IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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



Appeal from the Judgment of the Superior Court

State of California, County of San Diego

The Hon. William D. Mudd, Judge

# APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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DEATH PENALTY

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# APPELLANT'S SUPPLEMENTAL OPENING BRIEF

## INTRODUCTION

As set forth in the motion requesting permission to file this supplemental opening brief, this brief contains matters that should have been raised in the opening brief in connection with issue I, but were not due to inadvertence and neglect, which this brief is intended to remedy.

## SUPPLEMENTAL ARGUMENT

### IA
### EVIDENCE CODE SECTION 351.1, AS A MATTER OF STATUTORY LAW, PROHIBITS THE USE OF POLYGRAPH EVIDENCE IN PROCEEDINGS FOR PURPOSES OF OBTAINING A SEARCH OR ARREST WARRANT

In his opening brief, appellant contended that the first search warrant, on which all subsequent warrants issued in this case depended, was not supported by probable cause. (AOB, pp. 60 *et seq.*) Appellant's attack on polygraph evidence adduced in support of the warrant was based on the constitutional rule that evidence must be sufficiently reliable before it can be deemed competent for Fourth Amendment purposes. (*Alabama* v. *White* (1990) 496 U.S. 325, 330.) Evidence Code section 351.1 was discussed only for its parallel significance to this question, but the claim was never made that section 351.1 directly, as a matter of statutory application, barred the use of polygraph evidence in warrant proceedings. That omission cannot be justified. Evidence Code section 351.1 does in fact so apply regardless of whether or not the evidence is barred as a matter of federal constitutional law.

Evidence Code section 351.1 defines the scope of its own application:

> "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."

One may take as one's starting point in the analysis of the language, respondent's own position since he has broached the question of 351.1 applicability himself in his respondent's brief.[1] There respondent argued:

> " . . . . By its terms, Evidence Code section 351.1 applies to criminal *proceedings*, not events that proceed [*sic*] criminal proceedings such as an investigation. In this case, at the time Judge Bashant considered Detective Allredge's affidavit and testimony in support of the telephonic search warrant in the early morning hours of February 5, 2002, there were no criminal proceedings pending against Westerfield. He faced no criminal charges, he had not been arrested. The criminal complaint was not filed until February 26, 2002. (1 CT 1-3.) Thus, no criminal proceedings had been instituted and Evidence Code section 351.1 did not operate to preclude the magistrate's consideration of the polygraph results. (See *People v. Superior Court (Laff)* 25 Cal.4th 703, 716 [search warrant often issued before any criminal proceeding commenced]; see also *People* v. *DePriest* (2007) 42 Cal.4th 1, 33 [right to counsel does not exist 'until the state initiates adversary judicial criminal proceedings such as by formal charge or indictment.']." (RB, pp. 40-41, emphasis in original.)

Thus, respondent assumes that "criminal proceedings" start only after the filing of a criminal charge. They do not include proceedings to determine whether or not there is probable cause to search for evidence that will lead to a criminal charge, or to arrest someone to be subjected to a criminal charge. Respondent does not clarify what the case would be if the probable cause proceedings for a search or arrest warrant occurred *after* the filing of a criminal charge; but there is no need to debate such a vexed question, because respondent's position is simply incorrect.

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[1] Appellant assumes that respondent will have an opportunity to answer the contentions raised in this brief. That is why they are presented in a supplemental opening brief, which removes any apparent unfairness in citing respondent's brief in this argument.

