and impartial.

"VENIREMAN NUMBER 34: No, I don't." (8 RT 2938-2939.)

Juror 4 was sent out while Mr. Feldman raised his challenge for cause. (8 RT 2939-2940.) He pointed out that her statements were unequivocal when he was examining her, but "[r]espectfully, the Court's tone of voice with regard to this juror may have been construed as intimidating" due to the Court's frustration with her. (8 RT 2940.) Mr. Feldman suggested also that the prospective juror had

difficulty understanding because of a language problem. (8 RT 2940.) Mr. Dusek, implicitly confirming Mr. Feldman's remark about Judge Mudd's tone, stated, "She told me without even the pressuring as to whether or not she could be fair, and she volunteered that." (8 RT 2940.) Judge Mudd responded:

> "The language I'm definitely satisfied there's no cause challenge there. She clearly knows and understands. Reading the note would imply that she's given the defense two pieces of information. One, that she knew a person in law enforcement that she didn't disclose who happens to be an L.A. retired deputy district attorney who she happened to see last night. And, two, that she may be pro prosecution as a result of knowing that.
>
> "These are people that she's known, I mean, throughout this process. That's what's so confounding about the whole thing. She has known these people the entire time and has represented to the court that she can be fair and impartial. I recognize what she told you, Mr. Feldman, but it doesn't appear to the court that based on language grounds that she is substantially impaired in any way in her ability to be fair and impartial." (8 RT 2940-2941.)

There is, on this record, no basis to conclude that Juror 4's initial statement on her questionnaire, that she knew no prosecuting attorneys, was an intentional falsehood. The matter was not explored expressly, but Judge Mudd and the parties seemed to accept 4's representations as to the omission at face value. When a material omission is unintentional, the question to be resolved is the same as it is for any other challenge for cause: is the juror disqualified for actual bias? (*People* v. *San Nicolas* (2004) 34 Cal.4th 614, 644.) Here, the question is whether Number 4 was in fact biased in favor of the prosecution as she stated unequivocally in her note and in her examination by defense counsel, or whether she could be fair and impartial, as she stated to the prosecutor.

The normal rule is deference to the trial court's resolution of conflicting statements by a prospective juror. The rule is based on the principle that "[e]xcept where bias is clearly apparent form the record, the trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire examination." (*People* v. *McPeters* 1992) 2 Cal.4th 1148, 1175.) But what if the trial judge's manner of interaction with the juror contributes to the formation of that state of mind, or more properly, of its appearance? Here, defense counsel expressly stated that Judge Mudd took an intimidating tone with Juror 4; the prosecutor impliedly confirmed this; and, to the degree one can discern such things from a written transcript, the Court's diction and syntax was expressive of impatience and frustration. That Mr. Dusek could cite her answers to his own "gentle" questioning is of no moment if it occurred *after* the trial court's less gentle inquiry. Indeed, when Mr. Dusek finished, and Judge Mudd resumed, the voir dire concluded with a flustered Number 4 avowing in unequivocal language only her own confusion. (8 RT 2939.)

The further dilemma of this record is that *if* an intentional falsehood cannot be imputed to Number 4 in the initial omission of the information she revealed later, Judge Mudd's refusal to grant the challenge for cause necessarily implies her avowal of lack of fairness and impartiality *was* an intentional falsehood. She clearly did not want to be on the jury, and her friendship with a former district attorney was in fact the *second* reason she belatedly discovered for her own disqualification. This kind of falsehood *ipso facto* disqualified her from serving as a juror. (*In re Hitchings* (1993) 6 Cal.4th 97, 112; *Herrera* v. *Hernandez* (2008) 164 Cal.App.4th 1386, 1390.) Thus, what "confounded" the Court about the juror's belated discovery of her own prejudice was itself the basis for a dismissal for cause.

C.

If the court erred in not dismissing Venireman 19 for cause, and if Juror 4 was not competent to sit on the petit jury for this trial, then appellant was denied his right to a fair and impartial jury as guaranteed by the Sixth Amendment of the United States Constitution and this in itself requires reversal with no further showing of prejudice. (*People* v. *Crittenden* (1994) 9 Cal.4th 83, 121-122; *People* v. *Bittaker*, *supra*, 48 Cal.3rd 1046, 1087-1088.) But even if this Court defers to the trial court's ruling on Juror 4, appellant, as he will maintain and demonstrate in the following, is entitled to reversal under the Article I, section 16 of the California Constitution, which is California's constitutional guarantee of the right to trial by jury.[99]

As noted in the previous section, a peremptory challenge is not part of the Sixth Amendment guarantee of the right to an impartial jury, and the improper loss of a peremptory challenge alone cannot constitute the prejudice arising from an erroneously denied challenge for cause under the federal Constitution. (*Ross* v. *Oklahoma* (1988) 487 U.S. 81, 85-89.) Thus, to maintain that the loss of a peremptory challenge alone is prejudicial error regardless of the impartiality any or all of the petit jurors, the peremptory challenge must be seen as essential in itself to the procurement of an impartial jury. At first blush, to contend that this is so by virtue of the California Constitution meets an apparently insuperable roadblock in this Court's pronouncement in *People* v. *Gordon*, *supra*, 50 Cal.3rd 1223: "Insofar as [the claim for improper denial of challenges for cause] rests on the California Constitution, defendant's claim must also be rejected. We find the reasoning of *Ross* to be applicable to the state constitutional analogues to the

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[99] The California constitutional provision provides, in relevant part, that "[t]rial by jury is an inviolate right and shall be secured to all . . . ." The language on its face is more absolute than that of the Sixth Amendment, which states that there is in a criminal case a "right to ... trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ... ."

federal constitutional rights considered there. And we also find that reasoning to persuasive." (*Id.* at p. 1248, fn. 4.)

One would of course accept this as conclusive except that it is contradicted by this Court's pronouncement in another case that is still authoritative. In *People* v. *Bittaker*, *supra*, 48 Cal.3rd 1046, *Bittaker*, this Court stated:

> "*The denial of a peremptory challenge to which defendant is entitled is reversible error when the record reflects his desire to excuse a juror before whom he was tried.* [Citation.] Since the erroneous denial of a challenge for cause compels the defense to use a peremptory challenge, a similar analysis applies to denial of a challenge for cause. [Citation.] Defendant must show that the error affected his right to a fair and impartial jury. [Citation.]
>
> Thus, defendant must show that he used a peremptory challenge to remove the juror in question, that he exhausted his peremptory challenges [citation] or can justify his failure to do so [citation] and that he was dissatisfied with the jury as selected. *But if he can actually show that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different.* [Citations.]" (*Id.* at pp. 1087-1088, emphasis added.)

What this Court meant by an "actual showing" that the "right to an impartial jury was affected" is established by the course this Court then took in analyzing the denial of the challenges for cause to the five jurors defense counsel had to remove with peremptory challenges. (*Id.*, at pp. 1088 *et seq.*) Before embarking on this analysis, this Court, noting that appellant had received 2 additional peremptory challenges to the full complement of (then) 26, which had been exhausted, stated, "[I]t is necessary for him to show erroneous rulings affecting three jurors to prove prejudice." (*Id.*, at p. 1088.) As it turned out,

defendant in *Bittaker* could only establish two erroneous denials of challenges for cause, but the principle underlying *Bittaker* is clear: the loss of a peremptory challenge expended to cure an erroneous denial of a challenge for cause *is* the prejudice and harm from that erroneous denial. Of course, this Court has also held that it is not, as stated in *Gordon* and in other cases (see *People* v. *Yeoman*, *supra*, 31 Cal.4th 93, 114), but the conflict has never been resolved. (See *People* v. *Baldwin* (2010) 189 Cal.App.4th 991, 1000.)

It of course may be resolved by overruling *Bittaker* in this regard, but it would be hasty to deem this the proper resolution. This Court's pronouncement in *Gordon* consisted of a single paragraph in a footnote, and there is more to say on the issue, part of which is said in the above quotation from *Bittaker*. If one begins from the proposition that "the effect" of the California constitutional provision for trial by jury "is to preserve and continue in force the right of trial by jury as it existed at common-law" (*People* v. *Powell* (1891) 87 Cal. 348, 354), and that at common law, one of the elements deemed essential to the right to trial by jury was the allowance of challenges, "not only for cause, but also peremptory, without assigning cause" (*id.*, at p. 357), then it follows that peremptory challenges are mandated by the California Constitution.

The ancient provenance of the peremptory challenge in the common law right to trial by jury has led California courts, including this Court not only in *Bittaker*, but in other cases, to treat the peremptory challenge as though it were a paramount right inextricable from the right to a fair and impartial jury. (*People* v. *Armendariz* (1984) 37 Cal.3rd 573, 584; *People* v. *Din* (1919) 39 Cal. App. 695, 697-698.) It has led other jurisdictions to find the right to a peremptory challenge to be secured by their own state constitutions. (*Dunlap* v. *People* (Colo. 2007) 173 P.3rd 1054, 1081-1082; *Eiland* v. *State* (Md. Ct. Spec. App. 1992) 607 A.2nd 42, 61.)

The difference in language between Article I, section 16 of the California Constitution and the language of the Sixth Amendment has been noted above.

(See p. 176, fn. 99.) The more exacting language of the California provision has already led to more exacting requirements for trial by jury in this state than is demanded by the Sixth Amendment. Thus, for example, Article I section 16 requires a jury consisting of a representative cross-section of the community (*People* v. *Wheeler* (1978) 22 Cal.3rd 258, 276-277), while the Sixth Amendment requires only an impartial, but not necessarily a representative, jury. (*Holland* v. *Illinois* (1990) 493 U.S. 474, 476-480.) Or, while a unanimous jury is not required by the federal constitution for conviction in a state criminal case (*Apodaca* v. *Oregon* (1972) 406 U.S. 404), it is a requirement of the jury trial provision of the California Constitution. (*People* v. *Feagley* (1975) 14 Cal.3rd 338, 350, and fn. 10.) That the peremptory challenge, whose status even the United States Supreme Court concedes to be *almost* essential to the Sixth Amendment jury trial right (*Holland* v. *Illinois*, *supra*, 493 U.S. at p. 482) is not within the California provision is implausible and inconsistent with the history of more exacting standards attendant upon the state right.

It follows from this that *Bittaker* represents the proper disposition of a claim brought under the California Constitution. In order to establish *reversible* error, one need only establish the forced expenditure of one peremptory challenge beyond the full complement of peremptory challenges granted, regardless of whether the challenge would have been used on a juror who should have been removed for cause. This, along with an expressed dissatisfaction with the jury as constituted, requires reversal under the California Constitution. Thus, even if Juror Number 4 is deemed to have been a competent juror, the erroneous denial of the challenge for cause to Venireman 19 is sufficient to require reversal under the California Constitution. (*People* v. *Bittaker*, *supra*, 48 Cal.3rd at p. 1088.)

IV.
THE TRIAL COURT'S FAILURE TO SEQUESTER THE JURY IN THE LATE STAGES OF THE GUILT PHASE, OR AT LEAST BY THE TIME THE CASE WAS SUBMITTED TO THE JURORS IN THE GUILT PHASE, RESULTED IN A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Introduction

Once the jury was selected in this case, publicity did not abate. If anything, public interest intensified once the proceedings were broadcast on television in their entirety starting with opening statements on June 4, 2002. During the guilt phase of the trial, the defense made ten unsuccessful motions to sequester the jurors (11 RT 3390-3392; 15 RT 4235; 25 RT 6561; 33A RT 8072-8073; 37 RT 8851-8852; 40 RT 9292-9293; 41 RT 9329-9330; 44 RT 9670; 47A RT 9733-9736; 49A RT 9779-9783; 58 RT 10102; 60A RT 10463), and jury sequestration is the subject of the instant claim.

Although our criminal justice system may have become more sophisticated and skilled in managing the frenetic extremes of electronic media since its surprising onslaught first provoked a firm judicial response (see *Estes* v. *Texas* (1965) 381 U.S. 532; see also *Sheppard* v. *Maxwell* (1966) 384 U.S. 333), nonetheless the two distinct, but sometimes overlapping, problems with such publicity abide: first, jurors must be insulated from information not presented as evidence in open court; and, second, where community passions run high, the jurors must be insulated from public pressure and influence. (*Estes* v. *Texas*, *supra*, at pp. 544-545; see also *People* v. *Dixon* (2007) 148 Cal.App.4th 414, 431-432.)

As to the problem of protecting the jurors from extraneous information, Judge Mudd, from the day the venire was summoned and throughout trial,

instituted a regimen of "self-policing", requiring the jurors to avoid the various media accounts of, or related to, the case, and suggesting to them methods for doing so, including a (half-facetious) encouragement that they become Padres' fans and watch baseball instead of the news. (5 RT 2170-2172; 11 RT 3340-3342; 12 RT 3515-3517; 14 RT 3999-4000; 17 RT 4716-4717; 20 RT 5441-5442; 26 RT 6799-6800; 44 RT 9672.) At various times throughout trial, when a special problem arose, such as media reports of an Orange County case involving the kidnap of a young girl, or the appearance of a television documentary about "body farms" where entomological experiments, such as those attested by the experts in this case (33 RT 8187, 8231; 36 RT 8651-8652), were conducted, Judge Mudd would give specific admonitions to the jurors to include these stories in their self-policing. (33 RT 8092; 37 RT 8851-8852; 38 RT 8872-8873.)

But in regard to the second problem, the influence of community passions on the jurors, it is questionable how far self-policing or mediocre baseball could insulate the jurors in the overheated atmosphere surrounding this case. The problems of a case's celebrity and notoriety defy these measures, and what Justice Clark, for the plurality in *Estes* v. *Texas*, *supra*, 381 U.S. 532, noted to be the unmeasurable but identifiable effects of televising a case, apply here not only to the televised trial but to the public fascination engendered by non-stop media coverage, before any camera had been placed in the courtroom:

> " . . . . The potential impact of television on the jurors is perhaps of the greatest significance. They are the nerve center of the fact-finding process. It is true that in States like Texas where they are required to be sequestered in trials of this nature the jurors will probably not see any of the proceedings as televised from the courtroom. But the inquiry cannot end there. From the moment the trial judge announces that a case will be televised it becomes a cause celebre. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the

> public press and the accused is highly publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases the chance of prejudice that is present in every criminal case. And we must remember that realistically it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship. The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused . . . .'" (*Id.* at pp. 544-545.)

In this passage one hears the discomforting resonance of Venireman 98's profession that returning a not-guilty verdict would be difficult in this case, even if the evidence warranted it, because of public pressure. (24 CT 5998; see above p. 144.)

And here, unlike in *Estes*, the jurors were not sequestered, but in the ninety-seven days from May 17 (14 CT 3413), when the venire was summoned, to August 21 (14 CT 3498), when guilt-phase verdicts were returned, the jurors had fifty-two days in which they did not have to come to court and were left to circulate among their family, friends, and neighbors – a category that must be expanded metaphorically to embrace a metropolitan community of interest in this case. In addition to the 52 non-court days for the jurors, there were, of course, in the 45 court days daily recesses and overnight adjournments in which the jurors were part of the community free from direct court supervision. But the jurors did not even have to leave the court to be accosted by the passions surrounding this case. Those emotions intruded into the courthouse and even into the courtroom

itself, such as when audience members wore buttons sporting Danielle Van Dam's image, which were being handed out in the hallway (11 RT 3390-3393; 14 CT 3422), or when several of the jurors expressed discomfort at Brenda Van Dam's glaring at them. (17B RT 4822-4866; 40 CT 9894.)

In Texas, it is now mandatory to sequester the jurors only after they are instructed, but at the time of the Billy Sol Estes' trial at issue in *Estes* v. *Texas*, *supra*, it was mandatory to sequester them for the entire trial. (*Johnson* v. *State* (Tex. Crim. App. 1971) 469 S.W.2nd 581, 583; *Maldonado* v. *State* (Tex. Crim. App. 1974) 507 S.W.2nd 206, 208.) In California, until 1969, sequestration was mandatory for jury deliberations (*People* v. *Santamaria* (1991) 229 Cal.App.3rd 269, 276), but now, the governing statute, Penal Code section 1121, vests discretion in the trial court to either sequester the jury or allow them to separate at any point in the trial process:

> "The jurors sworn to try an action may, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. Where the jurors are permitted to separate, the court shall properly admonish them. Where the jurors are kept in charge of a proper officer, the officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial and to return them into court at the next meeting thereof."

Pursuant to this statute, Judge Mudd's responses to the various motions to sequester may be summarized to the effect that, in regard to external publicity, "self-policing" worked (see 12 RT 3515; 20 RT 5440-5441; 23 RT 6309), and in regard to other intrusions, the instant jury was, in his view, a "hardy group" and could be relied upon to decide for itself whether or not to be sequestered. (41 RT 9330; 44 RT 9689; 44A RT 9715.) Despite this, appellant contends that it was error in this case not to sequester the jurors, at the very least when the intrusion of

community passions into the case reached an intolerable point when in the tenth week of trial, and then again just before deliberations itself, some jurors were stalked as they were leaving the courthouse to go to their cars (36B RT 8585-8610; 49A RT 9766-9775), and when at the outset of deliberations one of the jurors even requested sequestration because of the harassment he was experiencing at work. (40 CT 9905; 44A RT 9710-9714.)

A detailed examination of these incidents as well as the other events and occurrences in this case implicating the question of jury sequestration will be described and discussed in greater detail. But before doing so, it will be useful to place the issue of sequestration in this case in its proper legal perspective, and further to clarify the standard of review by which this Court must assess the events and occurrences to be described. Although appellant will argue below that Judge Mudd's effective delegation of the decision to sequester or not to sequester the jurors themselves was an abuse of discretion (*People* v. *Sandoval* (2007) 41 Cal.4th 825, 847-848 [failure to exercise discretion constitutes an abuse of discretion]), the issue of sequestration in this case emerges well past the threshold of a due process problem, and the issue of due process entails the necessity of *de novo* review by this Court. (*Sheppard* v. *Maxwell*, *supra*, 384 U.S. 333, 362.)

A.

Sequestration: Abuse-of-discretion vs. De Novo Review

"The theory of our [trial] system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." (*Patterson* v. *Colorado ex rel. Attorney General of Colo.* (1907) 205 U.S. 454, 462; see also *Skilling* v. *United States* (2010) 130 S.Ct. 2896, 2913.) Sequestration of the jury is one of the procedures traditionally available to advance the goal of precluding such outside influence on the jurors. (See *Sheppard* v. *Maxwell*, *supra*, 384 U.S. at p. 363.) It is commonly viewed as an "an extreme measure, one of the most burdensome tools of the many available to assure a fair trial" (*United States* v. *Greer* (5th Cir.

1986) 806 F.2nd 556, 557, internal quotation marks omitted), and one might well concede the characterization "burdensome" while insisting that "extreme" requires at least some qualification.

It has already been noted that in Texas, currently, sequestration is mandatory after the jury is instructed, and in California until 1969, it was mandatory for deliberating jurors. One might further consider that strict sequestration of jurors during trial was the historical common law norm (see *Lowery* v. *State* (Ind. 1982) 434 N.E.2nd 868, 870; *State* v. *Magwood* (Md. 1981) 432 A.2nd 446, 450; *People* v. *Potts* (Ill. 1949) 86 N.E. 2nd 345, 347; *State* v. *Craighead* (La. 1905) 38 So. 28, 29), while currently almost half the states, of which Texas is one, retain some form of mandatory sequestration, whether during deliberations only or during the entire trial, or only in capital cases.[100]

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[100] **Alaska**: mandatory in all criminal cases (*Lowery* v. *State* (Alas. Ct. App. 1988) 762 P.2nd 457, 461-462.) **Colorado**: mandatory in capital cases (*Jones* v. *People* (Colo. 1986) 711 P.2nd 1270, 1279 and fn. 7.) **Florida**: mandatory for deliberations in capital cases. (*Banda* v. *State* (Fla. 1988) 536 So.2nd 221, 224.) **Georgia**: mandatory in capital cases. (*Williams* v. *State* (Ga. 2010) 692 S.E.2nd 374, 377-378.) **Idaho**: mandatory for deliberations in 1st degree murder cases. (*State* v. *Flint* (Idaho 1988) 761 P.2nd 1158, 1161-1162.) **Indiana**: mandatory in capital cases. (*Johnson* v. *State* (Ind. 2001) 749 N.E.2nd 1103, 1107.) **Kentucky**: mandatory in all criminal cases after submission. (*Fields* v. *Commonwealth* (Ky. 2008) 274 S.W.3rd 375, 398.) **Louisiana**: mandatory in criminal cases after the charge is given, and mandatory throughout the trial in capital cases. (La. Code of Cr. P. Art. 791; see also *State* v. *Bowie* (La. 2002) 813 So.2nd 377, 389.) **Michigan**: mandatory in criminal cases upon submission. (Mich. Compl. Laws Serv., § 768.16.) **Minnesota**: mandatory in criminal cases upon submission. (*State* v. *Mems* (Minn. 2006) 708 N.W.2nd 526, 534.) **Mississippi**: mandatory in capital cases. (*Moody* v. *State* (Miss. 2003) 841 So.2nd 1067, 1076-1077 and fn. 7.) **Missouri**: mandatory in capital cases. (*Hadley* v. *State* (Mo. 1991) 815 S.W.2nd 422, 425.) **Nebraska**: mandatory in criminal cases on submission. (*State* v. *Barranco* (Neb. 2009) 769 N.W. 2nd 343, 347-348.) **North Dakota**: mandatory in criminal cases on submission. (*State* v. *Bergeron* (N.D. 1983) 340 N.W.2nd 51, 57-59.) **Ohio**: mandatory during capital case deliberations. (*State* v. *Elmore* (Ohio 2006) 847 N.E.2nd 547, 565.) **Oklahoma**: mandatory in criminal cases after submission. (*Landers* v. *State* (Okla. Crim. App. 1955) 281 P.2nd 193, 194-195.) **Oregon**: mandatory in criminal cases on submission. (*Downes* v. *Plank*

As noted above, in California, Penal Code section 1121 expressly refers to the discretion of the trial court, at all points in the trial, to allow sequestration or not, and the natural conclusion would be that the decision on review is subject to an abuse-of-discretion standard (*People* v. *Manson* (1977) 71 Cal.App.3rd 1, 26), the wisdom of which has been well formulated as follows:

> "Decisions on sequestration and anonymity require a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings. With so many factors entering the calculus, each varying subtly, an appellate court's de novo resolution of the issue would merely duplicate the trial judge's efforts and yet yield almost nothing of precedential value. 'Fact-intensive disputes, those whose resolution is unlikely to establish rules of future conduct, are reviewed under a deferential standard because the role of appellate courts in establishing and articulating rules of law is not at stake.' [Citations.] Furthermore, some of the relevant factors, such as the degree of menace presented by the defendants and the intensity of media interest, may be only incompletely captured in the written record, so that courts of appeal are particularly ill-equipped to second-guess these judgments. [Citation.] Finally, the factors counseling deference to the trial court's decision to empanel an anonymous jury apply equally to its decision on sequestration. [Citation.]" (*United States* v. *Childress* (D.C.Cir. 1995) 58 F.3rd 693, 702-703.)

(Or. 1964) 390 P.2nd 622, 623.) **South Dakota**: mandatory in criminal cases after submission. (*State* v. *McComsey* (S.D. 1982) 323 N.W.2nd 889, 890-891.) **Tennessee**: mandatory in capital cases. (*State* v. *Furlough* (Tenn. Crim. App. 1990) 797 S.W.2nd 631, 643.) **Texas**: mandatory in criminal cases after the charge has been read. (*Harris* v. *State* (Tex. Crim. App. 1987) 738 S.W.2nd 207, 222-223.) **Utah**: mandatory in criminal cases after submission. (*State* v. *Garcia* (Utah 1960) 355 P.2nd 57, 58-59.) **Vermont**: mandatory sequestration in criminal cases absent the consent of the defendant to dispersal. (*State* v. *Bailey* (Vt. 1984) 475 A.2nd 1045, 1054.) **Wisconsin**: mandatory for life-sentence cases. (*State* v. *Cooper* (Wis. 1958) 89 N.W.2nd 816, 818.) **Wyoming**: mandatory in capital cases. (*Hopkinson* v. *State* (Wyo. 1984) 679 P.2nd 1008, 1027.)

On the other hand, sequestration is an issue that touches directly on the very center of due process, and the United States Supreme Court has been explicit that due process is not a matter of deference to a lower court's exercise of discretion:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that he balance is never weighed against the accused. *And appellate tribunals have the duty to make an independent evaluation of the circumstances.* Of course there is nothing that proscribes the press from reporting events that transpire in the courtroom. *But where there is a reasonable likelihood that prejudicial news* prior to trial *will prevent a fair trial*, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. *In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel.* If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measure that will prevent the prejudice at its inception." (*Sheppard* v. *Maxwell*, *supra*, 384 U.S. 333, 362-363, emphasis added.)

By this principle, this Court has long held that the question of change of venue to be a mixed question of law and fact requiring de novo review by the reviewing court, and that the standard of review for reversal is whether or not the circumstances prompting the need for such a measure presented a reasonable likelihood of vitiating the fairness and impartiality of the jurors. (*People* v. *Tidwell* (1970) 3 Cal.3rd 62, 69; *People* v. *Bonin* (1988) 46 Cal.3rd 659, 676-677; *People* v. *Farley* (2009) 46 Cal.4th 1053, 1082-1083; see *Maine* v. *Superior Court* (1968) 68 Cal.2nd 375, 382 ["The traditional [discretionary] approach, however, is no longer adequate since *Sheppard* v. *Maxwell* . . . ."].) Sequestration of the jury,

another procedure designed to prevent the intrusion of external influences on the jury, should be no different.

The resolution of the apparent tension between deferent and independent review in the sequestration context seems to lie in discerning the threshold beyond which the scope of deference must diminish in the face of growing due process concerns. *Sheppard*, where "bedlam reigned in the courthouse" because of the media frenzy that took place in the courtroom itself (*Sheppard* v. *Maxwell*, *supra*, 384 U.S. at p. 353), represents a case clearly beyond this threshold. In *Rideau* v. *Louisiana* (1963) 373 U.S. 723, the police filmed Rideau's confession to robbery and murder, which was then broadcast on television in a small Louisiana parish. (*Id.* at p. 725.) In *People* v. *Bonin*, *supra*, 46 Cal.3rd 659, discussed in detail above (see pp. 148-152), the defendant, dubbed popularly or notoriously, "The Freeway Killer," was the subject of extensive media coverage for his reign of homicidal terror on the freeways of southern California. (*Id.* at p. 673.) Again, these are cases falling on the *Sheppard* side of the line. Undoubtedly, in cases where there is more limited media coverage or intense interest on the part of a small segment of the community or even on the part of some threatening or overly intrusive individual, there should be more deference given to the trial court's discretionary assessments. This case falls on the *Sheppard* side of the line, as the account already given of the pretrial publicity and jury selection in this case establishes. (See above, pp. 121-130.)

The more generalized principle, of which *Sheppard* represents a specific application, is that where "the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." (*Crocker National Bank* v. *City of San Francisco* (1989) 49 Cal.3rd 881, 888.) There can be no dispute that a fair and impartial tribunal free from external influences is at the center of the legal principle of due process and is the very substance of its underlying values, and when the subject comes up in an appellate context, it is

virtually impossible to escape the demands of independent and de novo review. The case of *People* v. *Santamaria*, *supra*, 229 Cal.App.3rd 269 is illustrative of this.

In *Santamaria*, the Court found reversible error in a murder case from the trial judge's adjourning, i.e., allowing the jurors to separate, for 11 days during deliberations. The Court in *Santamaria* purported to find on an abuse-of-discretion standard the adjournment to be, in effect, a continuance without good cause, which, here meant, that the judged did not announce what the cause of the continuance was. (*Id.*, at pp. 276-277.) This silence of the record, however, was not the only reason for finding error:

> "This absence of good cause is not our only concern; both the timing and duration of the continuance are particularly troublesome. A long adjournment of deliberations risks prejudice to the defendant both from the possibility that jurors might discuss the case with outsiders at this critical point in the proceedings, and from the possibility that their recollections of the evidence, the arguments, and the court's instructions may become dulled or confused. [Citations.] Obviously, the longer the separation the greater the risk. A long adjournment of deliberations also disrupts the very process and pattern of the jury's orderly examination of the evidence. The People cite no case in which an interruption of jury deliberations of such length has been countenanced in a criminal case. [Citations.]" (*Id.* at pp. 277-278.)

The Court then noted that Penal Code section 1053 provided a mechanism for a substitute judge, and then concluded the analysis of error as follows:

> "To summarize, appellant was faced with a serious charge, a special circumstance first degree murder. The risk of prejudice inherent in suspending deliberations for 11 days was considerable, from the prolonged exposure of the jurors to outside influences, from the strong probability that their recollections of the evidence and the

> instructions would fade or become confused, and from the subversion of the pattern of orderly deliberation. The record is devoid of any good cause for the delay, and section 1053 provided an alternative. Under these circumstances, the only conclusion possible is that the trial court exceeded the bounds of reason and abused its discretion with this inordinate interruption in deliberations." (*Id.* at pp. 278-279.)

The invocation of the abuse-of-discretion standard here is something of a paradox. The discussion shows no real sign of deference to the trial court's assessment of specific historical facts in the case, but is rather cast in terms of the *typified* risks of a lengthy adjournment of a murder case in the midst of jury deliberations. As to the trial judge's silence as to the cause for adjournment, it will be rare that such silence will constitute an abuse of discretion when the burden is on the appealing party to establish the absence of good cause in order to prevail on appeal. (*People* v. *Panah* (2005) 35 Cal.4th 395, 394; *People* v. *Beeler* (1995) 9 Cal.4th 953, 1003; *People* v. *Strozier* (1993) 20 Cal.App.4th 55, 60.) The paradox dissolves when one realizes that regardless what the *Santamaria* court stated expressly, it in fact applied de novo review to find error. In regard to prejudice, the Court expressly invoked the "reasonable probability" standard of *Sheppard*, and found reversible error, again, based on the typified risks of a lengthy adjournment during deliberations. (*Id.*, at pp. 280-283.)

It must be emphasized that appellant is far from contending that *Santamaria* was wrongly decided. He is contending that the invocation in that case of the standard of review for abuse of discretion was little more than verbal obeisance to a legal dogma whose application requires more discrimination than dogma can usually provide. *Santamaria* clearly proceeded on the basis of de novo review, or, what is really the same, on the basis of review of a discretion so circumscribed by legal principles and values as to amount to de novo review.

Appellant has belabored the point of de novo review simply to untangle a contradiction between the statutory language and the constitutional requirements

of the issue. He addresses the issue because Judge Mudd, if he did not abuse his discretion in surrendering the sequestration decision to the jurors themselves, did not in any event employ a substantial-likelihood standard, but treated the matter as a kind of mistrial-standard where *actual* and incurable prejudice had to be established. (*People* v. *Gonzales* (2011) 51 Cal.4th 894, 921.) Thus, in assessing the following narrative, this Court should keep firmly in mind its obligation to evaluate the circumstances independently of the trial court's assessment, and to determine whether or not the occurrences and events recounted establish, at whatever point in their aggregation, a reasonable likelihood that the jury's fairness and impartiality was vitiated by outside influences. (*Sheppard* v. *Maxwell*, *supra*, 384 U.S. 333, 362-363; *People* v. *Santamaria*, *supra*, 229 Cal.App.3rd 269, 280.)

B.
Publicity and Other Intrusive Occurrences
From the Beginning of Trial on June 4
Through the Guilt Phase Verdict on August 21

In the introduction to this argument, appellant identified the stalking of the jury as a crux in the events and occurrences bearing on the question of jury sequestration. The other crux mentioned was the actual request by one of the jurors that the jury be sequestered during deliberations because of the harassment he was experiencing at work.

The first stalking incident (there was more than one) occurred on July 25, well into the guilt phase of trial, in the tenth week as measured from May 17 when the venire was summoned, but in the eighth week when measured from June 4 when opening statements were given. (14 CT 3422.) The juror's request came on August 7, the day before the case was submitted for deliberations (14 CT 3487-3488), in the thirteenth week of trial as measured from May 17, or the eleventh week as measured from June 4. But neither one of these events burst surprisingly on the scene as an inexplicable aberrance. They were culminating points of a

series of events and occurrences whose steady aggregation throughout the guilt phase made the sequestering of the jurors an ever-hovering possibility in this case.

The following account traces this aggregation, relating events or occurrences that tend to illustrate the substantial likelihood that outside influences vitiated due process in this case. The account relates those occurrences that show not only the flood of irrelevant and provocative non-evidentiary information bandied about by the media in broadcast fashion, but also, and more importantly, the occurrences that show or suggest a likelihood that the jurors felt the pressure of threats to their privacy and personal security. The account is divided into two parts. The first part relating the occurrences from June 4 to July 24 serves as a kind of background and build-up to the stalking incident of July 25, at which point the second part of the account begins, tracing the increasing urgency of the need for sequestration, which need, at least by the time deliberations began, could not be reasonably debatable.

1. June 4 through July 24

a. Juror Privacy and Security

That the pressure of public attention would intrude on the jurors' privacy would not be surprising, given the pretrial publicity. But there were, from the beginning, indications that this intrusion could arise in surprising ways, in the very heart of the jurors' own families, as indicated by Juror 9's problem, brought to Judge Mudd's attention in a note she submitted on June 3, the day before opening statements.

On June 4, Judge Mudd called Juror 9 in to discuss the note she had dropped off the day before. The note indicated not only that she had an appointment with her cardiologist on June 13, but also mentioned a second problem. When she advised her family that she had been chosen as a juror in this case, her brother told her that he too had been summoned, but that he had to tell the court that he was a registered sex offender, which was the first Number 9 had

ever heard of this. (10 RT 3313; 11 RT 3335-3336; 40 CT 9882.) Her note to the court ended with: "I just don't know if I can do this." (*Ibid.*) She indicated that her brother's problem would not affect her ability to be fair and impartial in this case (11 RT 3336), and made the startling assurance that she would sequester herself from her brother and her other family members for the course of this trial. (11 RT 3336.)

The following day, Wednesday June 5, Judge Mudd had to address Juror 16's concern over the sight of an acquaintance of hers in the audience attending trial. The two women used the same daycare, they talked to each other, and had socialized at children's birthday parties. (12 RT 3682-3683; 40 CT 9886-9887.) 16 was anxious because the "women in daycare, we talk about everything. So the last thing I wanted was for her to leave the courtroom, go back to my, you know, the school, and say, hey, guess what? This is where I am." (12 RT 3683.) As it turned out, Judge Mudd talked to the woman, ascertained that she was attending the case pursuant to some class she was taking, and reported that she had assured him that she would not reveal Number 16's identity as a juror or discuss this case with Number 16. (14 RT 4173.)

Still on Wednesday June 5, Judge Mudd had to have the bailiff confiscate the sketches some artist in the audience was making of the jurors, although the faces were left blank. (13 RT 3864-3865.)

Again after lunch recess that day, as the jury reconvened in open court, Juror 13 raised her hand, which was the agreed-upon sign for a bathroom request. When Judge Mudd intimated some surprise in that the recess has just ended, 13 assured him that it was not "that," but rather that she was "kind of shaken up for what happened." (13 RT 3867.) The Judge knew what she was referring to:

> "Just a minute. Let me comment on that.

"Ladies and gentlemen, one of the finer citizens of San Diego has seen fit to come to this courthouse and apparently in some form or some effort, protest, make their opinions known. That was intentional and it was done in front of you intentionally.

"Ladies and gentlemen, the only thing I can tell you is it has absolutely nothing to do, number one, with the job you have. Number two, it has nothing to do with the lawyers on either side of this. And number three, it has nothing to do with the evidence. It is just one more form of the kinds of publicity or bias that you have been selected to overcome." (13 RT 3867.)

"So everybody take a deep breath, sit back, and relax. And we're going to do everything we can to insure that this is not repeated." (13 RT 3867.)

On Thursday June 6, Juror 7 expressed concern for her privacy. The press had somehow gotten hold of a list of the jobs of each of the jurors and had published them. Juror 7 was a probate examiner for the Superior Court, and the calls started flooding in. The office properly did not reveal the juror's identification, but her superiors required that she post her public hours. Since she only worked on Fridays during trial in this case, the posting of her available hours would reveal her identity. (13A RT 3738-3739.) The matter was resolved by Judge Mudd, who called in the manager of the probate department and worked out a satisfactory arrangement. (13A RT 3740-3741; 14A RT 4224-4227.)

On Monday, June 10, Judge Mudd had to deal with the problem that the media were not using the room Judge Mudd had designated for calling in stories. Instead they were in the hallway during recess giving their interpretation of the events inside the courtroom. (14 RT 4101-4102.)

On Wednesday, June 12, Juror 14 had gone to the post-office during lunch only to find out that there was a television there, and to hear the words " 'juror has been identified.'" (40 CT 9890; 16 RT 4503.) Judge Mudd was concerned about the alleged identification, but Juror 14 claimed he was only bothered by the

obstacle placed on him in mailing a letter now that the post office had a television in it. (16 RT 4503.)

A week later, before lunch on Thursday June 13, some jurors expressly indicated in a note to the judge a feeling of anxiety about Brenda Van Dam. "Some jurors feel," the note stated, "that Brenda Van Dam is glaring at us. [¶] No juror number given because that would let the media and Ms. Van Dam know identity." (40 CT 9894; 17B RT 4822-4826.) Judge Mudd assured the jurors that he had the discretion to bar the Van Dams from the courtroom if there was a problem, and that he would monitor the situation. For the time being, however, he would have Mr. Dusek talk to the Van Dams and caution them. (17B RT 4822-4823, 4826-4827.)

Almost a week later, on June 19, just before the lunch recess, the Court retained the jury for a "chat" regarding "the comings and goings of certain people in and out of this courtroom." (20 RT 5661):

> "I watch you folks and I watch the audience very carefully, and some of the pundits in the courtroom indicated that when Mrs. Van Dam left the courtroom yesterday that a number of you appeared quite concerned.
>
> "I was watching that very thing and disagree wholeheartedly in their observations. But the fact remains that we privately have discussed this subject, and I now want to publicly remind you, that if at any time any of you see any person in this courtroom that you feel in any way is intimidating to you or in any way interfering with your objectivity and the job you have to do, please let me know that and I will correct the situation.
>
> "I stand by what I told you privately and now I've told you once again. So if any of you become concerned for any reason that you're being compromised, please let me know and we'll deal with it." (20 RT 5561-5562.)[101]

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[101] It might be worth noting here that there is no basis to reprehend Judge Mudd's efforts to protect the jury from the bad behavior of the media, the Van Dams, and

b. Damon Van Dam's Banishment

Even when something did not happen in their presence, there was always the risk that the jurors would read about it, hear about it, or otherwise become aware of it. This risk was substantial in the case of Damon Van Dam's expulsion from the courthouse, although this did not take place in the jury's presence.

In the hallways of the courthouse Damon behaved in a manner intentionally calculated to imply a threat or menace to Westerfield and his attorneys. He engaged in a campaign of confrontation, aggressively staring at them in the hallways, and making passing remarks of a menacing implication. On Monday, June 24, in the fourth week of the prosecution's case-in-chief, and the sixth week of trial, Judge Mudd, in closed session, prompted by his bailiff's report of another incident involving Damon, decided that the matter could no longer be handled by Mr. Dusek's unsuccessful mediation, and he ordered Mr. Van Dam expelled, not only from the courtroom, but from the courthouse, for the balance of the guilt phase of trial. (17B RT 4827-4828; 20 RT 5446, 5663-5664; 22 RT 6021-6022.)

Later that day, before the evening adjournment, Mr. Dusek asked to approach the bench. "I'm seeking," he said, "an added warning from the Court to the jury not to look at TV or the newspaper. Damon Van Dam has threatened to go to the media after he was excluded. We've done everything we can and will continue to do anything to keep him from them, but he may go today." (22 RT 6136.) Under this threat by a third party to manipulate the media in order to pressure the court, Judge Mudd admonished the jurors that there were rulings made today that might or might not make the press that night, and that it should be "re-emphasize[d]" that the jurors must be vigilant in their self-policing. (22 RT 6136-6137.)

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other outsiders. The problem, as will emerge later, was that he was unwilling to make the difficult decision that sequestration was necessary whether the jurors wanted it or not.

By the next day, Tuesday June 25, the media knew what had happened and were clamoring for a transcript. Judge Mudd saw no point now in keeping the transcript sealed, and he released it, denying the defense request to redact Judge Mudd's conciliatory preface to the banishment, "And while as a father I can certainly appreciate the disdain to which you must hold Mr. Westerfield and his counsel . . .". (22 RT 6022; 23 RT 6260, 6308-6309.)

Could Judge Mudd's policy of self-policing possibly filter out an event so likely to provide a renewed impetus, if any was needed, for public discussion and interest in the Westerfield case? Even if a juror had imposed strict discipline on his family and friends and associates, and avoided the commonplace transactions of life involving the random garrulous stranger, could a television or radio station be changed, or a glance averted quickly enough to render unperceived the words, "VAN DAM FATHER BANISHED FROM WESTERFIELD CASE!"? It would not take much to comprehend fully the force of these words and their meaning *in*advertently in the very process of making the discrimination required for self-policing. And their full force and meaning, in light of the jurors' perception of Mrs. Van Dam's demeanor, would present grounds for further anxiety to the jurors themselves.[102]

c. Publicity and Outside Information

As to the issue of publicized information and opinions about the case, opening statements were the occasion for this trial's return to the blare and glare of the front page. (12 RT 3513.) On June 10, the admonition to self-police had to be extended to the editorial pages of the newspaper, since an editorial cartoon had appeared in the Union Tribune. (14 RT 3996-4000.) On June 11, there was a newspaper advertisement for a radio station, incorporating the jurors as part of the pitch. (15 RT 4325-4236.) On June 12, Juror 12 requested that the television in

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[102] By July 11, Damon Van Dam, on the motion of his lawyer, was given a second chance and readmitted to the courthouse and courtroom. (31 RT 8046-8053.)

the juror lounge be turned off during lunch – a measure opposed by the other jurors, prompting the Jury Commissioner to make the overflow lounge, where there was no television, available. (40 CT 9891; 16 RT 4566, 4568.) On June 13, there were press stories with quotes from Westerfield's ex-brother-in-law; and a story in the Union Tribune purveying "news" about Mr. Feldman in matters that had nothing at all to do with the case. Judge Mudd gave the jurors a specific admonition to avoid the interviews with "a family member of one of the participants," to avoid that day's Union Tribune, and also to avoid the Los Angeles Times, whose financial page at least one juror was reading in the courthouse. (17A RT 4710-4711; 17 RT 4716-4717.)

The prosecution had started presenting its pornography evidence on Tuesday, June 25 (23 RT 6313-6315), the day the press discovered Damon Van Dam's banishment, and by Wednesday, June 26, the admonition for self-policing had to be expanded to the national news media because CBS was now presenting stories about "virtual" pornography (24A 6372-6373; 24 RT 6389-6390.) The pornography spawned further sensationalism under the guise of the expertise of some television psychiatrist on the local evening news broadcast pontificating on the similarities between Westerfield, Jeffrey Dahmer and Ted Bundy. (24 RT 6562.) By June 27, the media was reporting the gross inaccuracy that there were 8000 to 10,000 child pornography images recovered from Westerfield's computers, when in fact the testimony was that there were only about 85 possible images of child pornography out of 8,000 to 10,000 pornographic images altogether. (24 RT 6392-6393, 6413-6416; 25 RT 6559, 6566.) On top of all this, on June 26, this Court issued an order denying the defense's writ of mandate against Judge Bashant's order to unseal the search warrant affidavits (see above p. 122 and fn. 66), which now meant that Westerfield's statements to Detectives Ott and Keyser, found by Judge Mudd to have been actually involuntary and obtained in violation of the Fifth Amendment, would soon be in the press. (24 RT 6562, 6567-6568.) Judge Mudd recognized the problems, but saw no need at this point

to order sequestration without evidence that the jury was not abiding by the court's orders to avoid publicity. (24 RT 6567-6568.)

The jurors, in addition to their three- or four-day weekends, one of which was for the 4th of July holiday, which fell on a Thursday in 2002 (14 CT 3459-3460), were excused for eleven days, from Wednesday July 10 until Monday July 22 (14 CT 3466), to allow the court and attorneys to address matters on July 11 and 12 (14 CT 3467-3468), and because Judge Mudd had a pre-planned vacation from July 15 through 19. (5F RT 2047.) The first order of business on Monday morning July 22, however, was a motion for mistrial based on the massive publicity generated by this case. (33A RT 8071.) The motion provided a compendium of what had been going on from the beginning of the case to this point in the trial:

> "Defendant David Westerfield is charged with the alleged abduction and murder of seven-year-old Danielle Van Dam. Danielle disappeared from the bedroom of her suburban home on February 2; her body was found over three weeks later on February 27. The case has received an unprecedented amount of press coverage, often reported in a highly sensationalized manner, and commented on by local talk show hosts and lawyer commentators. Many of these commentators have publicly opined that Mr. Westerfield is guilty.
>
> "In the early weeks of the investigation, police officials selectively 'leaked' inflammatory inadmissible information regarding their investigation of Mr. Westerfield to the media. At Mr. Westerfield's arraignment, he requested a gag order. This request was denied. In the following weeks, the press reported on prejudicial, inadmissible, and often speculative information regarding the investigation of Mr. Westerfield. An enormous amount of prejudicial pretrial publicity caused this court to issue a gag order to prevent 'future prejudice' to the defendant.
>
> "Notwithstanding the gag order, massive publicity of the trial continued, unabated. Every single proceeding that has not been closed to the public has been broadcast on radio and television.

Local radio and television stations, as well as Court T.V. provide continuous coverage of the trial with the public and commentators voicing their views regarding the evidence and any inadmissible information the media obtains. The adjacent courtroom has been reserved for media representatives and broadcast equipment. An entire street adjacent to the courthouse is blocked off and lined with news vans, equipment, and media tents.

"Reporters have delved into Mr. Westerfield's past, and televised a biography of Mr. Westerfield's personal life, and an interview with Mr. Westerfield's mother. A psychiatrist who specializes in serial killers' psychological profiles – such as Ted Bundy and Jeffrey Dahlmer – was interviewed on television regarding his views on Mr. Westerfield's profile.

"Just last week, search warrant affidavits relating to Mr. Westerfield's statements were released to the media. These affidavits contained Mr. Westerfield's statements, which this Court found were involuntary. The media, not privy to the pretrial proceedings, speculated – inaccurately – that the statements were likely excluded based on some 'technical' violation of the law.

"There is absolutely no doubt that during this trial at least some of the jurors have been exposed to publicity about this case. Mr. Westerfield has repeatedly requested, both *in limine*, and during the trial, that the jury be sequestered. The court has denied these requests. The jurors' exposure to prejudicial publicity is simply inescapable, notwithstanding the court's admonitions.

"The case has become a media circus. Nearly half the courtroom is taken up by media representatives. A huge television camera takes up almost a quarter of the seating area in the courtroom. Every single day the case is featured prominently in the headlines of the local newspaper, *The San Diego Union-Tribune*. Highlights of the witnesses' testimony, along with commentary, is aired every day and night on local television news and radio stations." (9 CT 2207-2209.)

In oral argument on this motion, defense counsel, Ms. Schaeffer, emphasized the relentlessness of the media. Every night there was a recap on the news and an hour-long show on KUSI devoted to this case, which was making headlines every day. (33A RT 8071.) At the beginning of the jury's long break

from July 10 to July 22, the involuntary statements released with the warrant affidavits made the headlines. It defied possibility that none of the jurors were exposed to this inescapable bombardment of media. (33A RT 8071-8072.) All this was compounded by news stories of the Samantha Runnion case, in which a five-year old girl was kidnapped and sexually molested. This story appeared side by side in the Union-Tribune on the front page with an article regarding the child pornography found on the computers in Westerfield's house. (33A RT 8072.) Based on the inexorable concentration of media attention, the defense felt compelled to request a mistrial. (33A RT 8072.)

Judge Mudd denied the motion. He did not deny defense counsel's factual representations as to the media coverage, but he reasoned that the coverage had not varied in quality since the beginning of trial when Judge Mudd instituted self-policing, and did not vary during the long vacation break. In addition to this, the judge himself had been monitoring the coverage, adding specific admonitions when necessary, and would do so in regard to the Orange County case of Samantha Runnion. (33A RT 8074.) In addition to all this, Judge Mudd had no evidence that the jury had been exposed to any of the coverage, and he said he had every reason to believe that the jurors were abiding by his order. (33A RT 8074.)[103]

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[103] When Judge Mudd referred to the "quality" of the coverage he was not intending a laudatory commendation. Two days after the mistrial motion was denied, Judge Mudd, angered over the disregard of his orders, admonished the media on its "feeding frenzy" in the hallway to get photographs and film of appellant's son Neal Westerfield coming to court to testify that day. The film had even already been shown on television. "The scuffling, the stakeouts, if you will, remind me of paparazzi for some important movie star." (35 RT 8483-8484.) This was followed by Judge Mudd's declaration of his impotence to control the activities of the press outside this courthouse. (35 RT 8484.) "But I need the message to get out that this conduct on the part of the media is so detrimental to the courts that it is unbelievable the impact it may have not only on this case but in future cases as well. [¶] So if the media is so concerned about their right to

Undoubtedly, in the posture of a ruling on a motion for mistrial, Judge Mudd did have considerably broad discretion to assess what he deemed to be or not be the *actual* effect on the jurors of the publicity and public atmosphere surrounding this case. (See *People* v. *Panah*, *supra*, 35 Cal.4th 395, 444; see also *People* v. *Haskett* (1982) 30 Cal.3rd 841, 854.) But the question here is not whether the trial should have been terminated in a mistrial, but whether the jurors, at some point, should have been sequestered, and as established at length in the previous section of this argument, that question had to be decided on the degree of *likelihood* of prejudicial influence on the fairness and impartiality of the jurors (*Sheppard* v. *Maxwell*, *supra*, 384 U.S. 333, 362-363) – a standard that considerably reduces the scope of discretion and is subject to independent review by this Court. (*Ibid.*) With this, one may now turn to the stalking incident, which occurred the day after the motion for mistrial was denied.

2. July 25 to end the guilt trial

a. The First Stalking Incident

On Wednesday July 25, at about 5 p.m., Juror 2, using the court reporter's phone number, which had been given to the jurors as a confidential line to use, reported that he saw two of his fellow jurors being followed to the parking lot. Juror 2, who was not wearing his badge at this point, peeled off from the other two when he noticed the man following. The man followed the other two, who were still wearing their badges, into the trolley station and onto the streetcar to "Old Town," where they got off. The two jurors proceeded to their cars, still being followed by the same man keeping his distance. The man than took out a piece of paper and pencil and wrote something down as the two jurors got into their cars. (36B RT 8588-8589.)

The Court Reporter, Robert Stark, related this to Judge Mudd, who took the matter up the next morning with counsel in closed session. (36B RT 8585-8588.)

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access, they need only look at their conduct in this case to know why many judges will not tolerate any of this at all." (35 RT 8484-8485.)

Before calling in Juror Number 2, there was a discussion about whether or not to inform the other jurors. Judge Mudd did not want to frighten them, but wanted them to report any sense they had that anyone was following them. Judge Mudd also indicated that he was seriously considering sequestration and that he had had the sheriff make a contingency plan for this. (36B RT 8590-8591.)

Mr. Feldman thought the matter perhaps transcended the aggressiveness of the media. " . . . I don't know whether the court is aware," he stated, "but individuals have been sending if not threatening, pretty disgusting letters which implicate my religion, my family, my representations of my client, whatever." (36B RT 8593.) There were a lot of angry people out there, so the possibility was that the stalker was not a member of the press. (36B RT 8593.) He nonetheless suggested that the judge have a heart-to-heart talk with the media to suggest that *they* might just self-police on this one (36B RT 8593) – a hope that Mr. Dusek did not share given the media's disregard of the Judge Mudd's order in relation to Neal Westerfield. (36B RT 8592; see above, p. 201, fn. 103.) Judge Mudd agreed, and ventured to add that if he spoke to the media, the matter would be all over television and radio today. (36B RT 8594.) Judge Mudd's preference was rather for a heart-to-heart talk with the jurors only, informing them of the potential problem and putting them on alert until the Sheriff made security recommendations. (36B RT 8594-8595.)

When Mr. Clarke, the second prosecutor, suggested the jurors be given their own room to gather in, Judge Mudd responded that the only facilities were at the Hall of Justice where, at least in the view of the attorney for the media, Judge Mudd's writ, so to speak, did not run. If the jurors were provided with their own room in this building, then, according to Judge Mudd, he would have to provide them lunch and maintain them together – something he was not yet ready to do. (36B RT 8595-8596.)

Mr. Feldman pressed Mr. Clarke's idea, noting that as things were now mobs of people were in the hallway every day, with no other business there but to

gawk. Anyone who had been in the courthouse knew what the jurors looked like. They were always being stared at, and all that needed to be done was to let them use the adjacent jury room. (36B RT 8596.) Judge Mudd said he would think about it, and if he chose that option, he would leave it to the jurors' choice. (36B RT 8596.)

At that point, Juror 2 was brought in. Juror 2 related that the two others being followed were Juror 17 and Juror 18. The man who followed them did not seem to notice that 2 was following him. The man was about 5-8, 200 lbs., Caucasian, with sparse blondish hair, and was wearing a blue long-sleeved shirt and gray denims or dockers. (36B RT 8597-8598.) He was not wearing a press-pass necklace. (36B RT 8600.) As 2 watched, the man looked like he was writing the license plate numbers of 17 and 18's cars. The man ducked out of the way to hide when 17 and 18 began pulling out of the lot. (36B RT 8598-8599.) This morning, Number 2 ran into 17 and 18 and apologized to them for seeming to ignore them. He told them he thought someone had been following them. 17 responded that he too had seen the man and described what he was wearing. (36B RT 8599.) As for Number 2, he assured Judge Mudd that the incident would not affect his impartiality. (36B RT 8599-8600.)

