In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **DAVID ALAN WESTERFIELD,** **Appellant.**	**CAPITAL CASE** Case No. S112691

San Diego County Superior Court Case No. SCD 165805
The Honorable Michael D. Wellington, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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IA. EVIDENCE CODE SECTION 351.1 DOES NOT PROHIBIT THE USE OF POLYGRAPH TESTING RESULTS FOR THE INVESTIGATORY PURPOSE OF PROCURING A SEARCH WARRANT

In his supplemental opening brief, Westerfield contends that Evidence Code section 351.1 prohibited Judge Bashant's reliance on his failure of a polygraph test in issuing the first search warrant. The supplemental opening brief focuses on the meaning of "criminal proceeding" as used in Evidence Code section 351.1, and Westerfield argues that a search warrant proceeding is a "criminal proceeding" for purposes of the section's prohibition on the use of polygraph evidence. (Supplemental "Supp." AOB 2-8.) Contrary to Westerfield's assertion, a hearing to procure a search warrant serves an investigatory purpose, not an evidentiary one, and therefore is not a criminal proceeding within the meaning of Evidence Code section 351.1 Accordingly, as explained in Respondent's Brief (RB at 39-46), the court properly considered Westerfield's failing the polygraph test as one factor among many demonstrating probable cause to issue the search warrant.

Evidence Code section 351.1 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.

While Evidence Code section 351.1 does not define "criminal proceeding" as used therein, " '[t]he word "proceeding" necessarily has different meanings, according to the context and the subject to which it

relates. . . .' " (*The Recorder v. Commission on Judicial Performance* (1999) 72 Cal.App.4th 258, 270, citing *Burns v. Superior Court* (1903) 140 Cal.1, 5-6; *Zellerman v. Brown* (1991) 235 Cal.App.3d 1097, 1105.) "Narrowly, it means an action or remedy before a court. [Citations.] [P] "Broadly, it means 'All the steps or measures adopted in the prosecution or defense of an action.' " (*Zellerino v. Brown, supra,* 235 Cal.App.3d at p. 1105; Black's Law Dict. (6th ed. 1990) p. 1204 [proceeding generally defined as, "the form and manner of conducting juridical business before a court or judicial officer"].) Here, for purposes of Evidence Code section 351.1's prohibition against the use of polygraph evidence, the meaning of "criminal proceeding" must be construed in light of the rationale for that prohibition: polygraph testing results are unreliable for the evidentiary purpose of proving deception. But where, as here, polygraph results are being used for the investigatory purpose of procuring a search warrant, the rationale for prohibiting the results does not apply.[1] (See *People v. Lara* (1974) 12 Cal.3d 903, 909 ["But whatever may be the rule on the admissibility of the *results* of the polygraph test as evidence of *guilt* — a question we do not reconsider today — we are cited to no authority holding

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[1] As Respondent argued in the initial brief, Westerfield faced no criminal charges at the time of the search warrant proceeding and thus no criminal proceeding had been instituted for purposes of Evidence Code section 351.1. (RB at 40-41.) It is often the case that search warrant proceedings occur before a criminal proceeding commences. (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 716.) Westerfield challenges that Respondent did not clarify whether a search warrant proceeding following the initiation of a criminal charge would qualify as a criminal proceeding. (Supp. AOB at 3.) For clarification, the answer is no. The seeking of a search warrant, whether before or after the initiation of a criminal action, is always for an investigatory purpose, and thus would never be a criminal proceeding for purposes of Evidence Code section 351.1.

such collateral use of the test for investigative purposes to be improper."], original emphasis.)

Appellant's reliance on *People v. Silverbrand* (1990) 220 Cal.App.3d 1621 (*Silverbrand*) is misplaced. (Supp. AOB 4-7.) *Silverbrand* involves the meaning of "criminal proceeding" in a context completely unrelated to, and distinguishable from, the search warrant context at issue here. The court of appeal in *Silverbrand* was asked to determine whether a hearing before a magistrate for purposes of obtaining a search warrant was a "criminal proceeding" within the meaning of Penal Code section 190.2, subdivision (a)(10) — the special circumstance for the killing of a witness in retaliation for testimony in "any criminal proceeding." (*People v. Silverbrand, supra,* 220 Cal.App.3d at p. 1624.) The defendant contended he could not be charged with the special circumstance for killing an informant because the informant testified at a search warrant hearing, at a time when the defendant had not been arrested or charged with a crime, no criminal action had been initiated, and thus the hearing was not a "criminal proceeding." (*Id.* at p. 1626.) The *Silverbrand* court disagreed, concluding that a search warrant hearing was a criminal proceeding for purposes of the special circumstance. It reasoned that the hearings are governed by Penal Code section 1526[2], which falls under title XII of part 2 of the Penal Code — "Of Special Proceedings of a Criminal

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[2] Penal Code section 1526 provides in relevant part:

(a) The 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.