In *People* v. *Silverbrand* (1990) 220 Cal.App.3rd 1621, defendant was convicted of first-degree murder for the killing of a confidential informant, who had testified before a magistrate in support of the issuance of a search and arrest warrant against the subject, who then induced defendant to kill the informant for being a "snitch." (*Id.*, at p. 1624-1625.) The Court in *Silverbrand* upheld the conviction and the special circumstance finding under Penal Code section 190.2(a)(10), which enhances a murder that, *inter alia*, is committed "in retaliation for [the victim's] testimony in any criminal proceeding." The Court found that "criminal proceeding" in the special circumstance statute, included proceedings pursuant to Penal Code section 1526, which governs the procedures for obtaining a warrant. (*Id.* at p. 1624.)[2]

Penal Code section 1526 is of course the procedure used in the instant case for obtaining a warrant, and the question is: is the use of the term "criminal proceeding" for section 190.2(a)(10) is the same as its use in Evidence Code section 351.1? The beginning of an answer at least is rooted in the *Silverbrand* court's discussion of whether 1526 proceedings are "criminal proceedings" – a discussion that does not draw at all on any special definition expressed or required by the specific context or inherent requirements of Penal Code section 190.2(a)(10).

In determining that 1526 proceedings are "criminal proceedings," the Court first took note that section 1526 was found in title XII, Part 2 of the Penal Code. "The fact," noted the court "that the code commissioners gave title XII the caption, 'Of Special Proceedings of a Criminal Nature,' and this designation was approved by the Legislature in 1872 when it established the penal Code, indicates that a

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[2] Subdivision (a) of section 1526 provides that "[t]he magistrate, before issuing the warrant, may examine on oath the person seeking the warrant and any witnesses the person may produce, and shall take his or her affidavit or their affidavits in writing, and cause the affidavit or affidavits to be subscribed by the party or parties making them." Subdivision (b) allows the magistrate to take the affidavit orally in person or over the telephone under various conditions.

section 1526 hearing is a criminal proceeding by virtue of its placement under title XII." (*Silverbrand, id.*, at p. 1626.)

Next, the court noted that for section 1526 proceedings, the statute designated a magistrate to be the presiding officer. A magistrate, the court stated, is "[p]urely 'a creature of statute' [citation]" whose "duties . . . are solely criminal in nature. [Citations.]." (*Id.* at p. 1627.) Thus, "[t]hat the Legislature has designated a magistrate to preside over section 1526 hearings, coupled with their inclusion within title XII, signifies a legislative intent to make these hearings criminal proceedings." (*Ibid.*)

Finally, as the Court in *Silverbrand* went on to note, there was an absence in any of the codes of any special definition of the term "criminal proceeding." One must therefore consult general definitions of ordinary usage, beginning with the meaning of the word "proceeding." (*Ibid.*):

> " . . . . A proceeding is 'a particular step or series of steps adopted for doing or accomplishing something.' [Citation.] In legal terms, a proceeding is defined 'in a general sense, as the form and manner of conducting juridical business before a court or judicial officer;' and more particularly as 'an act which is done by the authority or direction of the court . . .; an act necessary to be done in order to obtain a given end.' [Citation.] 'Criminal proceeding' is defined in Ballantine's Law Dictionary (3d ed. 1969) page 291, as a 'proceeding in court in the prosecution of a person charged *or to be charged* with the commission of a crime, contemplating the conviction and punishment of the person charged or *to be charged.*'" (*Silverbrand, ibid.*, emphasis added; internal brackets omitted.)

It was then just a matter of applying these definitions to section 1526 proceedings:

> "A section 1526 hearing meets each of these definitions," and in the case itself, "the hearing at which the victim testified was a

> necessary step law enforcement was taking in court to obtain the authority to search for and seize evidence to assist in the prosecution of a person who was under investigation for the commission of a crime." (*Ibid.*)

As noted before the discussion in *Silverbrand* of the term "criminal proceeding" made no reference to section 190.1(a)(10) itself, nor to any special rationale that attaches to the purpose of section 190.2(a)(10) as a special circumstance. There is therefore nothing in *Silverbrand* that would allow for a distinction between the term as used in Penal Code section 190.2(a)(10) and as used in Evidence Code section 351.1. But is there something in section 351.1 itself that requires a restriction on the meaning of the term not applicable to section 190.2(a)(10)?