Number 17 came in and told Judge Mudd that he was aware of being followed. Number 2 had in fact alerted him to it at the time. 17 added that in the lot after they had gotten off the trolley, 17 had turned back to look two times, and both times the man following ducked out of sight so as not to be seen. 17 did not notice the man wearing a press badge. (36B RT 8601-8604, 8605-8606.) Number 17 was not happy about this incident, but, he assured Judge Mudd, it would not affect his ability to remain impartial. He did not inform Number 18 about the man following because he did not want to upset her. (36B RT 8604-8605.)

Juror 18 told Judge Mudd that she was not sure about being followed because "I'm having a little bit of paranoia to begin with" and always felt as though she were being followed. But as to last night, she had noticed nothing

specific. Now that she knew about the incident for sure, this would not raise her level of paranoia to the point where she would be unable to be fair and impartial. (36B RT 8606-8608.)

Judge Mudd then had the rest of the jurors called in and he addressed them as follows:

> "Ladies and gentlemen, I have something on a more serious note to discuss with you because it has come to our attention that during the course of some activities yesterday afternoon one or more of you may have been followed to your car. In this particular case I'm going to be very up front with you because that's my style is not to play hide the ball." (36B RT 8608-8609.)

Judge Mudd, after relating what had occurred to Jurors 17, 18, and 2 in full detail (36B RT 8609) then continued:

> "Now, this is the very first indication that I have had that in any way the integrity of this jury panel is being jeopardized. Now, we've talked to all of the three jurors involved, and they've basically indicated to us that this experience is not in any way going to affect their ability to be fair and impartial and do their job. But I'm bringing it to you r attention for a number of reasons.
>
> "Number one, you should rest assured that between the police department and the Sheriff's department we are going to work on trying to determine who this individual is. That goes without saying.
>
> The second thing is I want to kind of remind you of something that goes way back when you were officially empanelled, and that was that I don't want you to be paranoid, but I do want you to let us know about anything that might happen to you, anyone that might approach you or anything that you see that appears to be out of the ordinary, which is exactly what has happened here.

"Now, it is no secret that this case has generated an enormous amount of attention, and you should know that I have told the media that when the case is over, those of you that want to talk to the media I will make available in an area where you can talk to them. It will be strictly your choice, with the understanding that your identity will become known. Until that day arrives, however, I expect all of these folks to have absolutely no contact with you. And as I've indicated, if you have any contact with the media regarding this experience, it's going to be a decision you make, not them.

"So this has come to our attention. And rather than have three jurors walking around wondering and so forth, I felt that it was appropriate to bring to your attention the significance of this.

"Number one, it has a tendency to undermine your confidence in the system. But more importantly, your comfort in doing your job. In other words, you should not feel on edge because somebody might be following you. That is just simply not acceptable.

"The second thing you should know that along the course and the history of this trial, there have been motions made to sequester you folks, not at the end when you're in deliberations, but throughout the entire trial. I have felt frankly, that that is not appropriate. This is the first really serious violation of your integrity that I have seen. And it comes not from within but from without. And that is of great concern to me.

"So you should be aware of the fact that I am reconsidering whether or not the panel, the twelve that will be deliberating, will be sequestered. That is still a very real possibility if this kind of conduct continues.

"So we don't want you to be afraid; we don't want you to be paranoid; we don't want you to feel that somehow you're physically at risk. But we do want to make you aware of the fact that this has occurred and that, you know, we don't know who the person is. We don't know whether it's a media type or what is going on. And so we are going to attempt to find that. But you should rest assured we are doing everything we can." (36B RT 8609-8611.)[104]

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[104] Throughout the trial, Judge Mudd engaged in admirable efforts to relax the jurors with humorous admonitions and observations. Thus, his tone here was in striking contrast. Moreover, one such piece of humor, -- a pleasant anecdote on Monday June 10 when it was delivered – might well resonate differently with the

b. More Publicity Problems

On Monday July 29, a new publicity problem was brought to the Court's attention. Although Judge Mudd in one of his admonitions had suggested the jurors resort to cable television to avoid the news about this case, one of the cable stations was now running a documentary on the "body farm," which figured into the entomological evidence in this case. (37 RT 8850-8851.) Also, there had been an acquittal in the Samantha Runnion case in Orange County, and Larry King was carping on this, using the mother of the victim as his sounding board. Mr. Feldman renewed the motion to sequester, stating that "[t]he saturation level I think is now beyond anything contemplated." Judge Mudd stated that sequestration was still under consideration, but that this jury nonetheless seemed to be a "hardy group," and the judge believed in their integrity. While the county was working on a contingency plan for sequestration, he said, the motion to sequester was at this point denied. (37 RT 8851-8852.) When the jury returned on Tuesday July 30, the judge referred to the "body farm" show and the Runnion case in another admonition on self-policing, and also informed the jurors that the possibility of sequestration was still open. (38 RT 8870-8873.)

On Thursday August 1, the defense rested in surrebuttal and the jury was excused until Tuesday August 6 for instructions and closing arguments. (14 CT

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jurors after July 25. "I got to tell you," he told the jurors in June, "that I got discovered this weekend. My wife and I on Friday were at our local Petsmart getting dog food for our dog. And the dog, incidentally, to answer the St. Louis telepoll, is a retired, rescued greyhound. Anyway, I'm getting the IAMS food, and all of a sudden this voice says you're Judge Mudd, aren't you? *Now in my business, when somebody says that to you, that's not a good thing*. In this case, however, it turned out to be a Padre fan who wanted to let me know that they were winning. This was on Friday night. So, you see, we're still out there. And taking two out of three is a good start on the road trip. So hopefully you'll all be Padre fans if anything else by the time you get out of here." (14 RT 4000, emphasis added.)

3479-3780, 3483.) On Friday August 2, Judge Mudd, in session without the jury, made an announcement to counsel regarding sequestration:

> "And for Mr. Feldman, for your purposes, since you've raised this issue, I am letting you know right now that it appears to the Court that, based on the feelings of this jury and everything I've seen today, that I do not intend to sequester the jury. I realize you've made that request and it's over your objection.
>
> "The staff of the court have made inquiries and, due to the number of rooms and, what should I say, the season we are in, getting these folks in a nice place that I would want to stay in, as everyone here would, as opposed to some other place, it's been very difficult to find a place where we could basically allow them to stay in consecutive nights. Not knowing how long this is going to take, some places could accommodate us for perhaps as much as a week, then we're thrown out like every other person.
>
> "So at any rate, that hasn't been the reason I've made the decision. It is part of the reason I take into account. I think this jury can still do its job and abide by the court's order. So tentatively as of right now my intent will be to instruct them, that they'll be permitted to return home each night and so forth." (40 RT 9292.)

When Mr. Feldman advised the Court that there were now alerts about kidnapped little girls on the freeways, that there was a San Diego Reader article about "Dad's," that there were reports that Brenda Van Dam had telephoned Samantha Runnion's mother to talk about issuing a press release, and that Nancy Grace of Court TV was complaining about the defense in the instant case, Judge Mudd emphasized that the decision not to sequester the jurors was still tentative, but he was still inclined not to sequester. (40 RT 9294-9295.)

On Monday August 5, with the jurors still excused, Mr. Feldman renewed the motion to sequester. Over the weekend the Sunday newspaper had a front-page article about CALJIC Nos. 2.60 and 2.61 on the defendant's right not to testify. There were a number of criticisms of this instruction published. (41 RT

9329.)[105] In addition, the "San Diego Magazine" – a magazine distributed in bookstores and supermarkets and devoted to rating restaurants – ran an article on the Van Dams and Dad's. (41 RT 9329.) "So my request," Mr. Feldman concluded, "is that your honor either sequester or specifically direct the jury that there are more landmines out there. And there keeps growing, the landmines keep growing, Judge." (41 RT 9329.)

Judge Mudd responded:

> "All right. Those are the same kinds of materials that the court obviously has been drawing the jury's attention to. And I intend to once again indicate that by allowing them to not be sequestered, I am expecting them to abide by the court's order.
>
> "I think one thing needs to be said because the record is often exceptionally dry, and for any appellate review, this is a hardy group of people. And this court got the very distinct impression when we dealt with the matter of a number of them being followed and efforts to determine who they were through their license numbers, that they don't want their lives disrupted. And that's exactly what sequestration would do.
>
> "And, in addition to that, sequestration has its own pitfalls as this local community has already discovered. So I am aware of what the articles were this weekend, and it was just a matter of what was going to be today's topic of discussion. And --
>
> "MR. FELDMAN: Of course, the same problem with today's newspaper also, your honor.

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[105] CALJIC NO. 2.60 provides: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." CALJIC No. 2.61 provides: "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any essential element."

"THE COURT: Absolutely. Absolutely. And I intend to pursue the question of whether or not the sheriff is abiding by the court's orders because it appears they're not. So we'll pursue that matter independently.[106]

"At any rate, at this point in time my intent will be to allow them to commence deliberation without sequestration. But, again, if it gets – anything more than what we are seeing, and I think Mr. Feldman, you're right to raise it on the record, because even though we're not in session, there's an article, there's a picture. There's commentators and talking heads. And so – but that's all the material that's in the domain that they should know how to deal with. And I am assuming they are. Okay." (41 RT 9330-9331.)

c. Closing Arguments, Deliberations, and Juror's Request for Sequestration

Tuesday August 6 began with jury instructions for the guilt phase of trial (42 RT 9343.) The balance of the day was given over to closing arguments. (42 RT 9366 *et seq.*) At the end of the day, a note from Juror 7 had been submitted asking if the Court could arrange to have the jurors excused from their jobs on Fridays, even though court was not in session, without the jurors' therefore having to use vacation or sick leave. (42 RT 9490; 40 CT 9902.) Judge Mudd was somewhat surprised at the request and thought it a matter, not for him to address, but for each juror's conscience. (42 RT 9490.) Mr. Feldman suggested that the note might have to do with pressure on the jurors in their work places because of this case. Judge Mudd conceded the possibility, but let the matter stand. (42 RT 9491.)

Closing argument continued on Wednesday August 7. In the course of the day, there was a note from Juror 12:

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106 There was that day an article in the newspaper regarding the visit of a defense expert to the jail to see Westerfield. This information was supposed to have been sealed from the public, suggesting that there was a leak from the Sheriff's Department. (41 RT 9307-9308.)

"What the letter about not going to work was a misunderstanding.

"What is [unintelligible] is that due to the media of the case. Please understand that people are talking and you just can't escape it. Self policing is working to a certain point but it's getting hard to have a clear mind with people that have a big interest in the case at work place." (40 CT 9905.)

Judge Mudd addressed this note generally with the entire panel before excusing them for the day:

"Ladies and gentlemen, before we take the afternoon, break, I've received a note regarding the increased amount of exposure you folks are apparently starting to sense, either at the work place or in social gatherings and so forth, because the increased amount of conversation among your friends, colleagues, family members regarding the case.

"The only thing I can tell you is what I have been telling you all along. You have to figure out ways to avoid personally becoming involved in those conversations. That's number one. Number two, you know what your obligation is, and your obligation is to make your decision based only on what you see and hear in this courtroom. So obviously, anything that you inadvertently or accidentally overhear, a colleague, and employee, or before you can get out of range of that conversation, is stuff that you're easily going to be able to disregard

"Folks, I have a lot of faith in you. I have an enormous faith in our system and of this particular group. You've told me, you showed me, you don't want your lives disrupted. The only other choice I have is to disrupt your lives totally and put you in isolation. That basically is the choice I have. I don't want to exercise that because I don't think you want that to happen. And the only way that the system is going to work is if you abide by the court's order. And when you are confronted with a situation where you know the case is being discussed, do your best to avoid it, and what you hear disregard. That is the only choice I have right now. And unless something gets really, really worse, or is reported to me, I don't want

to basically isolate you from your families while you're deliberating. I believe in you, and you have to abide by the orders I have set in order to make this work, and I'm going to assume you're doing that.

"Please remember the admonition of the court not to discuss any of the evidence or testimony among yourselves nor with any other persons, nor form or express any opinions of the matter until it is submitted to you." (43 RT 9649-9650.)

On the morning of Thursday August 8, before Mr. Dusek continued his final closing, various matters were addressed in closed session, one of which was a leak to the media as to what had occurred in closed session the day before after the jurors had been excused for the day. In that session, matters concerning the Van Dams were discussed (43A 9653-9655) and were related that evening on the Rick Roberts radio show – a "leak of monumental proportions", as Judge Mudd characterized, since it could only have occurred if a camera or microphone had been left on, or if one of the participants had talked to the media. (44 RT 9961-9962.)[107] Mr. Feldman noted that the pitch of media coverage was rising to an even more intense level as the submission of the case came closer; media trucks were multiplying outside; and the crowds in the hallways were even larger. He argued that it was impossible to insulate the jurors from all this. (44 RT 9670-9671.)

Judge Mudd did not respond. He had the public admitted to the courtroom, and he turned his attention to River Stillwood, the producer of the Rick Roberts Show, giving her an opportunity to identify the source of her information. Stillwood claimed not to know, whereupon Judge Mudd peremptorily expelled her: "Good-bye. I will not tolerate this. Good-bye, ma'am." (44 RT 9671-9672.)

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[107] The discussions concerned anonymous information about Brenda Van Dam purchasing a firearm – which information proved to be false. (43 RT 9496-9497; 43A RT 9653.) The other matter concerned Damon's aggressive remarks to one of the defense attorneys and his family (43A RT 9654-9655), which occurrence in fact was true. (44 RT 9660-9661.)

This contrasted with his greeting to the jurors and his opening admonition when they reconvened:

> "Good morning, ladies and gentlemen.
>
> "I apologize for the delay. We had a few loose ends we had to take care of.
>
> "I want to alert you to the fact that now two weeks in a row 'The Weekly Reader' has another article, front page, on this case. Please avoid it.
>
> "Also, obviously, the television stations and radio are covering this quite extensively now that we're reaching the end of the line. So listen to your all-oldies station or whatever, but don't pay any attention. We're still self-policing.
>
> "How about those Pads. They finally won a ball game." (44 RT 9672.)

Mr. Dusek finished his final closing that morning and Judge Mudd gave the closing instructions, which included the following:

> "The next instruction is very important, and I'm going to comment.
>
> "You will be permitted to separate at the noon and evening recesses. During your absence the jury room will be locked. During periods of recess you must not discuss with anyone any subject connected with this trial, and you must not deliberate further upon the case until all twelve of you are together and reassembled in the jury room.
>
> "This is obviously the instruction, ladies and gentlemen, with the choice the Court had to make. I didn't sequester you. I know that you are a conscientious group and are going to deliberate conscientiously. If it becomes apparent to you collectively that you cannot do that given the freedom you have to go home each night, I

will expect you to alert me to that. I think I have done everything humanly possible to get you to understand how important it is that you make the decision based solely on what you see and hear in this courtroom.

"You will now start deliberations. You will now find out if you can do that. If you cannot do that with the outside influences, the day off, the weekend off, going home at night, alert me to that. And if you want to be isolated, I will do that. At this point in time I don't sense that you do want to do that, and I have every confidence you'll be able to do our job without those influences.

"I'm throwing that out to you only because now that you start deliberating for the first time, you're going to find out whether you're going to be able to do that or not unhindered by these outside sources. So I leave that to your discretion." (44 RT 9688-9689.)

At 10:10 a.m. on August 8, the bailiff was sworn to take charge of the jurors and the case was submitted to them. (44 RT 9692.) But before noon, the following note was submitted by Juror 10, the foreman:

"8/8/02

"One of the jurors has co-workers harassing him about this case at work. This is to the point where he would rather be sequestered then [*sic*] go to work.

"This (sequestering) would significantly affect the other 11 jurors. We propose the following:

"1. Judge talks to this unresponsive employer.

"2. Jury works on Fridays so this juror doesn't have to work [This proposal is crossed out in the note.]

"2. Or a ½ day on Friday.

"We are open to other ideas – this juror has talked to his employer extensively without cooperation.*

"Thanks,

"Juror # 10

"* We would like to orally discuss if possible." (40 CT 9906; 14 CT 3488.)

At first in closed session without the jurors present, Judge Mudd articulated the connection between this note and the one submitted the day before by Juror 12. Judge Mudd inferred from the note that the majority of the jurors wanted to avoid sequestration, but agreed that it was appropriate to speak to all the jurors about scheduling for half-day sessions on Friday, and to Juror 12 alone. (44A RT 9701-9706.) With the jury, Judge Mudd worked out a plan that allowed them to come on Fridays. Because of some of the jurors' pre-existing scheduling conflicts, all they would have to do was convene briefly and leave, which would then be sufficient to excuse them from work – unless, of course, like Juror 5, one had to be in court at least for six hours in order to be excused by one's employer. But number five was willing to go to work from the courthouse if it meant not being sequestered. (44A RT 9706-9710.)

Judge Mudd then excused the jurors except for Number 12. First, Judge Mudd ascertained that 12, unlike 5, would be excused from work so long as he had to go to court for even a brief amount of time. (44A RT 9710-9711.) As to what was happening at work, 12 related that "a lot of people aren't as respectful as they should be." (44A RT 9711.) Under Mr. Feldman's questioning, Juror 12 expatiated:

"JUROR NUMBER 12: Nothing's been said to me [at work]. It's just what I hear. Everyone at work has a radio, everyone at work reads the paper. Everyone – at my work it's pretty family. To get hired there you have to know somebody. This is how it is. My father's a manager there. Everyone knows my father. Everyone has

got – I don't know how they've got it, but they've got the clue I'm on this case. Everyone knows. It's hard to stay away, to keep everything pushed away. And that's what I'm doing. I feel that I'm doing a good job at it because I haven't broken any rules. I'm doing self-policing as I stated, but it's just getting hard to go to work." (44A RT 9713-9714.)

The rest of the jurors were called in, and Judge Mudd inquired further:

"Now, can I read the consensus of the group right now that the majority of you, and we don't have to take votes, but the majority of you at this point would prefer not to be sequestered? Is that a fair statement still?

"(Responses of 'Yes'.)" (44A RT 9716.)

Whereupon, the jurors were told they were to report each Friday at 9 a.m. and could deliberate for an hour or two or three as they chose. (44A RT 9716.)

After the jurors retired again to deliberate at 2:10 p.m., Mr. Feldman announced for the record that the defense continued to request sequestration, and that nothing said today was intended as a waiver of that request. (44A RT 9718.) In open court, Judge Mudd announced that the jurors would be deliberating five days a week, but that the exact hours would not be made public or released to the media. As to why a closed session was necessary, he gave the diversionary explanation that he had to resolve scheduling conflicts for the new schedule. (44 RT 9720.)

d. Publicity, Pressure, and Second Stalking Incident During Deliberations

The jurors deliberated on Friday August 9 for an hour (14 CT 3489; 45 RT 9724), and then returned on Monday August 12, when they deliberated for a full day. (14 CT 3490.) They had to be released from the courthouse by a different

entrance because of a demonstration taking place outside the Hall of Justice regarding the Westerfield case. (46 RT 9727.)

Tuesday morning, August 13, began in closed session at Mr. Feldman's request. It seems that on Monday night, the defense had received information from a Timothy Baker that Juror 12, the week before, had stated at work that he, 12, was not going to believe anything Feldman said because 12 did not like Feldman. After Feldman called Mr. Dusek about this, Feldman telephoned the court and left a message. The defense investigator then called Baker's number and talked to him further. It seems that his information came from a co-worker of 12's. Baker gave a number to contact the co-worker, but this yielded a voicemail message with 12's voice and name on it. No message was left because of this. (47A RT 9731-9732.) Mr. Feldman requested that the court either inquire of Juror 12 or suspend deliberations pending resolution of this issue, since the co-worker was not available until August 15. Mr. Feldman emphasized that this was not an anonymous call, and pointed out, as Judge Mudd corroborated, that Mr. Baker had called the court itself on August 9 with this information. (47A RT 9731, 9732-9733.)

Mr. Feldman then expanded his request in way that gives some sense of the public atmosphere outside the courthouse:

> "It does also seem as though the increasing press tensions on the case, on the jury, on the parties are sufficient for us to renew our motion for mistrial. And we do so based upon the media circus that's out there. We're concerned at this point that there's way too much pressure on the jurors basically to lynch Mr. Westerfield.
>
> "If anything similar is happening to the Court as is happening to counsel, we're getting just walking the streets, the most outrageous statements, including profanities in restaurants, including threats in – I don't know threats – however you would construe the words. I could put them on the record if you want to hear them.

"THE COURT: No. I can only imagine, Mr. Feldman. And I don't have any doubt that it's accurate.

"MR. FELDMAN: Thank you.

"So we also reported on the newspaper, I'm sorry, reported in the news there's people coming from San Bernardino apparently to come march outside court to protest the length of time our jury is deliberating. On the news, on the radio news, I'm being called a sociopath for defending Mr. Westerfield.

"THE COURT: Consider the source of that.

"MR. FELDMAN: I don't know who it is.

"THE COURT: Well, I'm not even going to say.

"MR. FELDMAN: I don't know who the source is. I just know the names called.

"You know, if the defense says this in open court, then the media is going to spin it against Mr. Westerfield, which is why I asked your honor to at least let me address you confidentially.

"THE COURT: They are not here. So we will do it in here and just report to them what has occurred.

"MR. BOYCE: Your honor, if I could add just a little, the jurors are obviously not receiving the type of notoriety that counsel are. Even from our family and friends it seems like everybody has to give their personal opinion about the case or offer some advice about the case. And I'm sure that these jurors, although they don't have the public, the public notoriety that we do, are receiving the same type of influence from family and friends. And it's ongoing.

"I think that the more time passes, the more obvious it becomes that something should be done, either the jury needs to be sequestered, I think, if the Court doesn't grant a mistrial." (47A RT 9733-9734.)

Judge Mudd denied the motion for mistrial. He saw no basis in fact for granting it, and agreed with Mr. Dusek that counsel's extrapolation of his own experience to that of the jurors was only a supposition. (47A RT 9734, 9736.) In regard to Juror 12, Judge Mudd was not going to follow up on this. He had his "hands full" with the internal investigation of the leak that had led to the expulsion of River Stillwood from the courthouse. At this point, the matter was double hearsay, and the parties themselves were free to follow up on it. (47A RT 9737.) No mention was made of Mr. Boyce's request that the jury should be sequestered.

On Wednesday August 14, the defense filed a written motion to preclude media access to the jurors. This was based on article from Court TV referring to events of Monday August 12. (10 CT 2397.) The article reported as follows:

> "Jurors weighing David Westerfield's fate finished a third day of deliberations Monday with a request for the media – stop staring at us.
>
> "The plea, relayed through a court officer, came after the panel took an afternoon coffee break in a public hallway. As they had in the past, reporters watched the 12 as they chatted around a picnic table, but the prying eyes apparently became too much for some jurors who asked bailiffs to step in. Five minutes after they returned to the jury room, a court officer told journalists to cease further 'peeking' at the panel.
>
> "The six men and six women have spent 12 hours deliberating charges of murder, kidnapping and child pornography against Westerfield in connection with the slaying of Danielle Van Dam, his 7-year-old neighbor. If convicted, Westerfield faces the death penalty.
>
> "Beside their picnic table conviviality, jurors have offered little clues to their progress. The only note from the panel concerned jurors' wish to deliberate five days a week instead of four.
>
> "One Los Angeles radio station expressed frustration with the pace of deliberations Monday by handing out broccoli spears and

> fliers reading 'Save the justice system . . . Chop down the Broccoli stocks (sic).' Employees of KFI AM, which bills itself as 'more stimulating talk radio,' said 'broccoli heads' were holdout jurors who favored acquittal." (10 CT 2400.)

The Court set a hearing on the motion for the next morning, Thursday August 15, and was going to hear it in open court, even though it was filed under seal. (49 RT 9763.) First, however, the court and parties went into closed session to deal with another problem of stalking. Juror 13 reported to the Court that on the previous Thursday (August 8), she felt she was being followed to the trolley as she left court. She saw the same man again on Monday August 12 when she was returning to her car in the company of Juror 2, to whom she pointed the man out. She did not report it at first because she was only an alternate, even though she was bothered by the incident. Finally, she decided to inform the Court when her mother scolded her for not doing so. Juror 2, who had seen the stalker in the earlier incident involving jurors 17 and 18, related to the Court that the person pointed out to him by 13 was not the same man. He also thought that there was nothing unusual about the man in the second instance and did not get the sense that the man was following, as he did with the stalker in the first incident. (40 CT 9911-9912; 49A RT 9766-9770, 9774-9776.)

Coming out of closed session, but out of the presence of the jury, Judge Mudd announced that the reason for the closed session was that one of the alternate jurors had been followed "again", and that, like the previous incident, the matter was being investigated "internally." (49 RT 9778.)

Judge Mudd then turned to the defense motion to preclude media access to the jurors. Mr. Feldman began his argument with the assertion that the jury was "under siege" and that the media was creating a "lynch mob mentality." (49 RT 9778.) He requested that the jurors be given a sequestered area in the courthouse to take their breaks free from the scrutiny of the media; but further, the defense still wanted full sequestration because the "environment" does not "allow[] for

independent, objective, non-emotional deliberations." (49 RT 9779-9780.) Finally, the defense requested that the Court "pull the plug" on the television cameras, since the prospect of returning a verdict in the full glare of such a broadcast was in itself intimidating. (49 RT 9780.)

Mr. Dusek argued that any assertion about a verdict based on a siege mentality was "pure speculation." They knew the jurors by now, knew their dedication to the cause of a fair trial, and there was no doubt that they would return a verdict based only on the evidence presented to them in court. (49 RT 9781.) The Court essentially agreed with Mr. Dusek. The motion for sequestration was denied, although the more limited request would be granted by designating a more sequestered area for jury recesses and lunch. As for the juror being followed, that was being investigated. (49 RT 9781-9782.) When Mr. Boyce pointed out that the Court did not rule on Mr. Feldman's request to "pull the plug," Judge Mudd gave his final word in this procedural account:

> "Let me just say that this Court, rightly or wrongly, and right now I'm ruing the day I made the decision for the live feeds, nonetheless, based on my experiences up to that point in time, my professional experience with the lawyers that were in the fishbowl on live television was nothing like it is today. I think it would be inappropriate, given the fact that I can't at this point in time point to any prejudice, so the live feeds, both radio and television, will remain at this point in time. I don't see the prejudice.
>
> "I would say the odds are not good that it will ever occur again in this department, but that awaits a future date." (49 RT 9788-9789.)

The jury deliberated the rest of the day on August 15 (14 CT 3493-3494) and on Friday August 16 for one hour (14 CT 3495; 50 RT 9795), and went home for what was virtually a three-day weekend. They returned on Monday August 19 to deliberate almost a whole day (14 CT 3496); they deliberated a whole day on

Tuesday August 20 (14 CT 3497); and reached their guilty verdicts by 9:45 a.m. on Wednesday August 21 (14 CT 3498).

C.
Summation

One can see from this account that from the stalking incident to the verdict, the encroachment of the public atmosphere on the trial intensified to the point that there was a substantial likelihood that this trial process would not conform to due process in providing a fair and impartial determination of guilt, free from outside influences. Judge Mudd, as the detailed account of the various incidents shows, was not using a substantial-likelihood standard, but rather a standard of actual prejudice, discounting the defense's arguments for sequestration as based on suppositions and speculations, and relying on his intuitive confidence in the integrity and dedication of the jurors. However accurate that intuition might be, it is not the ground on which our jurisprudence rests its confidence and trust for the protection of due process.

To summarize: Mr. Westerfield was on trial for a capital charge, involving the murder and kidnap of a seven-year old girl, which case had been the subject of intense publicity from the day the girl disappeared on February 2, 2002, through the deliberations of the guilt phase of trial, which began on August 8, 2002 and ended in guilty verdicts on August 21, 2002. The jury worked and circulated freely in the community during trial, and on court days had substantial free time in a courthouse beset with crowds of spectators, which included responsible and irresponsible media observers and private individuals, including the Van Dams, who were not clearly in the responsible category, and who, at least in Damon's case, was not unwilling to manipulate the media for his own purposes regardless of the demands of the justice system. After the defense rested and the case headed toward its conclusion in a guilt-phase verdict, there was: a stalking incident; increased publicity corresponding to an intensification of public emotion as the denouement of the case approached; a request by one of the jurors for

sequestration because of harassment at work; a second probable stalking incident; and more. This record, reviewed de novo against a standard of "substantial likelihood" shows much more by way of due process violation than the record in *Santamaria*, where error was established simply on the fact of an 11-day separation in a murder trial during deliberations. (*People* v. *Santamaria*, *supra*, 229 Cal.App.3rd 269, 278-279.)

But even if one must show an abuse of discretion, this record supports the finding not only in the number of events and occurrences that demonstrated the need for sequestration, but in the very abdication by Judge Mudd of the decision to sequester no not. The discussion, prompted by Juror 12's request for sequestration, as well as other earlier discussions in this case, was remarkable for the clear indication that Judge Mudd laid the matter of sequestration at the feet of the jurors themselves. *They* were to make the decision, and Judge Mudd was going to, and did, defer to that decision. Needless to say, a juror, whose life has already been disrupted by the fact of non-sequestered jury service, is not the best judge of whether circumstances require that service to become burdensome in the extreme. Legally, the jurors are not the judge of this at all, and Judge Mudd's improper delegation in this regard is a failure to exercise discretion, or an abuse of discretion. (*People* v. *Sandoval* (2007) 41 Cal.4th 825, 847-848 ["A failure to exercise discretion also may constitute an abuse of discretion"]; see also *In re James R.* (2007) 153 Cal.app.4th 413, 434-435 ["[I]mproper delegation of judicial power over visitation will necessarily be found to constitute an abuse of discretion."].) Thus, if one is to take *Santamaria*'s reference to discretion at face value, there was here too an abuse of discretion, and the failure to sequester the jurors, at least during deliberations, was error.

But whether the route to a finding of a due process violation in this case passes through de novo review or through an abuse-of-discretion standard, the evaluation of prejudice is in accord with the substantial-likelihood standard. (*Sheppard* v. *Maxwell*, *supra*, 384 U.S. 333, 362; *People* v. *Santamaria*, *supra*, at

pp. 280-283.) There can be little or no argument that under the circumstances of this case, as presented in great and lengthy detail above, there was, and is, a substantial likelihood that Mr. Westerfield did not receive a fair trial in accord with the Due Process Clause of the Fourteenth Amendment, and his convictions must accordingly be reversed.

V.
COUNT THREE, CHARGING POSSESSION OF CHILD PORNOGRAPHY, DID NOT MEET THE REQUIREMENTS OF STATUTORY JOINDER TO COUNTS 1 AND 2, CHARGING MURDER AND KIDNAPPING, RESPECTIVELY, AND IN ANY EVENT, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO SEVER COUNT 3 FROM COUNTS 1 AND 2

Introduction

The joinder of count three, misdemeanor possession of child pornography (Pen. Code, § 311.11(a)), to counts 1 and 2, charging respectively, capital murder and kidnapping, was the subject of a pretrial severance motion by the defense. (2 CT 475.) The defense also presented a related motion objecting under Evidence Code section 1101 to any pornographic evidence. (3 CT 588.)[108] Judge Mudd rejected the severance motion and further ruled that selected pornographic images, some constituting proscribed pornography under section 311.11(a) and some not, were admissible as relevant to prove motive and intent in this case. (5E RT 1961; 5F RT 1983-1985, 1993-1996.) The rulings, which so changed the complexion of this case, are the subject of the instant claim. [109]

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[108] Section 1101(a) states that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Section 1101(b) allows evidence of specific instances of conduct "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

[109] It will help in following the instant argument to have an overview of what is and is not proscribed under Section 311.11(a). A violation of this statute consists in the possession or control of "any matter, representation of information, data, or image" on some sort of "data storage media", which the statute sets forth in a non-

The law of joinder and severance is contained in Penal Code section 954:

> "An accusatory pleading may charge two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses, under separate counts. . . .; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

This means, simply, that different charges must be tried in separate proceedings unless they are either connected together in their commission or are the same class of crimes. (*People* v. *Soper* (2009) 45 Cal.4th 795, 771.) If the charges satisfy the requirement for consolidation, the trial court nonetheless retains discretion to grant a severance, but the defendant then bears the heavy burden of a clear showing of substantial prejudice from the otherwise proper

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exclusive list, which representation or image "involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4 . . . ."

Section 311.4(d) defines "sexual conduct" as "any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct."

At the time of trial, a violation of Section 311.11(a) was only a misdemeanor. In 2007, the statute was amended to make the crime a "wobbler." (Stats. 2007, chptr. 579, § 38.)

joinder of counts. (*People* v. *Ramirez* (2006) 39 Cal.4th 398, 438-439; *People* v. *Ochoa* (1998) 19 Cal.4th 353, 409; *People* v. *Bradford* (1997) 15 Cal.4th 1229, 1315.) In assessing whether or not there was an abuse of discretion, one of the issues is the cross-admissibility of the evidence (*Ibid.*; *People* v. *Vines* (2011) 51 Cal.4th 830, 855; *People* v. *Soper*, *supra*, 45 Cal.4th at pp. 774-775), and in this regard, the principles governing Evidence Code section 1101, albeit in modified form (*Alcala* v. *Superior Court* (2008) 43 Cal.4th 1205, 1222, fn. 11), will intersect, as they did here, with the question of joinder and severance.

It is appellant's contention that count three in this case did not meet the statutory requirement for joinder of counts as required by Penal Code section 954, but that even if it did, it was an abuse of discretion to allow the joinder, not only insofar as the evidence was *not* cross-admissible, but also because joinder of counts in this case created an intolerable risk of improperly skewing the guilt and penalty determinations in this capital case far in excess of any negligible benefit arising from consolidation. But before elaborating on the law, one must recount more detail the somewhat odd procedural course this issue took below in the trial court.

A.
Procedural Course of Joinder Issue

It was decided, at the suggestion of the second prosecutor, Mr. Clarke, that the defense's motion to sever would be deferred until the motion to exclude the pornography under Evidence Code section 1101 was decided, since the two issues were "intermixed" and were "down together." (5E RT 1943.) But the first step, for either issue, was for the prosecution to designate the selection of the pornographic images it was proffering to prove the misdemeanor possession charge. (5E RT 1943-1944.)

Pretrial (PT) Exhibits 30 and 34 consisted of the images the prosecution deemed to be child pornography, whose possession would actually constitute the charged crime. PT Exhibit 30 consisted of six video clips simulating the forcible

sexual assault of females who appeared to be pubescent minors, although the female in the last two clips appeared to have fully developed breasts, while the females in the previous clips had smaller breasts. (5E RT 1946-1948, 1953; 5F RT 1996; Ex. 139.)[110] PT Exhibit 34, was a photograph showing a female, who appeared pubescent, facing the camera, and sitting on the lap of the man with whom she was having sexual intercourse. (Ex. 138.)

The remaining exhibits were not contraband, but were offered to establish the *scienter* element of the crime. PT Exhibit consisted of cartoon images, or "animé" (5E RT 1948), which did not therefore depict a "person" as required for a violation of Penal Code section 311.11. (See above, p. 225, fn. 109.) Nonetheless, in cartoon images, PT Exhibits 31C, D, E, F, G, and I portrayed pubescent girls engaged in forcible, or possibly forcible, sexual acts. (Ex. 138.) PT Exhibits 31A, B, and H were single-frame cartoon depictions of the rape of a female with a fully mature body, but girlish facial features. PT Exhibits 32 and 33 were cartoon depictions of rape, conveyed in a series of frames, with captions, telling a continuous story. The females depicted were mature in body, but, as with PT Exhibit 31A, B, and H, they had girlish facial features as well as hairstyles and clothing. (Ex. 147.)[111] Finally, PT Exhibit 35A through L were also not child pornography, and perhaps were not even pornographic. These consisted of photographs of unclothed pubescent and prepubescent females. The poses in some of them were sexually suggestive, but in others they were not. (Ex. 138.)

As for admissibility, or rather cross-admissiblity, under Evidence Code section 1101(b), the prosecution's position was that the proffered evidence was relevant to prove motive and intent in connection with the kidnapping and murder.

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[110] This became Exhibit 139 at trial.

[111] Exhibits 138 and 147 refer to the numbering of these as trial exhibits. All exhibits cited in this brief will be transferred to this Court. (Cal. Rules of Court, Rules 8.634(a) and 8.224(a)(1).)

(3 CT 682.) According to Mr. Clarke, who argued the matter for the prosecution, the fact that Danielle Van Dam's body was found unclothed in a remote area was a sufficient predicate to raise the question of child molestation and sexual assault. The cartoons depicted sexual assaults on minor females, as did the movies, even if the actresses were actually over 18. Even the non-pornographic photographs in PT Exhibit 35 showed teenagers and girls in seductive poses. (5E RT 1951-1953.) One of them in this series, "even look[ed]," Mr. Clarke noted, "to some extent like Danielle Van Dam, in addition to being approximately her age." (5E RT 1954; see Prosecution's PowerPoint Presentation for opening statement, slide 15; see also Ex. 138, image IEA30527.JPG.) The proffered images, he argued, provided "an extremely rare insight into the reasons for this kidnapping and murder by Mr. Westerfield of Danielle Van Dam. They demonstrate graphically his special attraction to young girls as evidenced by this particular material" (5E RT 1953), and were "extraordinarily probative of intent". (5E RT 1952) The evidence, in sum, was admissible not only to prove the violation of Penal Code section 311.11(a), but also to prove that Mr. Westerfield kidnapped Danielle Van Dam for sexual purposes and killed her in the course of committing a violation of Penal Code section 288. (5E RT 1954.)[112]

Mr. Boyce took exception to Mr. Clarke's claim of a "special attraction" to girls, since the pornography involving minors was a small percentage of the pornography seized from the computers in Mr. Westerfield's home. If the prosecution's evidence was introduced, Mr. Boyce argued, the defense might have to counter with the entire collection. (5E RT 1955.) Beyond that, the evidence was extraordinarily prejudicial without much probative value, since there was here no "tie-in" with the charged crime as in the cases cited by the prosecution in its

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[112] It might be noted here that the murder charge was submitted to the jurors solely on a theory of felony-murder/kidnapping, and no instruction on felony-murder predicated on a violation of Section 288 was even requested, let alone given. (See below, p. 358; see also 10 CT 2522-2523; 42 RT 9357-9358.)

moving papers, in which cases there had been evidence that the victim had been sexually molested. Here there was no such evidence. (5E RT 1955-1958.)

After some questions directed to Mr. Clarke as to the location of Danielle's fingerprint in the bedroom of the motorhome, the blood drop in the hallway, and the possible hair in the bathroom and other places, Judge Mudd ruled:

> "All right.
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> "In order to make a ruling on this motion, the Court has to consider the totality of the state of the evidence in terms of its relevance to these proceedings. When one looks at a nude body, when one looks at blood, fingerprint, the hair evidence that is currently known, where it's located especially the handprint or the fingerprint in the area of the bed, coupled with this type of material, it becomes highly relevant, highly probative on the issues of motive and intent. I sort of saw this one coming when it was publically announced that the cause of death could not be determined. And as of now no physical samples were there: no semen, no other bodily fluids.
>
> "But when one looks at the entire context of what the People's theory on the case is, it becomes almost the only theory that makes any sense when one couples all of these factors together. I realize, as does everyone, the prejudicial nature of these materials, and whether I'm going to allow all of these in or not, I'll hear further argument on.
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> "But as to the threshold issue of whether it is relevant and probative on the People's theory of the case, and whether there is sufficient evidence to sustain that theory, the Court finds that there is." (5E RT 1961-1962.)[113]

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[113] The next day, Judge Mudd recapitulated this ruling for the benefit of defense co-counsel, Ms. Schaeffer, who had not been there the day before, and who was urging that the only nexus between the proffered pornography and the charged murder and kidnapping was speculative and theoretical, not evidentiary. (5F RT 1982.) Judge Mudd replied: "The evidence in this case is that the young girl was kidnapped from her house; her nude body in an advanced state of decomposition is found; her fingerprint is found immediately over the bed area of your client's

The next day, before the parties argued regarding which of the proffered exhibits should actually go to the jury, Mr. Feldman protested that there was still an analysis to do under Evidence Code section 352. The proffered evidence was extraordinarily prejudicial, while the vast majority of the pornography on the computers was adult pornography, which the defense might be forced to introduce to place the prosecution's evidence in perspective. (5F RT 1971, 1976-1978.) Judge Mudd conceded that he had not considered the issue in light of Evidence Code section 352. However, the prosecution's presentation of the material was succinct, while, if the defense wanted to offset the evidence with a presentation of the adult pornography, this could be done by stipulation or by reference simply to the numbers. (5F RT 1984.) In sum,

> " . . . I have, as best I can balanced the interest of the defendant, the time that it's going to take, the right of the People to present their case and their theory, and I have come to the conclusion that a limited amount of this material is relevant, it is probative, and while it is true that it is inflammatory, the fact is it exists and the fact is there is evidence in this case to sustain the People's theory." (5F RT 1984-1985.)

Once it was decided that proffered evidence of child pornography and supporting exhibits was within the range of admissibility under Section 1101(b), the Court proceeded to the question of severance. On this question, Mr. Boyce contended that a violation of section 311.11(a) was not the same class of crimes as

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motor home; her blood is found in the motor home, her hair is found in the motor home; and as I learned yesterday, more of her hair apparently may be found in other locations. [¶] It is true that because of the advanced state of decomposition the genitalia no longer exist to know whether or not there was molest, and no bodily fluids were found. But I have analyzed this and determined that based on all of the evidence that is involved in here, it is appropriate that the People be able to explore their theory because of what is located on you client's computer." (5F RT 1983.)

murder and kidnapping, and that in this case, the commission of the one was not connected to the commission of the other two. (5F RT 1988-1989, 1995-1996.) Mr. Clarke conceded that these indeed were not the same class of crimes, but, "as has been I think apparent from our previous argument yesterday and today, they are clearly connected together in their commission, justifying denial of the severance motion inasmuch as count three obviously is in our view part and parcel of the commission of counts one and two." (5F RT 1990, 1996.)

The motion to sever count three from counts one and two was denied. (5F RT 1996), and a narrower selection of the proffered exhibits was made. Judge allowed the video clips showing the forcible sexual assaults (PT Ex. 30); the cartoons showing forcible sexual assaults on pubescent girls (PT Exs. 31 C,D,E,F,G, and I); the photograph of the apparently pubescent girl having sexual intercourse (PT Ex. 34); and the photographs of naked pubescent and prepubescent girls. (PT Ex. 35.) He excluded the cartoons showing forcible rape and sexual assault on females with fully mature bodies (PT Exs. 31A, 31B, 31H, 32 and 33). (5F RT 1992-1995.).)[114]

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[114] The exhibits excluded were later admitted by Judge Mudd in a strange twist of events, in which it was claimed that Mr. Feldman "opened the door" not only to these, but also to all the pornography seized in this case. (*Ibid.*) This issue is discussed in the next argument of this brief not only as independent error, but as part of a gross unfairness in the trial due to joinder, *if*, in this argument, this Court rejects the claim that joinder was proper based on pretrial circumstances known to the court. (*People* v. *Gonzales & Soliz* (2011) 52 Cal.4th 254, 281 ["[E]ven if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts resulted in gross unfairness depriving the defendant of due process of law."]). In this argument, however, the discussion of error and prejudice is confined to the exhibits Judge Mudd held to be admissible in the pretrial hearing, and which were shown to the jurors initially, before the "door" was allegedly "opened."

B.
Statutory Joinder

By beginning with the 1101 question and then proceeding to the motion to sever, one may wonder if Judge Mudd confounded the questions of statutory joinder and discretionary severance so as to misconstrue the appropriate considerations for each. Nonetheless, under the rule of appellate procedure that every presumption and intendment is in favor of the order or judgment appealed from (*Walling* v. *Kimble* (1941) 17 Cal.2nd 364, 373; *Schnabel* v. *Superior Court* (1993) 5 Cal.4th 704, 718), one may paraphrase Judge Mudd's ruling as having two parts: 1) the requirements of statutory joinder were satisfied for the same, or similar, reasons that the evidence was cross-admissible; and 2) the defense did not meet its burden in showing the clear prejudice required for discretionary severance, because not only was the evidence cross-admissible under Evidence Code section 1101, the probative value of the evidence was so high as to overcome the extraordinary prejudice engendered by it. This is the ruling one must address, and one may begin with the question of statutory joinder, which is subject to de novo review, unlike discretionary severance, which is subject to an abuse-of-discretion standard. (*People* v. *Alvarez* (1996) 14 Cal.4th 155, 187-188.)

As already noted, Mr. Clarke conceded that possession of proscribed pornography under section 311.11 was not of the same class of crimes as murder and kidnapping. (5F RT 1990.) If his deference to the obvious requires any elaboration, it may be done in short compass. Crimes are "of the same class" when they possess "common characteristics or attributes." (*People* v. *Kemp* (1961) 55 Cal.2nd 458, 476; *People* v. *Smallwood* (1986) 42 Cal.3rd 415, 424, fn. 5.) Consistent with the word "class", the commonality of characteristics or attributes is sought on the general or definitional level, so that, for example, murder and kidnapping are properly joined as forms of assault against the person. (*People* v. *Kemp*, *supra*, at pp. 476-477.) Crimes involving the taking of property will constitute another class (*People* v. *Koontz* (2002) 27 Cal.4th 1041, 1075), and

undoubtedly sexual crimes constitute the class that embraces a violation of Penal Code section 311.11. (See Evid. Code, § 1108(d)(1)(A).) There can be cross-classification, such as robbery as an assaultive crime or property crime (*People* v. *Lucky* (1988) 45 Cal.3rd 259, 276), or rape as a sexual or assaultive crime (*People* v. *Kemp*, *supra*, at pp. 476-477.) Murder and kidnapping, however, are assaultive crimes, while criminal possession of pornography is not; criminal possession of pornography is a sexual crime only, while murder and kidnapping are not. Again, the matter is determined on the definitional level, so that even if one can posit the (meaninglessly) broad class of crimes involving minors, the classification of murder and kidnapping does not change simply because in this case the victim of these crimes was a minor. There is no basis in law or reason *not* to accept the People's concession.

What the People did not concede, and what was pressed below was that the murder and kidnapping in this case were "connected together in their commission" with the criminal possession of pornography. The statutory phrase has been construed broadly and is not confined to crimes committed in the same transaction of events or in a continuing course of conduct. "Offenses committed at different times and places against different victims are nevertheless connected together in their commission when they are . . . linked by a common element of substantial importance." (*People* v. *Valdez* (2004) 32 Cal.4th 73, 119, internal quotation marks omitted; *People* v. *Mendoza* (2000) 24 Cal.4th 130, 160; *People* v. *Lucky*, *supra*, 45 Cal.3rd 259, 276.)

Unlike the classification test, the "common element" measure refers to the facts of the case, such as evidence that the crimes were part of the same course of conduct (see *People* v. *Mendoza*, *supra*, at p. 160), or when the same instrumentality, such as a gun, is used in each separate and separated crime (see *People* v. *Scott* (1944) 24 Cal.2nd 774, 779), or when there is an apparent correspondence between the two crimes on some 1101-*like* theory of intent or modus operandi based on apparent similarities between the crimes to be joined.

(See *People* v. *Lucky*, *supra*, 45 Cal.3rd at p. 276 ["In both jewelry store incidents the robber carried a gold chain into the store, apparently on the pretext of attempting to sell it."]; see also *Ghent* v *Superior Court* (1979) 90 Cal.App.3rd 944, 955-956, 958 [frustrated attempted rape in the morning was evidence of motive for murder of same victim, whose nude and bound body was found the same afternoon.].)

Here, although Mr. Clarke's contention was that the pornography was "part and parcel" of the events surrounding the kidnapping and murder (5F RT 1990), there was no evidence that Mr. Westerfield had accessed this pornography right before Danielle Van Dam was kidnapped (see *Ghent*, *supra*, at pp. 955-956, 958.); there was no evidence or even contention that Westerfield had created the images seized (see *People* v. *Memro* (1995) 11 Cal.4th 786, 861, 865); there was no evidence or contention that any of the images were of Danielle Van Dam herself (see *People* v. *Bales* (1961) 189 Cal.App.2nd 694, 701); nor did any of the pornography or photographs depict a scene corresponding to some salient feature of the kidnap or murder. (See *People* v. *Clark* (1992) 3 Cal.4th 41, 129.) The absence of such factors significantly reduces the probative value of pornographic evidence for crimes that are not inherently sexual in nature. (See *People* v. *Page* (2008) 44 Cal.4th 1, 40-41.)

As noted above, Mr. Clarke did assert that one of the non-pornographic photographs in PT Exhibit 35 showed a naked young girl who looked "to some extent like Danielle Van Dam" (5E RT 1954) – and the prosecution would later highlight this photograph in its opening-statement PowerPoint presentation (People's Opening statement PowerPoint, slide 15) – but the resemblance seems to have been mostly of race and to some extent of hair color. The girl in the photograph seemed older. Moreover, her photograph did not stand out in any way from the other ones in Pretrial Exhibit 35, which showed many white and Asian girls, with hair colors ranging from black, to lighter brown, to blond. (Ex. 138.) Neither the so-called resemblance nor the circumstance of the placement or

possession of the photograph provided a substantial link to the murder and kidnapping. (See *People* v. *Page*, *supra*, at p. 41. ["Here, the cover of Oriental Delight featured a model who merely looked similar to Tahisha; defendant apparently took no steps to conceal or destroy the image, and the model was only one of perhaps hundreds of models who appeared in defendant's extensive pornography collection."].)

For the "link" between conjoined counts to be "substantial" and thereby satisfy the statutory requirements for joinder, it must have an anchor to fix the connection in place. That is to say, the possession of proscribed pornography had to connect to some evidentiary point in the evidence of the murder and kidnapping, and not to some speculation or theory of the prosecution as to how or why the murder or kidnapping was committed. Judge Mudd specified what those evidentiary points were, but before addressing them, one might resort to the case of *People* v. *Guerrero* (1976) 16 Cal.3rd 719 to help illustrate the general nature of the problem presented here where the evidence of sexual assault in the charged crime is problematical.

In *Guerrero*, defendant was on trial for murder. The victim, Miss Santana, was walking to a party with her girlfriend when defendant and another male offered her a ride. They were unable to find the party and began to "cruise." After buying some liquor, they stopped in a parking lot. Defendant then dropped off his friend and Miss Santana's friend, saying that he would drive Miss Santana home. A few hours later, her body was found by a passerby. She was fully clothed, but her blouse was hiked up above her brassiere, which itself was in place. There was no evidence of sexual molestation or trauma. (*Id.*, at p. 723.)

At defendant's trial, evidence of an uncharged act was allowed. Six weeks earlier, Irene Lopez and two girlfriends left a party with defendant and two other males. They went riding in defendant's car. After a series of stops and the dropping off of passengers, Miss Lopez was the only female left in the car. She asked to be taken home, but instead, defendant drove to a secluded area where he

and his two friends forced her to commit acts of oral copulation and to submit to sexual intercourse. One of the males warned Miss Lopez not to tell. A few minutes later, defendant, while driving, picked up a lug wrench, turned to Miss Lopez and smiled. She interpreted this as a threat. (*Id.*, at pp. 722-723.)

This Court, in *Guerrero*, discussed the contention that the Lopez rape was admissible to show that Miss Santana was murdered in the course of an attempted rape. In rejecting this contention, the Court identified the problem succinctly: "In the Santana offense, there is no evidence whatsoever of sexual intercourse or attempted sexual intercourse which the Lopez rape might explain." (*Id.*, at p. 727.) The Court elaborated:

> "Thus, the argument of the People is circular: (1) sexual activity must have taken place in the Santana offense because defendant's rape of Miss Lopez demonstrates his aggressive sexual tendencies; (2) therefore, evidence of the Lopez rape may be introduced to show the intent with which defendant tried to engage in sex with Miss Santana. The first premise, of course, seeks to prove defendant's conduct in this case by means of evidence of his criminal disposition. Such proof is expressly prohibited by Evidence Code section 1101, subdivision (a).
>
> "The flaw in the rationale of the People is revealed if we hypothesize that instead of raping Miss Lopez, defendant and his two friends had robbed her. Under the prosecution theory such Lopez robbery could then be admitted to show that the Santana offense was murder in the commission of a robbery, notwithstanding the fact that no property had been taken from Miss Santana. In short, the People may not conjure up an attempted rape in this instance in order to introduce evidence of another rape." (*Id.*, at p. 728.)

In other words, the connection cannot be merely to a theory, and although *Guerrero* was decided under Evidence Code section 1101, the basic principle

should apply to Penal Code section 954 when the substantial link between the crimes to be joined is an 1101-like connection.

Again, *Guerrero* is adduced to illustrate the general problem of using 1101(b) to confirm a speculation. As to the specific evidence recited by Judge Mudd -- the kidnapping of a little girl from her bedroom, the nude state of her body when discovered, the evidence establishing her presence in the motor home, and her fingerprint on the cabinet above the bed in the back of the motor home -- one may turn to another set of cases, beginning with those submitted by the prosecution.

In its pleadings and at oral argument, the prosecution cited the cases of *People* v. *Jennings* (1991) 53 Cal.3rd 334 and *People* v. *Robbins* (1988) 45 Cal.3rd 867. (3 CT 675-676; 5E RT 1951, 1956-1957.) In *Jennings*, the unclothed, badly decomposed body of a young woman was found in an irrigation canal. There was no other evidence to support an inference of sexual activity, but this Court held that the location of the body and its state of undress was enough to satisfy the corpus delicti for the crime of rape. (*Jennings*, *supra*, at pp. 366-368.) In *Robbins*, a six-year-old boy disappeared, last seen riding a motorcycle driven by a blond man wearing shorts. Three months later, the boy's skeleton was found, and the cause of death was determined to have been a broken neck. (*Robbins*, *supra*, at p. 872.) Again, this Court held the evidence sufficient to establish the corpus delicti for the crime of lewd and lascivious act on a child under 14: defendant was seen driving a motorcycle in the area where the boy was last seen; defendant fit the description of the man driving the motorcycle; the defendant's own experts gave their primary diagnosis as "pedophilia"; and no clothes were found at the scene of the crime. (*Id.*, at p. 886.)

But these cases do not provide support for Judge Mudd's ruling in the instant case. Again, for purposes of joinder, the link between the consolidated crimes must be substantial in an evidentiary sense. For purposes of the corpus delicti rule, however, the evidence need only be "slight or prima facie" (*People* v.

Jennings, *supra*, at p. 368), which will not be enough to satisfy any test that requires substantial evidence. (*People* v. *Johnson* (1993) 6 Cal.4th 1, 41.) Indeed, this Court's precedent establishes almost as a rule the proposition that " 'the victim's lack of clothing . . . is insufficient to establish specific sexual intent.'" (*People* v. *Holloway* (2004) 33 Cal.4th 96, 139.)

Thus, in *People* v. *Craig* (1957) 49 Cal.2d 313, the dead victim had been found lying on her back, partially underneath a jacked up car, strangled to death. Her legs were extended and slightly apart. She was wearing only a raincoat over a slip, and the raincoat was ripped open. Her panties were under her, having been torn apart, and her genitals were exposed. (*Id.*, at 316.) Two days before the woman's body was found, defendant had arrived in San Francisco from Fresno for a medical appointment. He checked into a hotel and went to the hospital the next morning. At the hospital, he told an attendant that he wished he was married, and that he would like to have a girl in order " 'to have a little loving.'" That evening, defendant went to a dance club. He was repeatedly rebuffed by one woman whom he kept asking to dance. On her last refusal, defendant showered her with abusive language, threatening that if she did not dance with him, " 'she would find herself picking herself up off the sidewalk.'" (*Id.*, at p. 315.) Later in the evening, defendant drank in various bars, left at 2 a.m., and was seen encountering the victim outside. When she was found the next day, defendant's hotel room key was found in the pocket of her raincoat, and appellant had not spent the night at his room. (*Id.*, at p. 316.)

In *Craig*, there was other evidence connecting defendant to the homicide and this Court rejected the claim of insufficient evidence to show that defendant in fact was the perpetrator. (*Id.*, at p. 318.) But this Court did find that there was insufficient evidence of first degree murder, predicated either on premeditation or on felony murder/rape. In reaching this conclusion the Court rejected the significance of the position of the body or its state of undress, especially in light of the lack of any other evidence of a sexual attack, which was not provided by either

his statements to the nurse or his obnoxious language and behavior at the dance. (*Id.*, at 318-319.)

In *People* v. *Granados* (1957) 49 Cal.2d 490, thirteen-year-old Elvira was found dead in her bedroom. Her skirt was hiked up above her private parts, while an apron had been pulled down below them. Elvira had been in the care of defendant, who claimed to remember nothing of what occurred that afternoon except that while he and Elvira were doing some chore, he asked her if she was virgin, to which she replied that it was none of his business. (*Id.*, at pp. 493-494.) This Court found that although the evidence was sufficient to sustain a finding of malice aforethought for murder, it was insufficient to establish that the murder occurred in the course of violating Penal Code section 288 – lewd and lascivious acts on a child under 14. (*Id.*, at p. 497.)

In *People* v. *Anderson* (1968) 70 Cal.2d 15, the defendant had repeatedly stabbed a 10-year-old girl all over her body. The wounds included vaginal lacerations. Her naked body was found under a pile of boxes and blankets, while her bloodstained and shredded dress was found underneath her bed. The crotch had been ripped out of her blood-soaked panties. Because only defendant's shorts and socks were stained with blood, it was inferable that he was only partially clothed during the attack. (*Id.*, at pp. 20-22.) This Court found this evidence insufficient to sustain a finding of an intent to commit a violation of Penal Code section 288. (*Id.*, pp. 34-36.)

Finally, in *People* v. *Johnson*, *supra*, 6 Cal.4th 1, the defendant admitted to the police that he had had sex with one of the victims, and made some unelicited statement suggesting that she might not have consented. In regard to the other victim, her body was found dressed only in a sweatshirt and bra, while she was naked from the waist down. She was in her bedroom, there was pantyhose on the floor, and she died from a severe beating that had left blood all over the bedroom. (*Id.*, at pp. 38-39.) This Court found insufficient evidence of first-degree murder predicated on the commission of rape or attempted rape. (*Id.*, at pp. 41-42.)

Whether the "substantial link" test of Penal Code section 954 is precisely identical with the "substantial evidence" test for sufficiency of the evidence, they must at least be similar in calling for a "substantial" factual inference from specific pieces of evidence. In all of these cases involving the victim's dead body found in a state of undress or some degree of undress, the inference of sexual activity was found to be *in*substantial, and in this case, the inference is no better – unless of course it was strengthened by other evidence. (See *People* v. *Rundle* (2008) 43 Cal.4th 76, 76, 138-140.) Was there such evidence here?

One can see from the discussion of the details of the above cases that evidence of the physical proximity of the victim and defendant at or around the time the crime was committed is not enough. In *Craig*, *Granados*, *Anderson*, and *Johnson*, there was no real issue that the victim and defendants were in fact in each other's presence, and, indeed, the cases seem to show that there were no real disputes as to whether or not the defendant had committed the homicide. Thus, the hair evidence in the bathroom and in other parts of the motor home, as well as the spot of blood found in the hallway of the motor home, if they show, in the prosecution's version, Westerfield's proximity to Danielle Van Dam, they do not add weight to an *evidentiary* inference of a sexual crime conjoined with the murder.

But this leaves the question of the fingerprint found on the cabinet above the bed in the motor home. The argument implicit in Judge Mudd's citing this evidence as significant is that the girl had no reason, under the circumstances, to be in the bedroom of the motor home unless it was for sexual purposes. However, whatever force this reasoning might have in regard to a bedroom in a fixed residence, whether a house or an apartment, it diminishes significantly in regard to a bedroom in a motor vehicle, which is compact enough to traverse public thoroughfares, and where the residential appurtenances of the vehicle must be cramped together in small space for purposes of transport and portability. The diminished expectation of privacy in a motor home has been recognized in law

(see *California* v. *Carney* (1985) 471 U.S. 386, 393-394 [diminished Fourth Amendment expectation of privacy in a motor home]), and in both common experience and common sense the notion of child sitting or even lying on a bed in a motor home as it moves from one point to another simply does not provide a substantial basis for concluding that there was sexual activity with that child. Indeed, in *Granados*, *Anderson*, and *Johnson*, the defendant and victim *were* together in fixed residential bedrooms without this fact adding anything substantial to the weight of the evidence.

There is one further point to consider in assessing this evidence, if in fact the considerations adduced already are not enough. If the "substantial link" and "substantial evidence" test differ at all, it is a difference that favors appellant's position in this argument. If the burden is deemed to shift to the defendant to establish his right to discretionary severance once the requirements of statutory joinder are met (*People* v. *Ramirez*, *supra*, 39 Cal.4th 398, 438-439; *People* v. *Ochoa*, *supra*, 19 Cal.4th 353, 409; *People* v. *Bradford*, *supra*, 15 Cal.4th 1229, 1315), it follows that the *prosecution* bears the burden of establishing *its* right to statutory joinder. Thus, unlike the substantial evidence test, where the burden favors strongly the proponent of the judgment. (*People* v. *Manriquez* (2005) 37 Cal.4th 547, 576; *People* v. *Memro*, *supra*, 11 Cal.4th 786, 861; *People* v. *Johnson*, *supra*, 6 Cal.4th 1, 38), the burden here favors the party opposing joinder, and this requires that the record in the instant case be construed most favorably against consolidation of charges.

Count three, then, in the instant case was neither the same class of crime as those in counts 1 and 2, nor was it connected its commission with the commission of counts 1 and 2. It follows that the prosecution in this case failed to establish the requirements for statutory joinder and such joinder was improper. The next step of course is to consider the issue of prejudice. But this might be properly deferred until appellant explores the question of discretionary severance on the contingency

that this Court does not agree with the preceding analysis and does not find that statutory joinder was here improper.

C.
Discretionary Severance

As noted above, the question of whether the evidence supporting each of the joined counts individually is cross-admissible is one factor to be considered in regard to discretionary severance. Other considerations are whether certain of the charges are unusually likely to inflame the jury against the defendant; whether a relatively weak case is to be conjoined with a relatively strong case, or with another relatively weak case so that the aggregation of the two distorts or disguises those weaknesses; or whether any of the charges carries the death penalty. (*People* v. *Bradford*, *supra*, 15 Cal.4th 1229, 1315; *People* v. *Vines*, *supra*, 51 Cal.4th 830, 855.) In the instant case, also as noted above, it is by no means clear whether Judge Mudd considered all of the pertinent factors or in what way he exercised his discretion, if indeed he at all recognized the issue of discretionary severance and statutory joinder as separate and distinct. But one can confidently conclude from the record that cross-admissibility was the primary, if not exclusive, consideration in the decision to allow joinder.

Although Evidence Code section 1101 requires a heightened scrutiny of the probative value of bad-act evidence because of its inherently prejudicial nature (*People* v. *Abilez* (2007) 41 Cal.4th 472, 500; *People* v. *Ewoldt* (1994) 7 Cal.4th 380, 402), this Court has made it clear that if the joinder-and-severance question of cross-admissibility concerns the issue of bad-act or other-crimes evidence governed generally by Evidence Code section 1101, the 1101 standards are relaxed in this context. If outside the joinder-and-severance context the proponent of other-crimes evidence must show the clear, unequivocal relevance of the other-crimes evidence to a legitimate fact in issue other than character or propensity (*People* v. *Thompson* (1980) 27 Cal.3d 303, 316, 318), inside the joinder-and-severance context, the burden will shift to the opponent of joinder to show that the

evidence is clearly irrelevant or that the prejudice resulting from the evidence clearly outweighs the values served by the consolidation of charges. (*Alcala* v. *Superior Court*, *supra*, 43 Cal.4th 1205, 1222, fn. 11; *People* v. *Soper*, *supra*, 45 Cal.4th 759, 772-772-774.) Do these loosened standards for other-crimes evidence defeat the instant claim?

One returns to the *Guerrero* problem, which does not change with the context. This is easily illustrated by applying the looser standards of Evidence Code section 1108 to the question of cross-admissibility in this case. Section 1108 provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101 . . . ." (Evid. Code, § 1108(a).) In other words, under 1108, in prosecutions for a sexual offense, evidence of an uncharged sexual offense is admissible *as character* evidence, and need not have any sort of specific evidentiary focus of such matters as motive and intent. In subdivision (d)(1), violations of Penal Code section 311.11 and of Penal Code section 288 are listed as among the enumerated crimes constituting a "sexual offense" within the meaning of the statute. Murder is not listed, but can fall within the statute if committed as a felony-murder predicated on a commission of one of the enumerated sexual offenses. (*People* v. *Story* (2009) 45 Cal.4th 1282, 1294.) If one were then to apply section 1108 to the question of cross-admissibility in this case the deficiency of evidence to establish the murder and kidnapping as sexual offenses remains the same and requires the same conclusion: even under the looser joinder-and-severance standards there is no cross-admissibility.

In the discussion on statutory joinder, appellant cited to *People* v. *Page*, *supra*, 44 Cal.4th 1 for the proposition that there had to be some meaningful point of contact between the pornographic evidence and the evidence of the murder itself. (*Id.*, at pp. 40-41; see above, p. 236.) Indeed, the abundance of evidence in *Page* that defendant had in fact sexually assaulted the murder victim, heightens, by contrast, the deficiency in this case so as to show that even in under the

unfavorable burdens on the defense in regard to discretionary severance, the defense argument for preclusion does not suffer.

In *Page*, six-year-old Tahisha had disappeared chasing a ball down a hill to an area outside of defendant's apartment. Her body was discovered the next day in mine pit several miles away. She had been brutally beaten, suffocated, and strangled to death. On her body were injuries consistent with sexual assault. The vaginal walls were bruised and the hymen disrupted. According to the pathologist, the internal vaginal injuries suggested that something had been inserted into the vagina, and because the presence of inflammation and blood, the girl was alive when the insertion took place. A swab taken outside of her vagina revealed saliva whose DNA profile matched that of defendant's, while blood found on one of defendant's shirts matched the DNA profile of the girl. (*Id.*, at pp. 6, 13, 17.) In defendant's apartment in *Page*, the police discovered magazines with adult pornography portraying post pubescent women, but with props like stuffed toys and lollipops, with clothing such as knee socks and saddle shoes, and with hair chevelured in pigtails or adorned with bows. Many of the models were bound or blindfolded, and many exhibited expressions that reflected fear or pain. However, none of the photographs simulated strangulation. (*Id.*, at p. 13.)

At issue was whether the admission into evidence of this pornography was error. Because, in this Court's view, the evidence was not sufficiently prejudicial to warrant a reversal of the conviction, this Court did not proceed to declare an error (*id.*, at pp. 41-42), but its preceding remarks on the nature of the problem of the pornographic evidence in that case suggested that the evidence lacked probative value absent some special feature connecting it to the charged crimes:

> "In certain circumstances, evidence of sexual images possessed by a defendant has been held admissible to prove his or her intent. In *People* v. *Memro* [*supra*] 11 Cal.4th 786 . . . (*Memro*), the defendant was charged with first degree felony murder based upon a violation of section 288, which prohibits the commission of a

lewd and lascivious act upon a child who is under the age of 14 years. The defendant in *Memro* enjoyed taking photographs of young boys in the nude, and he had escorted his victim, seven years of age, to the defendant's apartment with the intent of taking photographs of the victim in the nude. When the victim said he wanted to leave, the defendant strangled him and attempted to sodomize his dead body. The trial court admitted magazines and photographs possessed by the defendant containing sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult. We concluded the trial court did not abuse its discretion, because 'the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. (See *People* v. *Bales* (1961) 189 Cal.App.2d 694, 701 . . . [photograph of molestation victim in the nude admissible to show 'lewd intent'].) The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with [the victim].' (*Memro*, supra, at p. 865; see also *People* v. *Clark* (1992) 3 Cal.4th 41, 129 . . . [the defendant decapitated a victim and solicited oral copulation from other victims; picture from a pornographic book depicting a decapitated head orally copulating a severed penis 'was probative of defendant's interest in that matter'].)

"The magazines admitted in this case may have been probative with respect to defendant's commission of the crimes, but they had less probative value than the images considered in prior cases. None of the models whose photographs were staged to make them look younger than their age appeared to be as young as the victim, and defendant did not involve children in the production of pornographic images as did the defendant in *Memro*, supra, 11 Cal.4th 786. Although the assault upon Tahisha was violent, the acts committed against her and the acts portrayed in Bridled magazine were not similar; in particular, there was no evidence Tahisha was bound. Finally, the photograph admitted in *People* v. *Bales*, supra, 189 Cal.App.2nd 694, was of the victim herself, and the defendant had ordered his wife to destroy the photograph. Here, the cover of [one magazine] featured a model who merely looked similar to Tahisha; defendant apparently took no steps to conceal or destroy the image, and the model was only one of perhaps hundreds of models who appeared in defendant's extensive pornography collection." (*People* v. *Page*, *supra*, 44 Cal.4th at pp. 40-41.)

The evidence of sexual assault on Danielle Van Dam in the instant case was at best on the verge of non-existent, if not non-existent. If the probative value of the pornographic evidence in *Page* was low under sections 1101 and 352, then here it was even lower, and lack of cross-admissibility should have been a factor weighing heavily in favor of discretionary severance.

But, as this Court has made clear, even when cross-admissibility is lacking, the presumption in favor of properly joined counts weighs heavily in the discretionary balance, and still to be considered is "whether the benefits of joinder [are] sufficiently substantial to outweigh the possible 'spill-over' effect of 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses." (*People* v. *Bean* (1988) 46 Cal.3rd 919, 938.) This is where the other factors mentioned above – the inflammatory nature of the evidence on some of the counts, conjoining of relatively weak and strong cases, and the conjoining of non-capital with capital charges – come into play. (*People* v. *Soper*, *supra*, 45 Cal.4th 759, 775.)

The first factor, -- the inflammatory nature of the evidence, -- while not dispositively significant in this case, is not without significance. The kidnapping of a seven-year-old girl from her own home, and her murder, with her body dumped in a trash site, is, without any pornographic evidence at all, inherently inflammatory. But the pornography itself did add a distinct quantum of fuel to the fire, as it were. For the movies and the cartoons depicted sexual assaults on pubescent girls, while there was no evidence specifically of what, if anything, the kidnapper/murderer had done sexually to Danielle Van Dam. In short, there was here an evidentiary vacuum to be filled by imaginations inflamed by pornographic exhibits. Further, the provocative force of the evidence surrounding the murder and kidnap alone fell on Mr. Westerfield only if it was proved that he was the perpetrator – a matter that was the primary factual issue in the case. There was

considerably less dispute that Mr. Westerfield was the possessor of the pornography, which thereby brought the inherent prejudice in the murder and kidnapping home to him, like the powerful tugboat that pulls ocean liner into port. Finally, the special animus exhibited in jury selection against pornography was striking in a case in which there was the atrocious fact of murder in itself to draw the ire.

As to the conjoining of the weak with the strong, again, this was not a factor that favored discretionary severance, at least not based on what was known to Judge Mudd pretrial. At that point, Judge Mudd knew only about the fingerprint in the bedroom of the mobile home and the DNA identification of the blood spot in the hallway of the motor home. He did not yet know about the overwhelmingly favorable entomological evidence, which established Mr. Westerfield's alibi, and the measure of the issue of severance and joinder is based on what was known to the trial court at the time the court ruled on the matter. (*People* v. *Gonzales and Soliz*, *supra*, 52 Cal.4th 254, 281; *People* v. *Cook* (2006) 39 Cal.4th 566, 581.)

But the final factor, conjoining a non-capital with a capital offense, imports, along with lack of cross-admissibility and the inflammatory nature of the pornographic evidence, the decisive considerations in favor of discretionary severance. One may begin with the question of what penological or justiciary purpose was served by consolidating a crime, which at that time was punishable only as a misdemeanor (see above, p. 225, fn. 109), to a capital murder charge predicated on a homicide committed in the course of a kidnapping? If Mr. Westerfield was convicted of capital murder and sentenced to death, would a consecutive year in county jail, -- a term that will have been substantially or completely served pre-conviction in any event, -- add anything of significance to the values our justice system seeks to uphold? If acquitted of capital crimes, would a year in county jail, which, again, will have been substantially or completely served preconviction, vindicate the resources devoted to the attempt to

obtain a capital coviction? Again, one must keep in mind that these questions pose themselves in a context of a lack of cross-admissibility of the evidence.

But this disproportion is not all that must be considered. One must keep in mind that even in the guilt phase of a capital trial, the Eighth Amendment requires a heightened degree of factual reliability in the verdict. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 623.) In this regard, one must note that the cross-admissibility problem is aggravated in this case because not only were the possessed images criminal contraband, but they portrayed and simulated the further crimes of forcible rape, sodomy, oral copulation, and other forms of sexual assault. Was it realistic to expect jurors to observe the distinction between committing a crime and possessing images simulating the commission of that crime? If the jurors could recognize the theoretical difference, could they keep the two categories separate on an emotional level, so as to forestall the intolerable risk of speculation disguised as an evidentiary inference? There was, here, an obvious threat to the reliability of the capital determination at the guilt phase. But the threat to the integrity of the penalty determination was, in advance, equally obvious and clearly definable.

Under California law, at the penalty phase of a capital trial, "the prosecution's case for aggravation is limited to evidence relevant to the listed factors" in Penal Code section 190.3. (*People* v. *Boyd* (1985) 38 Cal.3rd 762, 775; *People* v. *Thompson* (1988) 45 Cal.3rd 86, 123; *People* v. *Wright* (1990) 52 Cal.3rd 367, 425.) Factor (a) of Section 190.3 consists of "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." Factor (b) consists of "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Was the evidence proffered by

the prosecution in support of count 3, and which would not be before the jurors except for the joinder of count 3 relevant under Penal Code section 190.3?[115]

First as to factor (a): Although evidence presented pursuant to Penal Code section 1101(b) constitutes circumstantial evidence, not all such evidence constitutes a circumstance "of the crime" at issue in the capital trial. A distinction is to be made between "other-crimes" that are inherent in the context of the evidence of the charged crime and form part of the historical facts of that crime; and "other-crimes" that form the logical basis for an inference about those historical facts, but are not part of those facts:

> "If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence simply because it involves the commission

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[115] The focus here is only on factors (a) and (b). These, along with (c), which consists of "[t]he presence or absence of any prior felony conviction", but which obviously has no application here, are what one may call the primary *prosecution* factors. Factors (d) through (j) are formulated in the affirmative as mitigation (except for (i), which is formulated neutrally), and as aggravation only in the negative, and whose aggravating thrust can in any event conceptually be assimilated to factor (a). Thus: "(d) Whether *or not* the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. [¶] (e) Whether *or not* the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [¶] (f) Whether *or not* the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct. [¶] (g) Whether *or not* defendant acted under extreme duress or under the substantial domination of another person. [¶] (h) Whether *or not* at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication. [¶] (i) The age of the defendant at the time of the crime. [¶] (j) Whether *or not* the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." (Emphasis added.) Factor (k), "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime", pertains only to mitigation and allows the *defense* to exceed the listed statutory factors. (*People* v. *Thompson*, *supra*, 45 Cal.3rd at p. 123.)

> of another crime. [Citation.] The general tests of admissibility of evidence in a criminal case are: 1. Is it part of the res gestae? 2. If not, does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not . . . ." (*People* v. *Sanders* (1896) 114 Cal. 216, 230; *People* v. *Ellis* (1922) 188 Cal. 682, 690.)

Indeed, when the "other crime" is inextricably intertwined with the evidence of the charged crime, it is not even deemed to be "another crime", at least as an evidentiary concept. (See *United States* v. *Ripinsky* (9th Cir.) 109 F.3rd 1436, 1442, amended on o.g., (9th Cir. 1997) 129 F.3rd 518.) If, for example, one ventured in this case to claim that evidence of kidnapping should have been excluded under section 1101, the incantation of the Latin phrase "res gestae" would lay this sprite of an argument to rest.

By the same token, if the evidence deemed relevant to prove the misdemeanor count was also deemed relevant to prove the murder and kidnapping charges, this was a relevance on the inferential or logical level, and not on the historical level. And even if the historical scope of factor (a) in a penalty trial is expanded and is broader than the res gestae at a guilt trial (see *People* v. *Bramit* (2009) 46 Cal.4th 1221, 1240), it is still not broad enough to include 1101(b) evidence whose connection to the case is purely logical.

None of this of course is to say that the 1101(b) evidence in the guilt phase cannot contribute to establishing a circumstance "of the crime" relevant at the penalty phase; but it is to say that the "other crimes" in themselves have no relevance to the penalty determination. Here, then, the pornographic evidence brought before jury, if it was relevant, was relevant only on the logical level and could not be deemed to be a circumstance "of the crime." Yet, was it realistic to expect that the jurors, even under correct instruction, would be able to separate the 1101(b) relevance of such inflammatory evidence from its 190.3 irrelevance? If

the jurors could recognize on the cognitive level a distinction, on the emotional level could they restrain the temptation to see in the pornography evidence militating strongly in favor of the death penalty? The answer is clearly no, this was not realistic at all, and this was obvious *in limine* when the joinder issue arose. (See *Rufo* v. *Simpson* (2001) 86 Cal.App.4th 573, 599 [test for undue prejudice is "[w]hether [or not] it would be impossible for a jury to follow limiting instructions" on the evidence in question].)

The problem under factor (b) was perhaps even more urgently obvious. A good deal of the proffered evidence for count 3, the cartoons and many of the photographs was not criminal at all. Factor (b) requires "criminal activity", which means that the evidence must show a violation of a specific penal statute, even if it does not need to show an actual conviction. (*People* v. *Phillips* (1985) 41 Cal.3rd 29, 71-72; *People* v. *Bunyard* (2009) 45 Cal.4th 836, 857.) But even when "criminal activity" is established, that activity must "involve" the use of "force or violence" or the threatened use of "force or violence." (*People* v. *Boyd*, *supra*, 38 Cal.3rd 762, 776.) If the crime of possession of child pornography can conceivably be committed in a way that qualifies under factor (b), it certainly was not committed in that way in the instant case. But the obvious problem presents itself: the videos proffered by the prosecution as contraband under count 3 consisted of portrayals of brutal sexual assaults, simulated in a highly realistic way so as to disguise the simulation. (See below, pp. 259-260.) The question should have posed itself again: was it realistic to expect a jury to separate the violent simulation from the crime itself, whose criminality inhered in the portrayal of a sexual act with a minor whether violent or not? Again, even if the jurors cognitively could acknowledge the distinction, there was an intolerable risk that the heat of emotion would not allow them to observe the distinction in making a penalty determination. (See *People* v. *Waidla* (2000) 22 Cal.4th 690, 724 [evidence must be excluded "if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome"].)

These considerations pertaining to the joinder of a non-capital charge with a capital charge are not inconsiderable, and are compelling in themselves. But when thrown into the scale with the almost complete absence of any penological purpose in conjoining a misdemeanor count with a capital count; also with the merely trivial gain in expedience in the administration of justice; and finally with the complete lack, or at least virtually complete lack, of probative value of the pornographic evidence for the kidnapping and murder charges, then there is here only one clear conclusion: the refusal to sever count 3 from counts 1 and 2 was an abuse of discretion. One may now turn to the question of prejudice.

D.
Prejudice

As noted in the introduction to the statement of facts, the salient feature of this case was the battle of forensic sciences, between the entomology on the one side, and DNA and a fingerprint on the other. The entomology established the time of death by inferring when the deposit of eggs (oviposition) occurred from the developmental stage of the insects found on the body on February 27. The significance of this was that oviposition would occur very shortly after death occurred. The time of death was significant because Mr. Westerfield, from the morning of February 4 through his arrest on February 22 was under constant police surveillance and under almost constant media scrutiny.

David Faulkner, a forensic entomologist, whose credentials and experience were extensive, and whose services were enlisted on this case, *not* by the defense, but by the San Diego authorities, attested that oviposition in this case occurred sometime between February 16 and February 18. (30 RT 7968-7969.) Faulkner was highly confident in his opinion, and he noted that because he had been given extraordinary access and resources, this was the most thorough forensic examination he had ever conducted. (30 RT 7948-7949, 7979.) The main source of variability in assessing insect development was ambient temperatures, and

Faulkner had taken this into account as well; in this regard his opinion was highly competent based not merely on his knowledge of entomological science, but on his experience and familiarity from working in the area, knowing the climatic conditions, as well as the normal baseline for seasonal insect populations. (30 RT 7968, 7974-7979.) In short, Faulkner's testimony was substantial, highly credible, and compellingly exculpatory.

Three more entomologists testified in this case. Neil Haskell, a leading forensic entomologist who was hired by the defense (33 RT 8110-8115), examined the site, the insects collected by Faulkner, and the climatic data, and placed oviposition as occurring no earlier than February 12 and no later than February 23. (33 RT 8117-811.) The prosecution upped the ante as it were, and brought in a forensic entomologist, who also had a PhD in entomology. Dr. Madison Goff did not examine the insects themselves, but trusted the identifications made by Haskell and Faulkner. He did statistical calculations based on varying climatic data only to conclude that he could not say with certainty that Danielle Van Dam was not dead between February 1 and 12. (38 RT 8094.) But his *opinion* – which was, after, all a professional and expert opinion – was that insect activity began on February 9. (38 RT 9021-9022.) The defense, on surrebuttal brought in Dr. Robert Hall, also a PhD in entomology, also with extensive forensic experience (39 RT 9076-9079), who testified that the entomological evidence established a time period of February 12 to February 23 as when death occurred. (39 RT 9082.)

If Dr. Goff could not carry the day for the prosecution in the entomological battle, he was not their shock trooper as it were, but only a skirmisher. The prosecution was relying for rebuttal of the entomological evidence on the forensic anthropologist William Rodriguez, who believed that because of the dry climatic conditions, mummification of the body would have impeded insect infestation, which impediment rendered the entomological assessments inaccurate. Rodriguez claimed that his independent assessment of time of death was in a range of four to

six weeks before the body was discovered (36 RT 8704-8705), which placed February 2 to 4 well within the incriminating time period.

Rodriguez claimed that the range of his earliest dates – four to six weeks -- was an independent conclusion, although he was aware that Dr. Blackbourne, who did the autopsy in this case, placed the earliest date at six weeks, and that Dr. Wecht, a leading forensic pathologist, who had been consulted in this case, had placed the earliest date at four weeks. (36 RT 8745.) But to show his independence, Rodriguez rejected Wecht's recommendation that in order to obtain a more accurate range for the time of death, a forensic entomologist should be consulted. (36 RT 8742-8744.)

But Dr. Hall, who knew Rodriguez and his work, testified that Rodriguez's estimate of four to six weeks simply could not be reconciled with the entomological evidence. (39 RT 9085.) This did not mean that the entomological evidence had to give way. Hall was not an expert on mummification, but then Rodriguez was no more an entomological expert. If Rodriguez nonetheless had ancillary experience with entomology, Hall testified that in every experiment he had reviewed or been involved in, there was always some degree of mummification in the corpse or cadaver, and this never significantly affected or retarded insect colonization of the body. (39 RT 9089.)

The real counter for the prosecution against the entomological evidence was the fingerprint and the nuclear DNA evidence matching the known DNA of Danielle Van Dam. One must be precise in this regard. This does not include the multitude of carpet fibers and of human or canine hairs rendering mitochondrial DNA. The fibers were manufactured in lots of millions of yards at a time, and given the ease of transfer of such fibers, it would be remarkable if there was not a massive promiscuity of carpet fibers all over a subdivision in which all the houses were constructed and carpeted around the same time. (See pp. 49-50.)

As to the mitochondrial DNA from the human hairs, this could only be traced to the Van Dam maternal line, and, again, given the ease of transfer, one

must consider that Brenda, Danielle, and Dylan were at Westerfield's house on Tuesday January 29, that Brenda was in close proximity to Westerfield when they socialized at Dad's on January 25 and February 1, and that the defense produced witnesses who had seen Brenda dancing with Westerfield at Dad's on February 1. (See above, p. 50.) As to the canine mitochondrial DNA, the testing and statistical frequencies came from Dr. Halvorsen, a veterinarian who was now running Quest-gen, her own animal DNA business, and who had to use her own data base of the 267 dogs that *happened* to come to her attention, and that yielded frequencies unamenable to the product rule at such blurry unhelpful rates of 23/267 and 55/267. (25 RT 6849, 6868-6869, 6875, 6877-6878; see above, pp. 38-40.)

The prosecution's forensic case depended rather on the fingerprint and the nuclear DNA that matched the known profile of Danielle Van Dam. However, the fingerprint, the small drop of blood on the carpet in the motor home, and the hair with root DNA in the motor home bathroom sink were all explicable by the accessibility of the motor home to curious neighborhood children. The evidence established that it was often parked unlocked on the streets near Westerfield's house; there was also evidence that Van Dam children were not under as strict a visual supervision as their parents attested at trial. (See above, at pp. 47-49.) Thus, the very centerpiece of the prosecution's case was the nuclear DNA match to the blood stain on the jacket. This was what Mr. Dusek called his "smoking gun." (44 RT 9683.)

But was there really a gun? Sean Soriano, the San Diego police criminologist, was the first person ever to see this stain. This occurred when he received the packaged jacket in the lab. When he took the jacket out he saw the almost 1/4 inch stain immediately and tested it for presumptive blood. This was sometime before the body was discovered. (21 RT 5688, 5694-5695, 5697, 5733.) If Soriano could see this stain immediately on a jacket that had been dry-cleaned, why did Detective Torgerson, who obtained the jacket on February 6, and Karen Lealcala, a criminalist, who received the jacket from Torgerson and packaged it,

not see the stain? (18 RT 5168-5175; 20 RT 5521-5524.) This is notable in a case in which the police from the beginning were urgently vigilant for the presence of any possible trace evidence, and the significance of a stain on a jacket brought in by Westerfield to the dry cleaners on February 4 was not an object whose significance required extended reflection. Most remarkable was that Julie Mills, the clerk who received the jacket, and who had twelve years of experience as dry cleaning clerk at Twin Peaks, did not see the stain when she received the jacket. (18 RT 5127-1528, 5150.)

None of this is to say that anyone trumped up this evidence. What it is to say is that in this case, to which the San Diego police devoted an extraordinary number of police officers and forensic personnel -- a case in which there were multiple crime scenes that had to be kept completely independent of each other in order to avoid cross-contamination, and in which the various serological abstractions were sensitive to mishandling or to cross-contamination, or to both -- the inference of a mistake was not at all far-fetched. When one considers further that the testimony was that nuclear DNA can break down when exposed to chemical agents (21 RT 5773, 5858), the fact of a perfect match of all 13 loci (21 RT 5842) on a stain that had been dry cleaned and seen by no one before Sean Sorriano, then the inference of mistake or cross-contamination is strengthened.

With the science at an impasse, the struggle becomes one between the persuasive and probative effect of the non-forensic evidence. For the prosecution there was Westerfield's somewhat unusual peregrination over the weekend. But the prosecution was not able to advance beyond the unusual because the defense brought in witnesses whose testimony corroborated what was in fact the ordinariness of the route taken for motor home enthusiasts, and of the ordinariness of the destination of Glamis for Westerfield himself. If his claim of parking in the Cays was supposedly refuted by the testimony of Officer Britton who shooed off a motorhome that was not Westerfield's (18 RT 5114-5118), it was corroborated by Heather Mack, the security guard at the gate of the Cays who identified

Westerfield as driving in there on the evening of February 3. (28 RT 7521-7522.) Even when one adds the prosecution's speculative inferences about unrolled-up hoses, over-cooperation, and sweaty armpits (see above, pp. 25, fn. 24, and 26, fn. 25), the non-forensic evidence was not sufficiently favorable to the prosecution to break the deadlock in the scientific evidence,

Indeed, the prosecution had its own glaring problem in the non-forensic evidence in explaining how Westerfield, who had just spent the evening at a bar drinking, was able to slip into a house he had never been in, remove a seven-year-old girl, first having to find her room, next having to wake her up, and next having to move her through the house and out the door, without disturbing the other three or four inhabitants of the house, who were each in their own bedrooms on the same floor as the girl, and without alerting the six-month-old Weimaraner puppy – and doing all of this without leaving *any* trace evidence in a case that abounded with trace evidence everywhere else? In this regard, the evidence of the Van Dams' sexual practices pointed in the direction of a relatively unexclusive knowledge of the house and its intimate quarters among a group that *did not* include Westerfield.

This lengthy description of the relative balance between the two cases is the foil for the decisive effect of the child pornography evidence, which would not have been before the jurors if not for the improper joinder of charges. The cartoons of sexual assault, the photograph of the girl having intercourse, and the non-pornographic photographs of naked girls were shown to the jurors as Exhibit 138, and the video clips were presented as Exhibit 139. (23 RT 6314-6315.) These have been described above in sufficient detail (see pp. 226-228); but the movies, characterized only as simulated rape, require further description to comprehend their provocative and inflammatory impact.

The first clip showed an Asian girl being sexually assaulted on a bed. Her plaid jumper was pulled up revealing small breasts. The hands of a man otherwise

off camera was pulling down her underwear revealing pubic hair on her genitals. Though the clip had no sound, the girl was clearly resisting. (Ex. 139.)

The second clip showed an Asian girl in a field. Her blouse was pulled up revealing small breasts, while her underwear revealed pubic hair. There was sound on this clip and she could be heard screaming as she struggled against two men holding her down. (Ex. 139.) The third clip involved the same girl in the same situation and appeared to be a continuation. The men could be seen now and they were also Asian. One man held the girl's arms down above her head while the second man orally copulated her as she screamed and struggled. (Ex. 139.) The fourth clip appeared to be again a continuation of the third. In addition to orally copulating the girl, who was crying and screaming, the man also digitally penetrated her. (Ex. 139.)

The fifth clip was still another continuation. The same girl, who was now either exhausted or unconscious, was lying limp as her assailant masturbated and climaxed on her face, as he rubbed the tip of his penis on her lips. (Ex. 139.) The sixth clip was a different Asian female wearing a sailor type blouse. A man, off camera, was copulating her from behind as she cried and whimpered. The same clip switched to a new scene with the same female on her back about to have frontal intercourse with her assailant, who pulls up her blouse to reveal moderate-sized breasts, not inconsistent with those of a mature woman. (Ex. 139.)

The description of each of the clips does not do justice to their graphic and harrowing realism. Indeed, it would require a space of calm reflection before one realized that the exaggerated girlishness of the clothing was an obvious artificiality, as was the placement of the camera, and the setting of the scene. But calm reflection was not likely in the face of such shocking material, and when the movie clips were shown at least three of the women jurors began to cry. (24 RT 6435-6436; see below, p. 284.)

This evidence should not have been before this jury. It was there because the prosecution needed at least to create the impression that unnatural lusts

betrayed David Westerfield as the kidnapper and murderer of Danielle Van Dam. This is neither logical nor evidentiary, and the pretext of relevance and probative value came only from the improper joinder of the misdemeanor charge of pornography possession to the capital charges of murder and kidnapping. If the trial court had properly severed the charges, it is reasonably probable that Mr. Westerfield would have been acquitted at the guilt phase of trial. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.)

Finally, for both the 1101 motion and the motion to sever, defense counsel specifically made objections under the Fifth, Sixth, and Eighth Amendments and under the Due Process Clause of the Fourteenth Amendment, raising the question of the appropriate standard of review for the error in denying mandatory or discretionary severance. (2 CT 479; 3 CT 587-588; 5F RT 1982, 1995.) Although this Court, on issues of severance and joinder, has tended to apply *People* v. *Watson*, *supra*, 46 Cal.2nd 818, and to treat the matter simply as state law error. (*People* v. *Brawley* (1969) 1 Cal.3rd 277, 288; *People* v. *Ortiz* (1978) 22 Cal.3rd 38, 48; *People* v. *McClain* (1988) 46 Cal.3rd 97, 105-106; *People* v. *Pinholster* (1992) 1 Cal.4th 865, 9381-932), nonetheless, the cross-over of non-cross-admissible evidence can be so prejudicial as to amount to a due process violation (*United States* v. *LeMay* (9th Cir. 2001) 260 F.3rd 1018, 1030; *Whelchel* v. *Washington* (9th Cir. 2000) 232 F.3rd 1197, 1211), and when an appellant meets the heavy burden of showing clear prejudice in the joinder of counts, this amounts to a showing of a due process error in the improper joinder. (See *Williams* v. *Superior Court* (1984) 36 Cal.3rd 441, 447-448; see also *People* v. *Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244.) Furthermore, for the reasons discussed in regard to the joining of count three to the capital charges (see above, p. 249), there was here a violation of the Eighth Amendment right to reliable factual determination of guilt. (*Beck* v. *Alabama*, *supra*, 447 U.S. 625, 628.) Consequently, it is incumbent on respondent to show that the erroneous joinder of count 3 to counts 1 and 2 in this

case was harmless beyond a reasonable doubt. (*Chapman* v.*California* (1967) 386 U.S. 18, 23-24.) This is a burden respondent cannot, *a fortiori*, meet in this case.

VI.
WHETHER AS A DENIAL OF DUE PROCESS RESULTING FROM AN INCORRECT OR EVEN CORRECT JOINDER OF COUNTS, OR AS A RESULT OF INDEPENDENT EVIDENTIARY ERROR, THE ADMISSION OF ALL OF THE PORNOGRAPHY RECOVERED FROM THE COMPUTERS INVOLVED IN THIS CASE WAS ERROR, WHOSE AGGREGATION AMOUNTED TO CHARACTER EVIDENCE OF NEGLIGIBLE, IF ANY, PROBATIVE VALUE, BUT WHOSE INHERENTLY INFLAMMATORY AND PROVOCATIVE NATURE CONSTITUTED A GROSS UNFAIRNESS AND DISTORTION IN THE TRIAL PROCESS

Introduction.

The discussion of prejudice in the previous argument was artificially restricted to assessing the impact of those exhibits Judge Mudd had, in the pretrial hearing, ruled to be admissible. For, as noted above (see p. 232, fn. 114), *all* the pornography recovered from the disks and computers seized in the search of Mr. Westerfield's house, was described to the jury (24 RT 6390-6398, 6407-6409), admitted into evidence (24A RT 6567-6569), and then viewed by the jurors during deliberations at their request. (14 CT 3849; 40 CT 9907-9908.) This happened after the jurors had been shown Exhibit 138 and 139, constituting those items that were held pretrial to be admissible. (23 RT 6314-6315.) Judge Mudd believed that Mr. Feldman, in cross-examining James Watkins, the prosecution's computer forensic expert, on the proportion of possible child pornographic images to the total number of images on the computer, had misled the jurors and had "opened the door" to all of the pornography recovered from the computers. (See 23 RT 6354-6360; 24A RT 6370-6372, 6378-6381; and 25 RT 6566-6567.) Although this concise formulation of the dispute has a rational sound to it, the dispute was extraordinarily incoherent and puzzling, and one must describe it in detail from its

beginning. But first, it will be helpful to identify precisely the evidence that is at issue, and then to sort out the precise legal claims that are being advanced.

Exhibit 144: Exhibit 144 consisted of 181 pages of pornographic images, with 16 images on each page. These were recovered from the hard drives of the computers in the office and in the bedroom. The vast majority of these were images of clearly adult women engaged in various types of sexual acts. There were some questionable or possible images of minors scattered through this collection. (23 RT 6361; 24 RT 6393; Ex. 144.)

Exhibit 145: Exhibit 145 consisted of 227 pages of pornographic images with 16 images per page. Again, the vast majority showed clearly adult females. There were questionable images in this collection, some of them already shown to the jurors through Exhibit 138. (23 RT 6371; 24 RT 6393-6394; Ex. 145.)

Exhibit 146: This consisted of 8 pages of photographs, each page containing an individual photograph: the first and the third were studio-type photographs of Susan L., Westerfield's girlfriend, with her daughter Danielle L.; the fourth and eighth were the same photographs of Danielle L. in a bikini, sitting on the edge of a Jacuzzi in a backyard, and looking into the camera; the second, fifth, sixth, and seventh, showed Danielle L. sun bathing in a back yard on a chaise lounge, lying on her back, wearing a bikini, and her head covered by a towel. In these latter photos, taken from different angles, Danielle lay on the chaise lounge with her legs extended and spread apart in a V-shape to the same width as the chaise lounge itself. The fifth and sixth photographs were taken from the foot of the chaise lounge from a moderate distance away and were therefore up-body shots. (23 RT 6361; 24 RT 6397-6398; Ex. 146.)

Ex. 147: Exhibit 147 consisted of the previously excluded PT Exhibits 32 and 33, which were described briefly in the previous argument as cartoons telling the story of the rape of a female who appeared at first to be a girl in her clothing, facial features, and hairstyle, but whose naked body, eventually exposed, was that

of a fully developed woman. (See above, p. 232; see also 23 RT 6361-6362.) A further more detailed description of is in order here.

Each frame of the cartoon is captioned to help explain the story. (24 RT 6394-6395.) The initial frames show a girl in some dank setting; she is being knocked unconscious, tied up, and then confronted with her assailant, who, as he waited for her to regain consciousness, anticipates his pleasure: "I can't wait to give her the fucking her young body needs. Ha, ha." (Ex. 147.) Frame six provides the caption that clarifies fully the mis-en-scène: "Our villan [*sic*] haunts the basements of girls [*sic*] school. He often grabs and ravishes their young bodies. Follow us as we watch his evil deeds." (Ex. 147.) As we do, we are made privy to various graphic sexual acts embellished with our "villan's" prurient commentary. ("Relax, sweety, I just want to feel you a while. Mmmm, wet pussy already.") Frame 16 progresses to an even more odiously violent images of the man holding a knife in one hand, forcing the female to orally copulate him, and reaching over with the other hand to finger her anus or vagina. The caption has him saying, "Hmmm. That little pussy is getting all wet. Now, suck before I cut you," to which she replied, "Ahggh! No! Don't cut me. I'll suck. I'll suck you. Mmmf, gawk, mmmph." (Ex. 147.) The last frame, 20, shows the man having intercourse with the female from behind. His caption states, "Oh, yah. A good tight one. Ooo and cherry too. Man, am I lucky tonight. Quiet bitch or I'll hurt you." Her caption states: Ahh! No! No! don't do that. I've never done it before. Aggh! You're tearing me up. Aiiee! It hurts, it hurts. Oh, no. You're fucking me." (Ex. 147; see also 42 RT 9414, where Mr. Dusek quotes in his closing a caption from the cartoon that had constituted PT Ex. 32.)

Exhibit 148: Exhibit 148 consisted of 46 additional questionable images not shown to the jurors the first time. There were 11 pages of these with four images on each page, and a twelfth page with two more images. They were graphically and explicitly sexual and involved females who were, or appeared to be, pubescent and post-pubescent. (Ex. 148.) The representations were not

realistic like the movies in Exhibit 139, but were stylized and artificial; in addition, unlike Exhibit 139, the representations were of consensual sexual acts. (Ex. 148.) A portion of Exhibit 148 contained 16 photographs of woman engaged in sexual acts with animals. The jurors were informed of the existence of these photographs through testimony, but, unlike the rest of the pornography, the jurors were not allowed to see these photographs. (23 RT 6362; 24 RT 6396-6397; 25 RT 6569; Ex. 148.)[116]

A list of the legal claims being advanced will help, since an otherwise straightforward claim becomes complicated depending on whether one views the matter presented here as a further aggregation of prejudice from improper joinder, or whether it is viewed as new error in itself, or both:

1. If appellant is correct, and consolidation of the child pornography charge was error, then the admission of this evidence augments the prejudice already emanating from Exhibits 138 and 139, making the case for reversal even more compelling. (*Chapman* v. *California* (1968) 386 U.S. 18, 23-24; *People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.)

2. Even if joinder was appropriate based on the pertinent considerations apparent at the time Judge Mudd made the ruling before trial, the manner in which the actual trial developed, with the admission of the additional pornographic materials, revealed the gross unfairness of the joinder of counts and vitiated the fundamental integrity of the trial under the Fourteenth Amendment (*People* v. *Rogers* (2006) 39 Cal.4th 826, 851; *People* v. *Mendoza* (2000) 24 Cal.4th 130, 162; *People* v. *Gonzales & Soliz* (2011) 52 Cal.4th 254, 281), and under the Eighth Amendment. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 623.)

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[116] The bestiality photographs, and the duplicates in Exhibits 147 and 148, were placed in a separate envelope and marked: "NOT TO BE SEEN BY JURY"; "Contains Original 147 + 148". (See Exs. 147 and 148.)

3. If joinder was appropriate, and the record does not meet the level of "gross unfairness," there is still a more circumscribed due process violation in the admission of Exhibits 144 through 148:

a. If the jury could consider images of child pornography on the issue of motive and intent (Evid. Code, § 1101(b)), then jurors needed only to know the gross number of images of adult pornography recovered as relevant to rebut the prosecution's claim about Westerfield's motives. (See *People* v. *Page* (2008) 44 Cal.4th 1, 41, fn. 17.) However, each actual image itself was irrelevant (Evid. Code, § 210), cumulative, and unduly provocative. (Evid. Code, § 352.) Thus, Exhibits 144 and 145, consisting mostly of adult pornography, were inadmissible independently of the joinder issue.

b. Similarly, Exhibit 146, the photographs of Danielle L., was inadmissible because the pornographic nature of the photographs was either non-existent or by no means clear, while, because of the identity of the name with that of the victim's, along with the emotionally aggravated suspicions fostered by the prosecution that this case was about perverted sexuality, the evidence was both misleading and inflammatory. (Evid. Code, § 352.)

c. Exhibit 147 the cartoon story of the rape with the pornographic captions, if not completely irrelevant, was almost completely irrelevant, adding to the mix another salient element of provocation that stood out even in the midst of a large amount of highly provocative evidence. (Evid. Code, §§ 210, 352.)

d. Exhibit 148, containing 46 more questionable photographs, was simply inadmissible if joinder was improper; but, even if joinder was proper, the evidence was cumulative and unnecessary for any purpose of proving the charge of possession of child pornography or motive for murder and kidnapping. (Evid. Code, § 352.) And as for the testimonial

evidence of the existence of bestiality photographs, this was completely irrelevant. (Evid. Code, § 210.)

e. The individual effect of each piece of evidence erroneously admitted, and its aggregate effect, especially as conveyed through the medium of Mr. Dusek's closing argument, was to turn the entire issue of pornography into one of pure character evidence, of such misleadingly inflammatory and provocative implications as to induce a conviction based on irrelevant and incompetent evidence in violation of the Fourteenth Amendment (*Bruton* v. *United States* (1968) 391 U.S. 123, 131, fn. 6; *People* v. *Valentine* (1986) 42 Cal.3rd 170, 177) and, in a capital case, in violation of the Eighth Amendment. (*Beck* v. *Alabama*, *supra*, 447 U.S. 625, 628; *People* v. *Cudjo*, *supra*, 6 Cal.4th 585, 623.)

This list is not intended as an outline of the following argument, but rather more as an identification of the interrelated legal themes that emerge from the record as the issue of pornographic evidence arose at trial, beginning with the pretrial motion to sever counts. The following argument will be organized around a description of the procedural progress of the issue as it developed in the case, for the actual legal structure applied below tended toward incoherence. At the appropriate points, the argument will digress into an elaboration of the legal points generalized in the above list, and the argument will end with a recapitulation of the legal permutations noted above as related to the question of prejudicial error.

A.
The Propriety of Mr. Feldman's Cross-Examination

The parties knew from James Watkins' report, and Judge Mudd from Watkins' pretrial testimony on May 13 during the hearing to suppress evidence seized pursuant to the warrants, that Watkins had found fewer than 100 questionable images from the thousands and thousands of images recovered from the computer. (5D RT 1758-1761.) At the pretrial hearing concerning joinder and cross-admissibility, both Mr. Boyce and Mr. Feldman, as noted in the previous

argument (see above, at pp. 229, 231), pointed out that if the court intended to permit introduction of any child pornography, then the defense might have to offer a significant amount of the adult pornography in order to place the small sampling of questionable material into its proper perspective and context. (5E RT 1955; 5F RT 1977-1979.) Judge Mudd's response to this was incorporated into his assessment of the 352 situation, which was partially quoted above. (See, p. 231.) He stated first that the exhibits that prosecution wanted to present were all "succinct and to the point" and could "be presented virtually in as much time as it took yesterday sans whatever experts they may call relative to that evidence." (5F RT 1984.) But as to Mr. Feldman's need to make a counter offer of evidence, this was not a problem:

> "How much time is it going to take to show the other, assuming you want to show this to the jury, which I doubt you will. I don't believe it's going to take that much time because what you will do is you will say there are a hundred thousand more images, Judge. We'll get a stipulation that there are a hundred thousand more images, or whatever the number is, without showing them to the jury, which is appropriate, because then you can argue out of twenty thousand or whatever the total number is, there are X number." (5F RT 1984.)

This has been quoted verbatim because, as noted at the beginning of this argument, Judge Mudd accused Mr. Feldman of circumventing the pretrial ruling in doing, almost precisely, what Judge Mudd outlined in the above paragraph. Since this cross-examination was the alleged hinge that "opened the door" through which the remainder of the pornography entered the case, it is appropriate to detail precisely what was raised in that cross-examination.

Watkins testified at trial on June 25, about a month after the pretrial hearings. Mr. Feldman's cross-examination of Watkins began shortly after the jurors had seen Exhibits 138 and 139 during Watkins' direct examination. (23 RT

6314-6317.) Early in that cross-examination, Mr. Feldman probed the question of the proportion of questionable images to the total amount of images recovered:

Q. Okay. So with regard to the computers in the office, the H.P. computers, did you do a search of those computers to determine how many stills, JPEGS, GIFS, whatever were in there? '

"A. I examined all the computers and – for a total for all the computers.

"Q. A total of what, sir?

"A. Of graphic image files which would include all of the above.

"Q. Okay.

"How many graphic image files did you find?

"A. Approximately about a hundred thousand.

"Q. A hundred thousand? Was that in all the computers?

"A. Yes sir.

"Q. And did that include only nudes?

"A. No, sir. That did not, no, sir.

"Q. Oh. How many nudes did it include?

"A. I would say between eight – and 10,000.

"Q. You're estimating that, is that correct?

"A. Yes sir, I am.

"Q. So there was a total of between eight- and 10,000 nudes, and that included the looks like about 17 stills that the jury just saw; is that right.

"A. Yes, sir.

"Q. So apparently culled out of a hundred thousand you identified down eight – to 10,000 and then of the eight- to 10,000 you spotted 14 or so that the jury just saw.

"A. Yes, sir.

"Q. And with regard to the MPEGS, were you able to determine how many MPEGS there might have been?

"A. There –

"Q. I'm sorry, sir, or AVIS or any variation?

"A. I determined there were several hundred of the digital movies.

"Q. Did you look at the digital movies.

"A. Yes, sir. I went through most of them.

"Q. And did you notice that most of them there was kind of a common theme?

"A. Yes, sir.

"Q. The common theme seemed to be intercourse with mature woman – women, didn't it?

"MR. DUSEK: Objection, best evidence.

"THE COURT: Well, I'm going to allow it because we are going to need to discuss this matter.

"You may answer that, sir.

"THE WITNESS: Thank you. Yes, sir.

"BY MR. FELDMAN:

"Q. In fact, most of the movies, virtually all the movies with a couple of rare exceptions involved adults engaged in various consensual sex acts, is that right?

"MR. CLARKE: Objection, argumentative as phrased.

"THE COURT: You can rephrase it and I'll allow it.

"Sustained.

"BY MR. FELDMAN:

"Q. Of the eight – to 10,000 – no, first of the movies. Most of the movies, virtually all of the movies depicted adults engaged in various consensual sex acts?

"A. Yes, sir.