There is, in this regard, the assumption that the Evidence Code does not *generally* apply to warrant proceedings. Hearsay is allowed, and, one might argue, it is not likely that the Legislature intended section 351.1 to have a more comprehensive scope than the Evidence Code generally. The ban on polygraph evidence is much different than the protection of life, and one would assume that in a special circumstance for the enhanced punishment of murder the Legislature would intend the term "criminal proceeding" to be comprehensive to its utmost limit. If this is the argument for a different treatment of the term "criminal proceeding" in Evidence Code section 351.1, it is specious, beginning with the very assumption that the Evidence Code does not apply to 1526 proceedings.

Evidence Code section 300 provides as follows:

> "Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a court of appeal or superior court, including proceedings in such actions conducted by a referee, court commissioner, *or similar officer*, but does not apply in grand jury proceedings."

Is there any real doubt that a magistrate is not a "similar officer" to a referee or court commissioner? (See *People* v. *Silverbrand*, *supra*, at p. 1627.)

As for hearsay, Penal Code sections 1525, 1527 and 1528 establish a hearsay exception for the use of affidavits as to those matters of which the affiant has percipient knowledge. (*People* v. *Magana* (1979) 95 Cal.App.3rd 453, 460-461.)[3] As to those matters the affiant recites from other declarants or verbal sources, these are not admitted for the truth of the matter asserted, but only for the non-hearsay purpose of assessing whether the affiant has reasonable belief and probable cause. (*Id.*, at p. 461.)

Finally, if Penal Code section 190.2(a)(10) tends to comprehensiveness in the protection of life, it also tends to comprehensiveness in the protection of the integrity of the judicial process. Evidence Code section 351.1 clearly intends comprehensiveness in this same regard, precluding the use of unreliable evidence in *any* criminal proceeding, with "criminal proceeding" conceived broadly. One does not need to add "as broadly as possible," since the proceedings under Evidence Code section 1526 are clearly within the parameters of a statute that takes an absolute and uncompromising view of its own prohibition against such evidence. (*People* v. *McKinnon* (2011) 52 Cal.4th 610, 663 ["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."].)

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[3] Penal Code section 1525 provides that "[a] search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched." Section 1527 provides: "The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist." Section 1528(a) provides in relevant part: "If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he or she must issue a search warrant . . . ."

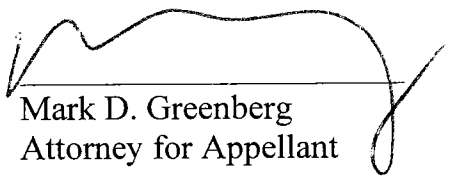
Respondent's interpretation of Evidence Code section 351.1 cannot be defended. The statutory prohibition of polygraph evidence embraces the "criminal proceedings" conducted under Penal Code section 1526. This means that polygraph evidence cannot be used in order to obtain a search or arrest warrant as a matter of California statutory law in addition to the prohibition emanating directly from the Fourth Amendment requirement of reliability.

## CONCLUSION

For the reasons stated in this brief, Evidence Code section 351.1 prohibits the use of polygraph evidence to obtain a warrant. For reasons stated in this brief and in the initial opening brief, the trial court erred in denying appellant's motion to suppress evidence of Fourth Amendment grounds.

Dated: February 20, 2013

Respectfully submitted,



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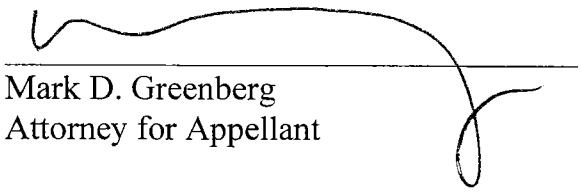
## CERTIFICATION OF WORD-COUNT

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 2186 words.

Dated: February 20, 2013



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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 SUPPLEMENTAL OPENING BRIEF

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

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