"Q. With regard to the eight- to 10,000 still images, JPEGS, GIFS, whatever, there was a theme to those, too, right?

"A. Yes, sir.

"Q. Again, with regard to the stills, adults, correct?

"A. Most of them, yes, sir.

"Q. Large breasted women, correct?

"MR. DUSEK: Best evidence, your honor. Let's look.

"THE COURT: Overruled. We are going to be discussing this I suspect at length.

"You may answer

". . . .

"THE WITNESS: I wouldn't be able to say the actual percentage. I know there was a large amount of those.

"BY MR. FELDMAN:

"Q. A large amount of those meaning a large amount of pictures of large breasted women, correct?

A. Yes, sir.

Q. Similar with regard to the movies, the movies contained a large amount of large breasted women; isn't that true?

"A. Again, there were quite a few of those, yes, sir." (23 RT 6322-6325.)

This set off something of a firestorm. As soon as the cross-examination, which moved on to other things, had ended, Mr. Clarke ostentatiously announced, "I have two binders I'd like to have marked in this case," to which Judge Mudd responded, "I think that's appropriate." (23 RT 6354.) Mr. Feldman asked for a sidebar conference immediately. Since it was the end of the day, Judge Mudd released the jurors, while the courtroom, for the ensuing discussion remained open to the public. When Mr. Feldman asked why, Judge Mudd responded, "I'll tell you why. You put everything in issue." (23 RT 6356.)

Judge Mudd accused Feldman of grossly misleading the jury in creating the impression that there were only 13 questionable images out of 100,000. The judge complained, "[W]e have done everything humanly possible to structure this particular issue out of the presence of the media and the public. . . ." (23 RT 6356.) Based on Mr. Feldman's objections, Judge Mudd had "asked the District Attorney to pare it down so we can see the images they wanted to used in trial apart from the images they could have used." (23 RT 6356-6357.) There was a hearing. Judge Mudd did pare the evidence down to "minimize your client's exposure, to minimize the prejudicial impact and allow the People to put on their case." (23 RT 6357.) And yet,

> "the very first thing you do on cross-examination is say how many images there were. A hundred thousand. And we get down to 13 images.
>
> "Now you tell me, Mr. Feldman, why you have not opened the door to every single image that is on every disk that was confiscated from that house. I'd be very interested in hearing it." (23 RT 6357.)

Mr. Feldman protested that he was not trying to "end run" the court's ruling or open any doors. If his only sin was to give the impression that there were only 13 questionable images when there were about 80 total, then perhaps that was the most that should be admitted into evidence to cure the problem. (23 RT 6357-6358.) Mr. Clarke was "at a loss" as to why there was even a pretrial hearing on which images were admissible. The jurors were grossly misled by Mr. Feldman's cross-examination, and the jurors now needed to know that Mr. Westerfield possessed hundreds and hundreds of pornographic photos. The Court stated, "I concur." (23 RT 6358-6359.) At this point, Judge Mudd was going to admit all the pornographic images into evidence. "[T]his door has been opened like a barnyard." (23 RT 6360.) Mr. Clarke then marked Exhibits 144 through 148. (23 RT 6361-6363.)

If the reader of this argument has not noticed that numbers were being loosely thrown about – 13, 14, and 17 -- as Mr. Feldman's cross-examination was also being loosely characterized, then some commentary here is necessary to clarify this rather remarkable exchange.

What was the thrust of Mr. Feldman's cross-examination? Of eight to ten thousand still images, most of which were of adult women engaged in sex acts, the jurors were shown between 13 and 17 questionable images; and out of hundreds of digital movies, most of which involved adult women engaged in sex acts, the jury was shown four or five movies.

What was Mr. Feldman's impropriety? Although there was no stipulation, Mr. Feldman's cross-examination did not transgress anything Judge Mudd said he would disallow. *If* 13 to 17 questionable images was inaccurate in light of Watkins' claim of about 80 questionable images, then this matter was easily corrected on redirect examination, and, it might be pointed out, corrected without much prejudice to Mr. Feldman's major point: the proportion of questionable images was small.

And the point was relevant. Motive is something with an emotional cast to it, for it "impels or incites one to act" in accord with the motivating factor. (*People* v. *Gibson* (1976) 56 Cal.App.3rd 119, 129; *People* v. *Spector* (2011) 194 Cal.App.4th 1335, 1383.) Because of its interiority, -- if one may call it that, -- the probative value of a motive depends on its strength, for "[m]en do not ordinarily commit grave crimes unless there is, in their minds, a motive strong enough to overcome the natural repugnance against crime and the fear of punishment which usually follows detection." (*Son* v. *Territory of Oklahoma* (Okla. 1897) 49 P. 923, 925.) It is on this principle that when the motive is alleged to be reflected in the possession of child pornography, the number of such images possessed in proportion to adult pornography is a relevant consideration, as this Court itself has recognized. (*People* v. *Page*, *supra*, 44 Cal.4th 1, 41, fn. 17.) When the proportion is small, it undermines the incriminating implication of the motive evidence.

Indeed, it may well be doubted that possession of Internet pornography provides any clear link to the commission of sexual assault, since the ease with which it is obtained does not betoken a strength of motive. (*Ibid.*) Furthermore, related to the ease of access is the ubiquity of such pornography. "The pornography industry in the United States is estimated annually to be between $10 billion and $14 billion; generating more revenue than professional football, basketball and baseball put together, more than Hollywood's domestic box office receipts and larger than all the revenues generated by rock and country music recordings." (*United States* v. *Extreme Associates, Inc.* (W.D. Pa. 2005) 352

F.Supp.2nd 578, 592, fn. 2.) When child pornography, downloaded from the Internet, represents a small portion of pornographic images also downloaded from the Internet, then the proportion is clearly relevant to show the weakness of the alleged motive.

But beyond the gross numbers, what was the relevance of exposing the jurors to the images themselves? At this point, Judge Mudd ruled that the jurors could see the images if they asked to see them, and eventually they did. (14 CT 3849.) But beyond having the numbers described and the photographs generally characterized as involving adult women involved in various sexual acts, there was no relevance at all. At best, whatever nugatory probative value there was in allowing the jurors to see each individual image, was far outweighed by the cumulative and superfluous value of the images themselves in resolving the true issues before the jurors. (See *People* v. *Mincey* (1992) 2 Cal.4th 408, 439; *People* v. *Wright* (1985) 39 Cal.3rd 576, 585; and *People* v. *Cardenas* (1982) 31 Cal.3rd 897, 905.)

The same argument applies to the questionable images scattered throughout Exhibits 144 and 145, and the 46 images contained in Exhibit 148. These were images the prosecution itself had not selected as part of its proffer of proof for count 3 and for motive. If count 3 was properly joined, then the single photograph of the girl having intercourse in Exhibit 138 and almost all of Exhibit 139 was sufficient to prove the charge, as Judge Mudd himself had already determined. Ancillary proof of the charge, as well as the evidence of motive and intent desired by the prosecution was served by all of Exhibit 138 and 139 taken together. Like the adult pornography, all that was required to rebut Mr. Feldman's cross-examination was the total *number* of questionable images found; to rub, as it were, the jurors' faces in the additional images, was simply an accumulation of odious and provocative evidence whose probative value was superfluous. (See *People* v. *Cardenas*, *supra*, 31 Cal.3rd 897, 905.)

One further comment may be in order regarding the so-called best-evidence rule Mr. Dusek invoked during Mr. Feldman's cross-examination. The "best evidence rule" in its traditional form provides that in order to prove the contents of a writing, the original writing must be produced, and secondary evidence is inadmissible. (*People* v. *Horvater* (2008) 44 Cal.4th 983, 1012.) For the purposes of the Evidence Code, "writing" is broadly defined, and includes photographs. (Evid. Code, § 250.)[117] However, having Mr. Watson attest to what he actually saw in reviewing the recovered images is not secondary evidence at all and is not subject to the best evidence rule. (*People* v. *Samuels* (2005) 36 Cal.4th 96, 129-130.)

But even if the best-evidence rule applied, it no longer existed in its traditional form at the time of trial. Now, competent secondary evidence *is* presumptively admissible unless disqualified by specified exceptions. Because of this, the rule is now denominated *not* as "the best-evidence rule", but as the "secondary-evidence rule." (Evid. Code, § 1521(d).) The original of a writing is required only when there is "[a] genuine dispute" over the "terms of the writing" and "justice requires" the primary evidence, or where the "admission of the secondary evidence would be unfair." (Evid. Code, § 1521, subds. (a)(1) and (a)(2).) As established above, quite the opposite is true.[118] Furthermore, oral

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[117] Section 250 provides: " 'Writing' means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."

[118] Evidence Code section 1521, which provides: "(a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following: [¶] (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. [¶] (2) Admission of the secondary evidence would be unfair. (b) Nothing in this section makes admissible oral

testimony of the contents of a writing is made expressly admissible when "the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time and the evidence sought from them is only the general result of the whole." (Evid. Code, § 1523, subd. (d).) This language applies, *mutatis mutandis*, quite clearly to the collection of 8000 to 10,000 pornographic images.[119]

It is clear, then, that Mr. Feldman was engaged in relevant and appropriate cross-examination. He circumvented neither the law nor Judge Mudd's pretrial ruling, and it was rather Judge Mudd's reaction that constituted overreaching, and that the trivial variation, easily correctible, between 17 and 80 images in a pool of eight to ten thousand images, does not adequately explain the amount of heat this episode generated. But whether calm or agitation surrounded the error, it was error *even* within the assumption – by no means conceded – that joinder was proper and that *any* pornography was admissible in this case.

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testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing). [¶] (c) Nothing in this section excuses compliance with Section 1401 (authentication). [¶] (d) This section shall be known as the 'Secondary Evidence Rule.'"

[119] Evidence Code section 1523 provides: (a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing. [¶] (b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence. [¶] (c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied: [¶] (1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means. [¶] (2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production. [¶] (d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

B.
"Open Doors" and Attorney Histrionics

The next morning, June 26, before Mr. Clarke began his redirect examination of Mr. Watkins, Mr. Feldman asked for a closed session out of the presence of the jury and the public, and indeed complained that the previous day's discussion took place before the public. (24A RT 6366-6367.) Mr. Feldman insisted no doors had been opened, but even if there had been there were still some matters to determine under Evidence Code section 352. (24A RT 6367-6368.) He pointed out to the court what it had said during the pretrial hearing, and stated that if he had failed to use the figure 85 for the total number of questionable images in Watkins' report, it was completely through inadvertence. If he opened the door, then he had provided ineffective assistance of counsel. (24A 6369-6370.)

Judge Mudd responded that the discussions were held in public because Mr. Feldman's conduct and insinuations during cross-examination occurred in public. In regard to ineffective assistance of counsel, Judge Mudd rejected this. "Not only are you very capable," he stated, "very organized, but you knew going in what your arguments were going to be. And you have succeeded in your cross-examination, whether it sticks or not, I don't know, in raising doubt as to where this material was, whose computer it was and so forth." (24A RT 6370.) "But," Judge Mudd added,

> "this record will not reflect your demeanor and the way in which you asked the question of the witness regarding the limited number of images that the People presented. It can best be described as a set up with a question, well, How many total images do you have? And he says, a hundred thousand. And you go [indicating]. And what I am doing right now is I'm raising my eyes. I am expressing dismay. And then you said but only thirteen [*sic*] of these. And, Mr. Feldman, it was intentional. It fits into the pattern of what the defense intends to argue. And it clearly left a false impression with this jury. And this court was not about to allow that to occur." (24A RT 6371.)

Judge Mudd then noted that he had reviewed the record and he firmly abided in his assessment that to convey the impression of 13 questionable images out of 100,000 was a "blatant falsehood." At this point, Judge Mudd was going to allow the People to mark the exhibits and allow them at least to be described. (24A RT 6371-6372.)[120]

If one may digress a moment at this point, the Court's conception of what Mr. Feldman had done is still odd. The actual cross-examination of Watkins fixed on the figure of 8000 to 10,000 as the pertinent foil for the number of actual pornographic images, not the figure of 100,000, which was the total number of images *simplex*. It is true that this was not made crystal clear by Mr. Feldman, but Mr. Clarke himself, in this closed session, stated in regard to the 100,000 figure, "I think we will be able to clarify that." (24A RT 6369.) But to term this ambiguity in Mr. Feldman's cross-examination a "blatant falsehood" is far in excess of the problem. Moreover, one is not talking about measuring the size of molecules or amoebas, but rather the measure at issue was the *moral* significance of the pornography, wherein the difference between .0008 percent and .008 percent hardly even registers.

But even more interesting in the above passage is Judge Mudd's emphasis not so much on the content of the cross-examination but on Mr. Feldman's argumentative demeanor. That this was a, if not *the*, crux of the matter was made clear later in this same proceeding by Judge Mudd's in response to Mr. Feldman's

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[120] The diction and syntax of the remarks from Judge Mudd that have been quoted throughout this argument certainly imply strong feeling on his part. In a further discussion of the controversy over the pornography exhibits on June 27, Judge Mudd himself confirmed explicitly what is rather clearly implied in the record, when he stated to Mr. Feldman: "That is what got the Court's *ire and blood pressure up*, because for a period of it was either a day or a day and a half, we had hearings paring down the amount that I was going to allow the prosecution to use." (25 RT 6566-6567, emphasis added.)

persistence, and his incredulity that the Court's ruling was based on "reading my body language as indicating something other than the record." (24A RT 6378-6379.) Judge Mudd remonstrated:

> "Mr. Feldman, what I am doing is exactly what these eighteen people did that were watching you at the time. That dry record does not -- you know, that's the reason The Moutaintop sometimes hammers us as bad as they do because they are going to read your words and they are not going to appreciate exactly how you did it, the theatrics you went through. I had two deputy district attorneys ready to jump out of their socks when they saw the very same thing I saw, Mr. Feldman. And that is the reason we are here today." (24A RT 6379.)

Judge Mudd again rejected a renewed claim by Mr. Feldman that this was then ineffective assistance of counsel, on the ground that Mr. Feldman's style was generally theatrical, and this was permissible, except now, when it distorted the truth. (24A. RT 6379-6380.) Mr. Boyce interjected that the only theatrics he observed in Mr. Feldman's cross-examination was when Feldman held up the binders containing the 8000 to 10,000 images (24A RT 6380); Mr. Dusek, however, agreed with Judge Mudd that Mr. Feldman's demeanor, his facial expressions, and his hand movements expressed "aghast, shock, amazement . . . ." (24A RT 6380.)[121]

So the problem was not so much the substantive ambiguities in the testimony as elicited by Mr. Feldman, but in Mr. Feldman's histrionic style. But there is a more traditional solution to this problem: lodge a contemporaneous objection that the questioning is argumentative; make a record as to the manner in which the questions were asked; have the objection sustained; and, if necessary,

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[121] Mr. Clarke could not see Mr. Feldman because of the angle. But he watched it the night before on television and it was as the Court and Mr. Dusek described. (24A RT 6381.)

have the jury admonished. (*People* v. *Calvert* (1926) 80 Cal.App. 50, 54.) The solution is not to admit irrelevant or incompetent or otherwise inadmissible evidence to correct Mr. Feldman's alleged misconduct. (*People* v. *Bain* (1971) 5 Cal.3rd 839, 849; *People* v. *Kirkes* (1952) 39 Cal.2nd 719, 725-726.) And this goes to the heart of the fallacy of Judge Mudd's "open-door" rationale: there is no rule in California that allows one party to introduce otherwise inadmissible evidence in order to correct the misconduct or the inadmissible evidence successfully elicited by the other party. (*People* v. *Steele* (2002) 27 Cal.4th 1230, 1273; *People* v. *Gambols* (1970) 5 Cal.App.3rd 187, 192; *People* v. *Arends* (1958) 155 Cal.App.2nd 496, 508-509.) If there is a risk here of being "hammered" from "The Moutaintop", it is not because of a cold record, but because of a misconceived remedy.

In this closed session, Mr. Feldman also pointed out that even if the door was now open to further pornographic evidence, there were still some issues under Evidence Code section 352. There was still the bestiality photographs (24A RT 6367), and then there was the question of the photographs of Danielle L. In regard to the bestiality photographs, Mr. Clarke stated that he was only going to have Watkins describe them generally, and this was acceptable to the Court, since this was not time consuming. (24A RT 6377-6378.) As for the Danielle L. photographs, Judge Mudd examined them. He described the photographs for the record, including up-body photos of Danielle L. sunbathing, which he characterized, for want of a better term, "crotch shots." (24A RT 6376.) Judge Mudd held that all of these photographs could be described, but that the question of their admissibility would be deferred. (24A RT 6377.)

Whether a quick and general description of bestiality photographs was time consuming or not, how were they not irrelevant? Did the prosecution even claim that these were probative of motive? Did the existence of 16 bestiality photos somehow change the significance of the proportion of questionable photographs in the pornography collection? These questions answer themselves. Indeed, Judge

Mudd himself found the answer to this question when, a couple of days later, he agreed that the bestiality photographs were irrelevant and would not therefore go to the jurors even if they asked to see them. (25 RT 6559, 6569.) Why testimonial reference to the possession of bestiality photographs is relevant when the photographs are not is simply not clear at all. The testimonial evidence alone constituted improper character evidence admitted in violation of Evidence Code section 1101(a) and Evidence Code section 352. (*People* v. *Ogunmola* (1985) 39 Cal.3rd 120, 123, fn. 4 ["[T]he rule stated in section 1101 is merely a concrete application of the general principle embodied in section 352."].)

As to the photograph of Danielle L. sunbathing on a chaise lounge and standing in the Jacuzzi, these, and the other photographs in what would become Exhibit 146 were not only described, but would be eventually admitted for viewing by the jurors. (23 RT 6397-6398; 42 RT 9490-9491.) The photographs of Susan with Danielle were admitted for their relevance to the hair evidence, in showing the color of Danielle's hair, which was relevant to the trace evidence recovered from the motor home. (24A RT 6374-6375.)[122] But the photographs of Danielle L. in the Jacuzzi were admitted, presumably, as part of the complex of pornography evidence, even though there was nothing even conceivably lewd about these photos in themselves, but only in the suspicions fostered by their placement with the pornographic exhibits. The photo of Danielle L. sunbathing was a bit more sexually suggestive, but it was far from clearly pornographic either in the sense defined for child pornography in Penal Code section 3.11.4(d) (see above, fn. 109, on p. 226) or even in the looser, non-legal sense of pornographic. Again, much is required from their placement with other pornographic material, and it is worth noting that these photographs were not part of the prosecution's

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[122] The photograph of Susan L. in Exhibit 146 was used also for purposes of identification (27 RT 7295; 29 RT 7645), and by the prosecution to establish that Danielle L. looked like Denise Kemal, to whom Westerfield was attracted. (27 RT 7342, 7343, 7360.)

original offer of images adduced to prove the charge in count 3. (See above, pp. 227-228.)

But their probative value in that regard was highly equivocal. One might indulge the term "crotch shot" if this were only a clumsy way of describing the perspective of the photograph; but if it was meant to convey the clear and inherently lewd nature of the photograph, then it is important for this Court to examine the photo itself. It is not inherently lewd, and the so-called "crotch shot" added nothing to the evidence Judge Mudd originally allowed in his pretrial ruling, and less than nothing to the expanded scope of evidence Judge Mudd pushed in through the supposedly "open door". It added nothing, that is, unless it added the misleading prejudice arising from the coincidence of names – a point of association that invited the jurors to *speculate* that a sexual perversion had found its focus in Danielle Van Dam through some lust conceived for Susan's daughter, Danielle. Thus, even if joinder of counts was proper here, the admission of these photographs so clearly presented an "intolerable risk to the fairness of the proceedings or the reliability of the outcome" as to constitute an abuse of discretion under Evidence Code section 352. (*People* v. *Waidla* (2000) 22 Cal.4th 690, 724.)

After the closed session, the redirect examination of Mr. Watkins proceeded in open court. Mr. Clarke first established that the 100,000 images referenced in the cross-examination included every type of image on the computer, including all icons, arrows, buttons, and things of that nature. (24 RT 6390.) Then Watkins proceeded to his description of the newly marked exhibits. He described Exhibits 144 and 145 as containing about eight thousand images, including cartoon images, showing mostly adult women, naked, and often engaged in sexual acts. (24 RT 6392-6393.) He then described the cartoon images of Exhibit 147 in general terms, noting that they had text accompanying them, showing sexual assault on a child. (24 RT 6394-6396.) From the bedroom computer, Watkins recovered "several digital photographs of bestiality," by which

he meant "a person having sex acts with animals. These were in Exhibit 148. (24 RT 6396-6397.) Finally, Watkins described the photographs in Exhibit 146, including the photograph of Danielle L. sunbathing. In Watkins's description, Danielle L. had "her legs spread." (24 RT 6397-6398.)

Later in the redirect examination, Watkins described for the jurors with a little more specificity some of the images in Exhibit 145. The CD's and Zip disks, whose images made up Exhibit 145, were organized into files and directories. There were for example folders marked "Jetsons", "Flinstones", "Star Trek", and "Simpsons", all of which contained cartoon pornography. Thus, for example, in the "Jetsons" folder, there were images that "depicted the father having sexual situations with the daughter. Some of them had pictures of Mrs. Jetson unclothed. And that sort of thing." The "Flintstones" were similar. (24 RT 6407-6408.)

After a short recross-examination, Mr. Feldman made a motion for mistrial based on the ruling of this morning allowing all the pornography in, and based on the denial of the severance motion. It was at this point that Mr. Feldman made the record that yesterday, several female jurors began to cry when watching the videos in Exhibit 139. This was confirmed by Judge Mudd. According to Mr. Feldman, since the admission of the pornographic evidence, "[t]here has been a consequential change in the appearance of the jury." (24 RT 6435-6436.) Judge Mudd, who believed all the pornographic evidence presented to have been presented legitimately, did not have to disagree with Mr. Feldman's added description in order to deny the motion for mistrial, which he did. (24 RT 6436.)

C.
Mr. Dusek's Closing Argument

On June 27, the day began with further discussion out of the presence of the jury. Judge Mudd at this point conceded that the bestiality photographs had no relevance, and they would not be admitted into evidence. (25 RT 6559.) This did not mean, apparently, that Watkins' testimony about the existence of such photographs was irrelevant in Judge Mudd's view, since he did not strike this

testimony, and a month later, during another motion for mistrial based in part on the testimony regarding these photographs, Judge Mudd stated that the photographs themselves were indeed irrelevant, but an articulated inventory of what was on the computers was relevant in its entirety. (33A RT 8083.) As demonstrated above, this was a spurious distinction in this case. In regard to Exhibit 146, the Danielle L. photos, which had already been described testimonially, Judge Mudd deferred his decision (25 RT 6569); but, as noted above, he would eventually admit them. (42 RT 9490-9491.) Exhibits 144, 145, 147, and 148 without the bestiality photographs, were admitted and would be shown to the jurors if they requested to see them. (25 RT 6565, 6569.)[123]

This brings us to Mr. Dusek's closing at the guilt phase, in which all the enormous prejudice from the pornographic exhibits was argumentatively reconcentrated on August 6 just before the case was submitted to the jury for deliberations on August 8. (14 CT 3487.) The subject of the pornography came up at first in limited references. At one point, Mr. Dusek, in enumerating the "evil" deeds of Mr. Westerfield in kidnapping and murdering Danielle Van Dam, mentioned as another "evil" deed of Mr. Westerfield, or at least of his defense team, in blaming his "own flesh and blood" for the pornography. (42 RT 9371.) At another point, in a quick reference to count 3, he invited the jurors to look at the photographs if they wanted to, but he singled out the photograph of Danielle L.

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[123] One further subject of this hearing was a renewed motion for mistrial, which was, of course, denied (25 RT 6561), and a renewed motion for sequestration, which was referred to in a previous argument. (See above, pp. 199-200.) This particular request was prompted by the in-court controversy over the pornography exhibits, because the media was reporting that 8000 to 10,000 images of child pornography had been recovered from Westerfield's computers. (25 RT 6559-660, 6561.) Judge Mudd agreed that there were gross errors in the coverage of this and that the media was incompetent, but nonetheless there was no evidence that the jury was not policing itself in regard to the press. (25 RT 6566, 6567-6568.)

sunbathing, and asked them to ask themselves "why was that picture taken" and stored on the computer. (42 RT 9378.)

But the full force of Mr. Dusek's argument on pornography was reserved for his long, rhetorical discourse on motive, and for purposes of accurately gauging the prejudicial impact of the pornography evidence in this case, a verbatim quote of that argument is necessary:

> "What his motivation was are all these pictures, all of these pictures that he had. Now, you saw just a small portion of them here in court. After questions were asked, you learned that in fact there are binders full of pictures. Binders full of stuff that he had downloaded, put on CD's, put in Zip disks. And so many of these are, you know, adult women, obviously adult women engaged in all sorts of sex acts. We also have the other material that we have. And I suppose the natural question is in this case from the beginning, why would a regular, normal fifty-year-old guy kidnap and kill a seven-year-old child? We all had to be asking that. Haven't we? Why would that happen. How would that happen? Probably a logical question you're thinking now, well, tell me, tell me why it happened. I think I can. But I think you folks have to answer some questions for me first.
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> "If we go through that, I think we'll see. I think you have to ask yourself why would anyone have this collection in their house at all. The magnitude of it. The types of sex acts that are involved. The people that are with each other. Why would a normal fifty-year-old man have that in his house. Why would a normal fifty-year-old man have pictures of young naked girls. Not on his computer, on his disks that he's provided. Why would he collect that. Why would he save that. You can find it fast enough on the Internet. Just go to it. Why do you have to make your own collection of it.
>
> It's almost like in the old days we would make our own cassette tapes, songs you like. Rather than buying the CD tapes in the store, you would make your own tapes, and then you would have your favorite songs and so we wouldn't have to wait for them to play them on our own. That's what we have here. We have his own favorite pictures.

"And why aren't nude pictures of young girls enough? How many does he need of the young girls. They are all showing the same thing basically. Why do we have to have pictures of young girls involved in sex? Why would a normal fifty-year-old man want that? Why would he want to collect it? Why would he hide it from everyone if he's a normal fifty-year-old man?

"How many have you seen? We saw them all here in court. And these are the tame ones. How young are they? How young are they? One is too many for a normal fifty-year-old man. One is too many.

"But he doesn't stop there. Not only does he have the young girls involved in sex, but he has the animé that you saw. And we will not show them to you again. The drawings of the young girls being sexually assaulted. Raped. Digitally penetrated. Exposed. Forcibly sodomized. Why does he have those, a normal fifty-year-old man?

"What you didn't see and that were introduced later and will be available for you if you request, if you really need to see, are the animés with the captions, the dialogue between the young girl and the person assaulting her. 'No. Oh, don't rape me.' 'I'm just a young girl. Please have pity.' 'Ah, what a sweet little pussy,' he says to this little girl. 'When I was young, girls like you would not even look at me,' as he is getting ready to sodomize her. 'Stop screaming. If someone hears you, I'll have to kill you,' as he's getting ready to assault her. Why would a normal fifty-year-old man have this in his collection? 'Why are you doing this to me? Why are you doing this to me?' There's too many. The dialogue is complete with that type.

"Those are his fantasies. His choice. Those are what he wants. He picked them; he collected them. Those are his fantasies. That's what gets him excited. That's what he wants n his collection.

"He doesn't stop with the animé. We hear description of bestiality. And when you were picked in this case, during the jury selection we talked about pornography. You guys have any problems with it? Can you handle it? Is it going to cause you to be biased or influenced by that type of thing? No. No. No. And the representation was made basically it's adult women engaged in consensual activity, consensual sex. We now know it's not. It's

way beyond that. We do not have adult women in what we're displaying here in consensual activity. Not when you're engaged in all types of sex with dogs, goats, horses. His fantasies. His fantasies.

And he still doesn't stop with what he likes, with what he collects that feed his primal needs. You saw the videos. You had to sit through and watch those. We all did. And saw what they depicted. His fantasies of that young, little girl being assaulted by those men in all ways imaginable. Not only silent movies but the screams that came with it. The screams were in his private collection.

"When you have those fantasies, fantasies breed need. He got the point here it was growing and growing and growing. And what else is there to collect? What else can I get excited about visually, audibly?

"That's the man we're dealing with. If you can answer me why an individual, a normal fifty-year-old man would collect that stuff, I can tell you why a fifty-year-old man would kidnap and rape – kidnap and kill, I'm sorry, a seven-year-old child. They go hand in hand." (42 RT 9412-9415.)

Just as Brutus is not really "an honorable man" in Marc Antony's famous speech (Shakes., *Julius Caesar*, Act III, sc. 2, ll. 78 *et seq.*), so Mr. Westerfield is not really "a normal fifty-year-old man" in Mr. Dusek's speech. But if in Antony's speech the irony was that Brutus was as ambitious as his victim, in Mr. Dusek's speech only Mr. Westerfield was sexually perverted, and broadly so without any distinction to be made between child pornography, cartoon pornography, adult pornography, and bestiality – to which Mr. Dusek added details not present in Mr. Watkins's testimony. The substance that gave Mr. Dusek's rhetoric its force was, as Mr. Dusek would have it, Mr. Westerfield's *general* character for sexual perversion, whose insatiability escalated as it sought its own satisfaction and relief:

"When you look at those things, perhaps the reason, the motivation, the intent to [do] this crime becomes clear. Looking wasn't good enough it appears. Listening wasn't good enough. And it explains the obvious of why a fifty-year-old man would take a seven-year-old child to his home, to his bedroom. To his bed, and why he would then take her to the bed of his motor home. We know now why he did it, what drove him to that. And that's the scariest part. That's the scariest part. He was normal guy right down the street." (42 RT 9416.)

Finally, toward the end of the first closing, Mr. Dusek returned to his theme of the horror of the "normal fifty-year old man" who is a pornography addict *and* a child murderer:

"The evidence tells us what we don't want to hear. Every bit of this evidence tells us what we don't want to hear. We don't want to hear that the 50-year-old man two doors down killed a seven-year-old child. But he did.

"We don't want to hear about the last hours of her life, and unfortunately, we have no descriptions of that. We've got physical evidence that perhaps even paints a stronger picture.

"We don't want to hear how he took her out of her own bed and took her to his and then to his bed in the R.V. but he did.

"We don't want to hear about that.

"She struggled as we can see. She fought as we can see. She bled. She left her fingerprints. She left her hair. This was not an easy time. This was not fast, but it worked. We'll never know, and again, it's probably best that we don't, whether she screamed out like those girls in the videos. Did she make any noise?" (42 RT 9454-9455.)

Three days later, on August 9, at the beginning of the second full day of a lengthy deliberation that would end on August 21 (14 CT 3498), the jurors asked to see "the photo of Danielle L." and also "all the available pornographic images" (14 CT 3489; 40 CT 9907-9908), which of course included the videos in which "those girls" were "screaming."

D.
Summation

What then occurred here? One need only expand a bit on the initial list of legal issues set forth in the introduction.

If the joinder of count 3 to counts 1 and 2 was improper, which is appellant's position in this case, the additional pornography intensified further what was already intense prejudice. To sum up the lengthy argument set forth in the previous claim, with no evidentiary point in counts 1 and 2 to raise the issue of sexual assault, except merely the assumption that such crimes had to be sexually motivated, joinder was improper, even if the prosecution overcame the obstacles to statutory joinder. If this Court agrees, then not only should the jury not have viewed Exhibits 138 and 139 – the prosecution's initial proffer -- they should not, under any rationale, have been exposed to Exhibits 144 through 148 – the material that entered through Mr. Feldman's "open door". In the previous argument, appellant contended that the provocative incitement of Exhibits 138 and 139 weighed heavily in favor of the prosecution in breaking the deadlock in the forensic evidence. (See pp. 257-260.) If any residual doubt of this remains, it must necessarily be dispelled by the addition of the remaining pornography that allowed the argument that Mr. Westerfield was guilty because he was an eclectic sexual pervert. There is at least a reasonable doubt that the error in joinder was harmless (*Chapman* v. *California*, *supra*, 386 U.S. 18, 23-24); indeed, it is not difficult to conclude that on this record, without the pornographic material, it is reasonably probably that the guilt phase of trial would have turned out more favorably to Mr. Westerfield. (*People* v. *Watson*, *supra*, 46 Cal.2nd 818, 836-837.)

But even if joinder was proper with the evidence pared down to Exhibits 138 and 139, can the same be said with the addition of Exhibits 144 through 148? This includes not only the massive number of pornographic images the overwhelming majority of which did *not* consist of child pornography, but also a testimonial reference to the bestiality photographs, with Mr. Dusek elaborating on this by informing the jury that these photographs showed women having sex with "dogs, goats, horses. His fantasies. His fantasies." (42 RT 9414.) There were the odious rape cartoons in Exhibit 147, and the inflammatory questionable images in Exhibit 148. Even if, as respondent will surely suggest, the very number of provocative images in itself dampened the inflammatory effect of the evidence, it did not dampen its misleading effect, which was to turn the question of pornography into a pure question of guilt by character evidence. This was a grossly unfair result of a joinder that, at pretrial, may have been correct and within the trial court's discretion, but which revives the joinder issue in retrospect, and requires reversal. (*People* v. *Rogers*, *supra*, 39 Cal.4th 826, 851; *People* v. *Mendoza*, *supra*, 24 Cal.4th 130, 162; *People* v. *Gonzales & Soliz*, *supra*, 52 Cal.4th 254, 281.)

Finally, taken individually, none of the exhibits was admissible independently of the question of joinder. Mr. Feldman, in raising the numerical proportion of pornography, did not legally or factually open the door to all the pornography recovered from the computers. The individual images of adult pornography were not contraband, and had no probative value on the motive to kidnap and kill a seven-year-old girl; the possession of bestiality photographs were not contraband and had no relevance to anything; the photographs of Danielle L. sunbathing had little probative value on count 3, and were extraordinarily misleading on counts 1 and 2; and finally, the additional questionable images were provocative, inflammatory, and misleading, as well as cumulative on an issue that was not in dispute.

This combination of evidentiary errors rises to the level of a constitutional violation in themselves. To the extent that the additional pornography was irrelevant and contributed strongly to the verdict in this case, there was a violation of due process. (*Bruton* v. *United States*, *supra*, 391 U.S. 123, 131, fn. 6; *People* v. *Valentine*, *supra*, 42 Cal.3rd 170, 177.) To the extent that the protection of Evidence Code section 352 markedly failed in this case, there was, again, a violation of due process. (*People* v. *Falsetta* (1999) 21 Cal.4th 903, 916-919; *People* v. *Jennings* (2000) 81 Cal.App.4th 1301, 1314.) Finally, there is the Eighth Amendment right to a reliable guilt determination in a capital case. (*Beck* v. *Alabama*, *supra*, 447 U.S. 625, 628; *People* v. *Cudjo*, *supra*, 6 Cal.4th 585, 623.) This is in play regardless how one parses the pornography issue in this case. Whether it's the impact of Exhibit 138 and 139 alone, or of those exhibits in conjunction with all the other exhibits and testimony, Mr. Dusek's invitation to the jurors to find murder and kidnapping as the result of the possession of Internet pornography was clearly not conducive to a reliable determination of guilt, especially in a case where evidence of alibi was substantial and credible. For any combination of the reasons adduced in this argument and in the previous argument, Mr. Westerfield's convictions for murder and kidnapping must be reversed. (*Chapman* v. *California*, *supra*, 386 U.S. 18, 23-24.)

VII.
THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO ELICIT FROM SUSAN L. EVIDENCE OF AN ALLEGED STALKING INCIDENT, AND HER OPINION OF WESTERFIELD'S CHARACTER FOR VIOLENCE WHEN HE WAS UNDER THE INFLUENCE OF ALCOHOL

One element of the defense presented in this case was to establish, from percipient witnesses, the accessibility of the motor home in the Sabre Springs neighborhood. To this end, Susan L. and her two daughters, Danielle and Christina Gonzales, testified about the preparation for motor home trips, how the vehicle was parked for several days in the neighborhood, both before and after the trip, and how the door was often left unlocked during preparations. (See above, p. 48.) But Susan L.'s direct testimony in this regard prompted another controversy over character evidence – one that, like the pornography issue, was beset by incoherence and inconsistency.

First, the Court allowed Mr. Dusek to elicit from Susan L. testimony that Westerfield had on one occasion, at the time of their break-up, stalked her in a way that rendered her uncomfortable. (30 RT 7891-7895, 7899-7901.) This was deemed somehow relevant as impeachment of her credibility for bias (30 RT 7896-7897; 33A RT 8082-8083), even though the logical tendency of the evidence was to show hostility *toward* Mr. Westerfield, the party *for whom* she was testifying, and *whose case* her direct testimony substantively favored. Secondly, she was allowed to testify, under Mr. Dusek's tutelage on cross-examination, that when Mr. Westerfield was drinking, he became quiet, depressed, and on one occasion, violent. (30 RT 7914-7915, 7922.) Judge Mudd allowed this on the ground that Mr. Dusek was merely eliciting evidence of Westerfield's reaction to alcohol, which reaction, as such, was not character evidence at all. (30 RT 7921; 33A RT 8083.) These rulings were erroneous. The stalking incident and Susan L.'s opinion as to Westerfield's character while under the influence of alcohol

were both instances of character evidence with no basis for admissibility under Evidence Code section 1101(b).

1. The Stalking Incident

Mr. Dusek's conception of the proper scope of cross-examination of Susan L. was foreshadowed by his attempt to expand the scope of the cross-examination of Danielle L. Danielle, like her mother, was, as noted, called by the defense to attest to the accessibility of the motor home. (29 RT 7670 *et seq.*) At one point in his cross-examination of Danielle, Mr. Dusek elicited from her that her friend Andrea had come on one of the motor home trips; Mr. Dusek then asked whether Westerfield had said "anything about bringing Andrea along on any occasion." (29 RT 7683.) Mr. Feldman immediately recognized the drift of the question, objected, and asked for a sidebar. Out of the presence of the jury, Mr. Dusek indicated that he expected Danielle to testify that Westerfield asked her to ask Andrea because Andrea, as Westerfield noted, had "a cute little body." (29 RT 7684.) Apart from the fact that the evidence was conflicting as to whether Westerfield had said this, or whether it had even been said (29 RT 7684-7685), Judge Mudd ruled that it was beyond the scope of direct examination and opened up "an area" that the Court simply did not wish to "get into." (29 RT 7685.)

Forewarned by this aggression by Mr. Dusek, Mr. Feldman, just before Susan L.'s testimony, stated that he intended not to open any doors to character evidence, and wanted to prevent Mr. Dusek from such attempts as the latter had ventured in the case of Danielle L. (30 RT 7809-7810.) Mr. Dusek protested that he had evidence of an incident that occurred during the break up of the relationship between Westerfield and Susan L., and that this evidence was legitimately relevant to L.'s "bias, motive, her attitude toward the defendant in relation to her testimony." (30 RT 7810-7811.)

The offer of proof was that she was coming home one evening, shortly after they broke up. She was with a male friend, but not a date, who walked her to the door and kissed her on the cheek. Westerfield was "hanging out" by her

apartment at the time, and told her that night and the next day, that he had come over to talk to her about a new business deal he had. This was unusual and made her feel uneasy. (30 RT 7811.) Mr. Boyce objected that this was irrelevant and in any event inadmissible under Evidence Code section 352. Judge Mudd, however, ruled that L. could testify as to whether it was unusual or not for Westerfield to come over at night to discuss a business deal, but in regard to her feelings of uneasiness, Judge Mudd thought that this was speculative and entered "an area" the case did not need to "get into." (30 RT 7812.)

The evidence would eventually come in in a slightly different, more prejudicial form, along with the initially proscribed testimony as to L.'s uneasiness. But it might be worthwhile pausing here to invoke some fundamental legal principles that illuminate this topic of Susan L.'s bias as impeachment of her credibility, -- for that was the terms of Mr. Dusek's offer. If they seem obvious and therefore labored in their formulation, one can only offer the apology that they were grossly ignored in this case.

Evidence is relevant to the question of a witness's credibility if it "has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing . . . ." (Evid. Code, § 780.) Evidence of bias is relevant in this sense only in reference to the party whom the witness's testimony favors or disfavors. A fact signifies an impeaching bias only if it tends to show the witness's inclination in favor of the party which called him and whose case his testimony supports, or disfavor to the party that did not call him and against whose case his testimony militates. Thus, "[i]t is competent to prove enmity or unfriendliness of a witness to a party *against whom* he testified" (*Estate of Martin* (1915) 170 Cal. 647, 671, emphasis added, internal quotation marks omitted); conversely, it is competent to show "that the witness cherished a friendly interest" in the party *for whom* he testified. (*People* v. *De Leon* (1968) 260 Cal.App.2nd 143, 156, internal quotations omitted.) These simple, well known, and logical principles informed the question posed by Mr. Boyce's objection: how would a fact tending to show Susan L.'s

hostility to Westerfield tend in reason to impeach the credibility of her testimony *in favor* of Westerfield? The simple answer is: it would not, and the evidence was therefore irrelevant.

But Judge Mudd's ruling was oddly unresponsive to the prosecution's proffer and the defense's objection. Mr. Dusek would be allowed to establish that the pretext of being at her apartment late at night to talk about a business deal was unusual. Divorced from her feeling of unease, it is not clear how the unusualness of the occurrence would be relevant to L.'s bias even on Mr. Dusek's theory. If the unusualness of the occurrence was independently relevant to some substantive issue in the case, it was not clear which one. The problem was solved in the upshot when Susan L. was allowed to attest to her feelings of unease. The justification for this added an even more convoluted variation to Mr. Dusek's bias theory, and to trace the remarkable twisting and turning, one may proceed with a description of Susan L.'s testimony.

Susan L. testified on direct examination, again, to the motor home trips and to the accessibility of the motor home in the neighborhood – evidence that supported the defense case. Mr. Dusek's cross-examination probed various matters within the scope of this direct examination. (30 RT 7882-7891.) At one point, Mr. Dusek in fact asked a *relevant* impeachment question: "You still like him, don't you?", to which she answered, "I care about him." (30 RT 7892.) But instead of pursuing the relevant bias evidence, Mr. Dusek veered in the direction indicated by the discussion prior to Susan L.'s testimony.

He elicited from her that she had last seen Westerfield three weeks before he was arrested. They had already broken up. She had been out with a male friend, in whom she did not have a romantic interest. Her friend brought her home and, inconsistently with Mr. Dusek's offer of proof, she *did not* see Westerfield at that time, but did know he had been there because she had spoken to him the next day. (30 RT 7892-7895.) At this point, the Court sustained a hearsay objection, whereupon Mr. Dusek asked to approach. (30 RT 7895.)

Judge Mudd expressed his surprise that she did not actually see him there, and was doubtful now as to the relevance of this evidence. As to relevance, Mr. Dusek pointed to the simple contradiction: she testified on cross-examination that she still liked Westerfield; now she can be impeached by eliciting from her that hearing about Westerfield's stalking of her apartment had "freaked her out." (30 RT 7895-7897.) Judge Mudd responded, "Well, in terms of – the way I want you to approach it is this. Without getting into what he said, I'm going to allow you to go to her state of mind because it is in conflict with the way she is today. Namely, that she didn't have good feelings for him back on that particular date." (30 RT 7897.) When Mr. Boyce invoked Evidence Code section 352 again, Judge Mudd responded that he was keeping out the inflammatory part, which was her reaction, i.e., that she was "freaked out." (30 RT 7897.)

There is no point forcing a conceivably sensible interpretation of any of this. The pertinent principles are, again, simple. That Susan L. should have been hostile to Westerfield *enhances* the credibility of her testimony in favor of Westerfield, and is therefore irrelevant for purposes of impeaching that testimony (Evid. Code, § 780.) That Susan L. expressed a feeling that could be construed as unfriendly to Westerfield *might* impeach her claim to still care about him, but for Mr. Dusek to impeach her with a prior inconsistent statement that, at the same time, rehabilitates her from the effect of Mr. Dusek's own previous impeachment of her for bias is a tangle so confusing and misleading as to preclude any doubt of inadmissibility under Evidence Code section 352.

In any event, with Judge Mudd's approval and guideline, Mr. Dusek returned to the cross-examination and concluded the topic as follows:

> "Q. Did you tell law enforcement that you found him setting outside?
>
> "A. No I didn't.

"Q. Have you had a chance to review the transcript?

"MR. FELDMAN: Asked and answered.

"THE COURT: Overruled.

"BY MR. DUSEK: Q. Does the transcript appear to indicate that?

"MR. FELDMAN: Objection, irrelevant.

"THE COURT: Overruled.

"MR. FELDMAN: Best evidence.

"THE COURT: Overruled.

"You may answer.

"THE WITNESS: That he was sitting outside?

"BY MR. DUSEK:

"Q. Yes.

"A. I said it because he told me he was sitting outside.

"MR. FELDMAN: Your honor, motion to strike.

"THE COURT: Motion granted. The jury's admonished to disregard the last comment.

"Ma'am, pay particular attention to the questions you're being asked, okay?

"BY MR. DUSEK: On the transcript doesn't it say 'the night I found him sitting outside'?

"A. Yes, it does say that but --

"Q. You made contact with him the next day?

"A. Yes, he called me.

"Q. And after discussing what you discussed you didn't feel comfortable with the defendant at that time, correct?

"A. At the time, yes." (30 RT 7899-7901.)

What really occurred in this cross-examination? Under the guise of cross-examination, Mr. Dusek was improperly allowed to present his own evidence-in-chief. (See *People* v. *Padilla* (1904) 143 Cal. 158, 162.) As evidence-in-chief it was incompetent and inadmissible as character evidence. (Evid. Code, § 1101(a).) As presented through Mr. Dusek's leading questions, the incident was intended to imply that Westerfield, under the sexual stress of his break up with Susan L., acted strangely, that he did so by stalking her, and that he was effective in stalking her invisibly – a capacity that would undoubtedly be useful for getting in and out of strange houses undetected with a seven-year-old girl in tow. This will be elaborated in the discussion on prejudice, but enough has been said to demonstrate undoubted error in Judge Mudd's ruling allowing this evidence to come before the jury.

2. Westerfield's Character for Violence When Intoxicated

Later in the same cross-examination, Mr. Dusek brought up the subject of Westerfield's drinking:

"Q. When you would go to the desert would there be any drinking?

"A. Yes.

"Q. Would the defendant drink?

"A. Yes.

"Q. Did you see any change in attitude or personality?

"A. Yes.

"Q. When he would drink?

"MR. BOYCE: Objection 352.

"THE COURT: Overruled.

"MR. FELDMAN: Character, objection.

"THE COURT: Overruled.

"BY MR. DUSEK:

"Q. What would you see?

"A. He would become very quiet.

"Q. What else did you see.

"A. Sometimes he would become a little upset.

"Q. Depressed?

"A. Yes.

"Q. Basically you'd see a change in character when he would drink, wouldn't you?

"MR. BOYCE: Objection, 352, asked and answered.

"THE COURT: Overruled.

"You can answer.

"THE WITNESS: Yes.

"BY MR. DUSEK:

"Q. The way he is as a sober individual was much different than when he'd be drinking, correct?

"A. Correct.

"Q. Is that one of the reasons you left?

"A. Because of the drinking?

"Q. Yes.

"A. Yes.

MR. DUSEK: Thank you, ma'am." (30 RT 7914-7915.)

At this point, Mr. Dusek seemed content only with her testimony that this vague change of character under the influence of alcohol was sufficient to prompt her to leave him. But Mr. Dusek in fact wanted more. Redirect examination barely touched the topic of drinking (30 RT 7916), but during recross-examination, Mr. Dusek asked to approach the bench. (30 RT 7920.) He had a transcript of an interview with Susan L. in which she stated that when Westerfield drank he became sexually and verbally abusive. He would not elicit this, but he wanted to elicit from her that Westerfield, on alcohol, became "more forceful." (30 RT 7930.)

Mr. Boyce objected that this was irrelevant, inadmissible under Evidence Code section 352, inadmissible as character evidence, and if nothing else, beyond the scope of direct examination. (30 RT 7920-7921.) Judge Mudd ruled as follows:

> "Let me just say that the evidence in this case is overwhelming that he had been drinking. And we have a percipient witness to how he changes when he's been drinking. It is relevant and probative. His sexual acting out is not involved. The way its been characterized is certainly within the bounds. And this is not character evidence in the true sense. It is evidence that directly relates to an issue in the matter that the witnesses have all testified to and here's a percipient witness to how he changes." (30 RT 7921.)

When Mr. Feldman asked if he could then rebut with testimony that Westerfield was not forceful with any of Susan L.'s children, Judge Mudd warned him he would "be walking on very thin ice." Judge Mudd reemphasized, "His state of sobriety has been brought into this trial, and his personality changes between sobriety and being under the influence had not come up until we now have a percipient witness that can testify to it." (30 RT 7921-7922.)

Back in front of the jury, Mr. Dusek brought his cross-examination to this close:

> "BY MR. DUSEK:
>
> "Q. One last area, ma'am.
>
> "When the defendant would be drinking would he become forceful?
>
> "A. I remember an occasion that he did.
>
> "MR. DUSEK: Thank you, ma'am.
>
> "THE COURT: All right.
>
> "Anything further, Mr. Boyce.
>
> "MR. BOYCE: No, no your honor." (30 RT 7922.)

This then was, under the rationale of Judge Mudd's ruling, percipient evidence and not character evidence at all. This seems obviously wrong, but, as with the stalking incident, a certain amount of tedious analysis is required to untie gratuitous legal knots.

Susan L. was not a percipient witness in sense of having seen and heard Westerfield on the night of February 1, 2002 when he was drinking at Dad's. (See *People* v. *Hurlic* (1971) 14 Cal.App.3rd 122, 127.) If she was a percipient witness

of Westerfield's sober demeanor in general compared with his intoxicated demeanor in general over a period of time, then her percipience was only foundational for her *opinion* as to his general reaction to alcohol. (See *People* v. *Honig* (1996) 48 Cal.Ap.4th 289, 349.) But the crux of the matter is whether or not this opinion relates to character or to something else. For Evidence Code section 1101(a) proscribes character evidence, whether shown by opinion, reputation, or conduct. (See above, p. 225, fn. 108; see also *People* v. *Noguera* (1992) 4 Cal.4th 599, 623.)

The rationale for Judge Mudd's allowance of this evidence implies some distinction between alcohol related character and character *simplex*, with the latter barred by Evidence Code section 1101(a) and the former not. Is there anything to this distinction? Can one characterize the personality and character changes exhibited under the influence of alcohol as physical reactions in the same category such as drowsiness, slurring of speech, dizziness, staggering, etc.?

The Evidence Code does not provide us with a definition of "character." (See Evid. Code, §§ 100 *et seq.*). We know that is it is something personal, and that it can be determinative of personal "conduct on a specified occasion," since this is precisely what the Evidence Code bars the trier of fact from considering. (Evid. Code, § 1101(a).) Judge Mudd's position seems to imply that "character" is, strictly speaking, something essential to, or inherent in, the person him- or herself, without any external qualification or condition. Hence, one's behavior under the influence of alcohol is not "character" but a kind of chemical reaction, even when that reaction can be characterized as forcefulness and violence –moral qualities usually associated with personal character otherwise.

But whatever a lively debate among philosophers, psychologists, and scientists might produce on this topic, Evidence Code section 1101 must be concerned with the practicalities of everyday experience. All human acts take place in a specific context, conditioned at all times by *something* external or something that can be conceived as external. If the externality – be it sickness,

health, stress, ease, poverty, affluence, the weather, etc. -- removes character altogether, then there is simply no such thing as character for all intents and purposes. Alcohol merely reduces inhibitions, which is to say, in common-sense language, that it can reduce the ability of the subject to exercise his better character in restraining his worse. Both, however, are his character.

The matter is instinctively understood and does not raise difficult legal questions, which perhaps accounts for a dearth of authority on this topic. But where a distinction such as that made by Judge Mudd could have been made, alcohol-related character evidence is summarily treated as simple character evidence. Thus, in *People* v. *Talamantez* (1985) 169 Cal.App.3rd 443. The Court of Appeal upheld the trial court's refusal to allow defense counsel to question witnesses concerning their knowledge of a third-party's reputation for violence while intoxicated. The evidence, the Court of Appeal succinctly stated, was "prohibited by Evidence Code section 1101." (*Id.*, at p. 466.)

People v. *Holloway* (2004) 33 Cal.4th 96 is also illustrative. In *Holloway*, during his interrogation by the police, the defendant, who denied having committed the charged murders, admitted to having been intoxicated that night. When asked by the detective whether he had blacked out at any point, the defendant answered:

> " 'Holloway: I knew what I was doing. I wasn't drunk. Usually I can drink a beer and not, you know, really get drunk. As far as hard liquor, I don't really mess with that, because I know, you know, if I do get drunk that's – Just can't handle hard liquor. That's why I only took one shot of Tequila. 'Cause I know what I'm capable of doing if I'm drunk, if I'm—
>
> " '[Detective]: What is that?
>
> " 'Holloway: Staggering drunk. Can hurt somebody or whatever. If I was drunk I don't think I could do this.

" '[Detective]: Do what exactly?

" 'Holloway: Well, killing. Debbie was too close to me.'"
(*Id.* at p. 127.)

At trial defense counsel had moved to redact the statement that defendant did not "really mess with" hard liquor because he knew he could hurt someone when he was drunk. The basis for the motion was that, in defense counsel's opinion, the statement referred back to an assault, which the guilt phase jury was not supposed to hear about. The trial court agreed with the prosecutor that the remark made no such connection. (*Id.* at p. 128.) However, as noted by this Court, "[o]n appeal, defendant has shifted ground, claiming not that the remark at issue referred to his prior offense, but rather that it was an opinion about 'his own character for violence while intoxicated' and was inadmissible under Evidence Code section 1101, to show he acted in accord with that propensity by killing Debbie and Diane while intoxicated on the morning of March 20, 1983." (*Ibid.*)

This Court found this shift in defendant's position to constitute a forfeiture of the issue on review, *not* because the evidence did not involve character, but because defense counsel at trial did not invoke Evidence Code section 1101. (*Ibid.*) Further, this Court in any event went on to address the substance of the issue raised despite the forfeiture, and found that any error under section 1101 was without prejudice. (*Id.* at pp. 128-129.) What is to be noted here is that this Court did not take the opportunity to announce that alcohol-related character was not, for purposes of section 1101, character at all, which is fortunate since the distinction is spurious.

Judge Mudd's reasoning in regard to this matter of alcohol-related character was therefore erroneous. And as with the stalking evidence, this character evidence too suffered from defect of exceeding the scope of direct-examination (*People* v. *Padilla*, *supra*, 143 Cal. 158, 162), resulting in the compounded error

of the admission of evidence that was inadmissible on both formal and substantive grounds. [124]

The question is then the prejudice from the improper evidence admitted through Mr. Dusek's cross-examination of Susan L. As foreshadowed above, the stalking incident was prejudicially suggestive in imputing to Westerfield an ability to sneak around undetected when motivated, however vaguely, by sexual impulses. In other words, it gave the impression of filling a gap in the prosecution's case in establishing a common scheme or plan in regard to the kidnapping. Of course, as common-scheme-or-plan evidence proper, the stalking incident was not even close to meeting the requirements of a showing of a substantial degree of circumstantial similarity between the charged and uncharged conduct. (*People* v. *Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

As for the evidence of Westerfield's supposed character for violence while drinking, this, again, was opinion evidence, and as such did not even have a colorable claim to admissibility under Evidence Code section 1101(b), which makes exceptions only for specific instances of conduct, and not for opinion evidence. (See above, p. 225, fn. 108.) Nonetheless, L.'s opinion was supposed to establish the basis for an inference that because Westerfield had been drinking at Dad's on the eve of Danielle Van Dam's disappearance, he was in a characterological state to commit the violent crime of kidnap and, perhaps, if she had been killed before Westerfield had sobered up, murder.

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[124] Susan L. testified on July 10. (14 CT 3465.) On July 22, after the eleven-day recess in the middle of trial (14 CT 3469), defense counsel made these rulings, along with the ruling allowing testimony about the bestiality pornography, the subject of a motion for mistrial. (9 CT 2194-2199.) Judge Mudd abided in his the correctness of his rulings: the stalking incident, which was not characterized as such to the jurors, was relevant to illuminate Susan L.'s relationship and feelings toward the defendant; as to Susan L.'s testimony that Westerfield was forceful when intoxicated, "intoxication [was] fair game" in this case; and as to the bestiality, although it had no relevance in itself, what was on the computer in its entirety was relevant. (33A RT 8083.)

Mr. Dusek, however, did not neglect to exploit Susan L.'s character evidence in his closing argument:

> "When we broke for lunch, I had just completed talking about what was in the defendant's head, what he knew on that last weekend Danielle was alive.
>
> "What was he going through at that time in his life. We've heard that he had recently broken up with his girlfriend of longstanding Susan L. We heard that through not only himself on the taped interview with Paul Redden, I would describe, didn't want to be by himself that weekend, that type of thing.
>
> We also heard through Glennie Nasland, the lady from Denmark, one of the friends from Dad's, she had described her knowledge of the breakup. We heard from Mark Roehr, the neighbor who lived across the street, about the breakup and how it was not the easiest of things to go through. We heard from Susan L., herself, how they had broken up and then just a few short days, short while before these events, she had been out with someone, came home with someone at nighttime. He gave her a little kiss on the cheek. And we found out that he was there. The defendant was there that night. That made her uncomfortable. What's going on? What is going on with that?
>
> "We know that alcohol plays a role in the defendant's personality, how he behaves, how he acts, that there is a change in character when he's out drinking. Oftentimes he becomes quiet, might become depressed. According to Susan L. he had become forceful. Forceful when he's had too much to drink." (42 RT 9409-9410.)

"What's going on with that?" is a nice vague locution designed to allow Mr. Dusek to avoid saying out loud something he knew was legally problematic: Mr. Westerfield had a character for violence and *modus operandi* of stalking.

This evidence produced a prejudice independent of that emanating from the improper pornography evidence. The stalking and alcohol testimony alone was

sufficiently prejudicial to break the impasse between the competing forensic science cases, and these errors, quite apart from those related to the admission of pornographic evidence, are enough to establish a reasonable probability of a more favorable outcome for Mr. Westerfield in the guilt phase of trial. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.) But the incompetence of the evidence was so egregious and the prejudice so great, that the error here crosses the line to a violation of due process (*United States* v. *LeMay* (9th Cir. 2001) 260 F.3rd 1018, 1030; *Whelchel* v. *Washington* (9th Cir. 2000) 232 F.3rd 1197, 1211), and in seriously distorting the integrity of the guilt phase verdict in a capital case, a violation of the Eighth Amendment. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 623.) In any case, the instant error, in combination with any or all the errors set forth in regard to the pornography evidence, requires reversal of appellant's convictions under any standard of review. (See *People* v. *Glass* (1975) 44 Cal.App.3rd 772, 780 [*Chapman* applied to cumulative error when each constituent error is of federal constitutional magnitude.]; see also *People* v. *Woods* (2006) 146 Cal.App.4th 106, 117 ["Because some of Jones's improper arguments were of federal constitutional magnitude, we assess the cumulative effect of misconduct under the standard applicable to federal constitutional errors that are not reversible per se."].)

VIII.
THE TRIAL COURT'S RESTRICTIONS ON DEFENSE COUNSEL'S CROSS-EXAMINATION OF PAUL REDDEN CONSTITUTED A DENIAL OF THE SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL AND TO CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES

Westerfield's statement to Paul Redden, the San Diego police "interrogation specialist", had to be presented to the jury in redacted form because the statement was part of the polygraph examination, evidence of which was barred by Evidence Code section 351.1. The statement was more or less consistent with the statement given earlier in the morning to Detective Keene, but there was at least one incriminatory detail in the Redden statement emphasized by the prosecution. The evidence was Westerfield's use of the pronoun "we" when talking about his weekend stop at Borrego Springs -- a usage the prosecution thought was highly significant in this case. (15 RT 4888; 42 RT 9437; 8 CT 2034; see above p. 22 and fn. 21.)

The cross-examination of Redden began with Mr. Feldman asking two questions, both of which were not answered because Judge Mudd sustained Mr. Dusek's 352 objections. The first question was "How many hours did you spend speaking with Mr. Westerfield?" and the second question was "How many different times did Mr. Westerfield ask you for counsel?" (16 RT 4490.) Judge Mudd himself called for a sidebar conference, which he began as follows:

> "I had made a legal ruling regarding the admissibility of these tapes. You can preserve it if you would like to raise your objection here. But how many times he may have asked for counsel, didn't ask for counsel, is contained in parts of the tapes that you don't want in. And you're coming dangerously close to opening up this entire interview. I'm just telling you. . .

"So if you want to preserve the issue, you preserve it right now. But you don't go into anything that relates to pretrial rulings." (16 RT 4490-4491.)

Judge Mudd here was referring to the pretrial defense motion to suppress all of Westerfield's statements to the police on February 4 through 6 as in violation of *Miranda* (*Miranda* v. *Arizona* (1966) 384 U.S. 436) and as involuntary. Judge Mudd ruled that all statements, including the Redden statement, were admissible, but that those statements made after Ott and Keyser came on the scene at about midnight as February 4 gave way to February 5, were involuntary and admissible. (5E RT 1883-1891.) However, Judge Mudd's reference to "parts" of the tapes that Mr. Feldman did not want in was not to the involuntary statements, it was to those "parts" within the admissible statements where the polygraph examination was expressly mentioned. (46 CT 10840, 10976.) In any event, Mr. Feldman argued that he had the right to re-raise the question of voluntariness in front of the jury (16 RT 4491), to which Judge Mudd responded, "Let me be as blunt as I can, Mr. Feldman. If you raise that issue, this entire tape comes in." (16 RT 4491.) Mr. Feldman accepted the Court's invitation to register an objection, but to refrain from this line of questioning under the threat of having the door "opened" to the entire tape. (16 RT 4491-4492.)

Later in a second sidebar conference prompted by Mr. Feldman's attempt to broach other matters, Mr. Feldman returned to the issue:

"MR. FELDMAN: Your honor, I'm sorry. The other problem's counsel stood up earlier either yesterday or this morning, said on two separate occasions the man used the word "we". In order to explain that I have to establish a foundational record that permits the jury to understand the guy was in custody for a long period of time. He could have been fatigued. I was going to go there. I was going to ask permission, now asking permission to inquire as to allow me to show that Westerfield told this man that he hadn't eaten breakfast, he hadn't slept well, he didn't have a lot of

sleep. He certainly didn't have a lot of food. He had asked for counsel. But you have already ruled on that. I understand that. And I think to explain the inference that –

"THE COURT: This witness can testify as to his observations as to whether he appeared fatigued. What I'm telling you is that what I am left with right now is an excised version of the tape that doesn't contain all the material you want to get in. And this jury has not heard it. But they have heard that this witness tape-recorded it. You seem to be concerned through the objections of Mr. Boyce that the jury not be advised that there were items excised. You questioning is going to open that door. Now, I don't know how to make it any clearer. You were with the tape you've got –

"MR. FELDMAN: Yes, your honor.

"THE COURT: -- as it is right now. And that's it.

"MR. FELDMAN: Very well." (16 RT 4499-4500.)

Judge Mudd restriction on Mr. Feldman's cross-examination had three erroneous components.

First, Mr. Feldman, was in effect, correct. Although he could not submit the question of "voluntariness" to the jury as a legal issue, he could submit the same facts insofar as they related to the reliability of the statement. (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 689-690.) Secondly, in introducing Mr. Westerfield's statement to Redden as a party admission (Evid. Code, § 1220)[125], the defense was entitled to "show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.]" (*People* v. *Arias* (1996) 13 Cal.4th 92, 156.) This is provided for in Evidence Code section 356[126],

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[125] "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ."

[126] "Where part of an act, declaration, conversation, or writing is given in

and "in applying [this section], the courts do not draw narrow lines around the *exact* subject of inquiry." (*People* v. *Zapien* (1993) 4 Cal.4th 929, 959, internal quotes omitted, italics added; see also *People* v. *Hamilton* (1989) 48 Cal.3rd 1142, 1174.)

Finally, the pursuit of a competent and relevant line of inquiry does not, as noted above in the discussion on the pornographic evidence, ever "open the door" to inadmissible evidence. (*People* v. *Steele* (2002) 27 Cal.4th 1230, 1273; *People* v. *Gambols* (1970) 5 Cal.App.3rd 187, 192; *People* v. *Arends* (1958) 155 Cal.App.2nd 496, 508-509.) Evidence Code section 351.1 prohibits any reference to polygraph evidence "[n]otwithstanding any other provision of law . . ." (Evid. Code, § 351.1(a)); at the same time, "[n]othing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible." (Evid. Code, § 351.1(b).) Thus polygraph evidence is clearly and completely inadmissible and is not allowable even for its value as supposed context for statements made during the exam.

The restriction Judge Mudd placed on Mr. Feldman's cross-examination of Paul Redden was improper, but one should acknowledge in this regard that despite Judge Mudd's apparent adamancy, Mr. Feldman was, after the second sidebar, suffered to elicit *some* facts that were deemed to be door-opening without objection and without prompting any door-opening:

> "Q. Did you provide Mr. Westerfield with any food?
>
> "A. I did not, no, sir.

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evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

"Q. Could you tell whether or not – you had not met Mr. Westerfield prior to that date, is that right, sir?

"A. No, sir. This was the first time.

"Q. I'm sorry. I didn't want to interrupt.

"A. This was the first time.

"Q. Did you – then you're not able to form an opinion as to how fatigued he might have been, is that right?

"A. Except I asked him how much sleep he had had.

"Q. What did he tell you?

"A. Five hours.

"Q. And did you ask him when he had last eaten?

"A. Yes, sir, I did.

"Q. What did he tell you?

"A. That he hadn't eaten." (16 RT 4501-4502.)

Why Mr. Dusek did not object or Judge Mudd intrude is not clear.

In any event, there was much more in the Redden interview that was relevant to Mr. Westerfield's state of mind and to the reasons he might have given for odd or inconsistent answers, or why he might have said "we" when he meant "I". In regard to the summary answers Redden gave about Westerfield's state of nourishment, Westerfield did not merely state he had not eaten, he stated he had not eaten breakfast or lunch, and that he had had only six grapes that day. (46 RT 10846.)

There was also this exchange regarding Westerfield's ability to remember the details of his weekend and how he could not remembers some details when he was talking earlier in the day to Keene:

"WESTERFIELD: You know, because I wanted to be as straight forward as I could, and . . .

"REDDEN: Well I had some time trouble remembering yesterday much less . . .

"WESTERFIELD: Yeah, you're standing out in your front yard, I don't know if you've gone through this. But I was standing on my front yard, these two guys walk up, bigger than me, which is good, but um, then all of a sudden two more guys joined them. It was like the squads of cars came . . . .

"REDDEN: Um hum.

"WESTERFIELD: And it was like, oh shit, what's going on, you know." (46 CT 10891.)

Finally, there was this passage:

"REDDEN: But the thing . . . and I'm gonna show you 'cause I put it in quotes.

"WESTERFIELD: Okay.

"REDDEN: I'll read you my notes as I was typing. And I want you to look right . . .

"WESTERFIELD: I, I can't read that.

"REDDEN: Alright. I just put the cursor and highlighted it on there. And what is that word that I've highlighted right there?

"WESTERFIELD: It's 'We'.

"REDDEN: Alright.

"WESTERFIELD: Yeah.

"REDDEN: And what you said to me at that point was . . . pulled off the side of the road, you ate, you showered, and you said 'we' were at Warner Springs. What you just told me was that there was somebody else with you.

"WESTERFIELD: There wasn't anybody else with me.

"REDDEN: There was somebody else with you. Otherwise you don't say we.

"WESTERFIELD: I didn't say . . . If I, If I said we . . .

"REDDEN: You said we, 'cause I can play the tape back and show you . . .

"WESTERFIELD: That's fine.

"REDDEN: . . . where you said we.

"WESTERFIELD: If, if I said that . . . and I'm not gonna . . . I'm not gonna say I didn't say it, it's one of those mix-ups I use in my head.

"REDDEN: Freudian slip is what we call it.

"WESTERFIELD: Well no, it's just that it . . . you know, I . . . it sounds like a lie, but it's not." (46 CT 10976-10977.)

All of this was fair game for cross-examination. Moreover, all this was important in light of the importance of Westerfield's statements to the prosecution case, and, in the Redden statement, the importance placed by the prosecution on the use of the pronoun "we" as a "Freudian slip" betraying Westerfield's guilt. In this regard, the limitation on cross-examination transcended a state law violation of Evidence Code section 356; it constituted a violation of the Sixth Amendment right to confront and cross-examine adverse witnesses. (*Olden* v. *Kentucky* (1988) 488 U.S. 227, 231-233.)

If it is objected that Judge Mudd did not precisely bar Mr. Feldman from engaging in his desired cross-examination, the judge nonetheless exacted a price for it: if Mr. Feldman proceeded, then the entire tape would come into evidence. But this merely shifts the constitutional violation to another aspect of the Sixth Amendment. Conditioning relevant and competent cross-examination on the admission of incompetent evidence constitutes an unwarranted interference in the right to assistance of counsel. (*Brooks* v. *Tennessee* (1972) 406 U.S. 605, 611-613.)

Finally, the jury was not given a true and complete picture of Westerfield's statement not only to Redden but to Keene as well. His state of mind on the morning of February 4 when he went out to his driveway simply to collect the mail, only to find himself suddenly confronted by nine or ten San Diego policeman, certainly must have had some bearing on how nervous and distracted he was during both interviews. As for the Redden interview alone, the jury was not given a true picture of the pronoun evidence so bruited by Mr. Dusek as a confession of guilt. Thus, the improper restriction on cross-examination of Redden resulted in a violation of the Eighth Amendment right to a reliable determination of facts in the guilt phase of capital case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 623.)

Is there a possibility that the restricted cross-examination of Redden contributed to the verdict of guilt? As set forth in detail above (pp. 253-257), the forensic evidence put this case at an impasse. The battle was to be decided by the non-forensic evidence and it would not take much one way or the other to tip the scale. Westerfield's statements to both Keene and Redden described an unusual trip, but not one that was incredible, especially after certain details were rendered anodyne for prosecution purposes through the testimony of various witnesses, like Eugene Yale, who verified the ordinariness of the route (see above, p. 56), or like the Lapisas, who verified that Westerfield often camped with them at Glamis on

Super Bowl Sundays. (*Ibid.*) Thus, there was a sub-battle over the statements themselves, and even a small amount of key evidence was important.

The evidence of Westerfield's mental and emotional condition in rendering an account of his trip would be evidence in favor of the defense. An explanation of why he used the pronoun "we" instead of "I" in that brief passage with Redden would also be of high importance. Under the circumstances of this case, it cannot be shown beyond a reasonable doubt that the erroneous restriction on the cross-examination of Paul Redden was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

On the other hand, if this Court does not deem this error to be of constitutional magnitude, or if it deems it not to be sufficiently prejudicial even under the favorable standard of review for constitutional error, nonetheless, combined with the prejudice emanating from the pornography evidence, whether from all of it, if joinder was improper, or from the additions let in after Mr. Feldman had supposedly "opened the door" to it, requires reversal of the guilt phase verdict n this case. (See *People* v. *Glass* (1975) 44 Cal.App.3rd 772, 780; see also *People* v. *Woods* (2006) 146 Cal.App.4th 106, 117.)

IX.
THE TRIAL COURT ERRED IN NOT ALLOWING AS A DECLARATION AGAINST INTEREST THE FEBRUARY 15 TELEPHONE CALL TO BRENDA VAN DAM REGARDING DANIELLE

The defense proffered evidence that on February 15, 2002, at about 4 p.m., Brenda Van Dam received a telephone call from an unknown male, who asked her if she wanted her daughter back, and who told her that Danielle was still alive, but had been abused. (9 CT 2200-2201, 2205; 13 RT 3852-3853.) This was offered not only as declaration against interest pursuant to Evidence Code section 1230, but also on federal due process grounds. (9 CT 2201, 2203; 13 RT 3853-3854.) Judge Mudd sustained a hearsay objection when the matter was first broached during the cross-examination of Brenda Van Dam (13 RT 3852, 3854) and again, after the 11-day recess, when the defense made a formal motion to have the evidence admitted. (33A RT 8077-8078.)

Evidence Code section 1230 provides:

> "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true."

Under usual circumstances, a statement by an anonymous declarant is not deemed to be against interest since the declarant has taken pains to shield himself against criminal liability or social opprobrium by maintaining this very anonymity.

(*Clark* v. *Optical Coating Laboratory, Inc.* (2008) 165 Cal.app.4th 150, 170-172.) But this case does not present the usual circumstances.

In the instant case, as may be seen from previous arguments, virtually the entire metropolitan community was aware of this case, and a substantial portion of this community must also have been aware of the intensity of the investigation and search for Danielle Van Dam before her body was discovered on February 27. It was not unlikely that Brenda Van Dam's telephone calls would be monitored for contacts from the perpetrator of the abduction of Danielle, and indeed they were.

Detective Alldredge had initially obtained a warrant to install a "tap and trace" on the Van Dam telephone based on his experience that abductors will often contact the victims. He had allowed the warrant to lapse inadvertently, distracted as he was by the intensity of the investigation. It was this particular call at issue that alerted him to his negligence, whereupon he immediately had the tap and trace reinstalled on an emergency basis, while he sought a renewal of the warrant. (9 CT 2205-2206.) In a case under such intense police and public scrutiny, it would be either against penal interest or against social interest for *anyone* under *any* circumstances to make the declarations at issue here. That there was only one such call only reinforces this view.

That there was only one call also reinforces the reliability of the statement, which, along with the unavailability of the declarant, is a further foundational requirement for the hearsay exception at issue. (*People* v. *Lucas* (1995) 12 Cal.4th 415, 462.) But not only the singularity – in both quality and quantity – of the call was an indicium of reliability. There was also, as the defense argued, the entomological evidence from David Faulkner that placed the earliest date for oviposition at February 16, which meant that Danielle was alive on February 15 when the telephone call was made. (9 CT 2202-2203; 13 RT 3854; 33A RT 8075-8076.)

Thus, under the circumstances of this case, there was a declaration against interest by an unavailable declarant, whose statement showed sufficient indicia of

reliability to be admitted under Evidence Code section 1230. To have excluded this evidence constituted an abuse of discretion. But even if Judge Mudd acted within his discretion under the statutory strictures for the hearsay exception at issue, there is still the question of due process.

In *Chambers* v. *Mississippi* (1972) 410 U.S. 284, the United States Supreme Court held that the application of the technical rules of evidence could not, under the specific circumstances, be allowed to deprive the defense of crucial evidence, and that to do so constituted the denial of the right to a fair trial. (*Id.*, at pp. 294, 297-298, 302.) As this Court has glossed the decision in *Chambers*, a foundational requirement for a hearsay exception that is somehow irrational in principle or mechanistically imposed cannot be invoked to preclude or obstruct the presentation of a defense. (*People* v. *Hawthorne* (1992) 4 Cal.4th 43, 57-58.)

In the instant case, to say that Judge Mudd's finding was reasonable and therefore within the scope of his discretion, is not to say that the opposite conclusion *was not* reasonable (see *People* v. *Gordon* (1990) 50 Cal.3rd 1223, 1253), i.e., that the anonymous call under the circumstances of this case was a sufficiently reliable declaration against interest. The jurors would indeed be capable of weighing the probative value of the evidence in context, and there would be no real danger of misleading or confusing them. (See Evid. Code, § 352.) When one considers the closeness of the question, and the crucial nature of the evidence in regard to Mr. Westerfield's alibi defense, then the exclusion of the proffered evidence constituted a denial of due process.

Finally, one further consideration must weigh in the balance either as part of the due process calculation or as an independent one. This consists in the Eighth Amendment right in a capital case to a heightened level of reliability in the determination of guilt. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 623.) If the evidence was, strictly speaking, inadmissible under the statutory rules of evidence, it was nonetheless important for the integrity of the guilt determination for the jurors to know such important

information before making such a momentous decision on Mr. Westerfield's eligibility for the death penalty.

In regard to prejudice, one returns to the paradigm informing this case: a virtual equipoise between the competing forensic evidence to be decided by the balance of non-forensic evidence. (See above, pp. 253-261.) It is clear that evidence tending to show that Danielle was alive on February 15 strongly corroborated the entomological results, which in turn was the centerpiece of the alibi defense in this case. On this record, respondent cannot show beyond a reasonable doubt that the exclusion of the evidence of the February 15 telephone call to Brenda Van Dam was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

X.
CALJIC NO. 2.16, ON DOG-SCENT EVIDENCE, IS INADEQUATE IN NOT EXPRESSLY ADMONISHING THE JURORS TO VIEW SUCH EVIDENCE WITH CARE AND CAUTION

The dog-scent evidence of Cielo's "alert" at the outside compartment of the motor home, and his "interest" in the lawn chair and shovel inside the compartment was summarized in detail in the statement of facts, both from the prosecution's perspective, and from the defense perspective. (See above, pp. 42-44, 52-54.) This evidence prompted instruction to the jury in accord with CALJIC No. 2.16, as follows:

> "Evidence of dog tracking has been received for the purpose of showing, if it does, that the defendant is the perpetrator of the crimes of kidnapping and murder. This evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of kidnapping and murder. Before guilt may be inferred, there must be other evidence that supports the accuracy of the identification of the defendant as the perpetrator of the crimes of kidnapping and murder.
>
> "The corroborating evidence need not be evidence which independently links defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking.
>
> "In determining the weight to give to dog-tracking evidence, you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the tracking in question." (10 CT 2500; 42 RT 9439.)[127]

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[127] In this argument, the term "dog-scent evidence" is used. It is more serviceable because it seems to cover all the situations arising from forensic use of dog evidence. Thus, here, Cielo did not track or trail a cadaver; he identified, purportedly, a scent. Moreover, even if he had trailed or tracked, it would have been the scent that he trailed or tracked. There are now "scent lineups" and "scent-matchings" quite apart from tracking and trailing (see *People* v. *Mitchell* (2003) 110 Cal.App.4th 772, 779-782; see also *People* v. *Willis* (2004) 115

In giving CALJIC No. 2.16 on the corroboration of dog-scent evidence, Judge Mudd was discharging a sua sponte instructional duty. (*People* v. *Malgren* (1983) 139 Cal.App.3rd 234, 241-242.) But it is the burden of this argument that dog-scent evidence requires a stronger, more express admonition, to the effect that such evidence must be viewed with care and caution (see *People* v. *Craig* (1978) 86 Cal.App.3rd 905, 917-918; see also *People* v. *Malgren*, *supra*, 139 Cal.App.3rd 234, 246, Feinberg, J., dissenting), and that without this, CALJIC No. 2.16 is seriously deficient.[128]

Cal.App.4th 379, 384), which can still be grouped under the concept of "dog-scent evidence."

[128] The defense proffered an alternative instruction, pinpointed more to the actual evidence in this case. (10 CT 2294.) Judge Mudd rejected it finding CALJIC No. 2.16 adequate to cover the subject. (40 RT 9258-9260.) The proffered instruction does not precisely touch on the deficiency in CALJIC No. 2.16 that is the subject of the instant argument, and is raised here pursuant to Penal Code section 1259. (*People* v. *Prieto* (2003) 30 Cal.4th 226, 247.) But the proffered instruction was, in any event, clearly intended as a cautionary instruction more pinpointed to the evidence in the case: "You have heard evidence in this case regarding the use of a dog in the identification of places where Danielle Van Dam's body is alleged to have been. Before you can consider any evidence regarding the dogs' behavior, you must be convinced beyond a reasonable doubt that a dog alerted. [¶] If you are so convinced, you are instructed to consider the following factor in determining what weight, if any, to be [*sic*] given to this testimony: [¶] 1. Whether or not the handler was qualified by training and experience to use the dog, to recognize the significance of its behaviors and to interpret its behaviors. [¶] 2. Whether or not the dog was adequately trained in locating cadavers. [¶] 3. Whether or not the dog has been found reliable in locating cadavers. [¶] 4. Whether the dog engaged in clear and unequivocal behavior capable of interpretation. [¶] 5. Whether the dog previously examined the same location and failed to alert. [¶] 6. Whether, at the time of the alleged alert, the handler said he did not know how to interpret the dog's behavior. [¶] Before you may consider dog scenting evidence, you must conclude that there is other corroborative evidence which supports the accuracy of the handler's interpretation of the dog's behavior." (10 CT 2294.)

A.

The provenance of CALJIC No. 2.16 will be traced in more detail below, but it is apparent on its face that the instruction is parallel to, if not modeled on, CALJIC No. 2.15, whose subject is possession of recently stolen property as evidence of guilt for a theft-related crime. CALJIC No. 2.15 provides in relevant part:

> "If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of theft.
>
> Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt."[129]

But there are other ways to formulate a cautionary instruction. For example, instructions on accomplice testimony begins in a similar manner as CALJIC Nos. 2.15 and 2.16, informing the jurors that "[y]ou cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense" (CALJIC No. 3.11), but ends with the express

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[129] Like CALJIC No. 2.16, 2.15 also sets forth pertinent factors to consider in corroboration: "As corroboration, you may consider the attributes of possession--time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, his false or contradictory statements, if any, and other statements he may have made with reference to the property, a false account of how he acquired possession of the stolen property, or any other evidence which tends to connect the defendant with the crime charged."

admonition that such testimony, "[t]o the extent that [it] tends to incriminate the defendant, [] should be viewed with caution." (CALJIC No. 3.18; see also CALCRIM No. 334.) Sometimes, there is no requirement of corroborative evidence but there is only an express cautionary admonition, such as the admonition that "[e]vidence of an oral confession or an oral admission of the defendant not made in court should be viewed with caution" (CALJIC Nos. 2.70, 2.71), or that "[t]he testimony of an in-custody informant should be viewed with caution and close scrutiny." (CALJIC No. 3.20.) Why do these matters require an express cautionary admonition while CALJIC No. 2.15, regarding stolen property, does not, but is deemed sufficient with only the corroboration requirement?

The answer lies in the inherent nature of the subject matter of each cautionary instruction. Recent possession of stolen property as evidence of a theft crime needs only a relatively light restraint on the use of that evidence. Thus, while CALJIC No. 2.15 constrains the jurors from convicting solely on such evidence, the instruction was also designed also to *permit* a conviction for a theft crime on this evidence in conjunction with only *slight* corroboration. For "[p]ossession of recently stolen property is so incriminating that to warrant conviction there need *only* be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt." (*People* v. *McFarland* (1962) 58 Cal.2nd 748, 754, emphasis added; *People* v. *Vann* (1974) 12 Cal.3rd 220, 224.) In other words, the cautionary element of the instruction arises to forestall the effects of overconfidence in what is typically highly probative evidence, and to prompt the jurors to consider at least a non-incriminating reason for the possession of the stolen property. (See *People* v. *Najera* (2008) 43 Cal.4th 1132, 1138.)

By contrast, such matters as accomplice evidence, in-custody informant evidence, and oral confessions and admissions are typically problematic, and the need for a cautionary instruction arises not from over confidence, but from its

opposite: diffidence, or a wariness and distrust grounded in legal experience. Thus, courts expressly caution jurors about oral admissions or confessions because

> " ' . . . no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable by omission or the changing of words to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.' [Citation.]." (*People* v. *Bemis* (1949) 33 Cal.2nd 395, 399; see also *People* v. *Carpenter* (1997) 15 Cal.4th 315, 392-393; and *People* v. *Beagle* (1972) 6 Cal.3rd 441, 456.)

In the case of accomplice testimony, "[e]xperience has shown that the evidence of an accomplice should be viewed with care, caution, and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity." (*People* v. *Wallin* (1948) 32 Cal.2nd 803, 803; *People* v. *Tewksbury* (1976) 15 Cal.3rd 953, 967.) Similarly, an in-custody informant, like an accomplice, is among the "false friends" and "the other betrayals which are 'dirty business'" and "may raise serious questions of credibility." (*On Lee* v. *United States* (1952) 343 U.S. 747, 757.)

Which is the appropriate model for dog-scent evidence? Is the danger from overconfidence in its already high probative value, or is the danger in careless lack of scrutiny of evidence that presents a substantial risk of only a specious reliability? An examination of the broader topic of dog-scent evidence demonstrates clearly that it falls within the latter category, and that the popular faith in "the dogs' inerrant inspiration", -- to use Wigmore's skeptical pun (quoted in *State* v. *Streeper* (Idaho 1987) 747 P.2nd 71, 75) – is a serious misconception

that warrants a more express cautionary admonition, in line with those given for oral admissions or accomplice testimony.

A minority of states in this country bar the use dog-scent evidence as unreliable. Although the majority view is that dog-scent evidence is admissible in criminal cases to prove identity (*State* v. *White* (S.C. App. 2007) 642 S.E.2nd 607, 614-615; *People* v. *Malgren*, *supra*, 139 Cal.App.3rd 234, 237) the unanimous view within the majority is that dog-scent evidence nonetheless requires heightened foundational requirements to assure reliability. (See *State* v. *Roscoe* (Ariz. 1984) 700 P.2nd 1312, 132-1321; *State* v. *White*, *supra*, at pp. 614-615.) California's list of foundational requirements is fairly representative:

> " . . . . We conclude that the following must be shown before 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 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. [Citations.]." (*People* v. *Malgren*, *supra*, 139 Cal.App.3rd 234, 238.)

The foundational requirements may be modified in accord with the specific canine function at issue. Thus, the cadaver scent, which seems detectible for a substantial period of time after it was originally emitted, will not require a showing that that scent or scent trail is fresh. (See *Trejos* v. *State* (Tex. App. 2007) 243 S.W.3rd 30, 52.)[130]

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[130] "Scent-lineups" and "scent-matchings" have been found to require additional, and more strict, factors as foundational requirements. (*People* v. *Mitchell*, *supra*, 110 Cal.App.4th 772, 793-794; *People* v. *Willis*, *supra*, 115 Cal.App.4th 379, 386.) It has also been held that as to a Sensor Transfer Unit (STU), which is a vacuum device used in these procedures, and designed to preserve scents and render them portable without corrupting them, a court must apply a *Kelly-Frye* (*People* v. *Kelly* (1976) 17 Cal.3rd 24; *Frye* v. *United States* (D.C. Cir. 1923) 293 F. 1013) test to

The heightened foundational requirements for this evidence arise from some level of diffidence in its forensic use. Thus we may congratulate ourselves on that celebrated sympathy between dog and man that renders the animal philanthropically amenable to training in such matters as search and rescue. But this does not necessarily fit dog-scent evidence to forensic usage. (See *People* v. *Bledsoe* (1984) 36 Cal.3rd 236, 249-250 [Rape trauma syndrome, developed as a therapeutic tool to treat rape victims is inadmissible in court to prove that rape occurred.].) A dog's skill in searching and rescuing can be adapted to make it a useful investigatory instrument for the finding of remains or suspects, where the dog's capabilities are validated by success or not. But an instrumentality of investigation is not necessarily relevant in proving the case in court. (See *People* v. *Johnson* (2006) 139 Cal.App.4th 1135, 1150 ["The means by which a particular person comes to be suspected of crime – the reason law enforcement's investigation focuses on him – is irrelevant to the issue to be decided at trial, i.e., that person's guilt or innocence, except insofar as it provides independent evidence of guilt or innocence."].)) For use as evidence in court itself the acuity of the dog's olfactory powers, combined with a popular over-estimation of these powers, has engendered the cautionary view, which is well formulated in Wigmore's fuller statement of the issue:

> " ' . . . . [I]n actual usage, evidence of the conduct of animals is apt to be highly misleading, to the danger of innocent

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establish that this novel scientific technique is accepted in the relevant expert community. (*People* v. *Mitchell*, *supra*, at p. 787; *People* v. *Willis*, *supra*, at pp. 385-386.) Indeed, it has been held that the highly artificial and sophisticated technique of the "scent lineup" must be subjected to a *Kelly-Frye* test quite apart from the STU. (*Mitchell*, *supra*, at p. 793.) Generally, however, dog-scent evidence is not deemed to be a novel scientific technique, let alone scientific evidence (*People* v. *Craig*, *supra*, 86 Cal.App.3rd 905, 915; *State* v. *Roscoe*, *supra*, 700 P.2nd 1312, 1320; *Debruler* v. *Commonwealth* (Ky. 2007) 231 S.W.2nd 752, 756-757)f – a matter that will be elaborated below.

men. Amidst the popular excitement attendant upon a murder and the chase of the suspect, all the facts upon which the trustworthiness of the inference rests are apt to be distorted in the testimony. Moreover, the very limited nature of the inference possible is apt to be overestimated – a consequence dangerous when the jurors are moved by local prejudice. . . . The hesitation shown in some courts to the use of this evidence is due to the risks of its misuse by the jury, for in some regions of our country the mysteriously accurate operation of the dogs' senses has given rise to a superstitious faith in the dogs' inerrant inspiration, and this gross popular creed might in a jury mislead them into giving excessive credit to the evidence of the dogs' itinerary.' (1A Wigmore, Evidence, § 177, at 1852 (Tillers rev. 1983)." (*State* v. *Streeper*, *supra*, 747 P.2nd 71, 75.)[131]

In some of the majority jurisdictions, in addition to the heightened foundational requirements, there is the additional requirements of corroboration and a cautionary instructions. (*State* v. *White*, *supra*, 642 S.E.2nd 607, 615.) At the most extreme pole, again, are the minority jurisdictions whose distrust of this evidence prompts them to raise a per se bar to its admissibility. (*Brott* v. *State*,

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[131] In *Brott* v. *State* (Neb. 1903) 97 N.W. 593, the Nebraska Supreme Court also gave lively expression to distrust of dog-scent evidence: "The argument of the attorney general is that the blood hound has an exceptionally fine perception of scent; that in following a trail and discriminating between smells, he seldom or never errs; and that knowledge of his extraordinary aptitude is so nearly universal that courts will act upon it without proof. The bloodhound has, of course, a great reputation for sagacity, and there is a prevalent belief that, in the pursuit and discovery of fugitive criminals, he is practically infallible. It is a commonly accepted notion that he will start from the place where a crime has been committed, follow for miles the track upon which he has been set, find the culprit, confront him and, *mirable dictu*, by accusing bay and mien, declare: 'Thou art the man.' This strange misbelief is with some people apparently incorrigible. It is a delusion which abundant actual experience has failed to dissipate. It lives on from generation to generation. It has still the attractiveness of a fresh creation. 'Time writes no wrinkle on its brow.' But it is nevertheless a delusion, and evident and obvious delusion. The sleuthhound of fiction is a marvelous dog, but we find nothing quite like him in real life." (*Id*, at pp. 593-594.)

supra, 97 N.W. 593, 593-594; *People* v. *Cruz* (Ill. 1994) 643 N.E.2nd 636, 662-663; *Brafford* v. *State* (Ind. 1987) 516 N.E.2nd 45, 49; *State* v. *Storm* (Mont. 1951) 238 P.2nd 1161, 1176-1182.)

There is then no disagreement as to the fundamental nature of dog-scent evidence or on the need for some assurance of its reliability. The minority position is predicated on the belief that any such assurance, at least for forensic use in criminal cases, can never be sufficient. Within the majority position, California has taken a conservative view, imposing not only the foundational requirements, but also an instruction that calls for corroboration. That instruction was, at the time of trial, CALJIC No. 2.16, which, as noted above, is parallel to CALJIC No. 2.15, but whose subject, as seen from this account, falls on the side of the line evidence requiring an express admonition of caution. [132]

B.

That could have been the end of the argument, except that CALJIC No. 2.16 has been approved as adequate even without an express cautionary admonition. (*People* v. *Malgren*, *supra*, 139 Cal.App.3rd 234, 241-242.) The matter thus requires more elaboration, beginning with the immediate history of CALJIC No. 2.16's development – a development with a marked dissenting strain favoring an even stronger instruction containing express cautionary admonitions.

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[132] The current instruction is formulated in CALCRIM No. 374, which is not substantially different from CALJIC No. 2.16. This instruction provides: "You have received evidence about the use of a tracking dog. You may not conclude that the defendant is the person who committed the crime based only on the fact that a dog indicated the defendant [or a location]. Before you may rely on dog tracking evidence, there must be: [¶] 1. Evidence of the dog's general reliability as a tracker; [¶] AND [¶] 2. Other evidence that the dog accurately followed a trail that led to the person who committed the crime. This other evidence does not need to independently link the defendant to the crime. [¶] In deciding the meaning and importance of the dog tracking evidence, consider the training, skill, and experience, if any, of the dog, its trainer, and its handler, together with everything else that you learned about the dog's work in this case."

Dog-scent evidence was addressed for the first time in California in *People* v. *Craig*, *supra*, 86 Cal.App.3rd 905, which enlisted California in the ranks of the majority of jurisdictions in allowing the admission of dog-scent evidence on the laying of a proper foundation to assure the reliability of such evidence. (*Id.*, at pp. 915-916.) After finding that the evidence in *Craig* established the requisite foundation, the Court turned to examine the complaint that the defendant's proffered cautionary instruction on dog-scent evidence was rejected in favor of the modification by the trial court. The proffered instruction provided:

> " 'Testimony of dog trailing has been presented in this case. Such dog trailing evidence must be viewed with the utmost caution and is of slight probative value. Such evidence must be considered if found reliable, not separately, but in conjunction with all other testimony in the case, and in the absence of some other direct evidence of guilt, dog trailing evidence would not warrant conviction.'" (*Id.*, at p. 917.)

The modified instruction given by the trial court was as follows:

> " 'Testimony of dog trailing has been presented in this case. Such dog trailing evidence must be viewed with the utmost caution. Such evidence must be considered, if found reliable, not separately but in conjunction with all other evidence in the case. Dog trailing evidence alone is not sufficient to warrant conviction. In determining what weight to give such evidence you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the trailing in question.'" (*Ibid.*)

The Court in *Craig* found the modified instruction was more appropriate, since the pronouncement in the proffered instruction, that the evidence has "slight probative value", encroaches on the function of the jury to determine for itself the weight of the evidence. (*Id.*, at p. 918.)

But it will be noted that the modified instruction approved in *Craig* admonished the jurors to view the dog-scent evidence not merely with caution, but with the "*utmost* caution." In addition, when the *Craig* instruction states that "[s]uch evidence must be considered, *if found reliable*, not separately but in conjunction with all other evidence in the case", it emphasizes the contingent nature of this question of reliability in a way that CALJIC No. 2.16 does not even approach. *Craig* bestows at least an initial authority on the position taken in this argument, but one must proceed to discover why the *Craig* instruction did not become CALJIC No. 2.16.

In *People* v. *Malgren*, *supra*, 139 Cal.App.3rd 234, the Court agreed with *Craig* regarding the admissibility of dog-scent evidence, and rationalized *Craig*'s foundational facts into a systematic and numbered list. (*Id.*, at p. 238.) *Malgren* then went on to hold that a sua sponte cautionary instruction was also necessary, but not the same one as approved in *Craig*:

> "It did not take omniscience to see the significance of dog tracking evidence in this case, and *Craig* was decided almost three years before appellant's trial. The principle that dog trailing evidence is not sufficient to warrant conviction was unquestionably a principle openly and closely connected with the facts before the court. Nevertheless, we disagree that the court was obligated to instruct that dog trailing evidence must be viewed with caution or that such evidence is of little probative value. Unlike accomplice testimony, dog tracking evidence is not inherently suspect because of a self-interested source. [Citation.] 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. [Citation.] In light of the stringent foundational requirements which must be met before such evidence is admissible at all, however, we see no reason to categorize that evidence thereafter as inferior or untrustworthy, and instruct that it be given less weight than other evidence. The *Craig* court itself suggested that what the law in this state actually requires is not that dog trailing evidence be viewed with caution, but that it be treated as any other evidence with its

> weight left to the trier of fact. [Citation.]" (*People* v. *Malgren*, *supra*, at pp. 241-242.)

In fact, *Craig* did approve an instruction that dog-scent evidence be viewed with the "utmost caution" and that only the admonition that the evidence was of "slight probative value" was improper as encroaching on the jury's function. (*People* v. *Craig*, *supra*, 86 Cal.App. 3rd at pp. 916-918.) With that clarification, one may note that Justice Feinberg, in his dissent in *Malgren*, weighed in on the side of an express cautionary statement along with an admonition about the slight probative value of the evidence.

Justice Feinberg believed that the evidence of identity in *Malgren* was insufficient, but that if there was sufficient evidence, he was still unable to agree

> "with the majority that the court was not required to instruct, sua sponte, that the dog tracking evidence is of little probative value and must be viewed with caution. While I agree with the majority that a sua sponte instruction is required as to the necessity for other direct or circumstantial evidence of the identity of the defendant (ante, p. 242), I would hold further that whenever the evidence is admitted after a proper foundation has been laid, the jury must be instructed to view it with caution. [Citation.] I do not believe that the scientific validity of dog-tracking evidence has been demonstrated even as well as voice printers; exercise of restraint is therefore warranted. [Citation.] I am concerned with the matter of undue weight as evidence gleaned from the efforts of dogs has been part of our folklore for centuries." (*Id.*, at p. 246, Feinberg, J., dissenting.)

The *Malgren* majority, and not *Craig*, prevailed with the CALJIC Committee, whose instruction required only one more refinement. In *People* v. *Gonzales* (1990) 218 Cal.App.3rd 403, the Court confirmed *Malgren*'s pronouncement of a sua sponte duty to instruct the jurors that dog scent required corroboration, but "in so concluding, we emphasize that the corroborating

evidence necessary to support dog-tracking evidence need not be evidence which independently links the defendant to the crime; it suffices if the evidence merely supports the accuracy of the dog tracking." (*Id.*, at p. 408.)

Why then is the *Magren/Gonzales* cautionary instruction insufficient? One can repeat the criticisms of this evidence, that it is fallible yet overly trusted, which is the hallmark criterion placing dog-scent evidence in the category of requiring an express admonition of caution. But it will be more helpful to penetrate even farther into the debate of the degree to which dog-scent evidence is or is not reliable.

C.

In this regard, it is instructive to examine rationale for *not* applying to dog-scent evidence the foundational requirements used for scientific evidence generally. The Court in *Craig* noted as follows why dog-scent evidence is not subject to *Kelly-Frye* standards:

> "In the area of new scientific techniques, especially dealing with electronic gadgetry, one piece of testing apparatus is essentially the same as another of similar design, make and purpose.
>
> "When dealing with animate objects, however, we must assume each and every unit is an individual and is different from all others. Within one breed of dog, or even with two dogs of the same parentage, it cannot be said each dog will have the same characteristics and abilities. Therefore, while the reliability of a machine can be duplicated and passed down the assembly line with relative ease, the abilities and reliability of each dog desired to be used in court must be shown on an individual basis before evidence of that dog's effort is admissible. We simply cannot say all dogs can trail a human, or even that all dogs of specific breeds can do so." (*People* v. *Craig*, *supra*, 86 Cal.App.3rd, 905, 915,)[133]

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[133] See also *People* v. *Brooks* (Colo. 1999) 975 P.2nd 1105, 1112: "In our view the differences between a mechanical apparatus or standardized scientific procedure on the one hand, and a living, breathing, animate creature on the other,

There is in this passage identified the peculiar nature of dog-scent evidence. If it requires a human expert to draw inferences from circumstantial evidence, these inferences are not drawn from purely physical evidence. Nor are they drawn from the patterned behavior of the lower order of animals, such as the blow fly or beetle, whose swarming uniformity and regularity provides the basis for forensic entomology. Nor are they drawn from the range of natural behaviors of the higher order of animals unaffected by human interaction. They are inferences drawn from the behavior of a relatively highly individuated animal that is trained *to communicate* and to understand human *communication* directed at it in what, for the dog, is a highly artificial context.

One need not overstate the matter by characterizing dog-scent evidence as hearsay, as is done in the cases where the evidence has been held to be inadmissible per se: "Dogs and other dumb animals do not qualify as witnesses in the courts of this state. They know not the nature of an oath. They may not be sworn. They cannot be cross-examined. They testify only through professed interpreters whose translations and conclusions are always hearsay." (*State* v. *Storm*, *supra* 238 P.2nd 1161, 1176.)

But the response to this is equally glib: "Such evidence falls into the category of opinion evidence rather than hearsay[;] [t]he animals are not witnesses against a defendant any more than a microscope or a spectrograph[;] [t]hese are not subject to cross-examination any more than the animal. It is the handler who is the witness and he is merely asked to testify to what the animal actually did, not his opinion as to the guilt or innocence of a person." (*People* v. *Centolella* (N.Y. Cty. Ct. 1969) N.Y.S.2nd 279, 282; see also *State* v. *White*, *supra*, 642 S.E.2nd 607, 615.) A nice point; yet no one pets a microscope or gives it treats and pull toys to

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are weighty enough to take scent tracking outside the realm of processes ordinarily associated with the *Frye* standard."

reward it for doing its magnification properly, or indeed swats it with a rolled up newspaper when it does not.

The dog, then, even if it does not speak English, French, or Latin, is engaged in a communication that involves not only the dog, which has its own desires and appetites, but the human handler and trainer, who has his own biases, interests, and, as one may see in the instant case, vanities. This renders the evidence highly problematical for purposes of courtroom use, where precision and exactitude in establishing the truth is the normative goal.

The other rationale for exempting dog-scent evidence from the tests applied to scientific evidence is that the acuity of a dog's olfactory powers is a matter of common knowledge and experience, and not the discovery of a scientific theory. (*State* v. *Roscoe*, *supra*, 700 P.2nd 1312, 1319-1320; *People* v. *Brooks*, *supra*, 950 P.2nd 649, 653; *Copeley* v. *State* (Tenn. 1926) 281 S.W. 460, 461 ["It is a matter of common knowledge, of which courts may take notice, that dogs of some varieties . . . are remarkable for the acuteness of their sense of smell, which enable them to follow a trail upon which they are laid, even though this trail be crossed by others."].) But this points in the direction of the *over*-esteem in which dog-scent evidence is cloaked. For there is no doubt that the olfactory sense in the dog is more developed than in humans, and that dogs do remarkable things with it from the point of view of human beings. But not all dogs are remarkable for all purposes for which human beings attempt to channel the dog's powers, and "common knowledge" translates into a jury at trial conferring too much careless weight on the evidence, and misleads the jurors into thinking that the dog's interpreted behavior is in fact more scrutable than it really is. In this regard, dog-scent evidence *is* akin to accomplice testimony.

Thus, one of the primary reasons for advising a jury of caution in evaluating accomplice testimony is the tendency of the uncautioned jurors to overly credit such testimony: an "accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness

peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth." (*People* v. *Tewksbury*, *supra*,15 Cal.3rd 953, 967, internal quotation marks omitted.) The same rationale would apply to the testimony of an in-custody informant. In regard to oral admissions and confessions, a jury's strong attraction to this kind of evidence requires little explanation. Similarly, the lay juror, if not the judge and lawyers as well, are likely to credit the dog-scent evidence uncritically in light of the "common knowledge", which rises to the level of a common misconception, or at least common dogma whose stereotyped truth does not do justice to the individual occurrence.

If it is objected that the level of self-interest and its sophistication is high in accomplice and informant witnesses, or that the potential for human mistake or perfidy in reporting an oral admission presents a substantial risk, then one must answer that that in dog-scent evidence the dog and its handler are not without self-interests and motives. Moreover, in accomplice or informant testimony, or in confession or admission testimony, the witnesses are much more vulnerable to an actual cross-examination that can penetrate to the heart of motives at work. The dog is not; and the handler is unlikely to be impeached unless, as here, there is the serendipity of an email with tactless and revealing remarks. Thus, if an express cautionary instruction is appropriate for accomplice testimony and for oral admissions and confessions, an express cautionary instruction is appropriate for dog-scent evidence.

What of *Malgren*'s claim that the foundational requirements alone are sufficient to assure reliability and convey a sense of caution to the jurors in evaluating the evidence? The foundational elements, as applied by the court, are not hard to satisfy. Indeed, this is the age of the credential and the certification, and, as may be seen from Jim Frazee's testimony, there are organizations set up to certify dogs and their handlers in search and rescue techniques, and one may

assume that in California, the CARDA certification will become a virtually automatic satisfaction of the foundational requirements for dog-scent evidence.[134]

What of the admonition that dog-scent evidence alone is insufficient to convict, and that there must be other evidence to support the accuracy of the identification? In the case of accomplice testimony, it is not deemed sufficient merely to instruct on the need for corroborating evidence; the duty to instruct includes *both* corroboration *and* an express cautionary admonition. (*People* v. *Zapien* (1993) 4 Cal.4th 929, 982.) The reason is not difficult to discern. The corroboration requirement, especially when it is conveyed to the jurors as *not* being onerous, takes on the appearance of a mere legal trigger or rule, whose easy satisfaction releases the jurors to consider the evidence without any care or caution if they see fit. Indeed, as one sees in the case of CALJIC No. 2.15, advising the jury of the lightness of the corroboration requirement is intended to convey to the jurors the basic *reliability* of evidence of recently stolen property. Such implication is completely inappropriate for accomplice testimony, and it is no more appropriate for dog-scent evidence. The express admonition to view such evidence with care and caution takes the matter off the technically legal plane and places it on an experiential level, where one must be careful about drawing actual inferences and conclusions.

Thus, in the instant case, with the corroboration requirement alone, the jurors might well deem that Cielo's CARDA certification is all that was needed.

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[134] Thus, the defense, in the foundational hearing on the dog-scent evidence in this case presented the testimony of Dr. Lawrence Myers, a professor of veterinary medicine at Auburn University, who had been called in to assist with the search and rescue dogs used in the Oklahoma City bombing and 9/11 (10A RT 3264-3265), and who reviewed Frazee's training records of Cielo and found that they had failed to establish that Cielo was properly trained to give a clear and unambiguous alert. (10A RT 3267-3269.) These were the records submitted to CARDA as one of the requirements for Cielo's certification as a "cadaver dog." (24 RT 6506-6507.) For foundational purposes, the certification by CARDA carried more weight than the deficiencies attested by Dr. Myers in Frazee's records. (10A RT 3260-3261, 3302-3303.)

They might deem sufficient corroboration to lie in the fact that Cielo, as reported by Frazee, found remains in two real-life searches, although Frazee did not testify to the number of failures, if any. (See above, p. 42 and fn. 36.) Or they might deem Frazee's remarkably illogical "control" in having Cielo first sniff the tires to see if the dog would be distracted by an animal scent (see above, pp. 42-43), and then concluding that he was not when he showed no sign of being distracted by a scent that was as likely to be there as not. Or they might deem the fingerprint and DNA evidence found in the motorhome as corroborative. But the issue here was whether this was deposited on or about the time that Danielle was killed, and if this was the corroborative evidence used by the jurors, it served only the circular function of corroborating the evidence that was supposed to corroborate it.

Finally, one may note that in those jurisdictions that require a cautionary instruction in addition to the foundational requirements and corroboration rule, only one besides California seems to think it sufficiently cautionary to admonish the jurors that dog-scent alone evidence is insufficient to establish the crime. (*State* v. *Taylor* (N.H. 1978) 395 A.2nd 505, 507.) One requires that the jury be instructed to view the evidence with caution, and that the evidence has only slight probative value. (*People* v. *Perryman* (Mich. App. 1979) 280 N.W. 2nd 579, 582-583.) One counsels that the jurors be admonished to exercise "the utmost caution." (*People* v. *Centolella*, *supra*, 305 N.Y.S.2nd 279, 282.) And one counsels an admonition of simple caution. (*Wilkie* v. *State* (Alask. App. 1986) 715 P.2nd 1199, 1203, fn. 3.) Here, the argument is that "care and caution," the same formulation used for accomplice testimony or for oral admissions or confessions is appropriate. To the extent that the problems inherent in dog-scent evidence approach or equal the problems inherent these types of evidence, the conclusion is unassailable.

D.

As to prejudice, the instant case fits almost perfectly into Wigmore's paradigm of dog-scent evidence used in a case that arises "[a]midst the popular

excitement attendant upon a murder and the chase of the suspect . . . ." (See above, pp. 328-329.) Cielo did not literally give hot pursuit, chase down Mr. Westerfield, and hold him at bay as Westerfield stood half-drenched in swamp water until authorities caught up to make the arrest. But this scene was subject to easy metaphor for the prosecution's pursuit of conviction, and in this regard Cielo chased down, as it were, the case – a case that evoked in the community a good deal of the overwrought emotion concomitant with hot pursuit. Although there was considerable impeachment of Frazee's testimony, his statements of uncertainty as to whether in fact Cielo alerted or not, the failure of Cielo to alert when sniffing the same places two days earlier – none of this was sufficient to dispel the undue prestige of dog-scent evidence which would induce the jurors, in a way that could not be addressed, to believe that the dog indeed found *something* incriminating. If a proper cautionary admonition had been given, it is reasonably probable that the case would have resulted more favorably for Mr. Westerfield. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.)

Finally, one should observe further that in a case in which the slightest corroboration to one side or the other was determinative of the guilt issue, dog-scent evidence, without a proper cautionary instruction to accompany it, could not but have an undue influence on the triers of fact in this case. Like Evidence Code section 352, the cautionary instruction serves as a federal constitutional prophylactic, without which, in a given case, there could be a violation of due process. (See *People* v. *Falsetta* (1999) 21 Cal.4th 903, 916-919; see also *People* v. *Jennings* (2000) 81 Cal.App.4th 1301, 1314.) There was just such a violation here, made all the more pressing because of the heightened requirements of accuracy demanded by the Eighth Amendment in a capital trial. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 623.) Since the standard of review for prejudicial state error is met in this case, the standard of review for federal constitutional error, requiring respondent to show the error harmless beyond a reasonable doubt (*Chapman* v. *California* (1967) 386 U.S. 18,

23-24), is met *a fortiori*.

XI.
REGARDLESS OF ITS PROPRIETY *VEL NON* AS A CAUTIONARY INSTRUCTION, CALJIC NO. 2.16 IS DEFICIENT IN FAILING IN FAILING TO RELATE THE ISSUE OF DOG-SCENT EVIDENCE TO THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT

Whether or not one deems CALJIC No. 2.16 sufficient as a cautionary instruction, there is still another problem in the instruction's failure to relate the question of dog-scent evidence to the reasonable doubt standard. The problem arises because, in accord with CALJIC No. 2.16, the jurors here were told that dog-scent evidence *was* sufficient "to permit an inference that the defendant is guilty of the crimes of kidnapping and murder" if there was "other evidence" that "support[ed] the accuracy of the dog tracking" even if that evidence did not "independently link[] defendant to the crime." (See above, p. 322.) This implicates the reasonable-doubt standard, without which there can be no constitutionally sound criminal conviction, and the instruction requires further language much along the same lines as that used in the current CALCRIM instruction on recently stolen property, CALCRIM No. 376. CALCRIM No. 376 adds this closing admonition: "Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."[135] One may therefore baldly state that without such language, CALJIC

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[135] This is the last paragraph of the instruction. The preceding balance of the instruction does not deviate substantially from CALJIC No. 2.15: "If you conclude that the defendant knew (he/she) possessed property and you conclude that the property had in fact been recently (stolen/extorted), you may not convict the defendant of _____ <insert crime> based on those facts alone. However, if you also find that supporting evidence tends to prove (his/her) guilt, then you may conclude that the evidence is sufficient to prove (he/she) committed _____ <insert crime> [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other

No. 2.16 is deficient, and, in creating the false impression that dog-scent evidence has some special status independent of the other types of evidence presented in the case, unconstitutionally lightens the prosecution's overall burden of proof beyond a reasonable doubt. (See *In re Winship* (1970) 397 U.S. 358, 364.)

Appellant recognizes that this argument is written on a rather messy slate, however. In invoking the CALCRIM instruction on recently stolen property as the warrant and model for the instant claim, one is faced with this Court's equally bald assertion that CALJIC No. 2.15, which does not have the CALCRIM type modification on reasonable doubt, has nothing in it "that directly or indirectly addresses the burden of proof, and nothing in it relieves the prosecution of its burden to establish guilt beyond a reasonable doubt. [Citations.]" (*People* v. *Parsons* (2008) 44 Cal.4th 332, 355-356.) This would seem to be dispositive of CALJIC No. 2.16, and the first step in the following argument is to present the reasons for this Court to reconsider its position. But the second step is to suggest that in any event, for reasons already discussed in the previous argument, dog-scent evidence is sufficiently different from stolen-property evidence to warrant a different result here as well as a the different result at issue in the previous argument on cautionary language.[136]

The prima facie warrant for reconsidering the matter is the CALCRIM committee's modification of the 2.15 instruction. Why add the language reminding the jury of the overall burden of proof beyond a reasonable doubt if "nothing" in the instruction implicated that burden or could be understood as tending to lighten the prosecution's burden of proof beyond a reasonable doubt? It

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relevant circumstances tending to prove (his/her) guilt of _____ <insert crime> ."

[136] The CALCRIM instruction on dog-scent evidence, CALCRIM No. 374, does not contain the "reasonable doubt" admonition that is added in CALCRIM No. 376. (See above, p. 330, fn. 132.)

is not easy to answer this question, but much easier to answer the opposite one as to why the CALCRIM committee added the language. The instruction's assertion that only "slight" corroboration triggered permission to fully accept the probative value of stolen-property evidence strikes the ear and understanding as in fact inimical to a standard of proof that requires the elimination of all reasonable doubts as to the guilt of the accused.[137]

It is true that CALJIC No. 2.16 does not talk about "slight" evidence. But what it does do is posit or assume the inherent strength of dog-scent evidence as such, conveys the sense that it, with only evidence "to support" its accuracy, is sufficient for conviction, even if the evidence of that accuracy has nothing to do with connecting the defendant to the commission of the crime. One simply cannot speak of evidence being sufficient for an "inference that the defendant is guilty" under these conditions without implicating the burden of proof required to find a defendant guilty. This would be especially true for a lay person not used to the parsing rigors of legal language. Without a specification that dog-scent evidence is still to be assessed within the overall burden of proof beyond a reasonable doubt, then there is clearly at least a substantial likelihood that the instruction will be applied in an unconstitutional manner that allows the jurors to confer undue

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[137] The federal courts have come to this conclusion in regard to the "slight corroboration" rule for the crime of conspiracy. Under federal law, the jurors were instructed that once it was proved that there was a conspiracy, the Government need adduce only "slight evidence" to connect the specific defendant to that conspiracy, and thereby to produce a conviction for that crime. (*United States* v. *Toler* (11th Cir. 1998) 144 F.3rd 1423, 1427.) The rule is now in disrepute and disavowed as contrary to the due process requirement of proof beyond a reasonable doubt. (*United States* v. *Hall* (5th Cir. 1976) 525 F.2nd 1254, 1255-1256; *United States* v. *Gray* (5th Cir. 1980) 626 F.2nd 494, 500; see also *United States* v. *Marsh* (1st Cir. 1984) 747 F.2nd 7, 13 and fn. 3; *United States* v. *Burgos* (4th Cir. 1996) (en banc) 94 F.3rd 849, 861-862; *United States* v. *Malatesta* (5th Cir. 1979) 590 F.2nd 1379 1382; *United States* v. *Durrive* (7th Cir. 1990) 902 F.2nd 1221, 1228-1229; *United States* v. *Lopez* (8th Cir. 2006) 443 F.3rd 1026, 1030; *United States* v. *Dunn* (9th Cir. 1977) 564 F.2nd 348, 356-357; and *United States* v. *Toler*, *supra*, 144 F.3rd 1423, 1427, fn. 5.)

probative weight on dog-scent evidence. (*Estelle* v. *McGuire* (1991) 502 U.S. 62, 74; *Boyde* v. *California* (1990) 494 U.S. 370, 381.)

The problem presented by the language of CALJIC Nos. 2.15, and therefore of 2.16, in respect to the overall burden of proof beyond a reasonable doubt is typically circumvented by adducing an argument based on permissive inferences:

> " . . . CALJIC No. 2.15 does not create an improper presumption of guilt arising from the mere fact of possession of stolen property, or reduce the prosecution's burden of roof to a lesser standard than beyond a reasonable doubt. Rather the instructions 'relates a contrary position: a burglary may not be presumed from mere possession unless the commission of the offense is corroborated.' [Citation.] The inference permitted by CALJIC No. 2.15 is permissive, not mandatory. Because a jury may accept or reject a permissive inference 'based on its evaluation of the evidence, [i]t therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt.' [Citation.] Requiring only 'slight' corroborative evidence in support of a permissive inference such as that created by possession of stolen property, does not change the prosecution's burden of proving every element of the offense, or otherwise violate the accuser's right to due process unless the conclusion suggested is not one that reason or common sense could justify in light of the proven facts before the jury." (*People* v. *Snyder* (2003) 112 Cal.App.4th 1200, 1226; see also *People* v. *Moore* (2011) 51 Cal.4th 1104, 1131-1132.)

This sort of argument begs the question. At issue is not an irrebuttable presumption of guilt in violation of due process (see *Ulster County Court* v. *Allen* (1979) 442 U.S. 140, 167); but rather the issue is by what standard of proof a "permissive inference" is to be measured in determining its evidentiary significance in the case. It will be recalled from the previous argument that CALJIC No. 2.15, and CALJIC No. 2.16 without express cautionary language, are as much instructions of permission as they are instructions of constraint. Once the conditions for removal of the constraint are satisfied, then the evidence, as the jury

is impliedly told, "is so incriminating that to warrant conviction there need only be . . . slight corroboration . . . ." (*People* v. *McFarland* (1962) 58 Cal.2nd 748, 754; *People* v. *Vann* (1974) 12 Cal.3rd 220, 224.) It is the very permissiveness of the permission that requires a reminder as to the overall burden of proof. To say that no irrebuttable presumption of guilt arises from stolen-property evidence or dog-scent evidence simply begs the question of whether or not the jury is allowed to draw the permissible inference of guilt on an improperly diminished and diluted standard of proof.

Finally, as noted above, if there is no constitutional impropriety in CALJIC No. 2.15, 2.16 is distinguishable. Again, stolen-property evidence is subject to a cautionary instruction not because such evidence is typically unreliable. But, to the contrary, because such evidence is typically reliable and highly probative of guilt (*People* v. *McFarland*, *supra*, 58 Cal.2nd at p. 754), there is the slight danger of over confidence that needs a slight pause to consider a non-incriminating possibility. (See *People* v. *Najera* (2008) 43 Cal.4th 1132, 1138.) As demonstrated in the previous argument, dog-scent evidence, like accomplice evidence or evidence or verbal admissions, requires much more than a pause, because such evidence *is not* typically reliable and is invidiously misleading. (*People* v. *Bemis* (1949) 33 Cal.2nd 395, 399; *People* v. *Tewksbury* (1976) 15 Cal.3rd 953, 967.) One could therefore, proffer a plausible rationale that in the case of stolen-property evidence, CALJIC No. 2.15, even without express invocation of the reasonable doubt standard, states no less than the truth: the evidence with slight corroboration is sufficient to establish proof beyond a reasonable doubt for a theft crime. This cannot be said in the case of accomplice evidence and the like, in which group is dog-scent evidence.

CALJIC No. 2.16 is therefore an unconstitutional instruction. In the previous argument, the importance of the dog-scent evidence in tipping the balance of a close and difficult factual case based on the forensic evidence was discussed. There is no need to repeat the argument. On this record it cannot be

shown beyond a reasonable doubt that the standard-of-proof deficiency in CALJIC No. 2.16 was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XII.
THE TRIAL COURT'S REFUSAL TO ADD A LEGALLY CORRECT, NON-ARGUMENTATIVE CAUTIONARY ADMONITION TO CALJIC NO. 2.51, THE STANDARD INSTRUCTION ON MOTIVE, CONSTITUTED PREJUDICIAL ERROR IN THIS CASE

The jury in the instant case was instructed in accord with CALJIC No. 2.51 as follows:

> "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty." (10 CT 2506; 42 RT 9351.)

The defense, however, requested an augmentation to this instruction with the following cautionary addendum: "However, motive is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." (10 CT 2298.) Judge Mudd declined to append this modification (40 RT 9263), and this was error under the circumstances of this case.

The admonition that motive is not by itself sufficient to prove guilt is of course a formulation used in CALJIC Nos. 2.15 and 2.16, discussed in the previous arguments, and one also used standardly in other instructions where the evidence is such that the jurors must be cautioned against a careless evaluation of its true evidentiary weight in the case. (See, e.g., CALJIC Nos. 2.03, 2.04, 2.05, 2.06, 2.15, 2.16, and 2.52.) It serves the purpose of assuring that the jurors discharge their function of weighing the evidence – a function that is their exclusive province. (*People* v. *McKinnon* (2011) 52 Cal.4th 610, 676, fn. 40; *People* v. *Sanders* (1995) 11 Cal.4th 475, 531.) The requested modification also contained a reminder that the subsidiary fact of motive had to be evaluated

ultimately against the overall burden of proof beyond a reasonable doubt – a proposition that cannot be denied. (*In re Winship* (1970) 397 U.S. 358, 364.) There is then nothing legally objectionable to the additional language, but the question is whether it was necessary, and the answer to this is rooted in the specific circumstances of this case.

In this case the evidentiary vehicle for the issue of motive was the emotionally potent images of child pornography – Ex 139 especially, the videos that portrayed brutal rape and sexual assault on young victims. These images, it will be recalled, drew tears from some of the jurors. (See above, pp. 259, 284.) At the same time, the connection between the pornography and a motive for the kidnapping and murder in this case bordered on the speculative, if, that is, that link was not purely speculative. (See above, pp. 236-242) Thus, there was indeed here an undue risk that a careless and emotional evaluation of the evidence would receive undue weight from the jurors.

This danger was compounded by the potentially misleading admonition in CALJIC No. 2.51 that the prosecution did not have to prove motive at all. Although motive was not a necessary element of the crime charged, this did not mean that, in a given case, it was not a necessary *fact* in a chain of inferences required for proof beyond a reasonable doubt. (See CALJIC No. 2.01.) The requested cautionary admonition forestalled this misinterpretation by reminding the jurors that the factual question of motive, like all the others in the case, had to be measured ultimately against the overall standard of proof beyond a reasonable doubt.

Thus, in the face of highly inflammatory images of child pornography, presented to the jurors as rational evidence of motive, the feckless language of the unmodified CALJIC No. 2.51 -- that "absence of motive" was, you know, the other side of the coin – was grossly insufficient. The requested instruction was legally accurate, non-argumentative, and necessary, and Judge Mudd erred in rejecting it.

In regard to prejudice, the prosecution had adduced highly provocative evidence of pornography in order to establish a motive in Mr. Westerfield for kidnapping and murdering Danielle Van Dam. It was highly likely that the jurors would use this evidence, and find it *easy* to use this evidence, as a circumstance probative of guilt. It could only be salutary to inform them that they should cautiously determine how important that evidence *actually* was to the case. Since this case could certainly be construed as depending on a single, sequential chain of inferences for proof beyond a reasonable doubt, a link in which would be the pornography evidence (see CALJIC No. 2.01), the error in refusing the requested modification becomes a federal due process error (*In re Winship*, *supra*, 397 U.S. 358, 364), which cannot be deemed harmless beyond a reasonable doubt in this case. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

In any event, there can be little doubt of the importance of the motive evidence in resolving this case, and if the road to a finding of guilt did not follow a single path, the pornographic evidence, as corroborative, would still have to carry a good deal of weight, rendering the instructional error here prejudicial even under the standard of review for state error. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 837-838.) In this regard one returns to the basic paradigm in this case in which this was a battle of corroborative evidence to break the effective tie between the forensic evidence. The motive evidence loomed very large indeed, and if the modified motive instruction had been given to cut this evidence down, as it were, to its proper size, then it is reasonably probable that the guilt phase would have resulted more favorably to Mr. Westerfield in this case. (*Ibid.*)

XIII.
THERE WAS INSUFFICIENT EVIDENCE OF FORCIBLE ASPORTATION TO SUPPORT A FINDING AND CONVICTION FOR KIDNAPPING AS CHARGED AND SUBMITTED TO THE JURY

The previous issues are all congruent with the primary factual dispute in this case, which was whether or not Mr. Westerfield was the perpetrator of the crimes against Danielle Van Dam. But from the evidence arose the subsidiary factual question as to precisely what those crimes were, and the first issue in this regard is whether there was sufficient evidence to support a finding of forcible asportation, which is a requisite element of the crime of kidnapping as charged and submitted to the jury in this case.

The contention in this argument is that if there was enough evidence to support a finding that the victim was asported and killed at the end of that asportation, the almost complete lacuna in evidence supporting a conclusion of force, and precluding the possibility that the asportation was effected by fraud or deception, renders it impossible that a rational trier of fact could have found beyond a reasonable doubt the crime of kidnapping in this case. (*Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319.) The facts will of course be discussed in more detail, but it is first important to emphasize what type of kidnapping was at issue here, and, correlatively, what types were not.

The crime of kidnapping is defined in Penal Code section 207. Subdivision (a), which was specifically charged in the instant case (1 CT 175), provides:

> "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county is guilty of kidnapping."

Thus, the prosecution bears the burden of proving beyond a reasonable doubt that the victim was moved by the use of physical force or fear, that the movement was without the person's consent, and that the movement was for a substantial distance. (*People* v. *Arias* (2011) 193 Cal.App.4th 1428, 1434-1435; *People* v. *Bell* (2009) 179 Cal.App.4th 428, 435.) The requirements of physical force and fear, and the lack of the victim's consent are intertwined to the extent that an asportation effected by fraud alone does not constitute the crime of kidnapping under section 207(a). (*People* v. *Majors* (2004) 33 Cal.4th 321, 331; *People* v. *Davis* (1995) 10 Cal.4th 463, 517, fn. 13; *People* v. *Green* (1980) 27 Cal.3rd 1, 64.) But there are other forms of kidnapping that do not require force or lack of consent.

Subdivision (b) of Penal Code section 207 provides:

> "Every person, who for the purpose of committing any act defined in Section 288[[138]], hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping."

There is here no requirement of force or fear. But the crime defined in subdivision (b) was not charged in the information or submitted to the jurors. (1 CT 175.) The prosecution, for all its urgency and vehemence in seeking joinder of the misdemeanor count and in introducing pornography evidence, was apparently not prepared to prove beyond a reasonable doubt that the asportation was for the purpose "of committing any act defined in Section 288", and the jurors were

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[138] Penal Code section 288, of course, proscribes "any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child . . . ." (Pen. Code, § 288(a).)

instructed only on the crime of kidnapping as charged in Penal Code section 207(a).[139]

The information in the instant case did specify Danielle Van Dam as "a child under the age of fourteen years" (1 CT 175), but this language was intended to trigger the provisions of Penal Code section 208(b), which was also expressly invoked in the pleadings for count 2 of the information. (1 CT 175.) Section 208(b), however, provides only for an enhanced sentence for whatever type of kidnapping is alleged under Section 207 (see *People* v. *Martinez* (1999) 20 Cal.4th 225, 232), and here the type of kidnapping alleged was that pursuant to subdivision (a) of Section 207.[140]

There is also an alternative theory of forcible kidnapping that existed at the time of the instant trial only in the form of a judicial gloss by this Court of Penal Code section 207(a). First, in *People* v. *Oliver* (1961) 55 Cal.2nd 761, this Court, confronted with the situation in which a baby was taken and asported, held that when the victim lacked the capacity to give actual consent, the prosecution needed only to establish that the taking and asportation were done for an illegal purpose or

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[139] The jurors were instructed in accord with CALJIC No. 9.50 in pertinent part as follows: "Defendant is accused in Count Two of having committed the crime of Kidnapping in violation of section 207, subdivision (a) of the Penal Code. [¶] Every person who unlawfully and with physical force or by any other means of instilling fear, steals, or takes hold, detains, or arrests another person and carries that person without her consent for a distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a). . . . . [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person was unlawfully moved by the use of physical force, or by any other means of instilling fear; [¶] 2. The movement of the other person was without her consent; and [¶] The movement of the other person was for a substantial distance, that is, a distance more than slight or trivial." (10 CT 2530-2531; 42 RT 9361.)

[140] Under Penal Code section 208(a), kidnapping is punishable by a term of three, five, or eight years. If the victim is a child under 14, then, pursuant to subdivision (b) of Section 208, the punishments increase to five, eight, or eleven years.

with an illegal intent. (*Id.*, at p. 766.) In a later case, this Court extended the principle to children and held that "the amount of force required to kidnap an infant or child incapable of resistance is simply the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose *or* with an illegal intent." (*In re Michele D.* (2002) 29 Cal.4th 600, 610, emphasis added; *People* v. *Jones* (2003) 108 Cal.App.4th 455, 462-463.)[141]

But like 207(b) kidnapping, "*Michele D.* kidnapping" was not submitted to the jury in this case. There was nothing in CALJIC No. 9.50 as given (see fn. 139) to suggest a diminution in the standard of force required to satisfy the element of forcible asportation, and nothing regarding a special purpose or intent requirement. A conviction, of course, cannot be affirmed by a reviewing court on factual theories never tried before the jury. (*McCormick* v. *United States* (1991) 500 U.S. 257, 270, fn. 8; *Chiarella* v. *United States* (1980) 445 U.S. 222, 236-237.) Thus, whether or not sufficient evidence *could* have been mustered to save the kidnapping conviction under alternate forms of the crime of kidnapping, the integrity of that conviction depends here solely on the form of kidnapping requiring forcible asportation beyond the amount of force required merely to physically transport the victim. With the question properly focused, one may now to turn the issue of sufficiency of the evidence itself.

The standard of review for sufficiency of the evidence is well known. The question the reviewing court must answer is whether, after viewing the evidence in

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[141] *Michele D.* was issued by this Court in December 2002, after both phases of the instant trial were completed, but before judgment was imposed. In 2003 (Stats. 2003, ch. 23, §§ 1-2), the Legislature ratified this Court's interpretation by adding subdivision (e) to section 207, which subdivision provides: "For purposes of those types of kidnapping requiring force, the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." The Legislature stated expressly that this amendment "codifies the holding in *In re Michelle* [*sic*] *D.* (2002) 29 Cal.4th 600 and does not constitute a change in existing law."

the light most favorable to the judgment, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319; *People* v. *Hatch* (2000) 22 Cal.4th 260, 272.) To this end, the reviewing court must discern if the evidence is "substantial," i.e., "reasonable, credible and of solid value." (*People* v. *Johnson* (1980) 26 Cal.3rd 557, 578.) Thus, for purposes of a sufficiency of the evidence claim, one must accept as given that Danielle was taken from her house sometime between 10:30 p.m. on February 1, when Damon Van Dam first went to bed, and 9 a.m. on February 2 when she was discovered missing. One must further accept for purposes of this argument that she was killed sometime between 10:30 p.m. on February 1 and the morning of February 4 when Westerfield returned home.

But what is the evidence as to how she was removed from the house? The facts surrounding the disappearance of Danielle Van Dam have been recited in detail in the statement of facts. There is a remarkable absence of evidence that any force was used in the initial asportation out of her house. If the taking occurred between 10:30 p.m. and 2 a.m., before Brenda arrived home, there were still three other people and a dog inside the house, all upstairs on the same floor as Danielle, none of whom was wakened or disturbed by any commotion such as might attend a forcible taking. It is virtually impossible that the taking occurred between 2:00 a.m. and 2:30 a.m. when there were five other adults moving about the upstairs and the downstairs of the house, with the dog roaming freely. Then between 2:30 a.m. and 9 a.m. there was one additional family member – Brenda -- in the upstairs of the house, while the dog was in Derek's room, the door of which was slightly open. (See above, p. 11.)

This absence of any apprehension of a disturbance or commotion, when so many persons were at close quarters while the crime was occurring, suggests a taking effected by fraud or deceit rather than by force or threats. The suggestion was further buttressed by the absence of any manifestation of a physical disturbance having occurred in Danielle's room or anywhere in the house, and by

the *complete* absence of any trace evidence linking Westerfield to the interior of the Van Dam house. (See above, pp. 50-52.)

Of course, the status of the evidence surrounding the initial taking is not absolutely determinative of the issue of kidnapping. The application of force or fear at any time in the course of an otherwise uncoerced asportation will establish the crime. (*Parnell* v. *Superior Court* (1981) 119 Cal.App.3rd 392, 408.) But what was the evidence for this? *If* Westerfield killed Danielle, there is no way to determine precisely when this happened. But even on the assumption that she was alive until a short time before Mr. Westerfield returned with his motor home to Sky Ridge Road on Monday morning, the absence of evidence showing the use of force or the exploitation of fear was virtually complete.

When Mr. Westerfield showed up on Sky Ridge Road on Saturday morning, Keith Sherman's granddaughter Holly saw Westerfield as she went outside to fetch the paper. They waved to each other, and Holly noticed nothing amiss. (16 RT 4558-4551.) Back in the Sabre Springs neighborhood, Martin Franklin, on the way to taking his kids to Tae Kwan Doe practice, saw the motor home parked in front of Westerfield's house. (16 RT 4620-4621.) Paul Hung, who lived on Mountain Pass, was up at 8 and out doing yard work by 8:30 a.m. The motor home was there. (26 RT 6985-6986.) This was a family neighborhood with lots of children around and lots of pedestrians (17 RT 4726-4727), and there was every indication that this Saturday morning was lively with joggers and with people doing their weekend chores and errands. (See 16 RT 4592-4596, 4632-4639.) No one reported anything amiss.

At Silver Strand, Beverly Askey was there with her daughter and her family (17 RT 4779-4780); Teresa Hastings was there with her mother, her children, and some friends (17 RT 4799-4800, 4805); Jimmy Rodgers was there with his wife Joyce, his daughter, son-in-law, and their three children. (17 RT 4811, 4814); and Nicole Arsenault was there on an outing with her husband's unit from the Chula Vista Police Department, which had that day 20 to 30 people coming and going at

Silver Strand. (17 RT 4811-4814.) These were the people within proximity of Westerfield's motor home, who were brought in by the prosecution to attest to the oddity of Mr. Westerfield's need for privacy (suggesting, as the prosecutor would have it, some incriminating motive), but who did not attest to anything suggesting the actual presence of another person, a commotion, or a disturbance.

Further, Brian Neill, the park ranger who returned the overpayment, was close to the door of the motor home (17 RT 4894-4895), while Donald Raymond, the volunteer camp host, walked by the motor home as part of his duty to take down its license number. (17 RT 4920.) Neither one filled in the gap in the evidence. Moreover, it should be noted that Raymond was the person whom Westerfield approached to complain about the refund. In order to do so, however, Westerfield had to walk some distance away from the motor home, and he did so alone. (17 RT 4916-4920.)

Back in Sabre Springs, on his return from Silver Strand to find his wallet, Westerfield left the motor home a block away while he went back to his house in a neighborhood now crowded with police, media, and onlookers. He even stopped to talk to his neighbor, Mark Rohr. He left Sabre Springs and stopped for gas at the Mount Carmel Chevron. (18 RT 5181-5184.) At Glamis, on Sunday, he was the center of attention when his motorhome became stuck in the sand. Sunday night he stopped again for gas at the Mount Carmel gas station. (19 RT 5413-5414.) And if he spent the night in the Coronado Cays, as confirmed by Heather Mack (28 RT 7521-7522), the residents in the area seemed reasonably attuned to problems and disturbances. (See 18 RT 5105-5108, 5112.) No one at any of these venues where Westerfield was in, or was likely to be in, the proximity of other people, reported anything, or attested to anything, that provided an evidentiary basis for a conclusion that if Danielle was inside the motor home and alive, she was being moved forcibly.

This is not to say that the evidence here does not raise a suspicion that the asportation was forcible in the sense required by the statute. However, evidence

"which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People* v. *Redmond* (1969) 71 Cal.2nd 745, 755.) In order to justify a criminal conviction on a standard of proof beyond a reasonable doubt, the trier-of-fact must "have reasonably rejected all that undermines confidence" in the existence of guilt. (*People* v. *Hall* (1964) 62 Cal.2nd 104, 122; *People* v. *Thompson* (1980) 27 Cal.3rd 303, 324.) Here, the inference that the asportation was effected by fraud or deception could not rationally be rejected beyond a reasonable doubt, which means that no rational trier of fact could have found guilt beyond a reasonable doubt for the crime of kidnapping. (*Jackson* v *Virginia*, *supra*, 443 U.S. 307, 318-319.)

But the matter does not end with the reversal of the kidnapping conviction in count 2. For during the settlement of jury instructions, Mr. Dusek claimed he had the prosecutorial authority insist that the case be submitted to the jurors solely on a theory of first-degree felony-murder predicated on the commission of the crime of kidnapping. (9 CT 2217-2223; 37 RT 8819; 40 RT 9263-9265.) Although Mr. Dusek's claim authority was doubtful (see below at p. 369), Judge Mudd accepted it (40 RT 9276-9277), and instructed the jurors only on felony-murder/kidnapping. (10 CT 2522-2523; 42 RT 9357-9358.)[142] The upshot of this unusual posture of the case is that insufficient evidence of kidnapping removes any basis for a conviction of murder. Both counts one and two must therefore be reversed for insufficiency of evidence.

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[142] In accord with CALJIC No. 8.10, the jurors were told that murder required only that "1. A human being was killed; and [¶] 2. The killing occurred during the commission of kidnapping." (10 CT 2522.) In accord with CALJIC No. 8.21, first-degree felony murder was defined them as "[t]he killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of a kidnapping . . . ." (10 CT 2523.)

XIV.
IN LIGHT OF *PEOPLE* V. *CHUN*, WHICH ESTABLISHES FELONY-MURDER AS A FORM OF MALICE MURDER, FIRST-DEGREE FELONY-MURDER MUST BE DEEMED TO HAVE A FULL RANGE OF LESSER-INCLUDED OFFENSES, FROM SECOND-DEGREE MURDER TO INVOLUNTARY MANSLAUGHTER, AND THE TRIAL COURT'S FAILURE IN THIS CASE TO INSTRUCT ON THESE CONSTITUTED PREJUDICIAL ERROR

As just noted in the previous argument, Mr. Dusek limited the murder charge to first-degree felony murder. His claim of that this was within his prosecutorial authority was in response to a defense request for instructions on premeditated murder. This request was designed, of course, as an entrée for instruction on the lesser-included offenses of second-degree murder and involuntary manslaughter. Again, Judge Mudd accepted Mr. Dusek's claim, and instructed the jurors only on first-degree felony murder. (37 RT 8819; 40 RT 9263-9265, 9276-9277; 42 RT 9357-9358; 9 CT 2217-2223; 10 CT 2283-2287, 2522-2523.)

Of course, if second-degree murder and its lesser-included offenses are necessarily included in the elements of first-degree *felony*-murder, then the defense had no need to request instruction on first-degree premeditated murder at all. For the trial court has a sua sponte duty to instruct on such lesser offenses "if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense". (*People* v. *Moye* (2009) 47 Cal.4th 537, 556; *People* v. *Breverman* (1998) 19 Cal.4th 142, 162.) This indeed is the contention presented here: even if the evidence of kidnapping was sufficient to sustain a verdict for first-degree felony murder, that conviction must nonetheless be reversed for failure to instruct on second-degree murder and on involuntary manslaughter.

On the one hand, this claim seems to be dispositively foreclosed by this Court's unequivocal pronouncements that felony-murder and malice murder have

different elements, even though there is "but a single statutory offense of murder." (*People* v. *Moore* (2011) 51 Cal.4th 386, 413; *People* v. *Nakahara* (2003) 30 Cal.4th 705, 712.) On the other hand, this Court has nonetheless stated expressly that the question of lesser-included offenses of first-degree *felony* murder is still an open one. (*People* v. *Valdez* (2004) 32 Cal.4th 73, 114, fn. 17; *People* v. *Castaneda* (2011) 51 Cal.4th 1292, 1328-1329.) This reticence on the part of the Court seems well taken, because the claim that felony murder has different *elements* than malice-murder can no longer be maintained in light of this Court's recent clarification of the law of murder in *People* v. *Chun* (2009) 45 Cal.4th 1172.

In *Chun*, one of the questions was whether or not second-degree felony murder was a judicially created crime, and therefore in violation of the Separation-of-Powers Clause of the California Constitution, which vested the Legislature the sole power to determine and define criminal acts. *Chun* in fact held that there was a statutory basis for second-degree felony murder in Penal Code section 188's definition of malice aforethought (*id.*, at p. 1184) -- a finding whose implications bear on the question here. [143]

In sum, if, per *Chun*, second-degree felony murder is a form of malice-murder, then, by implication, so is first-degree felony murder. If so, one can no longer maintain that felony murder and malice murder have different elements in respect to the *definition* of murder. Thus, malice aforethought is a definitional

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[143] The issue of the constitutional status of second-degree felony murder arose because, before *Chun*, the conventional view was that second-degree felony murder, unlike its first-degree counterpart, had no statutory basis and was a judicially created crime. (*People* v. *Howard* (2005) 34 Cal.4th 1129, 1135; *People* v. *Patterson* (1989) 49 Cal.3rd 615, 621; *People* v. *Burroughs* (1984) 35 Cal.3rd 824, 829; *People* v. *Dillon* (1983) 34 Cal.3rd 441, 472, fn. 19.) Second degree felony murder was understood to be any killing committed in the commission or attempted commission of an inherently dangerous, but non-assaultive, felony not listed in Penal Code section 189 (*People* v. *Robertson* (2004) 34 Cal.4th 156, 166; *People* v. *Ford* (1964) 60 Cal.2nd 772, 795; *People* v. *Ireland* (1969) 70 Cal.2nd 522, 538-539.) First-degree felony murder, by contrast, is specifically defined in Penal Code section 189. (See below, p. 364, fn. 144.)

element of first-degree felony murder, which element it shares with second-degree murder -- even non-felony second-degree murder.

These summary assertions must of course be elaborated and justified, but a claim that there should have been instruction on lesser-included offenses, *if* in fact first-degree felony murder has lesser-included offenses, first requires a factual foundation in order to establish that there was substantial evidence to warrant such an instruction. The factual question must itself begin with the legal definitions that confer on it its significance.

The core definition of murder is co-extensive with murder in the second-degree. Penal Code section 187 defines the crime as "the unlawful killing of a human being or a fetus with malice aforethought." Section 188 defines "malice aforethought. Malice "may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Implied malice has been glossed in more prosaic terms as a killing which "results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*People* v. *Dellinger* (1989) 49 Cal.3rd 1212, 1217; *People* v. *Martinez* (2003) 31 Cal.4th 673, 684.)

The fact that an abducted seven-year-old girl's dead body was found in a decomposed condition three weeks after her disappearance, in an area where it had been dumped in a way to avoid discovery is clearly sufficient evidence on which to base an inference that she was dead at the hands of a perpetrator who intended to kill her, or who had assaulted her in conscious indifference to whether or not she died. Furthermore, as seen from the previous argument, there was a substantial basis on which the jurors could find that the abduction did not amount

to a kidnapping, which then removed the homicide from the realm of felony-murder.

One can proceed further down the scale as well. Involuntary manslaughter is "the unlawful killing of a human being without malice" during "the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192(b).) This offense is a lesser-included offense of second-degree murder (*People* v. *Cook* (2006) 39 Cal.4th 566, 596), and here, given the absence of any clear evidence of the manner of death, a jury could find that there was a reasonable doubt as to the intent to kill or even as to a conscious disregard for life in the death of Danielle. This evidentiary doubt would then establish the crime of involuntary manslaughter. (*Ibid.*) There was, in short, a factual basis for instruction on second-degree murder and on involuntary manslaughter in this case, which brings us back to the question of whether second-degree murder is a lesser-included offense of first-degree felony murder.

In *Chun*, this Court began its analysis of whether or not there was a statutory basis for second-degree felony murder, by noting that the statutory definition of "implied malice", as manifest in circumstances showing "an abandoned or malignant heart" (Pen. Code, § 188) was "quite vague" and has had to receive clarifying reinforcement from judicial interpretation requiring first "an act, the natural consequences of which are dangerous to human life" and a mental component in which the defendant "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life" (*People* v. *Chun*, *supra*, 45 Cal.4th at p. 1181, internal quotation marks omitted) – the very gloss of implied malice noted above. In *Chun*, this Court then began using the formulation "conscious-disregard-for-life malice" to replace the usual term "implied malice" (*id.* at p. 1181, fn. 2), and it did so to make room for a *third* form of malice aforethought.

For this Court now found that a killing in the commission of an inherently dangerous felony was a further differentiation embedded in the compact symbol of "an abandoned or malignant heart" even though this Court in the past had referred to second-degree felony murder as a "nonstatutory" crime. As this Court itself explained in *Chun*, this designation of the crime as "nonstatutory" was imprecise, for

> "Even conscious-disregard-for-life malice is nonstatutory in the limited sense that no California statute specifically uses those words. But that form of implied malice is firmly based on statute; it is an interpretation of section 188's abandoned and malignant heart language. Similarly, the second-degree felony murder rule is nonstatutory in the sense that no statute specifically spells it out, but it is also statutory as another interpretation of the same 'abandoned and malignant heart' language. We have said that the 'felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree murder.' [Citation.] But analytically, this is not precisely correct. The felony-murder rule renders irrelevant conscious-disregard-for-life malice, but it does not render malice itself irrelevant. Instead, the felony-murder rule 'acts as a substitute' for conscious-disregard-for-life malice. [Citation.] It simply describes a different form of malice under section 188. 'The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life.' [Citation.]." (*Id.* at p. 1184.)

Thus, it seems, there are three forms of malice-aforethought. The first is express malice aforethought; the second is conscious-disregard-for-life malice; and the third is the malice concomitant with the commission of a felony inherently dangerous to human life. What does this imply as to first-degree felony murder? It implies that like its second-degree counterpart, it too is an unlawful killing of a human being with *malice-aforethought*. It, like all other forms of first-degree

murder designated in Penal Code section 189, is the crime of murder by virtue of Penal Code sections 187 and 188.[144]

This conclusion derived from *Chun* seems to resolve the paradoxes arising from the previous notion that first-degree felony murder has different elements from malice murder. For this Court has made it clear that specific allegations of malice murder in an accusatory pleading are sufficient to give the defendant notice of felony murder (*People* v. *Letner and Tobin* (2010) 50 Cal.4th 99, 140-141; *People* v. *Nakahara*, *supra*, 30 Cal.4th 705, 712); further, that for purposes of jury unanimity, this Court has also made it clear that first-degree felony murder, even with its different legal elements, is still only a theory of murder, a unanimous jury verdict can nonetheless be a compound of felony murder and malice murder. (*Ibid.*; *People* v. *Collins* (2010) 49 Cal.4th 175, 214.) The paradox disappears if first-degree felony murder *is* another type of malice-murder along with all the others. But does this necessarily solve the further problem of lesser-included offenses?

Under California law, "a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser." (*People* v. *Sanchez* (2001) 24 Cal.4th 983, 987.) The latter measure is denominated the "accusatory pleading test", while the former is called the "elements test." (*People*

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[144] Penal Code section 189 provides in relevant part: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree."

v. *Lopez* (1998) 19 Cal.4th 282, 288-289.) Here, the accusatory pleading alleged that Mr. Westerfield "did unlawfully murder Danielle Van Dam, a human being, in violation of PENAL CODE SECTION 187(a)" (1 CT 174), which does not specify any facts that would differentiate one form of murder from another. Here, rather, the elements test must be satisfied.

In the quote above, the "elements test" was cast in terms of "the *statutory* elements of the greater offense." (*Sanchez*, *supra*, at p. 987, emphasis added.) Another way of stating the matter is that the elements test "is satisfied when all the *legal* ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." (*People* v. *Lopez*, *supra*, 19 Cal.4th at p. 288, emphasis added, internal quotation marks omitted; *People* v. *Anderson* (1975) 15 Cal.3rd 806, 809-810.) Thus, if the elements test is to be determined by the "statutory" definition or by "the legal ingredients of the corpus delicti," then argument for the status of second-degree murder as a lesser-included offense of felony murder is straightforward: a killing in the course of a kidnapping or some other felony enumerated in Penal Code section 189 is first-degree malice aforethought murder by definition; if there is a doubt as to whether a kidnapping or some other enumerated felony was committed, then the first-degree element is negated, but not the malice aforethought; thus, one cannot commit first-degree felony murder without necessarily committing either second-degree murder in the form of express-malice murder, conscious-disregard-for-life murder, or second-degree felony-murder. The conclusion from all this is inexorable: the failure to instruct the jury on second-degree murder and on involuntary manslaughter was error in this case.

The failure to instruct on a lesser-included offense for a non-capital charge constitutes error under state law alone. (*People* v. *Breverman*, *supra*, 19 Cal.4th 142, 149, 176.) But for a capital charge, the Eighth Amendment requires that the jury be given the option of a legally available lesser-included offense. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638; *Hopkins* v. *Reeves* (1998) 524 U.S. 88, 94-

95.) Since, as demonstrated, second-degree murder and involuntary manslaughter are legally available lesser-included offenses, the instructional error here constitutes a federal constitutional violation, and it must therefore be shown that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) This cannot be done on this record.

As noted earlier in the argument, there was here substantial evidence that the crime committed was not first-degree felony murder but rather second-degree murder or even involuntary manslaughter. Under felony-murder instructions, the jurors were called on only to find the specific intent to kidnap the victim. (See CALJIC No. 8.21; 10 CT 2523.) No other instruction given presented them with an opportunity to resolve the question of whether or not defendant acted with an intent to kill, with conscious disregard for human life, or with criminal negligence. Instead, the "jury here was left with an 'unwarranted all-or-nothing choice'" (*People* v. *Ramkeesoon* (1985) 39 Cal.3rd 346, 352) between conviction for first-degree murder or outright acquittal, which skewed the fact-finding process and cannot in this case be deemed beyond a reasonable doubt not to have contributed to the verdict in this case. (*Chapman* v. *California*, 386 U.S. 18, 23-24; see *People* v. *Ramkeesoon*, *supra*, at p. 352.)

XV.
EVEN IF SECOND-DEGREE MURDER IS NOT A LESSER-INCLUDED OFFENSE OF FIRST-DEGREE FELONY MURDER, THE TRIAL COURT WAS OBLIGATED TO INSTRUCT ON FIRST-DEGREE PREMEDITATED MURDER, OF WHICH SECOND-DEGREE MURDER AND INVOLUNTARY MANSLAUGHTER ARE LESSER –INCLUDED OFFENSES

As stated in the previous argument, the defense had requested instruction on first-degree premeditated murder, and it did so as a basis for instruction on the lesser-included offense of second-degree murder. For if second-degree murder is not a lesser-included offense of first-degree felony-murder, it most certainly is a lesser-included offense of first-degree premeditated murder, which requires express malice aforethought. (*People* v. *Anderson* (2006) 141 Cal.App.4th 430, 443.) Further, if the obligation to instruct on second-degree murder did not arise directly from the specific obligation to submit to the jurors lesser-included offenses supported by the evidence, the defense request for instruction on first-degree premeditated murder nonetheless triggered the more comprehensive obligation of the Court to instruct the jurors on the general principles of law that are "closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People* v. *St. Martin* (1970) 1 Cal.3rd 524, 531; *People* v. *Wickersham* (1982) 32 Cal.3rd 307, 323.) Once the right to an instruction on first-degree premeditated murder was established, that instruction, in turn, would trigger in this case the subsidiary obligation to instruct on the lesser-included offenses of second-degree murder and manslaughter. (*People* v. *Breverman* (1998) 19 Cal.4th 142, 162.) As in the previous argument, the instructional duty requires an evidentiary predicate, and there was a substantial basis for instruction in this case on premeditated murder.

Premeditation and deliberation, which also raises the crime of murder to murder in the first degree, occurs "if the killer acted as a result of careful thought

and weighing of considerations; as a deliberate judgment or plan; carried out coolly and steadily, especially according to a preconceived design." (*People* v. *Velasquez* (1980) 26 Cal.3rd 425, 435, internal quotation and editorial marks omitted, ovrld. on o.g. in *People* v. *McKinnon* (2011) 52 Cal.4th 610, 643.)

This was a possible, though by no means necessary, circumstantial inference in this case. The jury could have found that Danielle's abductor had to have acted with a good deal of care, caution, and precision in order to effect her abduction from her own house without causing some sort of disturbance or leaving some manifest trace other than the girl's disappearance itself. Once out of the house, stealth and care was required in order to transport her however far she was in fact transported while alive. Finally, thought and planning, not inconsistent with the deliberate nature of all the preceding acts, were required for the disposal of the body, which was placed in an area where it would not be casually discovered.[145]

There was then sufficient evidence for instructing on the alternative theory of premeditated murder. At the same time, these facts did not lead inexorably to the conclusion of premeditation and deliberation. The perpetrator's undetected entry and exit with the girl may have merely been fortunate, or based on an impromptu deceit. Further, if there was any planning involved in the abduction, the perpetrator may not at this point have formed an intent to kill. Even further, if the perpetrator was Mr. Westerfield, he had just spent several hours of his evening in a bar drinking alcohol. As for the dumping of the body, while this might show planning *after* the commission of the homicide, it does not necessarily show premeditation and deliberation in regard to the homicide. Finally, because of the state of the body, there was no evidence from which one might infer one way or

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[145] One might add to this the evidence of motive, if the pornography exhibits were in fact properly before the jurors in this case and if it had the probative value claimed for it by the prosecution.

the other that the manner of killing betokened premeditation and deliberation. In short, there was a basis for instructing on second-degree murder as a lesser-included offense of first-degree premeditated murder. These same evidentiary factors could also reduce the crime even further to involuntary manslaughter, a lesser-included offense of second-degree murder.

What then of Mr. Dusek's claim, also noted above, that he had, pursuant to his lawful authority as the prosecutor, a veto power over what charges were submitted to the jury? (9 CT 2217-2223; 37 RT 8819; 40 RT 9263-9265.) His claim was misconceived. There is no doubt that as a prosecutor he had "the sole discretion to determine whom to charge with public offenses and what charges to bring." (*People* v. *Birks* (1998) 19 Cal.4th 108, 134.) But as seen from the analysis in the previous argument, his discretion was fully exercised when he chose to charge the crime of murder. If he had exclusive *tactical* control over what *theory* of the crime of murder he wished to urge the jury to find, he had no power to prevent the court from instructing on all applicable theories supported by the evidence. For, "[w]hen the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature." (*People* v. *Tenorio* (1970) 3 Cal.3rd 89, 94; *Manduley* v. *Superior Court* (2002) 27 Cal.4th 537, 552.)

The error here cannot be a direct violation of the Eighth Amendment insofar as premeditated first-degree murder is a co-equal crime with first-degree felony murder, and not a lesser-included offense. However, a state-law error, which this was, can nonetheless have federal constitutional consequences, which thereby render the error one of federal constitutional magnitude. (*People* v. *Partida* (2005) 37 Cal.4th 428, 438-439; *People* v. *Boyer* (2006) 38 Cal.4th 412, 441; *People* v. *Carasi* (2008) 44 Cal.4th 1263, 1289, fn. 15; *People* v. *Gutierrez* (2009) 45 Cal. 4th 789, 809.) Here, Judge Mudd's refusal to instruct on first-degree premeditated murder effectively cut off instruction on lesser-included offenses on a capital charge, which is a violation of the Eighth Amendment. (*Beck*

v. *Alabama* (1980) 447 U.S. 625, 638; *Hopkins* v. *Reeves* (1998) 524 U.S. 88, 94-95.)

In addition, the fact that the instructional error arose from a defense request transforms what would ordinarily be state-law error into federal constitutional error of a different sort as well. Although the factual focus of the guilt trial in this case was the identity of the perpetrator, the evidence itself presented the sub-theme of what crimes were committed. The defense made it clear during the settlement of jury instructions that it wished to take advantage of these evidentiary equivocations as a legally available alternative, which would at least provide the substantial benefit of preventing the death penalty. The Sixth and Fourteenth Amendments of the United States Constitution confer on a criminal defendant the right to a meaningful opportunity to present a defense (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 690), and this necessarily includes the right to present a partial defense. (*People* v. *Cash* (2002) 28 Cal.4th 703, 727; *Delaney* v. *Superior Court* (1990) 50 Cal.3rd 785, 809.) This right was denied by Judge Mudd's acceptance of Mr. Dusek's claims of authority to limit the theories of murder submitted to the jury, and the error here resulted in a violation of the Sixth and Fourteenth Amendments of the United States Constitution.

In regard to prejudice, the discussion would be identical to that in the previous argument, except to note that the prosecution would have had an expanded basis on which to obtain a first-degree murder verdict in this case. But that does not change the possibility inherent in the evidence of a conviction for second-degree murder or less. On this record, respondent cannot show the instructional error to be harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

B. PENALTY PHASE OF TRIAL

PENALTY PHASE STATEMENT OF FACTS

Prosecution Case In Aggravation

1. Victim Impact Evidence.

In addition to the evidence presented in the guilt phase of trial regarding the commission of the crime itself, the prosecution, in the penalty phase presented "victim impact" evidence, beginning with Danielle's teachers in elementary school, and ending with the testimony of Damon and Brenda Van Dam.

Ms. De Stefani, Danielle's kindergarten and first-grade teacher, described Danielle as a "very sweet," polite, hard working girl, who really enjoyed school and was enthusiastic to learn new things. Danielle liked to read; she was becoming a strong math student by the time she left first grade; and she liked to write so much that when there was a writing project Danielle would stay inside and skip recess to continue working. (57 RT 9958, 9960, 9963.) Danielle sometimes wrote about, and often talked about, her family activities, about summer camping trips, trips to Sea World, family celebrations, or about how her father helped her with her science project. (57 RT 9959-9960, 9962.) Brenda was a regular volunteer in the classroom, and Danielle loved it when her mother came in, and was able to show this without being distracted from her schoolwork. (57 RT 9961.) Often, Brenda had Dylan with her, and Danielle took pains to show Dylan what she, Danielle, was working on. (57 RT 9962.) In regard to others, Danielle was very considerate and helpful. She wanted to make sure no one's feelings were hurt and that no one was excluded: everyone, according to Ms. De Stefani, was Danielle's friend (57 RT 9959, 9963), and she was well liked by her teachers. (57 RT 9963.) According to Ms. De Stefani, Danielle's "caring personality" stood out from "the fact that she never wanted anyone to feel alone or sad." (57 RT 9964.)

Ms. Putenney, Danielle's second-grade teacher, echoed the description of Danielle by Ms. De Stefani as a good student who enjoyed school and was considerate of others. (57 RT 9967-9968, 9971-9972.) Ms. Putenney knew that Danielle was well liked because the kids would tell her that Danielle was the friend of both the "rookies" and the "pros," which were the respective designations in Ms. Putenney's consolidated class for the first-graders and for the second-graders. (57 RT 9968.)

In the last week of January, the class assignment was to write a "personal narrative" about a memory that they would never forget. About thirty minutes before the end of class on Friday, February 1, Ms. Putenney got a call from the office saying that Danielle was being checked out of school. Ms. Putenney asked to see Danielle's assignment first. Danielle had written about how her grandmother's house had been broken into. Ms. Putenney remarked to Danielle that that was so sad, and asked if she didn't have a happier memory to write about. Danielle answered, "But that's true, Mrs. Putenney." So the latter gave her approval, but asked Danielle next time to make it a happy memory, to which Danielle consented. Ms. Putenney said she would see Danielle on Monday, but she never saw Danielle again. (57 RT 9969-9970.) "Ever since Danielle disappeared," Ms. Putenney stated, "there has not been a day that passed that I have not thought of Danielle. Like I say, she was a young student, but a very delightful student. She cooperated. She was friend to the other kids. She wanted to learn. She listened to instructions. . . . . She was a very very obedient child and very pleasant child." (57 RT 9977-9978.)

Danielle's interests extended beyond schoolwork, as Brenda and Damon testified at the penalty phase. Even beyond her assignments in school, she loved writing. At night, she would open the dictionary, look up words, and write their definitions down on paper – something she was doing the night of February 1 before she went to bed. (57 RT 9986, 10070.) She was active in the "Daisies," the pre-"Brownie" organization, and was about to enter the Brownies. (57 RT

9987, 10062.) She took ballet and tap dancing, and at the time of her abduction she had just begun to take piano lessons. (57 RT 9988, 10064.) Brenda recalled the rigor of the ballet recital at the Escondido Performing Arts Center when Danielle was five. It required three 3-to-4 hour rehearsals and two nights of shows in full costume. During rehearsals, Danielle was nervous and hesitant, but after the first night she came running off the stage yelling "Mommy, I love doing that and I want to do it again." She was, Brenda remarked, "very cute." (57 RT 10064.)

The family was close-knit. Danielle "adored" her brothers, and had an especially close relationship with Dylan, the youngest. (57 RT 9990, 10067.) According to Damon and Brenda, after Danielle's death, he had regressed for a while, beginning to wet his bed again and sometimes talking in baby talk. (57 RT 9991, 10069-10070.) Derek was more restrained, but would have bouts of anger over trivial things. After Danielle was abducted, he asked his mother, "Mommy, I woke up that night but I didn't get out of bed, and if I had gone to the bathroom do you think I could have stopped that bad man from taking her?" (57 RT 9991-9992, 10068-10069.)

Damon recalled how Danielle loved to help him with yard work, or when he was working in the garage on his car, how she would hand him wrenches and listen to him explain what he was doing. She also loved the father/daughter dances at school, dressing up, wearing a corsage, and dancing the slow dances with him, while the girls danced with each other to the "Brittney Spears music." There was a father/daughter dance coming up the week after she was abducted. (57 RT 9985-9986.)

Brenda recalled Danielle telling her how much she wanted to be a mommy like Brenda. She talked about how, when that happened, she would share recipes with Brenda like Brenda did with her mother. (57 RT 10068.) In addition to wanting to be a mother, Danielle also talked about being a teacher. (57 RT 10068.) Danielle loved her teachers and wanted to emulate them. After the family

obtained Lyla, Danielle became interested in becoming a veterinarian. (57 RT 9993-9994, 10068.)

With Brenda narrating, the prosecution played a videotape showing various scenes of Danielle throughout her life. The latest were from the family's Florida trip to Disneyworld, which had occurred the previous Christmas. (57 RT 10074-10075.) The family had another trip planned for February 9. Damon was going on a business trip to Italy, and the rest of them were going to accompany him. Brenda had taken Danielle out of school early on February 1 in order to get the passport photos. (57 RT 10072.)

2. Factor (b) evidence.[146]

When Westerfield was still living in Poway with his wife Jackie and their two children Lisa and Neal, the Westerfields would get together and socialize with Jackie's brother's family. There was one such get-together at Westerfield's house about 12 to 14 years earlier. Jackie's sister-in-law Jeanne, her husband, and her two daughters were there, as were other family and neighbors. When it was bedtime for the children, Jeanne put her daughters to bed in sleeping bags on the floor of Lisa's room, while the adults remained downstairs to continue the party. Jeanne's eldest daughter, Jenny, was at the time between five and seven years old. (57 RT 10008-10011, 10025, 10036-10038, 10040, 10044.)

Now a 19-year-old sophomore at San Diego State University, Jenny testified at the penalty phase of trial. (57 RT 10008.) According to Jenny, at some point during the night she woke up. "Uncle Dave" was there and had his finger in her mouth and was rubbing her teeth. She pretended to be asleep and rolled over. He went to attend to Jenny's sister, but then repositioned himself and started rubbing Jenny's teeth again, so she bit him really hard for as long a she could. He stopped, stood up, then went to the head of his daughter Lisa's bed. Jenny rolled

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[146] Again, factor (b) of Penal Code section 190.3 consists of "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

over to see if he was doing anything over there. She noted that he was adjusting the sides of the dark colored running shorts he was wearing. (57 RT 10011-10014.) Jenny waited awhile until he left. Then she went downstairs and told her mother that Uncle Dave had been in the room, that he was being weird, and that it had bothered her. Her mother took her back to bed and tucked her in. No one came back to bother her again that night. Her mother later told her that she had talked to Dave about it. (57 RT 10016-10017.)

Jeanne testified that indeed around 10 or 11 p.m., Jenny had come downstairs complaining that Dave had been in her room and was bothering her. Jeanne did not remember Jenny's exact language, but Jeanne's impression was that Jenny was uncomfortable. (57 RT 10038.) In preschool and in elementary school, there was a program to teach the children that if anyone did anything to them that made them uncomfortable, the children were to tell an adult about it. (57 RT 10038-10039.) In any event, Jenny's manner was that night was fussy. Jeanne calmed her down, took her back to bed, and told her she would talk to Dave. (57 RT 10039.)

Jeanne then looked for him. She did not remember if anyone was present, but she told him that Jenny was upset that he had bothered her. She asked him what was going on. Westerfield answered that Jenny had been fussing in her sleep and that he was comforting her. (57 RT 10039-10040.) At trial she could not account for how he knew that Jenny was fussing in the first place, but her general impression and memory was that his explanation was reasonable and she had seen no need to question it further. (57 RT 10040.) Jeanne had no recollection as to how Westerfield was dressed. (57 RT 10044-10045.)

The incident came up on February 4, 2002 in the interview of Westerfield by Redden. This portion was not played at the guilt trial, but was played at the penalty trial. (57 RT 10051, 10054.) Redden asked Westerfield if the latter could think of any reason someone might think Westerfield was involved in the kidnapping of Danielle Van Dam. Westerfield's first reaction was, "Well, I hope

that's not the case." Redden nonetheless pressed: "Okay, I'm just asking you to get your opinion. Is, is there something that you said, did or otherwise would arouse suspicion, in your mind?" (12 CT 2930.) Westerfield could think of something, but first he wanted an assurance from Redden that the latter would not tell his ex-wife Jackie, who knew nothing about this. When Redden assured Westerfield that this would be confidential, Westerfield continued. (12 CT 2930.)

There was a party at his house, sometime in 1993 or 1994. Jackie's sister-in-law was there. Westerfield heard some sort of commotion in the bedroom upstairs where the kids were sleeping. He went in to check, and the little one was kicking her sister and getting her foot tangled in the other girl's pajamas. He reached down, extricated the foot, pulled up the older girl's pants, and told her to go down and see her mom. The little girl was upset. (12 RT 2930-2931.) Westerfield then went downstairs, "And that was the end of it. But that wasn't the end of it." About a week later, Jeanne came to him with a story about how she felt that he "had molested her children." (12 CT 2931.)

This portion of the February 4 interview ended with: "REDDEN: I don't know where you get molesting out of that. [¶] WESTERFIELD: Well but that's what she was accusing me of. [¶] REDDEN: Okay. Fine. [¶] WESTERFIELD: So . . . and that's always upset me and I've never told anybody. [¶] REDDEN: But even at that . . . I mean . . . [¶] WESTERFIELD: But I wanted to be honest with you." (12 CT 2932.)

Westerfield told Redden that he did not know whether or not Jeanne had reported him, but no one had come to talk to him about her charges. (12 CT 2931.) As Jeanne testified, she indeed never made any charges, and the two families continued to have contact and socialize throughout the years. (57 RT 10047-10048.) She never mentioned the incident again to Jenny (57 RT 10027), and Jenny herself never mentioned anything about fingers in her mouth, or anything else at all until after the disappearance of Danielle Van Dam. (57 RT 10016-10017, 10042.)

Sometime in February 2002, Detective Donna Williams telephoned Jenny and asked if she remembered Westerfield doing something to her. Jenny remembered that there was a time when Westerfield came into the room and was bothering her. She told Williams that she did not remember the details because she was half asleep. This was, as Jenny testified at trial, true, but she was also afraid that it would upset her family. (57 RT 10017-10018.) After the initial call from Williams, the details started coming back to her. She talked about the matter to her boyfriend, and then her mother. After that, she talked to Marion Pasas the defense investigator and told her that Westerfield had put his fingers in her, Jenny's, mouth. (57 RT 10019.)

After that, she talked to her father, who urged her to tell the truth. (57 RT 10020-10021.) So a tape recorded interview was arranged with the District Attorney's Office. When speaking to Pasas and to the DA, Jenny made no mention of Westerfield adjusting his shorts. According to Jenny, she did not because she was not sure whether or not it meant anything, but "it freaked [her] out a lot." (57 RT 10021.) In the second interview with Pasas and later with the DA, she did reveal the added detail. (57 RT 10021.)

Defense Case In Mitigation

The defense presented business associates, friends, and family members to attest to the good aspects of Westerfield's character and to show that these qualities commanded respect and admiration for his professional abilities, that they elicited strong loyalty from his friends, and that they prompted support and love from both friends and family.

1. Professional Achievements.

Westerfield was a design engineer and worked at various companies over the course of the years before he became an independent contractor. At Hydro Products, in the late 1970's, he helped develop the design for an underwater surveillance device, designed for work around oil platforms, and to reduce the

need for, and danger to, human divers. (58 RT 10104-10106.) When he worked at Technovision in the late 80's, he provided a design that overcame technical hurdles in the manufacture of the molds that allowed optometrists and ophthalmologists to cast eyeglass lenses in their offices. (58 RT 10139-10141.)

At Primary Access in the early nineties, Westerfield was on an engineering team that produced a device that connected dial-up users to the Internet. He designed the next generation product, which was one of the products that made AOL famous. (58 RT 1041.) As an independent contractor for Single Chip, Westerfield produced a number of designs, one of which was a security device that electronically diverted luggage of suspect air travelers. The device was used at San Francisco International Airport. (58 RT 10142-10143.) Also as an independent contractor with Prepack Products, which manufactured medical devices for physical therapy, he designed the pulley used in their "Home Ranger Shoulder Pulley" --- a home device to aid recovery from shoulder injuries or surgery. He was listed on the patent as the inventor, and Prepack Products sold 600,000 of these pulleys in 2001 in United States and abroad. (58 RT 1085-1088, 10190.) Carmen Genovese, an electrical engineer, who had been Westerfield's supervisor at various companies, and kept hiring him whenever Genovese moved to a new company, testified that Westerfield, who did not have an advanced engineering degree, was a very talented and creative designer. (58 RT 10141-10142.)

Genovese had first met Westerfield at Sutter Biomedical in 1983, where some of Westerfield's most important designs were conceived. Sometime in 1980, Dr. Richard Coutts, an orthopedic surgeon in San Diego, approached Sutter to see if a device could be developed for "continuous passive motion" (CPM) to aid in the recovery from joint injury and from joint surgery. (58 RT 1033-1035, 10165-10166.) Sutter began the project before Westerfield arrived, but when he did, Westerfield developed the design that made it work. It was found that motion helped in the healing of joint injury, and Westerfield designed a device that

provided mechanically for continuous motion of the extremity – a leg or arm or hip – without placing pressure on the site of the injury or surgery. (58 RT 10135-10137.) The device, now in wide use, reduced recovery time from months to a few weeks (58 RT 1037, 10167-10168, 10178) and, according to Dr. Coutts, benefited millions of people. (58 RT 10168.) According to Genovese, the devise was "revolutionary." (58 RT 10144.)

On the patent for the CPM devise, which was issued in May 1989, Westerfield was listed as the inventor. (58 RT 10144.) At Sutter, Westerfield also designed surgically implanted prostheses for fingers. What was new in Westerfield's design was the anatomic contours of the implants. On the patent issued in October 1989, he was listed as the inventor. (58 RT 10138, 10145-10148.)

2. Friends.

Genovese also considered himself to be Westerfield's friend. Over their twenty-year association, their families often socialized, and Westerfield had been to Genovese's vacation home in Mexico. (58 RT 10135-10136.) Westerfield also socialized with Ron Lawrence, who first met Westerfield when they both worked at Hydro Products. (58 RT 10104-10107.) After Westerfield got a job at Sutter, he got Lawrence an offer there as well. (58 RT 10108.) Genovese and Lawrence did not disavow Westerfield after the disappearance of Danielle Van Dam, but rather they went to visit him at home shortly before he was arrested in order to show their support. (58 RT 10110.) Genovese, who, at the time of trial, was a vice president for engineering and operations for a local San Diego company, was approached by the media six or seven times and spoke publicly on behalf of Westerfield. (58 RT 10133-10134, 10150-10151.)

Spectrum Design was started in 1980 by Westerfield along with Ron Lawrence and Wesley Hill, another co-worker and friend from Hydro Products, as a moonlighting venture for the three men. They all worked together for about a year and a half, and then went their separate business ways. Westerfield kept the

name Spectrum. (58 RT 10108-10109, 10125, 10127.) Hill, and his wife Diane, like Lawrence, remained good friends with Westerfield. The couple came in from Salt Lake City to testify for him. (58 RT 10295, 10303.)

The Hills became close friends with Westerfield and his wife Jackie at Hydro Products in 1978. Hill in fact was the best man at Westerfield's wedding. (58 RT 10295-10298, 10304-10305.) Even after the Hills moved to Spokane, they kept in touch with Westerfield and saw him almost every Christmas when they came down to visit Diane's father in Carlsbad. (58 RT 10298.) Diane related how Westerfield, who raised birds, gave their daughter a bird named "Squeakers" (58 RT 10305), and how Westerfield once helped Diane buy a car when she had flown to San Diego to do this. (58 RT 10306.) The Hills had been friends with Westerfield for twenty-five years, and both of them testified that they cared about what happened to him in these proceedings. (58 RT 10298, 10306.)

The Millers were also close friends. They were neighbors of the Westerfield in Poway and had known him for fifteen years. The entire family, the parents and the two sons, considered him a part of their own family. (58 RT 10320-10321, 10332, 10355.) They observed each other's milestones, such as birthdays and weddings. Westerfield was always a helpful neighbor going beyond the dictates of neighborliness. (58 RT 10322, 10333-10335, 10354.)

The older Miller son, A.J., shared a bond with Westerfield from their shared interest in birds. Westerfield had built an aviary, which was intricate in design, and which had several species. A.J. himself was now a wildlife biologist with a special interest in birds. (58 RT 10341-10342.) A.J. also noted how, when he was a "rebellious" teenager, he would often seek Westerfield's advice and use him as a "sounding board" because he was easy to talk to. (58 RT 10342.) The younger son, Michael, now a lawyer, looked on Westerfield as a brother or an uncle, who had gone out of his way to help him. (58 RT 10355-10361.)

Alden and Kathleen, the Miller parents, had been living in Florida for two years, and flew in to testify for Westerfield at the penalty trial. They also went to

visit him in jail, having to negotiate the restrictive conditions and having to fill out voluminous paperwork. (58 RT 10325-10326, 10328.) They both testified to their concern for him, with Kathleen adding that he was a special part of her life. (58 RT 10325, 10336.) A.J., who now lived in Portland with his wife, and had just returned from doing wildlife surveys in Eastern Washington, arrived only the day before his appearance to testify for a man whom he still cared about. (58 RT 10340-10341.) Michael attested to the same concern, adding, "I love David. David is a family member in my mind." (58 RT 10361.)

Margaret Hennon was Westerfield's high school "sweetheart." She came in from Wyoming to testify for him at the penalty phase of trial. They dated around 1970. He spent a lot of time at her house. Her parents knew him well, and they also became his friends. Margaret remembered the time they spent together, how he wanted to be an architect and would drive her around Del Mar and La Jolla to point out the beautiful buildings; and how he took her to museums and plays. (58 RT 10288-10290, 10292.) Although she had last seen him in 1974, she sent him a card around Easter of this year saying, "Dear David. You once told me if I ever needed anything I should call you. I carried that gift of love and care with me to various points on the globe. And it's a wonderful thing to feel loved. Now if there's anything that I can do for you, please let me know. Peg Hennon. My mother also sends her love." (58 RT 10290-10291, 10292.)

Westerfield's most recent girlfriend, Susan, testified how she still cared for him (58 RT 10251); how he had helped her when her father was dying from liver disease; how he helped with the funeral arrangements; how he helped her financially when she was on disability for a year; and how he helped her daughter Christina pack her belongings and escape from an abusive relationship. (58 RT 10249A-10251.) Christina Gonzales, Susan's daughter, confirmed this, describing how Westerfield let Christina and her young son stay at his house for three or four months, providing them with food and not charging any rent. Westerfield even threw a first birthday party for Christina's son, supplying the food and the cake

and helping generally with the party. (58 RT 10255-10256.) She too attested that she cared what happened to Westerfield. (58 RT 10256.)

3. Family.

The Westerfields were from Maine, where the father, David Horatio Westerfield served a term in the Maine Legislature. (58 RT 10203-10204, 10228-10229.) After the father's term was up, he brought his family – his wife Nan, Alan (the name the family used for Westerfield himself), Alan's younger brother Earl, and a younger sister, Tania, to San Diego where the father attended some art classes at San Diego State. He was able to support his family at that time from income property in Maine. (58 RT 10203-10204, 10218-10219.) The family returned to Maine, but moved back to San Diego in 1967, where Alan entered Madison High School, from which he graduated in 1970. (58 RT 10204, 10207.) Alan left the house at 18, and moved to Mesa where he entered junior college. (58 RT 10207, 10209.)

Alan worked in high school as a dishwasher at a restaurant named Saska's in Mission Beach. He also worked at the Ramada Inn. He also had to support himself by the time he entered junior college, because his father's income property was no longer producing. (58 RT 10207, 10220.) The parents themselves had opened a typesetting business called Composgraphics. (58 RT 10207.) Alan married Debbie in 1973, but they separated and divorced in 1978. In 1979, Alan married Jackie, with whom he had children, Lisa and Neal (58 RT 10222-10223); in 1990, Alan's brother Earl died of a terminal disease diagnosed two years earlier (58 RT 10215); and in 1996, Jackie and Alan divorced. (58 RT 10215.)

Tania, Westerfield's sister, remembered their childhood in Maine, where they grew up on their grandmother's farm, to be a happy one. (58 RT 10204-10205.) Seven years after the family moved to San Diego, her parents separated in 1974. This surprised everyone since there were never any fights between them or any hint that they did not get along. The separation particularly upset Alan, who was looking forward to having children and bringing them over to their

grandparents' house for holidays. (58 RT 10208-10209.) Around this time, Alan became a kind of substitute parent for Tania. He and his wife Debbie would come out to watch her practice with the drill team and give her moral support; or when she had school activities, he would give her rides. (58 RT 10209.)

After Alan married Jackie, Tania socialized with the couple over the years. Alan liked to host parties at his house and get together with the family. Tania was there often with her children. Alan, like his father, took an interest in the desert, and the two families often went camping there together. At that time, Alan did not have any "toys," but would simply "truck" around the desert. At night, the children would sleep in camper shells while the adults pitched tents outside. (58 RT 10206, 10212.) According to Tania, on these desert excursions, they sometimes got stuck in the sand. (58 RT 10212.)

In about 1986, Alan bought a new house in Poway on Treeridge. He designed the landscaping and the pool in the backyard. He also designed an aviary for the side of the yard. According to Tania, Alan always involved the children in his projects, especially the aviary. He asked them their opinions and how they wanted it constituted. When it was built, he taught them how to care for the birds, how to replace the sawdust, and how to feed them. The children promised to take care of the birds, but Alan ended up doing it. (58 RT 10212-10214.)

Tania related how their father died in 1993. It was fairly sudden. She had taken him to the hospital Saturday morning and he died Sunday night while Alan was out in the desert camping. He was depressed by his father's death, but he handled all the arrangements and settled his father's affairs. (58 RT 2015.)

The divorce from Jackie hit Alan hard. He still loved her and was concerned about the children. The couple agreed that both of them would stay in Poway so the children could attend the same schools and maintain as normal life as possible. The children would stay with Alan for two weeks and then alternate to Jackie's for two weeks. (58 RT 10215-10216.) Tania related that Alan was

involved with his children's activities. He boasted about Lisa's swim meets and her soccer, and about Neal's playing saxophone in the band. (58 RT 10216.)[147]

Tania was not the only person there from Westerfield's immediate family to show support. His mother, Nan, who did not testify, was in the audience (58 RT 10218, 10282); his children, Neal and Lisa, testified. They remembered how their father was their mentor and friend, involved in their school activities, and took them on trips to places like the Grand Canyon. They attested to their love for him, and how his absence from their future graduations and family holidays with their own children would weigh on them. (60 RT 10469-10472, 10476-10479.)

People from Westerfield's more extended family also came forward. Jean Westerfield, his aunt, married to his father's brother Wiley, who died in 1997, testified how she and Wiley were often guests at Jackie and Alan's house for barbeques, birthdays, Christmases and Thanksgivings. (58 RT 10228-10230.) Jean and Wiley lived with Alan's grandmother in Point Loma, taking care of her because she had dementia. Jean remained her caretaker even after Wiley's death, until the grandmother died in 1999. When the grandmother was alive, Alan would visit her. On these visits, he always did something to help, such as painting the house. (58 RT 10206, 10230-10233.)

Finally, Ina Bouselot and Andrea Witwer, maternal aunts testified. They were more like cousins, since Ina was only 8 years older than Alan, while Andrea was even a few months younger than he was. As children, Ina and Andrea came each summer to Maine from their home in Wisconsin to spend a month or two with their sister's family. They spent lots of time with Alan and his siblings, picking blueberries, fishing, riding bikes, and swimming. (58 RT 10268-10271, 10277-10279, 10284.) For a short time, Ina and Andrea's father moved the family

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[147] Marie Gunther had known Westerfield since 1985 through their encounters at school events attended by Westerfield for his son Neal, who was a friend of Gunther's daughter since Poway Country Preschool. (58 RT 10235-10236.) Gunther thought that Neal was an "excellent" child. (58 RT 10236.)

to San Diego. Andrea attended the same high school as Alan, who took a lot of teasing about having an aunt in the same class. (58 RT 10271-10272, 10280-10281.)

After the family moved away, they kept in touch. When Alan was 21, he drove out to Illinois to work for Ina's husband as a landscaper. He stayed about three months working and helping them around the house. Since that time, Ina kept in touch with him over the years, as did Andrea, who came to San Diego periodically to visit, once on her honeymoon, and thereafter on successive occasions to show off each newborn child. On these trips she and her family went out to the desert with Alan. (58 RT 10272-10273, 10281-10282.) Ina came in from Florida to testify; Andrea from Wisconsin. (58 RT 10268, 10277.)

PENALTY PHASE ISSUES

XVI.
THE JENNY N. INCIDENT WAS ERRONEOUSLY SUBMITTED TO THE JURORS AS A FACTOR (B) CRIME

Many of the guilt phase issues carry over into the penalty phase. Some do so as independent error, such as the denial of a challenge for cause to Juror 2, based on his death penalty voir dire. (See above, p. 159, fn. 96.) Some are semi-independent, such as the sequestration issue, which stems from the guilt phase but which revives itself with fresh incidents in the penalty phase, as will be seen below. Some are difficult to characterize, such as the joinder-and-severance issue, in which a primary consideration is the conjoining of a non-capital misdemeanor with a capital charge, and which required a pre-guilt-phase assessment of possible prejudice to a penalty trial. (See above, pp. 249-253.) In some, the prejudice from the guilt phase error simply carries over to the penalty phase, such the admission of pornographic evidence as an issue separate and independent from joinder and severance. (See above, pp. 263 *et seq.*)

All these will be addressed in due course, but the claims related to the admission of the Jenny N. incident at the penalty phase arise only in the penalty phase and this gives the Jenny N. incident pride of place in the presentation of penalty phase issues. But not only this. It is the urgency of these claims as well. The experienced reader of the penalty phase statement of facts might by now have wondered whether the representation of the Jenny N. incident in the previous summation of evidence is tendentiously slanted to raise the question of whether or not that incident constituted a crime that "involved the use or attempted use of force or violence or the express or implied threat to use force or violence" as required by Penal Code section 190.3, factor (b). As will be seen in the following, where Jenny N.'s verbatim testimony is presented, the summary is indeed a fair

one. Rather, the Jenny N. incident was not a factor (b) crime and its submission to the jury was error, whose prejudice to the penalty judgment in this case is palpable.

The Jenny N. incident was first proffered in a supplemental notice of aggravation filed on June 28, 2002, as an assault and battery. (9 CT 2054-2055.) In an opposition to this notice, the defense objected that the Jenny N. incident at most constituted a "technical battery" and was not a crime of "force or violence." (10 CT 2447, 2448.) In its reply the prosecution insisted that "[b]y forcing his fingers in Jenny's mouth, the defendant committed an assault and battery in violation of Penal Code sections 240 and 242, respectively. Also, in light of what is already know about the defendant, this conduct would constitute a violation of Penal Code section 288." (11 CT 2586.)[148]

The prosecution's summary of the evidence of the Jenny N. incident was not substantially different than the evidence actually presented at the penalty trial: she was wakened when she felt Westerfield's fingers in her mouth playing with her teeth; there was a short interlude in which he moved toward Jenny's sister, after which he returned and did the same thing as Jenny feigned to be asleep; he withdrew his fingers when she bit him; he then stood up, checked his sleeping daughter, and left the room. (11 CT 2592-2593.)

Judge Mudd had no difficulty finding the Jenny N. incident admissible. Indeed, he thought it *obviously* admissible, stating that "it goes without saying" that if the jury believed the Jenny N. incident beyond a reasonable doubt, it

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[148] It will be helpful to re-quote here the provisions of Penal Code section 288(a), which provides in relevant part that "any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." Penal Code section 288(b) provides for a more serious crime when the act defined in subdivision (a) is committed "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ."

"constitute[d] a crime[] of force or violence." (54A RT 9861.) The evidence was thus not only presented to the jury as summarized in the penalty phase statement of facts (see above, pp. 374-377), but it was submitted to the jurors through CALJIC No. 8.87 as the crimes of "battery and/or lewd act with a child under fourteen years . . . ." (12 CT 2964; 60 RT 10492.)[149]

Normally, the admissibility *vel non* of a proffered factor (b) crime is measured by the abuse-of-discretion standard (*People* v. *Bacon* (2010) 50 Cal.4th 1082, 1126-1127), which, in this context, is comprised in the question of whether or not there was sufficient evidence that the conduct qualifies under factor (b). (*People* v. *Whisenhunt* (2008) 44 Cal.4th 174, 225.) By this measure, the admission of the Jenny N. incident was indeed an abuse of discretion. But, here, Judge Mudd's swift, adamant, and unreflecting conclusion that the Jenny N. incident clearly and obviously qualified as a crime of force or violence suggests a prior mistake of law on his part. Such certitude in the face of what was obviously *at least* debatable suggests some problem in the understanding of the statutory use of the phrase "force or violence." The argument therefore begins with an examination of the proper, legal understanding of this phrase. As will be seen, the statutory language of factor (b) does not embrace what the defense correctly denominated as a "technical battery". After that, it will be established that no

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[149] The full instruction given in accord with CALJIC No. 8.87 was as follows: "Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: battery and/or lewd act with a child under fourteen years, which involved the express or implied use of force or violence. Before a juror may consider any such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance. [¶] It is not necessary for all the jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced that juror must not consider that evidence for any purpose." (12 CT 2964.)

rational trier of fact could have concluded beyond a reasonable doubt that the touching of a sleeping child's teeth was anything other than a technical battery outside the scope of section 190.3, factor (b).[150]

A.

To begin the analysis of the factor (b) language, which has been adjudicated and applied since even before 1978, and which has presented few legally complex questions, one must begin with a careful statement of the fundamentals. We know that Penal Code section 190.3, factor (b) is a statute of exclusion: it excludes evidence of criminal activity that does not involve the use of force or violence or the express or implied threat of force or violence. (*People* v. *Boyd* (1985) 38 Cal.3rd 762, 776.) And although factor (b) does not require an actual criminal conviction, the "activity" must violate a specific provision of the Penal Code, whether that provision defines a felony or misdemeanor. (*People* v. *Phillips* (1985) 41 Cal.3rd 29, 71-72; *People* v. *Bunyard* (2009) 45 Cal.4th 836, 857.) The "force or violence" required for factor (b), however, does not depend on the definitional elements of the crime committed, but on the factual circumstances of its commission. (*People* v. *Dunkle* (2005) 36 Cal.4th 861, 922.)

This last principle emanates from several concomitant principles informing the purpose of factor (b). Factor (b) evidence is admissible because it "shows propensity for violence, and helps jurors decide whether [the defendant] deserves to die." (*People* v. *Stiteley* (2005) 35 Cal.4th 514, 564; see also *People* v. *Avena* (1996) 13 Cal.4th 394, 426; and *People* v. *Bunyard*, *supra*, 45 Cal.4th 836, 857.) Consequently, "[t]he proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on his

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[150] There is no separate contention of insufficiency regarding the characterization of the crime as a violation of Penal Code section 288. The "force or violence" attending that crime, if it occurred, consisted in the same act as constituted the battery.

character, rather than on the labels to be assigned the past crimes." (*People* v. *Cain* (1995) 10 Cal.4th 1, 73.) It follows from all this that a special definition of "force or violence" that does not help the jurors make the penalty decision within the limits set by the Legislature in section 190.3, factor (b), is not the definition required by that section.

The qualification of battery as a factor (b) crime raises an apparent paradox. Penal Code section 242 defines battery as "any willful use of *force or violence* upon the person of another." (Emphasis added.) The definition of "force or violence" as used in section 242, however, takes on a somewhat technical meaning. As the phrase, for purposes of battery, is conveniently formulated in CALJIC No. 16.141:

> "[T]he words 'force' and 'violence' are synonymous and mean any application of physical force again the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest touching, if done in an insolent, rude or an angry manner, is sufficient."

Indeed, the synonymy of "force" and "violence" in the definition of battery renders one or the other superfluous and unnecessary: " 'It has long been established, both in tort and in criminal law, that 'the least touching' may constitute battery. In other words, force against the person is enough. *It need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.* [Citation.]" (*People* v. *Rocha* (1971) 3 Cal.3rd 893, 899, fn. 3, emphasis added; see also *People* v. *Myers* (1998) 61 Cal.App.4th 328, 325.)

CALCRIM No. 960, the current instruction on battery, eschews the use of either term, and states simply that battery has occurred when "[t]he defendant willfully touched [the victim] in a harmful or offensive manner." This is later

glossed in the instruction to mean that "[t]he slightest touching can be enough to commit a battery if it is done in a rude or angry way." In short, CALCRIM finds both "force" and "violence" unnecessary.

By contrast, the phrase "force or violence" in section 190.3, factor (b), is "self-explanatory" (*People* v. *Dunkle*, *supra*, 36 Cal.4th 861, 922) – a characterization that clearly does not apply to "force or violence" in the battery statute. Thus, in the factor (b) statute, a *non*-legal, or rather non-technical, definition is at issue, and the United States Supreme Court has specifically found that California's factor (b) survives due process scrutiny because it *is* phrased in "conventional and understandable terms" that have a " 'common-sense core of meaning . . . that criminal juries should be capable of understanding." (*Tuilaepa* v. *California* (1994) 512 U.S. 967, 975, 976, 977.) If the terms "force or violence" are to retain a "common-sense core of meaning" they must connote a force that tends towards violence or a violence that is forcible – an act that exceeds the battery standard of the slightest touching that is offensive, which can only be deemed to be a technical legal definition.

Before proceeding to the question of sufficiency of the evidence, it may be appropriate to elaborate further on the issue of the proper definition of "force or violence" in light of the anticipated objection that it is fallacious and improper to construe the phrase "force or violence" as "forcible violence" or "violent force", as was done in the previous paragraph. It will be argued, perhaps, that the factor (b) statute is in the disjunctive, and that "[f]orce is a general term" while "force [that] causes physical harm . . . is commonly called violence." (*People* v. *Soto* (2011) 51 Cal.4th 299, 255 (Wedergar, conc. and diss., internal quotation marks omitted.) Thus, the touching of a person involves the use of physical force in the general sense that any physical movement is an exercise of the vital force that enables one simply to move autonomously. And when such a movement results in an uninvited and unwanted touching of another person, it is an exercise of such force, albeit without violence.

There are two answers to this objection. The first is that this understanding of the factor (b) statute reduces "force or violence" effectively to the same definition used for battery. For this generalized sense of "force" is nothing other than the "slight touching" required for battery. If one needs only the "slightest" unwanted "touching" of another person to qualify a factor (b) crime, then there is no real function for the word "violence", which is, as in the battery standard, rendered superfluous. This big, friendly, anodyne "force" simply crowds out – forces out, if you will -- its more grasping and malevolent cousin "violence."

The second answer is lexical. Not every use of "or" is disjunctive. Sometimes "or" conjoins two words that are "interpretative or expository of one another." (*State* v. *Dunn* (Kan. 1903) 71 P. 811, 812.) Hamlet may pose the question of his existence in that famously stark disjunction, "[t]o be or not to be" (Shakes., *Hamlet*, Act. III, sc.1, l. 55); but language still abounds in exegetical pairings like "chronic or persistent" (*Hargraves* v. *Contintental Assurance Co.* (Ark. 1970) 448 S.W.2nd 942, 947-948), "manipulate or control" (*Schumacher* v. *Cargill Meat Solutions Corp.* (8th Cir. 2008) 515 F.3rd867, 872), "error or defect" (*United States* v. *Olano* (1993) 507 U.S. 725, 732); and a more prosaic Hamlet might have formulated his question as "to be or endure, or not to be or die", in which the disjunctive "or" is flanked by two expository ones. "Force or violence" is an expository pairing. Each term has a range of meaning that at some point merges into the range of the other term's meaning, and it is natural in context to understand the "or" as creating a single unit of meaning. If not all force tends toward violence, and not all violence is forcible, Penal Code section 190.3, factor (b) nonetheless requires in its plain language some sort of conjoined tension between the two.

But there is a third answer also that substantively informs the other two. "Force or violence" must be understood in the context of a capital penalty trial. As noted above, the purpose of factor (b) is to limit the scope of a defendant's criminal history to matters of force or violence proportional in some degree to the

question of whether or not to impose the death penalty. Criminal acts involving the actual use or threatened use of forcible violence or violent force certainly fall within the ambit of this purpose, while "force or violence" understood in the special sense required for battery simply does not.

In *People* v. *Collins* (1992) 10 Cal.App.4th 690, the Court addressed the question of whether the battery definition of "force or violence" applied to a Mental Disordered Offender (MDO) trial. Under the then statute, a mentally disordered offender could be forcibly hospitalized indefinitely from the beginning of his parole term if his initial incarceration had been for a crime involving "force or violence." The Court in *Collins* reversed the MDO extension at issue because the trial court had instructed on "force or violence" in accord with CALJIC No. 16.141. "It is unlikely," stated the *Collins* Court, "that the Legislature intended CALJIC No. 16.141 to be the standard for 'force' and 'violence' at a MDO trial. Otherwise a 'slight touching' done in an insolent, rude, or angry manner could lead to potential lifetime confinement." If the definition of "force or violence" in CALJIC No. 16.141 is not appropriate for a potential life term, how is it appropriate for a potential death sentence?

Thus, a strict equation between "force or violence" in the factor (b) statute and "force or violence" in the battery statute will lead to an erroneous submission of a factor (b) crime that consists in an incident that falls within the non-factor (b) margin of the battery definition. This is the first step in establishing Judge Mudd's legal error in misinterpreting the statute. The second step is to show the factual error in allowing the submission of an incident that could not be found beyond a reasonable doubt to have constituted anything other than a non-factor (b) battery. This requires a close examination of the facts surrounding the Jenny N. incident, both those proffered in advance in the offer of proof, and those attested at trial.

B.

The entire contour and character of the incident as a crime of force or violence came from Jenny N.'s description of it. Judge Mudd, who had refused the defense request for a *Phillips* hearing, wherein Jenny N. would have testified in advance to determine whether the incident was admissible (see *People* v. *Phillips*, *supra*, 41 Cal.3rd 29, 72, fn. 25), made his decision to admit the evidence based on the D.A. investigator's report attached to the prosecution's pleading on this matter. As the report related:

> " . . . . She said she and her sister were sleeping in her cousin Lisa's room on the floor at the foot of the bed. She said sometime during the night when all of the adults were downstairs 'partying' her Uncle David came in the room and put his fingers in her mouth. She described this as 'he was kind of playing with my teeth or something.' He then stopped and went around to her sister. She did not know if he did anything to her sister. She said her sister was four at the time and probably does not remember anything. She continued, He then came back to me and did it again. She said she bit him real hard. She said he then went to where his daughter Lisa was sleeping. He stood there a minute and then left the room. Ms. N[] said that when she was sure he was gone she went downstairs and told her mother about what had happened." (11 CT 2592.)

Later in the report, it was stated: "She said she was asleep and was awakened with his fingers in her mouth." (11 RT 2593.) And again:

> "She said Mr. Westerfield had his fingers in her mouth and was 'playing with her teeth.' She said this lasted for a minute or two. He then went to her sister. She said she pretended she was asleep. She said he came back and did it again, and she bit him. She said he did not make any sounds and did not say anything. I asked her if he was doing anything else in conjunction with his fingers in her mouth, and she said, I don't think so. I asked her if she could

estimate the time it took from when he woke her up, until he left the room. She estimated four to five minutes. She said he did not touch her anywhere else. She said she did not think that he had touched her sister. She said she did not see him touch his daughter." (11 CT 2593.)

Jenny N.'s actual testimony added little or nothing to this account:

"Q. What's the next thing you remember?

"A. Waking up and my Uncle Dave had his fingers in my mouth, and he was kind of playing with my teeth. And then I was still pretending I was asleep. And he went around to where my sister was sleeping. She was to the right of me. And I kind of rolled over to see what he was doing over there. But I don't remember seeing him doing anything.

"And then he came back over to where I was and did it again. So I bit him really hard for as long as I could. And then he went to the head of Lisa's bed. And I rolled over to see if he was doing anything over there. And he kind of adjusted the sides of his shorts and then left the room.

"Q. All right.

"Were you aware of him coming into the room?

"A. Not until I had been woken up.

"Q. Did you act like you were awake the first time?

". . . .

"THE WITNESS: No I didn't.

"BY MR. DUSEK:

"Q: Why not?

"A. 'Cause I was too freaked out about it. I didn't understand what was going on.

"Q. And describe for us as best you can what he was doing.

"A. He just had a couple of fingers in my mouth, like rubbing my teeth or massaging them. And that's it.

"Q. Are you able to – did you say anything to him?

"A. No.

"Q. Did you acknowledge at all that you were awake at that point?

"A. Only when I bit him.

"Q. And that was the second time?

"A. Yes.

"Q. I'm just talking about the first time first. Did he say anything while he was doing that?

"A. No.

"Q. Had he ever done that before to you?

"A. No.

"Q. How long would say it lasted?

"A. Maybe a minute or two.

"Q. If one hand he was using to put fingers in your mouth, do you know what he was doing with his other hand?

"A. No.

"Q. What was he wearing?

"A. He was wearing dark-colored little running shorts.

"Q. How do you know?

"A. 'Cause when I rolled over and looked at him when he was at Lisa's bedside, I just remember the shorts he was wearing.

"Q. When he left you the first time, you went where?

"A. Over to where my sister was sleeping.

"Q. How far away was she?

"A. Right next to me. But he went on the other side of her from where I was.

"Q. What did he do over there?

"A. I have no idea.

"Q. Why not?

"A. Either I don't remember or he didn't do anything. I don't know why.

"Q. Okay.

"From there where did he go?

"A. He came back to where I was sleeping and did the same thing. That's when I bit him.

"Q. How did he get his hand in your mouth?

"A. I don't know.

"Q. Were you still – well, were you acting like you were awake of asleep at that point?

"A. Still sleeping.

"Q. Did you say anything to him when he did it the second time?

"A. No.

". . . .

"Q. When his fingers were inside your mouth the second time, what was he doing with them?

"A. Oh, the same thing as before. Just rubbing my teeth and massaging my teeth.

"Q. Do you know how he was positioned while he was doing that? By that I mean standing, sitting, kneeling, that type of thing.

"A. I think he was kneeling. I'm not sure, though.

"Q. Did you say anything to him on the second occasion?

"A. No.

"Q. What did you do?

"I bit him.

"Q. Why?

"A. Because I was scared.

"Q. How hard?

"A. As hard as I could.

"Q. Then what did he do?

"A. He stopped.

"Q. Did you say anything to him?

"A. No.

"Q. Did he say anything to you?

"A. No.

"Q. From there he went where?

"A. To Lisa's bedside.

"Q. She was actually in the bed?

"A. Yeah.

"Q. And you and your sister were sleeping on the floor.

"A. Yes." (57 RT 10011-10015.)

There is nothing either in the report reviewed by Judge Mudd or in the testimony presented to the jury that betokens the use of "force or violence" within the meaning required by Penal Code section 190.3, factor (b). If in inserting his fingers into Jenny N.'s mouth the first time, Westerfield met with any resistance to overcome, it was the resistance simply of a sleeping child's inanimation and inertia. In the second instance, it was, according to Jenny N., feigned inanimation and inertia, unknown to Westerfield. In any event, what impressed itself on Jenny's memory was not the "force" of insertion, but the rubbing of her teeth. Indeed, this "rubbing" and "massaging" of her teeth suggested that the penetration into her mouth was no deeper than passing her lips to the surface of her teeth, rather than past the teeth and deeper into her mouth. This required even less "force" to overcome even from the dead weight of a sleeping body – a weight that was not likely to be concentrated in the lips in any event.

Finally, the manner in which the incident stopped in Jenny's account is also significant for purposes of assessing whether there was any "force or violence." Although Jenny said she bit him as hard as she could and as long as she could, she did not describe him pulling back his hand swiftly and violently as one whose fingers had been so mordantly assailed would naturally do. She did not describe him crying out in pain, as one might expect. And there was no evidence that anyone woke up from an ensuing commotion. In short, she did not bite hard, and

at the first sign of her being awake, he retreated with no show of force, violence, or menace.

There was, then, insufficient evidence to support a finding that the battery, as described by Jenny N. constituted a factor (b) crime in which "force or violence" was used or threatened. Thus, if Judge Mudd's error did not arise from his misinterpretation of the statute, his ruling was still an abuse of discretion under even the correct definition of "force or violence", which no rational trier of fact could have found on this record Moreover, to the extent that this state law error brought before the jury factor (b) aggravation that had no "common-sense core of meaning", Judge Mudd's error in submitting the Jenny N. incident to the jury constituted a violation of due process. (*Tuilaepa* v. *California*, *supra*, 512 U.S. 967, 975-977.) The question is prejudice.

C.

If the Jenny N. incident could be rationally assessed only as a crime of "force or violence" pertinent to the question of death *vel non*, then there would be little prejudice since it would be unlikely that a jury with common sense would find much that was significant in it. But in this case, the significance of the incident was really intended to lie in the claim that the incident represented a lewd act on a child under fourteen. Even the most analytical attitude might find it difficult to maintain its discipline against the logical and experiential fallacy of drawing a direct line of development from rubbing a seven-year-old child's teeth in 1992 to murdering a seven-year-old child in 2002. It is the element of molestation that weighed heavily in the balance, which molestation was intended by the prosecution to weigh heavily in the balance, and which molestation would have contributed heavily to the jury's verdict for death.

This would be so even though molestation alone, without "force or violence", is not relevant as a factor in aggravation militating toward a death verdict. Indeed, once the jurors were told, as they were in the question-begging

formulation of CALJIC No. 8.87, was that Jenny N. incident, if it occurred, constituted both a battery and a lewd act with a child under fourteen involving "the express or implied use of force or violence" (12 CT 2964), then they had their warrant to give all the weight that unreflective prejudice could give to the Jenny N. incident as a capital aggravator.

Of course the factor (a) evidence, i.e., the evidence surrounding the kidnap and the murder itself, with the addition of the victim-impact evidence was undoubtedly a strong and moving case in aggravation. But this was balanced nonetheless by a substantial case in mitigation. Mr. Westerfield's productive professional life as an engineer and inventor was well established by the evidence. He not only had the professional esteem of his colleagues, but also their friendship. The circle of his friendships also extended beyond his professional life, and he maintained very close ties with former friends and neighbors, such as the Millers, the Hills, and others, who attested to their love, respect, gratitude, and esteem for him. Then there were his relatives, with whom he had kept close ties over the years, and who attested to his help and his kindnesses toward them.

This is not, of course, to depreciate the horrendous facts of a crime in which a seven-year-old girl was taken from the security her house and murdered. This is not to discount the poignancy of the loss of so young a life and of the pain and grief to the family. But one must consider also that a significant element in mitigation in this case was that of lingering doubt as to guilt:

> " . . . . Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (*People* v. *Terry* (1964) 61 Cal.2nd 137, 146.)

The entomological evidence on which the defense of alibi was firmly rooted, and which was not inherently impeached, was still strong enough at this margin of residual doubt to cast a shadow on the penalty determination in this case, and at least make a juror pause over whether the aggravation surrounding the commission of the crime pertained to Mr. Westerfield or not.[151]

One must also consider that the case in mitigation is not required to balance out, as it were, the case in aggravation in order to forestall a death penalty. What is required of mitigation in that regard is to approach a ratio wherein, in the language of CALJIC No. 8.88, a death verdict is warranted only if each of the jurors are "persuaded that the aggravating circumstances are *so* substantial in comparison with the mitigating circumstances *that it warrants* death instead of life without parole." (12 CT 2975, emphasis added.) For if aggravation had merely to outweigh mitigation on a scale initially in equipoise, then, as this Court has noted, it would be virtually impossible for mitigation to achieve a sufficient mass to offset the defendant's having committed a murder, which the jury has already found beyond a reasonable doubt to be the case. (*People* v. *Brown* (1985) 40 Cal.3rd 512, 541, fn. 13, rev. on o.g., *sub nomine California* v. *Brown* (1987) 479 U.S. 538.) Considered in this light, the case in mitigation here, which included strong elements of lingering doubt, was sufficient to create that ratio by which one can reasonably deem the penalty question to have been a close one.

There is some indication in the record that one or more jurors indeed had difficulty with the penalty decision even with Jenny N.'s evidence before them. Just before lunch on September 16, the jurors returned a note stating: "We are unable to reach a unanimous verdict at this time and would like further guidance." (67 RT 10604.) They were released for lunch, but on their return, before the

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[151] In this regard, one cannot realistically ignore the effect of months of pounding publicity and intense public interest in this case that would have, after the guilt verdict, suffused the atmosphere with a pro-death sentiment that had to be felt even if one were religiously devoted to Padres' baseball. (See below, pp. 426-427.)

matter of the original note could be addressed, a second note came: "Subsequent to writing and sending our note this morning, we have decided we want more time to deliberate." (67 RT 10604) Ten minutes after this, the jurors announced that they had a verdict. (67 RT 10604.) Whatever the problem was, the first note made it clear at that point there was not, after a substantial amount of deliberation, a unanimous verdict for death.

Something in this case had to tip the scale in favor of death, – again, not a scale in equipoise, but one in which mitigation and aggravation were within the bounds of a certain ratio. The Jenny N. incident stood out as a discretely identifiable nexus of evidence and consideration – a separate counter, as it were, and the only factor (b) counter added to the scale for the prosecution. Indeed, the record shows that the Jenny N. incident was closely scrutinized by the jurors, who specifically asked that all the testimony of the witnesses brought in to prove the Jenny N. incident be re-read. (61 RT 10566; 40 CT 9918.) It cannot be shown beyond a reasonable doubt on this record that the erroneous admission of the Jenny N. incident was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XVII.
IF THE JENNY N. INCIDENT WAS ADMISSIBLE AS A FACTOR (B) CRIME, LABELING IT AS A "LEWD ACT WITH A CHILD UNDER FOURTEEN YEARS" WAS UNDULY PREJUDICIAL WITHOUT SERVING ANY PERTINENT, RELEVANT, OR MATERIAL FACTOR (B) PURPOSE

If this Court finds the evidence sufficient to have established the Jenny N. incident as a factor (b) crime, there is still the issue of labeling the crime not only as a "battery" but as "a lewd act with a child under fourteen years", as Judge Mudd did in his instruction to the jury in accord with CALJIC No. 8.87. (See above, p. 388, fn. 149.) For purposes of the factor (b) crime, the defense had requested instruction on the elements of battery, while the prosecution requested instruction on the elements of Penal Code section 288 as well. (59 RT 10386.) The defense not only opposed any instruction on 288, but argued that it should not even be mentioned as a factor (b) crime. Judge Mudd rejected this and announced that he would denominate the factor (b) crime in CALJIC No. 8.87 as both battery and as a lewd act on a child, and in light of that ruling, the defense requested that no instruction be given on the elements of either of the designated crimes. (59 RT 10411-10412; 60A RT 10446-10447.) In this case, the defense objection was well taken, and Judge Mudd abused his discretion in submitting the factor (b) crime to the jury as a lewd act with a child under fourteen years of age. [152]

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[152] The prosecution made no pretense of submitting the Jenny N. incident as a violation of subdivision (b) of section 288, which requires the use of "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another . . . ." (See above, p. 387, fn. 148.) Section 288(b) requires that the force or violence used be "substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*People* v. *Soto* (2011) 51 Cal.4th 229, 242, internal quotation marks omitted.) Here, it was plain that the rubbing of Jenny N.'s teeth was both the supposedly lewd act and the supposedly forcible act. Nonetheless, a violation of Section 288(a) can qualify as a factor (b) crime if it is attended by "force or violence" as properly understood in section

As noted above, the only relevant issue for factor (b) aggravation is the defendant's character or propensity for force and violence. (*People* v. *Stiteley* (2005) 35 Cal.4th 514, 564; see also *People* v. *Avena* (1996) 13 Cal.4th 394, 426; and *People* v. *Bunyard*, *supra*, 45 Cal.4th 836, 857.) The name of the crime is not the focus of this evidence; rather, "[t]he proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on his character, rather than on the labels to be assigned the past crimes . . . ." (*People* v. *Cain* (1995) 10 Cal.4th 1, 73; *People* v. *Bacon* (2010) 50 Cal.4th 1082, 1126.)

Thus if the label conferred on the factor (b) crime does not distract the jury from the true focus of the factor (b) evidence, then the denomination of the crime will be a matter of indifference. (See *People* v. *Collins* (2010) 49 Cal.4th 175, 219.) But in the instant case, where the issue of child pornography and sexual perversion was an explosive and inflammatory one, labeling the factor (b) crime as a lewd act on a child under fourteen could not be a matter of indifference at all, especially where the Jenny N. incident was not self-evidently a lewd act on a child under 14, even when her description of it is credited at face value. The question of the nature of the act became even more acute in light of the evidence showing that Jenny and her family continued to have social contact and relations with Westerfield – a state of affairs inconsistent with the claim of sexual victimization. In addition, and crucially, any force or violence attending the alleged molestation inhered in, and only in, the "rubbing" or "massaging" of Jenny's teeth, which is to say, in the battery. The molestation, in and of itself, had no factor (b) relevance apart from the battery. The overwhelming risk was that the jurors would thereby be misled, inflamed, and provoked to use the alleged molestation as character evidence beyond that allowed by factor (b), and Judge Mudd not only retained the discretion to prevent this (see *People* v. *Box* (2000) 23 Cal.4th 1153, 1201; see also

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190.3, factor (b). (See *People* v. *Raley* (1992) 2 Cal.4th 870, 908.)

People v. *Griffin* (2004) 33 Cal.4th 535, 587-588), it was an abuse of discretion not to do so.

Judge Mudd's abuse of discretion in denominating the factor (b) crime as "a lewd act with child under fourteen years" also violated the mandate of the Eighth and Fourteenth Amendments of the United States Constitution requiring that capital proceedings be attended by a heightened degree of reliability. (*Lankford* v. *Idaho* (1991) 500 U.S. 110, 125, fn. 21; *Zant* v. *Stephens* (1983) 462 U.S. 826, 874-879; *Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638.) There can be little doubt in general that factor (b) evidence is deemed by jurors to be an important element of the capital penalty determination (*People* v. *Cowan* (2010) 50 Cal.4th 401, 489), and there could be no doubt that in this case in particular, a jury would give decisive weight to a factor (b) crime consisting in what *the judge* had determined to be "a lewd act with a child under fourteen years."

Yet, as already stated, it was far from clear that there had been a violation of Penal Code section 288(a) even if Jenny's description of the event was credited. Moreover, there were considerable grounds for doubting that the event was as she described. The failure of her adamantine bite to produce so much as a whimper from Westerfield was odd. The continued cordiality over the years between the two families (57 RT 10047-10048) was not a reaction consistent the event as characterized at the penalty trial. And Jenny's ten-year silence, abetted by her mother's co-silence, broken only when the police approached Jenny, who could only remember vaguely that Westerfield had once "bothered" her, and whose memory had be coaxed and wheedled into something more substantial (57 RT 10017-10021), could hardly be explained by an accommodation syndrome involving only a single incident. (See *People* v. *Wells* (2004) 118 Cal.App.4th 179, 186 [describing testimony about Child Sexual Abuse Accommodation Syndrome].) A reasonable and rational assessment of Jenny N.'s testimony might well take into account whether the clarity of her memory had something more to do with the glare of frantic and frightening publicity than with a struggle to

articulate accurately a subliminal trauma, and even if this were taken into consideration, the evidence was still only at best marginally relevant as a factor (b) crime, if admissible at all.

But a reasonable and rational assessment of the event was severely and seriously forestalled by what amounted to the improper intervention of Judge Mudd, who effectively told the jurors that *if* anything happened, it was "a lewd act with a child under fourteen years." (12 CT 2964.) In this case, in regard to sexual perversion with children, after the presentation of shocking and inflammatory evidence of child pornography in the guilt phase of trial, the jurors would not long linger on the "if" when the instruction directed them to the *judge's* characterization of the evidence. Such apparently legal warrant could only give impetus to emotions straining for release. (See *People* v. *James* (2000) 81 Cal.App.4th 1343, 1353 [Even when evidence is properly screened, "there is still a danger that the presumption of innocence will melt under the heat of emotions aroused by the defendant's prior offenses."].) There is little doubt in general that factor (b) evidence is likely to be given considerable weight by jurors making a capital penalty decision (*People* v. *Cowan*, *supra*, 50 Cal.4th 401, 489), and there is no doubt that a jury would give even decisive weight in this case to a factor (b) crime consisting in what the judge had determined to be a child molestation. In violation of the federal constitution, the reliability of the penalty phase proceedings was considerably undermined by the court's abuse of discretion.

The discussion of prejudice in the previous argument applies also to this argument. The defense case in mitigation was substantial enough to offset what one might call the death ratio, wherein the evidence of aggravation is so substantial as to warrant death despite the mitigating evidence. (See above, pp. 400-403.) One might add in this argument that the undue and unfair boost the Jenny N. evidence, already problematic for the reasons set out above, received by the erroneous instruction, which characterized that evidence as a lewd act with a child under fourteen years, when indeed it was far from clear whether that was in

fact so, seriously undermined the defense case for residual doubt, or at least, had the appearance of seriously undermining that case. On this record, respondent cannot demonstrate beyond a reasonable doubt, that Judge Mudd's erroneous instruction to the jury did not contribute to the death verdict in this case. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XVIII.
IN LIGHT OF THE STATUTORY MANDATE OF EVIDENCE CODE SECTION 403, THIS COURT SHOULD RECONSIDER ITS RULE TO THE EFFECT THAT THE "FORCE OR VIOLENCE" ELEMENT OF A FACTOR (B) CRIME IS SOLELY A QUESTION OF LAW FOR THE COURT, AND NOT AT ALL A QUESTION OF FOUNDATIONAL FACT FOR THE JURY

CALJIC No. 8.87 is designed to satisfy the sua sponte obligation to instruct the jurors that, as a foundational or preliminary fact predicating consideration of factor (b) evidence, the criminal activity in question must be proved beyond a reasonable doubt. (*People* v. *Yeoman* (2003) 31 Cal.4th 93, 132; *People* v. *Robertson* (1982) 33 Cal.3rd 21, 54 see also *People* v. *Stanworth* (1969) 71 Cal.2nd 820, 840; *People* v. *Polk* (1965) 63 Cal.2d 443, 450–451.) The instruction submits to the jury the question of whether or not the act proffered as a factor (b) crime occurred; the instruction does not submit, as a preliminary or foundational fact, whether the crime involved the use or threatened use of force or violence. (See above, p. 388, fn. 149.)

Thus, here the jurors were told that "[e]vidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: battery and/or lewd act with a child under fourteen years, which involved the express or implied use of force or violence." (12 CT 2964.) This Court has repeatedly upheld the instruction in this regard on the ground that the character of the factor (b) crime as involving force or violence is a question of law to be determined by the trial judge and not a question of fact to be determined by the jury. (*People* v. *Loker* (2008) 44 Cal.4th 691, 745; *People* v. *Gray* (2005) 37 Cal.4th 168, 235-236; *People* v. *Nakahara* (2003) 30 Cal.4th 705, 720.) One would suggest here, however, that this characterization of the question is inaccurate, and that the instruction's question-begging quality in relation to the issue of "force or violence" cannot be maintained in light of Evidence Code section 403.

Evidence Code section 403 provides in relevant part as follows:

> "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the preliminary fact, when:
>
> "(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;
>
> ". . . .
>
> "(4) The proffered evidence is a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.
>
> "(c) If the court admits the proffered evidence under this section, the court:
>
> "(1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.
>
> "(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists."

CALJIC No. 8.87 clearly reflects Section 403(a)(4). But (a)(4), in the "so conducted" language would seem also to include whether the factor (b) crime was committed with the express or implied use of force or violence. In any event, because the relevance of factor (b) evidence lies in not simply whether or not the act is criminal, but whether it also involves the use or implied use of force or violence (*People* v. *Boyd* (1985) 38 Cal.3rd 762, 773-774), the factor (b) "force or violence" issue falls clearly within the terms of Evidence Code section 403(a)(1). It follows from this that the question of "force or violence" should have been

submitted to the jurors pursuant to Evidence Code section 403(c)(1). Although the sua sponte requirement is not part of the statute, but a supervisory rule issued by this Court, once instruction on preliminary facts is given, such instruction should conform to the rules of evidence, which in general apply to the conduct of a capital penalty trial. (*People* v. *Richardson* (2008) 43 Cal.4th 959, 1033.)

One cannot meet this argument by merely repeating that the character of a factor (b) crime is a "legal question". Undoubtedly, in some sense, a sufficiency of evidence assessment is a legal question, but it is a legal question that depends strongly, primarily, and substantially on a resolution of historical fact, which is why the abuse-of-discretion standard for a *judge's* preliminary review of factor (b) evidence inheres in a sufficiency-of-evidence standard. (*People* v. *Whisenhunt* (2008) 44 Cal.4th 174, 225.) Moreover, the "legal" element in this legal question resides *not* in some highly elaborated or abstract concept of law, but in the common, everyday English meaning of the terms "force" and "violence," which terms are *supposed* to be self-evident to a jury and accessible to their understanding. (*People* v. *Dunkle* (2005) 36 Cal.4th 861, 922.) That one may denominate the question at all as "legal" depends from the common equivocation that arises when a trier-of-*fact* draws a kind of legal conclusion by applying a legally significant definition to a set of relevant historical facts. (See *People* v. *Figueroa* (1986) 41 Cal.3rd 714, 730 ["There is no categorical distinction between 'legal' and 'factual' questions, for in every case application of a legal principle turns on the presence of particular facts."].) Indeed, in the case of other-crimes evidence used pursuant to Evidence Code section 1101(b) at a guilt trial, Section 403 applies to the determination not only of the historical occurrence of the other crime, but also to the determination of whether its manner of commission establishes relevance under 1101(b). (*People* v. *Simon* (1986) 184 Cal.App.3rd 125, 129-132.) There is no principled reason for treating factor (b) evidence differently.

CALJIC No. 8.87 is, then, in fact misconceived and contrary to the mandate of the Evidence Code. Here, therefore, even if the Jenny N. incident was admissible after a preliminary review of the evidence by Judge Mudd, and regardless whether the evidence was characterized as a battery, or a lewd act with a child under fourteen years, or as both, the instruction was erroneous for not submitting to the jurors the issue of "force or violence" as a foundational fact. If that had been properly done, there was indeed a reasonable possibility that with the jurors' attention having been properly focused on the central factual issue of Jenny N.'s testimony, the evidence would have been rendered completely null for the failure of that foundational fact. The possibility cannot be dispelled, and the verdict of death must there be reversed for instructional error. (*People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XIX.
THE PORNOGRAPHY EVIDENCE ADMITTED AT THE GUILT PHASE, COMBINED WITH THE PROSECUTOR'S MISSTATEMENT OF THE LAW REGARDING THIS EVIDENCE AT THE PENALTY PHASE, CONSTITUTED PREJUDICIAL PENALTY PHASE ERROR

If one needs even to proceed beyond the Jenny N. issues in this case, the next logical step is to address the evidence that had disposed the jurors to construe the Jenny N. incident in the most prejudicial light: the pornography evidence adduced in the guilt phase of trial. This evidence re-raises the joinder issue, by which some of the child pornography was admitted – the cartoons and especially the videos that showed realistic sexual assaults on supposedly minor girls. (See above, pp. 226-227, 257-258.) This also implicates the vast amount of pornography that entered through the "door" that Mr. Feldman had allegedly "opened" in his cross-examination of James Watkins. (See above, pp. 262 *et seq.*) This includes the vast amount of adult pornography, the additional child, or purported child pornography, the photograph of Danielle L., and the testimony that bestiality photographs were recovered from the computers in the house. It is the contention here that the guilt phase errors in admitting all of this evidence, compounded in the penalty phase by the additional error of Mr. Dusek's misstatement of the law in his closing argument, were prejudicial and require at least the reversal of the penalty judgment in this case.

It will be recalled that in discussing the issue of discretionary severance, specifically, in addressing the problem of conjoining non-capital and capital charges, the scope of Penal Code section 190.3, factor (a) was discussed and analyzed. (See above, pp. 250-251.) There it was demonstrated that even if the pornographic evidence admitted due to the joinder of count 3 was also admissible under the looser joinder standards for Evidence Code section 1101(b) as other-crimes evidence relevant to the murder and kidnapping charges, this relevance did

not render the pornography part of "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." (Pen. Code, § 190.3, factor (a).) For evidence of other crimes or bad acts often come into the case as incident separate and discrete from the charged crime, relevant only in that they provide the basis for a logical inference of such factors as motive, intent, modus operandi, etc. They do not, as here, usually come in as an inextricable part of the historical facts or res gestae of the charged crime or crimes. (See *People* v. *Sanders* (1896) 114 Cal. 216, 230; and *People* v. *Ellis* (1922) 188 Cal. 682, 690.) This generality is true of the pornographic evidence at issue in this case. Thus, even *if* the pornographic evidence was admissible under Evidence Code section 1101(b), or *if* joinder was proper and a rejection of severance was within the trial court's discretion, or *if* doors to such evidence had been opened by some incautious cross-examination by defense counsel, the pornographic evidence was *still* not properly before the penalty phase jurors as a factor (a) aggravator.

It was also established in the discussion of joinder and severance that the pornography did not fall within the terms of factor (b). (See above, pp. 251-252.) The adult pornography and cartoons were simply not "criminal activity." (*People* v. *Phillips* (1985) 41 Cal.3rd 29, 71-72; *People* v. *Bunyard* (2009) 45 Cal.4th 836, 857.) But even where the jury found the images to constitute child pornography, the possession of such, even when the portrayals imitate violent acts, is not, and was not here, a crime that "involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, factor (b).)

This background of potential for jury confusion, which should have been considered more carefully pretrial in Judge Mudd's analysis of joinder and severance, came closer to actuality at the penalty phase through Mr. Dusek's closing argument where he claimed expressly that the pornography evidence was indeed relevant under factor (a), and impliedly claimed that it was also relevant

under factor (b). First, in regard, to factor (a), he made the following misstatement of law:

> "The factors. I think there are eleven up there. They are labeled 'a' through 'k'. [(See above, p. 250, fn. 115).] Those are the factors the court just got through reading to you and the factors that are available to you to consider, aggravating and mitigating factors. Good things and bad things about him, his behavior, his crime, his background.
>
> "The first one is fairly simple. It's basically the crime that we were here before talking about. The circumstances of the crime for which the defendant was convicted and the existence of any special circumstances. *The pornographic charge*, the kidnapping charge and the murder charge, the crimes that we are here that you folks returned the guilty verdicts on.
>
> "MR. FELDMAN: Objection, misstates the law, 311.
>
> "THE COURT: Overruled.
>
> "You may proceed.
>
> "MR. DUSEK: That is what we're talking about here today under factor 'a'." (60 RT 10500-10501, emphasis added.)

The italicized portion of the argument clearly misrepresents the scope of factor (a) in this case, and represents a form of prosecutorial misconduct for which Mr. Feldman's timely objection should have been sustained. (*People* v. *Cash* (2002) 28 Cal.4th 703, 734-735.)

In regard to factor (b), Mr. Dusek began by stating that this factor applied to the Jenny N. incident (60 RT 10501), which was true, assuming that the Jenny N. incident was in fact admissible as factor (b) evidence at all. Later, however, after a disquisition on each of the 190.3 factors, Mr. Dusek returned to factor (b) to analyze it more closely. He recounted the evidence of the Jenny N. incident, urged that Jenny's testimony was credible, and asserted that the evidence showed

"factor 'b' beyond a reasonable doubt." (60 RT 10515-10516.) Then he discoursed on the significance of the incident for the penalty determination:

> "And here is what that act means, how you work that in. This was the beginning stages of his fantasies, at least the beginning stages that we know about. We have young Jennie [*sic*] either at seven or five, the defense raised the question it could have been two years earlier. That's who she was. That's who he did this to.
>
> "His fantasies then continued, that we know about, with these books and these pictures and these images and the videos and the screens. And it concludes with Danielle. We have a history, a progression. That tells us what this means. That tells us what he likes, what he wants, what he gets, every single one. Also tells us something else. It also tells us that he did this crime. What he did to that child gives us that added confidence. The deed that he did, this crime, the lingering doubt that I suppose you'll hear about, he did that crime. He did this crime. He is not the saint he has been portrayed." (60 RT 10516.)

In this scheme, Mr. Dusek portrays the route from factor (b) with Jenny N. to factor (a) with Danielle Van Dam as passing over the bridge formed by the pornography, which was itself a hybrid of (a) and (b) and could therefore conjoin the two. But, again, the pornography was neither factor (a) nor (b), let alone a hybrid of the two. Mr. Dusek's second argument too was susceptible to a valid objection of misstatement of the law and misuse of the pornography evidence. That no objection was lodged for the second misstatement does not forfeit the claim here insofar as Judge Mudd's ruling on virtually the same objection to the first misstatement established the futility of any further objection. (*People* v. *Abaszadeh* (2003) 106 Cal.App.4th 642, 648; *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.)

Thus, the guilt phase errors in relation to the pornography evidence are here compounded and magnified by Mr. Dusek's exploiting the prejudicial potential of

the evidence with a misstatement of its legal relevance to the penalty decision. But if the route to the instant claim is through a finding that there was no error in the joinder of counts, nor any independent evidentiary error in the admission of any or all of the pornography evidence, the destination is still the same. The question of the prejudicial impact of this evidence on the penalty phase is still in play as the consequence of a new penalty phase error in Mr. Dusek's misstatement of the law and in Judge Mudd's refusal to sustain an objection to this misstatement.

In regard to prejudice, one cannot seriously maintain that the record here establishes beyond a reasonable doubt that the error, whether in the joinder, the admission of evidence, or in the prosecutor's misstatement of the law, was harmless beyond a reasonable doubt. As stated above, the defense case in mitigation was a substantial one. Yet how could any mitigation presented make the relatively short distance to a life imprisonment verdict against a headwind fed by videos of showing the brutal sexual assault on young girls; or against images that portrayed the same thing in cartoon form, which allowed for a crude and inflammatory exaggeration of the prurience, in some instances through captions cast in the most explicit terms; or, against the testimony that the pornography collection taken from the computers contained images of bestiality? How could the photograph showing Danielle L. *not* be taken as another factor (b) incident in effect? For even if the jury was not so absurd as to understand the clicking of a camera as the type of "force" the instruction was talking about, the emotional restraint required *not* to project this evidence as at least on the verge of a factor (b) crime would be rare in anyone of normal sensibilities? Finally, as Mr. Dusek himself brought home to the jurors in his argument, how could lingering or residual doubt *not* smothered and consumed by the sheer mass of this inflammatory and provocative evidence? Whether the errors in their penalty phase aspect are conceived only as state law error, or as a violation of the Eighth Amendment right to heightened reliability in a capital determinations (*Beck* v.

Alabama (1980) 447 U.S. 65, 637-638; see also *Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305), there is more than a reasonable possibility that the errors that placed the pornographic evidence before the jury as penalty phase aggravation contributed to the death verdict in this case. (*People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XX.
ERRONEOUSLY ADMITTED EVIDENCE OF THE STALKING INCIDENT AND OF SUSAN L.'S OPINION OF WESTERFIELD'S PROPENSITY TO BE "FORCEFUL" WHEN UNDER THE INFLUENCE OF ALCOHOL

In the seventh claim of this brief, it was demonstrated that the alleged stalking incident attested by Susan L., and her opinion as to Mr. Westerfield's propensity to be "forceful" when he was drinking, were erroneously admitted into evidence in violation of Evidence Code section 1101(a). (See above, pp. 293 *et seq.*) If this Courts rejects this as prejudicial guilt phase error, there was nonetheless no penalty phase relevance that would have justified the use of this evidence at the penalty phase, since the evidence was responsive to none of the factors listed in Penal Code section 190.3. In addition, whatever non-statutory relevance for this evidence might be tolerated under the federal constitution (see *People* v. *Musselwhite* (1998) 17 Cal.4th 1216, 1267-1268), its probative value was so low in this regard that its presence as a factor to consider at the penalty phase was violation of the Eighth Amendment's heightened reliability requirement for capital cases. (*Beck* v. *Alabama* (1980) 447 U.S. 65, 637-638; see also *Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.)

But Mr. Dusek at the penalty phase attempted to reform the evidence. Having claimed at the guilt phase that it was adduced only for the narrow purpose of impeaching the credibility of Susan L. (see above, at pp. 294-299), at the penalty phase, it was now rebuttal evidence to the defense evidence of mitigation:

> "Other family and friends. Susan L. and her daughter, Christina Gonzales. We heard from them I think yesterday. Obviously still had feelings for the defendant. And He had opened up their home – his home to Christina Gonzales and let her move in there for a few months. But again, how much is that worth? He's describing events, things that he did for them. And we have heard the opposite side back in the other part of the trial from Susan. We

> heard about how the defendant behaves when he has too much to drink, that he's forceful. We heard her describe the event after she broke up with him and had been out with some fellow and had come home and he gave her a little kiss and her encounter with the defendant." (60 RT 10509-10510.)

"We have heard the *opposite*" from Susan L.? What precisely is *opposite* in what we've heard from Susan L.? That if he had had a few drinks before Christina Gonzales appeared, he would have forcefully barred the door against her supplication for help? Or that his hospitality to her was somehow marred by a vaguely prurient interest in secretly monitoring Christina's activities? What it *does* mean is that the stalking incident and Westerfield's supposed character for force and violence were to be deemed factors in aggravation militating toward the imposition of a death penalty. The "rebuttal" value of this evidence was nil, does not reform its admissibility for penalty purposes, and its re-exploitation was penalty phase error.

In regard to prejudice, the jurors would naturally understand the evidence as purveying an affirmative factor in aggravation. Although the stalking incident, as described, did not rise to the level of a crime, it undoubtedly has the feel of one to lay sensibilities, and there is indeed a crime that is called "stalking."[153] Although the act as presented in the guilt phase cross-examination of Susan L., exhibited not a hint of force or violence, nonetheless in a case in which a salient feature of the kidnapping of Danielle Van Dam was the extraordinary surreptitiousness by which it was accomplished, and where the murder was clearly a crime of force and violence, a juror would undoubtedly see the stalking of Susan L. as at least containing an implied threat of force and violence.

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[153] Penal Code section 646.9(a) provides in relevant part: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking . . . ."

In regard to Susan L.'s opinion of Westerfield's character for force when he was drinking, the undue prejudice from this evidence in a case where the events leading up to the crime began in a bar is obvious. If the error in allowing this evidence was insufficiently prejudicial for reversal of the guilt judgment, it cannot be shown harmless beyond a reasonable doubt in regard to the penalty judgment. (*People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XXI.
THE COMBINED PREJUDICE OF ANY ONE OF THE ERRORS SET FORTH IN ARGUMENTS XVIII THROUGH XXII REQUIRE REVERSAL OF THE PENALTY JUDGMENT

Arguments **XVIII**, **XIX**, and **XX** related to the Jenny N. incident, claiming first that there was insufficient evidence that it qualified as a factor (b) crime (XVIII); secondly, that it was improper and unfair for the court to characterize the incident as a violation of Penal Code section 288; and thirdly, that CALJIC No. 8.87, in failing to submit the foundational requirement of "force or violence" to the jurors was inadequate. Arguments **XXI** re-raised as a penalty phase issue the improper joinder and the improper admission of pornography evidence as penalty phase errors, while **XXII** did the same for Susan L.'s guilt phase testimony regarding the stalking incident and her opinion as to Westerfield's character for force and violence when he was drinking.

Any one of these errors alone was prejudicial in a penalty trial in which there was a strong case for mitigation. The defense evidence, presented through numerous witnesses, showed that Westerfield had had a long and productive career as an engineer and inventor who had contributed to the welfare of others by developing medical devices to aid in rehabilitation from injuries; that he was esteemed for his professional qualities by business associates, who also had become close personal friends; and that he was further esteemed for his kindness and generosity as a friend and that he was loved and supported by his family. This was a case substantial enough to warrant the still serious term of life-imprisonment and forestall a death penalty, even in the face of the horrendous facts of the crime itself. The strength of the mitigation was augmented in this regard by a compelling case of residual doubt. For the entomological evidence presented by the defense had not been so conclusively rebutted in this case as to foreclose the effect of residual doubts as to whether Mr. Westerfield had even committed the crime for which the jury was asked to put him to death.

On this record, any combination of the errors set forth in the specified arguments were, *a fortiori*, prejudicial. In sheer quantity, that evidence overwhelmed; in its provocative and inflammatory quality, it consumed in the conflagration of feelings the strong mitigating force of the defense case. If this Court finds that the individual errors specified do not warrant reversal of the penalty judgment, then the combination of any one or more of them do, whether they combine as state-law error or as federal constitutional error. (*People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XXI.
ALLOWING VICTIM IMPACT EVIDENCE FROM DANIELLE'S TEACHERS EXCEEDED THE DUE PROCESS LIMITS ON SUCH EVIDENCE UNDER THE FACTS OF THIS CASE

As recounted in the penalty phase statement of facts, Ms. DeStefani and Ms. Putenney, Danielle's kindergarten and second-grade teacher, respectively, testified to Danielle's character and contributions, and to the effect of her murder on themselves and on Danielle's classmates. The defense, *in limine*, of the penalty phase of trial, had moved to limit the victim impact testimony only to immediate family members and to exclude the testimony of the teachers. (10 CT 2422-2433; 54A RT 9840, 9842.) Judge Mudd denied the motion. (54A RT 9843.) On this record, the motion was well taken.

So-called victim-impact evidence is deemed to be relevant and constitutional so long as it does not invite a "purely irrational response form the jury" (*People* v. *Garcia* (2011) 52 Cal.4th 706, 751, internal quotation marks omitted), and is not so unduly prejudicial as to amount to a denial of due process, and render the penalty trial fundamentally unfair. (*Ibid.*; see also *Payne* v. *Tennessee* (1991) 501 U.S. 808, 825.) This Court has certainly in the past rejected contentions that the victim impact evidence must be confined to a single witness, or only to witnesses who had witnessed the crime, or only to immediate family members. (*People* v. *Carrington* (2009) 47 Cal.4th 145, 196-197; *People* v. *McKinnon* (2011) 52 Cal.4th 610, 690.) This would be dispositive except for special considerations emanating from the specific circumstances of this case.

A capital trial involving the murder of a seven-year-old girl, even without any further specifying circumstance, carries victim-impact evidence within itself the very exemplar of how murder shuts off the promise of life. Each and every juror intuits immediately, without the need for further evidence, the compelling aggravation in this alone, and in this case one is hardly speculating to assert that

the attention of an entire community was fixed by this fact. When one adds the further circumstance that the victim was a middle-class young girl, living happily with her brothers and parents in a nice, safe neighborhood in San Diego, it is clear that the impact of victim impact evidence did not require much boosting in this case to be effective. Under the circumstances, the testimony of the teachers, who testified to their own trauma and that of the students, could only irrationally exploit feelings that would be extremely close to the surface in any event. The evidence in this case exceeded the due process limits on victim-impact testimony and should have been excluded. (See *State* v. *Muhammad* (N.J. 1996) 678 A. 2nd 164, 180 ["[A]bsent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness."].)

The victim impact evidence was a major portion of the prosecution's case in aggravation, and the testimony of Ms. DeStefani and Ms.Putteney was half of the victim-impact case. As stated in previous arguments, the defense case in mitigation was substantial and sufficient to bring the weighing process within that ratio that would warrant a life verdict. If the trial court had properly excluded the testimony of Danielle's teachers, there was a reasonable possibility that there would have been a life verdict, and the judgment of death must be reversed. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XXII.
THE FAILURE TO SEQUESTER THE JURY REQUIRES AT LEAST A REVERSAL OF THE PENALTY JUDGMENT

In the fourth argument of this brief, it was contended that jury sequestration should have been ordered toward the end of the evidentiary portion of the guilt phase of trial, and certainly no later than the jury deliberations for that phase. A detailed review of the publicity contemporaneous with the trial, and the various events and intrusions of external factors into the courtroom process and into the courtroom itself were traced in detail. (See above, pp. 192-222.) Against a standard of review requiring only a showing that the possibility of a fundamentally unfair trial was substantially likely (*Sheppard* v. *Maxwell* (1966) 384 U.S. 333, 362), error was, in appellant's view, established. But, as the argument went, even under an abuse-of-discretion standard, Judge Mudd improperly abdicated his obligation by submitting the issues of sequestration to the jurors to choose. (See *People* v. *Sandoval* (2007) 41 Cal.4th 825, 847-848; see also *In re James R.* (2007) 153 Cal.app.4th 413, 434-435.) The intruding events did not, however, stop with the guilt phase of trial, and *if* it is necessary to continue the narrative into the penalty phase, then one finds at least either that the failure to sequester at the guilt phase had prejudice reaching into the penalty phase, or that the failure to sequester at the penalty phase was an independent error.

The guilt phase verdicts were announced in open court at 11:15 a.m. on August 21, 2002. (53 RT 9816-9817.) The streets around the courthouse were crowded with expectant onlookers who let out a cheer that was televised along with the news of the verdicts. (54A RT 9836-9837.)[154] The Police Chief gave a

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[154] Mr. Clarke, a participant both in the O.J. Simpson case and in the Westerfield case, assured everyone that the public demonstration was worse when the verdict in Simpson was announced. (53 RT 9838.) One may take Mr. Clarke's word for it, but also point out that Mr. Simpson was acquitted and not on his way to a penalty trial.

news conference in violation of the gag order. (54A RT 9837.) Finally, in knowing violation of the rules of court forbidding photographs of any spectator, the pool photographer snapped a photograph of the Van Dams in the courtroom just as the verdict was announced, capturing in the frame other spectators who were most definitely not public figures connected at all with the case. That photograph was on the front page of the newspaper by noon. The photographer was barred from the courtroom for balance of the trial. (54A RT 9837; 56 RT 9916-9927.)

After the verdicts, the jurors were released for a week, to return on Wednesday, August 28 for the beginning of the penalty phase. (53 RT 9823.) On that day, the jurors heard the victim impact evidence and the testimony of Jenny N. (See 57 RT 1007.) In the releasing admonition that day, Judge Mudd noted that this evening would be "a couch potato's dream." The Padres were playing at 5 and the Charger game started at 6. (57 RT 10079-10080.) This was of course not idle sports camaraderie with the jurors, but part of Judge Mudd's self-policing regimen designed to have the jurors insulate themselves from trial publicity by anodyne sports events on TV.

As it turns out, however, during half-time of the Chargers' game, the station cut to news about the Westerfield case, reporting on the allegations of "child molestation" at the penalty phase that day (58 RT 10102) – a particularly noxious public intrusion on the trial process since whether one could characterize the Jenny N. incident as a child molestation was not clear cut, and the characterization of that event was crucial to the penalty determination in this case. Nonetheless, despite this gaping breach in the self-policing rampart, Judge Mudd denied the next morning Mr. Feldman's renewed request to sequester the jurors. Judge Mudd reasoned that the jurors in any event had heard Jenny N.'s testimony *in* the courtroom and therefore knew the actual evidence. (58 RT 10102.) But, Judge Mudd did give the returning jurors a rather mild admonition, minimizing the problem and prescribing even more sports:

> "Just because it was a good night for couch potatoes didn't mean it was a good night for San Diego sport franchises unfortunately. Those of you that watched the football game during halftime were exposed to some television coverage relative to the trial. I'm assuming you just looked another way or tried to see how the Padres were doing. Tonight the Aztecs start the season, so maybe we better hope at the collegiate level." (58 RT 10102.)

The next event reached back to an incident that arose in the guilt phase and that was mentioned only briefly in the previous argument on sequestration. This refers to a telephone message to Mr. Feldman's office from a Timothy Baker, who had also left a message with Judge Mudd. This was during guilt phase deliberations. It was a second-hand report that Juror 12, at work, had announced that he would not believe anything Mr. Feldman said because 12 did not like Feldman. Baker had left the phone number of a co-worker of 12 as a direct source for this information. (47A RT 9731-9733.) Judge Mudd was not going to pull Number 12 aside based on hearsay, but declared that the parties were free to investigate. Judge Mudd himself had his hands full with his own internal investigations in this case. (47A RT 9736-9737.)

On Tuesday September 3, the guilt trial, Mr. Feldman announced that the week before they had in fact called Timothy Baker's reference, and found out from him that Juror Number 12 had been essentially "tight-lipped" and had said nothing, although 12 was being harassed by other employees on the job. Mr. Feldman's information should then have solved the problem, except that Juror 12 in fact found out that inquiries were being made and, later in the day on September 3, sent in a note to ask why. (59 RT 10265-10267, 10435-10436; 40 CT 9916.) The next day, Juror 12 was called in and Judge Mudd assured him that reports had to be substantiated whether or not they were true. Judge Mudd had authorized each side to look into a rumor regarding Number 12, and someone from Mr.

Feldman's office pursued it. At this point, Judge Mudd told Juror 12, there was nothing in Juror 12's conduct that concerned the court. Juror 12 in turn assured the judge that there was nothing in Mr. Feldman's conduct that concerned Juror 12 and that he would not be affected in his impartiality between the parties. (60A RT 10445-104459.) When Number 12 left, Mr. Feldman, based partly on this incident, made another motion to sequester the jurors, which Judge Mudd denied. (60A RT 10463.)[155]

One might comment here that although it was established that Juror 12 had not committed misconduct, it was also established that he was still feeling harassed at work, as 12 had indicated during the guilt phase when he in fact requested that he and his fellow jurors be sequestered. Further, the attempt to give the Juror 12 a plausible pretext for not going to work on Fridays when there was no court, did not work for the entire week off between the guilt and penalty phase of trials. In addition, it should be noted that while there was no reason to believe that Mr. Baker, who had actually given his name to both Mr. Feldman and Judge Mudd, was a malicious caller, there were bound to be incidents in a case like this of such mistaken and malicious reports regarding jurors, and this one resulted in the uncomfortable possibility that investigating an alleged animus against Mr. Feldman, a real animus was created. Sequestration would have reduced, if not completely prevented this sort of occurrence.

The penalty phase occurrences are indeed fewer, and if in the court below a sort of fatigue set in about making a record of all of them, the penalty phase was in any event significantly shorter than the guilt phase. But the events and occurrences warranting sequestration were, as seen in the previous argument on the subject, cumulative. The force of all the guilt phase events, from the

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[155] The motion was also based on a problem reported by Juror Number 6, who had an altercation with someone harassing him. (60A RT 10460-10462.) However, this seemed to be a purely personal matter, having nothing to do with the Westerfield case or with Juror 6's service on that case.

spectators wearing their buttons in the courtroom, to Damon Van Dam's threats to pressure the court with publicity, to the stalking incidents, to Juror 12's own request to be sequestered, -- all enveloped in a steady stream of publicity, whose intensity would spike as the case emitted another one of its abundant pieces of sensational news – all of this flowed into the latest occurrence, feeding an extrajudicial atmosphere whose intensity never abated.

This was the atmosphere the jurors were breathing from even before the beginning of trial and for the substantial amount of time during trial when free from court supervision. In the remaining twenty-seven days from August 21, when the guilt verdict was announced, through September 16, when the death verdict was entered, there were only seven actual court days. The penalty trial began on August 28. (14 CT 3506.) There was a full court day on Thursday, August 29 (14 CT 3508), but no court for the jurors again until Tuesday, September 3. (14 CT 3510.) The case was submitted to the jury at the end of the day on Wednesday September 4. (14 CT 3513.) There was a full day of deliberations on Thursday, September 5 (14 CT 3514) and again on Monday, September 9. Because of the illness of Juror Number 8, as well as the usual three-day weekend, the jurors were at large in the community from Tuesday, September 10 and did not return until Monday, September 16 (14 CT 3517-3519), and it was on noon of that day that a death verdict was returned. (14 CT 3519.)

This was a large extent of time to be immersed in the community intensity surrounding this case, especially during deliberations. (See *People* v. *Santamaria* (1991) 229 Cal.App.3rd 269, 278-273.) There was here at least a substantial likelihood that the jurors could not maintain their impartiality in regard to penalty (*Sheppard* v. *Maxwell*, *supra*, 384 U.S. 333, 362), if it is at all possible to conclude that they could in regard to guilt. The penalty judgment in the instant case must be reversed.

XXIII.
THE ERRONEOUS DENIAL OF A CHALLENGE FOR CAUSE TO VENIREMAN 19 REQUIRES REVERSAL OF THE PENALTY JUDGMENT

In the third issue raised in this brief, it was contended that the denial of the challenge for cause to Venireman Number 19 resulted in prejudice in that the defense had no remedy for the improper retention of Juror Number 4. (See above, pp. 158 *et seq.*) But another juror with whom Mr. Boyce expressed dissatisfaction after the exhaustion of peremptory challenges, was Juror Number 2. (9 RT 3106.) Insofar as the record establishes Juror Number 2 as having been incompetent to sit for the penalty trial, the error in denying the challenge for cause to Juror Number 19 requires at least reversal of the penalty judgment. (See *People* v. *Tate* (2010) 49 Cal.4th 635, 666-667; see above, p. 159, fn. 96.)

Under both state and federal law, a juror must be removed for cause when his views on the death penalty would prevent or substantially impair the performance of his duty as a juror. (*People* v. *Booker* (2011) 51 Cal.4th 141, 158; *Wainwright* v. *Witt* (1985) 469 U.S. 412, 424; *Witherspoon* v. *Illinois* (1968) 391 U.S. 510, 522, fn. 21.) This indeed was 2's state of mind in favor of the death penalty as was apparent from the record.

Juror 2 was a strong supporter of the death penalty, and when asked on the questionnaire what his feelings about it were, he wrote, "A life for a life." (15 CT 3639.) He was of course questioned about this in voir dire by Mr. Boyce:

> "Q. On the death penalty, you stated that you favor the death penalty; is that correct?
>
> "A. Yes, I do.
>
> "Q. And you stated that you believe in a life for a life?

"A. Yes, I do. Well, yes if you – in a way that if there's absolutely no doubt that that person took that life, yes, I do believe a life for a life.

"Q. Well, sir, if we reach a penalty phase in this case, that means that Mr. Westerfield will have been found guilty of murder, of taking a life, in other words?

"A. Right.

"Q. So based on your beliefs, then would you automatically impose the death penalty at a penalty phase?

"A. No.

"Q. Can you explain?

"A. It has to be – to me, I have to hear all the evidence, and it has to be proven beyond a reasonable doubt that the defendant actually did it. If not, you know, if – circumstantial evidence is kind of tough for me to have somebody get the death penalty.

"Q. But we're already going to be past that stage if we get to a penalty phase.

"A. Right. I have to hear everything first. I just can't say right now which way I would go.

"Q. And I know it's a difficult question.

"A. Right.

"Q. Because, like the judge said, we're putting the cart before the horse. But what we're asking you is that, assume that you've already found Mr. Westerfield guilty, you've already considered all the evidence and you have found him guilty beyond a reasonable doubt, and now we are in a penalty phase.

"A. Oh, okay.

"Q. Okay? Based upon your belief that a life for a life, you would automatically impose the death penalty then, would you?

"A. Yes.

"Q. And you're pretty strong about that belief, too, aren't you?

"A. Well, I do believe – I think a life is precious, you know.

"Q. How long have you held that belief, do you think?

"A. It's hard to say. Actually all my adult life.

"Q. And so – and you've thought about it quite a bit, I assume?

"A. Well, I don't think about it every day, no, but I mean – yeah, I've thought a lot and I probably still think about it now. It would be a hard decision to make and –

"Q. But if Mr. Dusek stood up here in five minutes, he's not going to change your opinion, is he?

"A. He might. I can't tell.

"Q. But as you sit here your opinion is a life for a life, is that right?

"A. Oh, yes, yes. The bottom line is yes." (7 RT 2561-2563.)

Mr. Dusek did change 2's mind about the adequacy of circumstantial evidence. (7 RT 2564-2565.) 2 stated that he would listen to mitigating evidence at the penalty phase "if it's evidence." Mr. Dusek assured him:

"Q. Well, if it comes from here it will be evidence. It will be your job to decide, is it worthwhile, do I believe it, how much weight do I give it.

"A. Right.

"Q. Is that something you can do?

"A. Sure.

"Q. Is that something you're willing to do before you make up your mind or are you going to make up your mind first and then listen tot he evidence.

"A. I'll listen to it first." (7 RT 2566.)

Mr. Boyce issued the challenge for cause based on Juror 2's views on the death penalty. The Court denied the challenge, noting that on the questionnaire Juror 2 checked off "No" to the questions about automatic imposition of the death penalty, and that the "life for life" answer came in response to only one question. (8 RT 2567; see 15 CT 3639, 3642-3644.)

It did not come in response to only one question. Mr. Boyce asked several clear, untendentious questions and the answers were all the same: if Juror 2 was satisfied beyond a reasonable doubt that the defendant was guilty of the crime, he would vote "automatically" for the death penalty. Mr. Dusek's rehabilitation established that Juror 2 would "listen" to mitigating evidence before making a decision, but never elicited a clear avowal that Juror 2 would vote to impose life without parole if warranted by the evidence. In short, the record does not show that Juror 2 was *not* "substantially impaired" by his views in favor of the death penalty in his ability to discharge his functions as a juror.

Again, Juror 2 was one of the jurors Mr. Boyce indicated he would have removed if given additional peremptory challenges. Thus, if prejudice for the denial of the challenge for cause to Venireman 19 can only be shown by the retention of an incompetent juror (*People* v. *Yeoman* (2003) 31 Cal.4th 93, 114), and if Juror Number 4 did not establish this in the previous argument, then Juror Number 2 does for the instant argument. Since Number 2's incompetence went only to the penalty trial, the penalty judgment must be reversed.

XXIV.
THE FAILURE TO GRANT ADDITIONAL PEREMPTORY CHALLENGES WAS AT LEAST PREJUDICIAL FOR THE PENALTY PHASE, IN THAT THERE WAS AT LEAST HERE A SUBSTANTIAL LIKELIHOOD THAT THE JURY WAS NOT IMPARTIAL ON THE QUESTION OF PENALTY

In the second argument of this brief, it was contended that the extraordinary play of media and public attention on this case warranted a grant of additional peremptory challenges, as requested by the defense both at the outset and toward the close of jury selection. (See above, pp. 117 *et seq.*) It was further argued that although issues surrounding the grant or denial of peremptory challenges usually did not implicate federal constitutional rights, in this specific case circumstances rendered the issue one of due process and fundamental fairness. (*Ibid.*) The course of pretrial publicity, and an exhaustive analysis of the actual jury selection, including a detailed examination of the questionnaires, was related with an eye to the establishment of the error under the appropriate standard of review: was Mr. Westerfield "reasonably likely to receive an unfair trial before a partial jury" in the absence of additional peremptory challenges. (*People* v. *Bonin* (1988) 46 Cal.3rd 659, 679.)

But the analysis above focused primarily on jury impartiality in relation to the guilt phase concerns. *If* this Court feels that that the showing was deficient, there still remains the question whether the likelihood of a partial jury increases when measured against the narrower question of penalty for a murder already determined to be the responsibility of Mr. Westerfield. The contention then is that the additional peremptory challenges were warranted on this record to assure a fair and impartial penalty jury.

The legal framework for whether or not this is a federal constitutional error requires only a slight adjustment. When the capital penalty determination is, as it is in California, left to a jury, the Sixth and Fourteenth Amendments also

guarantee the right to have that jury fair and impartial (*Morgan* v. *Illinois* (1992) 504 U.S. 719, 726; *Gray* v. *Mississippi* (1987) 481 U.S. 648, 658), and in this regard a juror's attitude toward the death penalty itself, independent of the juror's competence to determine guilt is a significant consideration. (See *Witherspoon* v. *Illinois* (1968) 391 U.S. 510, 518.) As with a guilt jury, a defendant has a constitutional right to a for-cause challenge to a juror unable to maintain his impartiality toward the imposition of the penalty; and also as with a guilt jury, the ordinary status of the peremptory challenge is not that of a federal constitutional right. (*Ross* v. *Oklahoma* (1988) 487 U.S. 81, 85.) But, as established in the guilt phase argument, extraordinary circumstances affecting the specific case can, and did in this case, transform the peremptory challenge into a federal constitutional issue. (See *Rivera* v. *Illinois* (2009) 129 S.Ct. 1446, 1454 ("[T]he mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution."].) Under these principles, one may re-examine the record of jury selection with a primary focus on penalty phase issues.

As noted in the first penalty phase claim raised in this brief (see above, p. 402), the standard for finding death *vel non* is that formulated in CALJIC No. 8.88's admonishment that a death verdict is warranted only if each of the jurors are "persuaded that the aggravating circumstances are *so* substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (12 CT 2975, emphasis added.) Thus, the penalty phase required jurors able to maintain the rational standard of CALJIC No. 8.88 against the strong and inherent tendency of an actual guilty verdict to close the jurors' ears and minds to evidence in mitigation of penalty. (See *People* v. *Brown* (1985) 40 Cal.3rd 512, 541, fn. 13, rev. on o.g., *sub nomine California* v. *Brown* (1987) 479 U.S. 538.) This problem was acute in the instant case because the murder was that of a child who had been kidnapped by a fifty-year-old man who had possessed not merely child pornography, but child pornography depicting rape and sexual assault.

Thus, Venireman 19, who spent 36-year career with the San Diego Unified School District, and who could not "abide" crimes against children (18 CT 4383), had expressed no special bias regarding murder (18 CT 4387), and when asked to identify what type of crimes were appropriate for consideration of the death penalty, she simply listed "murder." But it defies belief that there was not indeed a special consideration in her mind for the murder of a child or that her ability to fend off at least the more irrational tendencies of her bias after hearing all the evidence in the case was impaired.

There were of course those veniremen like Number 43, who declared her imagined delight "to see his face when he is proven guilty." (20 CT 4888.) Her obvious prejudices flowed naturally into her penalty declaration that "murderers" should die "slow and painfully" (20 CT 4891), and probably into her more restrained expression that "murder, especially when the victim is a child" was the type of crime appropriate for a death penalty." (20 CT 4892.) Similarly number 24, who had many qualifications as to her ability to be impartial in determining guilt or innocence, declared when asked about her attitude toward life without parole: "Why? So they can live & write book, get law degree & another trial on a technical issue? If he's dead, he can never hurt another child." (18 CT 4507.)

If one may recall Number 98, who considered herself eminently fair, though she detested child pornography, and who wondered whether she could return a not-guilty verdict in the face of what she perceived to be public pressure against it in this case , nonetheless declared herself fair and impartial in regard to the death penalty, and identified "horrible, beyond human comprehension crimes" as the types appropriate for death consideration. (24 CT 6002.) Was there any mystery as to what *specific* crime she had in mind when she wrote this? (See 24 CT 5998 ["I think it [child pornography] is disgusting and sick."])

Of the 261 veniremen who filled out the questionnaire, thirty-four, or about 13 percent, singled out either crimes against children or sexual assault in general as the types of crimes appropriate for the death penalty, and it was not always

clear that the declarant meant this in conjunction with murder.[156] One of these made it to the petit jury as Juror Number 8. (15 CT 3602, 3616; 40 CT 9855.) Again, it must be emphasized that, as before, one is attempting to assess the likelihood of latent biases. These are not easily extirpated by challenges for cause, and the real existence of the problem of latent bias is certainly a substantial reason for the persistence and endurance of the system of peremptory challenges, which, though not constitutionally compelled, are nonetheless universal in the jurisdictions of the United States. (See *Holland* v. *Illinois* (1990) 493 U.S. 474, 482.)

The likelihood of obtaining a fair and impartial penalty jury under the surrounding public circumstances of this case was beset by serious difficulties. By the time jury selection occurred, not only had the case captured public attention in a highly emotional manner, but also the child pornography count had been ruled to be properly joined. The case would be not only about the murder of a seven-year-old girl, but also about her molestation and rape at the hands of her murderer, although the question by itself was at least verging on the speculative if it was not completely over the line.

In this atmosphere, if it came to a penalty determination, could the jurors rationally distinguish between the possession of child pornography that depicted rape and the actual crime of rape? Could they critically evaluate the testimony of Jenny N., so as to give effect to a reasonable doubt that she accurately remembered an incident she reported once vaguely to her mother when she was seven-years-old, but about which she never said anything again for over ten years, all the while associating with Mr. Westerfield and his family? Could they

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[156] **15 CT** 3616; **17 CT** 4097, 4292; **18 CT** 4507, 4532, 4556; **20 CT** 4892, 4940; **21 CT** 5084, 5181; **22 CT** 5398, 5518; **23 CT** 5590, 5712; **24 CT** 5930, 5954; **25 CT** 6194; **26 CT** 6362; **27 CT** 6794; **28 CT** 6890; **29 CT** 7153, 7178, 7202, 7298; **30 CT** 7440; 32 CT 7897, 7945; **34 CT** 8378, 8450; **35 CT** 8642, 8786; **36 CT** 8930, 9098; **39 CT** 9772.

critically evaluate whether in fact it was a crime involving violence or threat of violence (Pen. Code, § 190.3(b)) – a matter that is at the very least highly debatable, if not dispositively clear in the negative? Could they entertain questions of lingering doubt as to Mr. Westerfield's guilt in light of the substantial and largely unimpeached defense of alibi? Could they do all this and keep an open mind to entertain the substantial and significant evidence in mitigation, which, if it could not balance out the murder of Danielle Van Dam, could prevent it from so heavily weighing down the metaphorical scale of punishment as to foreclose a verdict for life imprisonment? The answer is no, and if the entire judgment is not reversible for failure to grant additional peremptory challenges, the penalty judgment is.

XXV.
THE DEATH PENALTY IN CALIFORNIA IS UNCONSTITUTIONAL IN THAT IT CAN BE SHOWN BY STATISTICAL ANALYSIS TO HAVE FAILED IN NARROWING THE CLASS OF DEATH-ELIGIBLE OFFENDERS

A death penalty scheme that fails to adequately narrow the class of persons eligible for the death penalty and creates a substantial and constitutionally unacceptable likelihood that the death penalty will be imposed in a capricious and arbitrary fashion. (*Furman* v. *Georgia* (1972) 408 U.S. 238, 313, White, J., concurring [death penalty statute must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not"].)[157] A capital murder statute must take into account the Eighth Amendment principles that death is different (*California* v. *Ramos* (1983) 463 U.S. 992, 998-99), and that the death penalty must be reserved for those killings which society views as the most grievous affronts to humanity. (*Zant* v. *Stephens* (1983) 462 U.S. 862, 877 n.15; see also *Adamson* v. *Ricketts* (9th Cir. 1988) 856 F.2d 1011, 1025 [blanket eligibility for death sentence may violate the Fifth and Fourteenth Amendment due process guarantees as well as Eighth Amendment].)

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[157] In *Furman* v. *Georgia* the Supreme Court, for the first time, invalidated a state's entire death penalty scheme because it violated the Eighth Amendment. Because each of the justices in the majority wrote his own opinion, the scope of, and rationale for, the decision was not determined by the case itself. Justices Stewart and White concurred on the narrowest ground, arguing that the death penalty was unconstitutional because a handful of murderers were arbitrarily singled out for death from the much larger class of murderers who were death-eligible. (*Id.* at 309-310 (Stewart, J., concurring) and at 311-13, White, J., concurring.) In *Gregg* v. *Georgia* (1976) 428 U.S. 153, the plurality understood the Stewart and White view to be the "holding" of *Furman* (*id.* at 188-189), and in *Maynard* v. *Cartwright* (1988) 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372, a unanimous Court cited to the opinions of Stewart and White as embodying the *Furman* holding. (*Id.* at 362)

In the instant case, the defense filed a motion claiming that the California scheme for death penalty was unconstitutional for having failed to meet these Eighth Amendment requirements (11 CT 2566) -- a motion that Judge Mudd denied. (66 RT 10595.) Indeed, this Court has rejected these contentions multiple times. (*People* v. *Kipp* (2001) 26 Cal.4th 1100, 1137; *People* v. *Coddington* (2000) 23 Cal.4th 529, 656.) However, this Court has never addressed the issue in a direct appeal in light of an actual statistical analysis of whether the California scheme had in actual fact adequately narrowed the category of death-eligible murderers and has prevented the arbitrary and capricious imposition of the death penalty. Here, just such an analysis to the court, and this was before Judge Mudd in the form of a declaration from Steven Schatz, a law professor from the University of San Francisco, who had undertaken this study. (66 RT 10595; 12 CT 2885-2886.)

According to Professor Schatz, in California during the 5-year period from 1988-92 approximately 9.6% of convicted first degree murderers were sentenced to death. Since the percentage from an earlier five year periods from 1980 to 1984, was almost identical (9.5%), Schatz assumed that the percentage has been stable since the enactment of the 1978 death penalty law. (12 CT 2887-2889.)

At the time of the murder in the instant case, there thirty-two special circumstances. (12 CT 2887.) Based on a survey of both capital and non-capital murder convictions, Professor Schatz found that 87.4% of first-degree murderers were death-eligible under the California scheme and could have been prosecuted capitally if other decisions extraneous to the existence of a special circumstance *vel non* had not injected itself. (12 CT 2903.) Further, using the 9.6% figure for the actual imposition of death sentences, "California's death sentence ratio is approximately 11.0%" (12 CT 2903), which is to say that of those who were factually or factually and legally eligible for death, only 11% received a death sentence.

As a general matter, one would not claim that 87.4 % represents much of a narrowing of eligibility for anything, and one can only conclude that the special

circumstance regimen of the California system does not "genuinely narrow". (See *Wade* v. *Calderon* (9th Cir. 1994) 29 F.3rd 1312, 1319.) When one considers further that of those that were death-eligible, only 11% were sentenced to death, then the evidence at least tends in the direction of a conclusion that the entire capital penalty scheme is arbitrary. This conclusion becomes inescapable when one considers that in *Furman* v. *Georgia* (1972) 408 U.S. 238, the Supreme Court found inadequate under the Eighth Amendment sentencing schemes in which 15-20% of those convicted of capital murder actually received the death penalty. (See *id.*, at p. 309, fn. 10, Stewart, J. conc.; *id.*, at p. 386, fn. 11, Burger, C.J., dissenting; and *id.*, at 435-436, fn. 19, Powell, J. dissenting.) Therefore a scheme in which the discrepancy suggests an even greater risk of arbitrariness than those at issue in *Furman* cannot be upheld. The California death penalty law is unconstitutional under the Eighth Amendment.

XXVI.
CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL IN FAILING TO REQUIRE A FINDING THAT DEATH IS APPROPRIATE BEYOND A REASONABLE DOUBT

As repeated throughout this brief, the Eighth Amendment requires a heightened standard of reliability at both guilt and penalty phases. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) Proof beyond a reasonable doubt is of course required for the guilt determination (*In re Winship* (1970) 397 U.S. 358); proof beyond a reasonable doubt is constitutionally required to establish a special circumstance (see *Ring* v. *Arizona* (2002) 536 U.S. 584, 588-589; see also *Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 489); and proof beyond a reasonable doubt should be required for the determination of death as the penalty under California law for special circumstance murder. Without this standard of certainty, it cannot be said that the law has minimized the risk of a "wholly arbitrary and capricious" imposition of the death penalty. (*Gregg* v. *Georgia* (1976) 428 U.S. 153, 189.)

The argument against this is, of course, that the penalty decision is inherently normative and moral, and thus not susceptible to the test of proof beyond a reasonable doubt. (*People* v. *Rodriguez* (1986) 42 Cal.3rd 730, 779; *People* v. *Sanchez* (1995) 12 Cal.4th 1, 81.) However, guilt determinations, too, sometimes rest on the jury's applying normative and moral categories, such as when it must be determined whether murder may be mitigated to voluntary manslaughter. (See *People* v. *Czahara* (1988) 203 Cal.App.3rd 1468, 1478 [Whether provocation is sufficient to reduce murder to manslaughter is a determination dependent on "community norms."].) "Beyond a reasonable doubt" represents not only a level of proof but also a level of certainty, which applies to decisions of various natures. Requiring the jurors to be certain, beyond a reasonable doubt that death is appropriate is necessary to ensure the reliability

mandated by the Eighth Amendment. Failure to provide such an instruction invalidates the current death penalty statute and requires reversal of the death judgment in this case. (*Sullivan* v. *Louisiana* (1993) 508 U.S. 275, 281-282; .)

XXVII.
THE FEDERAL CONSTITUTION REQUIRES JURY UNANIMITY AS TO AGGRAVATING FACTORS

It has been held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown* v. *Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge* v. *California* (1998) 524 U.S. 721, 732; see also *Johnson* v. *Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments require, *a fortiori*, jury unanimity on those factors warranting the death penalty. (But see *People* v. *Taylor* (1990) 52 Cal.3rd 719, 749; *People* v. *Bolin* (1998) 18 Cal. 4th 297, 335-336.) In the instant case, the jurors were specifically instructed that "[i]t is not required that all jurors agree on any matter offered in mitigation or aggravation." (12 CT 2954.) This instruction requires reversal of the death verdict. (*Sullivan* v. *Louisiana* (1993) 508 U.S. at 278-281.) In any event, given the substantial case in mitigation here, it cannot be shown beyond a reasonable doubt that the error in admonishing against unanimity was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XXVIII.
THE LACK OF INTERCASE PROPORTIONALITY REVIEW RENDERS THE CALIFORNIA DEATH PENALTY LAW UNCONSTITUTIONAL

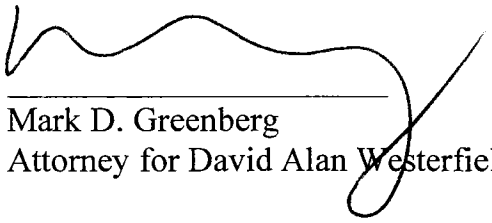
The lack of proportionality review in California's death penalty scheme violates the Eighth Amendment in allowing the imposition of the death penalty in an arbitrary and capricious manner. (*Gregg* v. *Georgia*, (1976) 428 U.S. 153.) In civil cases, uniformity and reliability of monetary awards by juries are subject to modification by the judge in light of experience with compensatory awards in general. (*Consorti* v. *Armstrong World Industries, Inc.* (2nd Cir. 1995) 72 F.3rd 1003, 1009, vacated o.g. (1996) 518 U.S. 1031.) The same considerations of uniformity and fairness should apply even more strongly in his context where much more than monetary compensation is at stake, and where the Sixth, Eighth and Fourteenth Amendments bar any arbitrariness or unreliability in the determination. (But see *People* v. *Clark* (1993) 5 Cal.4th 950, 1039.) The failure of the California law to require such a review vitiates the death judgment in this case.

CONCLUSION

This case presents the extraordinary spectacle of a capital trial proceeding on a no-time-waiver basis in a highly charged atmosphere of public passion and media frenzy. Nonetheless, the orderly and systematic determination of the truth under the rules of evidence, in a calm courtroom, removed from the pressure of external passions, all in the fulfillment of the constitutional mandate of a fundamentally fair trial, would have been possible here, but still did not occur due to significant legal missteps and errors. For any or all of the reasons adduced as legal error in the guilt phase, Mr. Westerfield's convictions for kidnapping and capital murder must be reversed; for any or all of the reasons adduced as penalty phase error, at least the death judgment imposed on Mr. Westerfield must be reversed.

Dated: December 27, 2011

Respectfully submitted,



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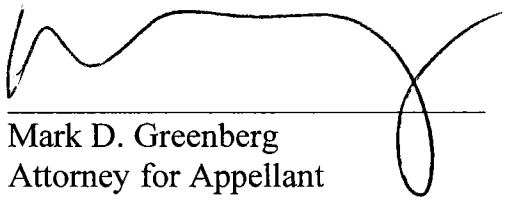
CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 147,741 words, which exceed the limit of 102,000 words as set by California Rules of Court, Rule 8.630. However, this brief is proffered for filing pursuant to the permission of this Court, granted on October 26, 2011, to file a brief in excess of the limits set by the Rules of Court.

Dated: December 27, 2011



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

APPELLANT'S OPENING BRIEF

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on December 28, 2011, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 28, 2011 at Oakland, California.

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