(b) In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath . . . .

Nature." (*Ibid.*) It further considered that section 1526 hearings are conducted before magistrates, and the duties of magistrates relate to proceedings that are solely criminal in nature. (*Id.* at p. 1627.) Finally, the court concluded that section 1526 hearings are consistent with the ordinary and legal definitions of "criminal proceeding" in that it is a necessary step law enforcement must take to obtain a search warrant to assist in the potential prosecution of a criminal suspect. (*Ibid.*)

It must be remembered that the context in which the *Silverbrand* court was defining "criminal proceeding" was whether a special circumstance for a killing in retaliation for a witness's testimony[3] applied where a non-peace officer witness provided testimony in support of a search warrant. As the court noted, if section 1526 hearings are not

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[3] Notably, the *Silverbrand* court only considered the retaliation aspect of the Penal Code section 190.2, subdivision (a)(10) special circumstance; it did not consider the alternative aspect of the special circumstance relating to the killing of a witness to a crime "for the purpose of preventing his or her testimony in any criminal or juvenile proceeding." (Pen. Code, § 190.2, subd. (a)(10).) It is conceivable that the prosecution elected to pursue only the retaliation aspect of the special circumstance as *Silverbrand* states: "The information alleged as a special circumstance that the victim was a witness to a crime who was intentionally killed in retaliation for his testimony in a previous criminal proceeding." (*People v. Silverbrand, supra,* 220 Cal.App.3d at p. 1625.) However, this Court has explained that the witness-killing special circumstance is also applicable if the defendant "believes the victim will be a witness in a criminal prosecution, whether or not such a proceeding is pending or about to be initiated." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1018, citing *People v. Weidert* (1985) 39 Cal.3d 836, 853-854.) Accordingly, although not discussed by the *Silvebrand* court, it would appear that this Court's authority makes clear that because the special circumstance does not require that a criminal proceeding be initiated, the defendant's conduct in *Silverbrand* would satisfy the prevention-of-testimony-in-a-future-proceeding aspect of the special circumstance even if a search warrant proceeding was not a criminal proceeding.

criminal proceedings for purposes of the special circumstance, then the killing of a non-peace officer witness at such a hearing would not be covered by any special circumstance. (*People v. Silverbrand, supra,* 220 Cal.App.3d at p. 1630.) It is difficult to imagine that the special circumstance was not intended to include such murders as they are entirely indistinguishable from other retaliatory killings of witnesses. To the contrary, the most comprehensive definition of "criminal proceeding" must be applied in the context of this special circumstance.

Here, in contrast, the meaning of "criminal proceeding" must be defined for purposes of whether the results of a polygraph test may be considered by a magistrate in issuing a search warrant. Evidence Code section 351.1 prohibits the use of polygraph tests for evidentiary purposes because they are unreliable. (*People v. McKinnon* (2011) 52 Cal.4th 610, 663.) The fear is that a factfinder may not be able to assess this unreliability and may place undue emphasis on its results. This may result in an improper pretrial ruling regarding the admissibility of evidence or an improper determination of guilt or penalty. That fear is not present at the time a search warrant is being issued as the same evidentiary concerns are not at stake. Respondent discusses this point in detail in Respondent's Brief at pages 41-43 and thus does not repeat the argument here.

Additionally, the plain language of Evidence Code section 351.1 indicates it was never intended to preclude the use of polygraph test results in a Penal Code section 1526 search warrant context. The section specifically permits use of polygraph evidence where the parties stipulate to its admission. A Penal Code section 1526 hearing would typically only involve a law enforcement officer, and/or his or her affidavit, and a magistrate. It is not an adversary hearing and there are no traditional "parties" to stipulate to the use of the polygraph information. Accordingly,

non-adversarial search warrant hearings are not encompassed by this section.

Moreover, as Westerfield recognizes (Supp. AOB at 6-7), other sections of the Evidence Code do not apply to search warrant proceedings for the very reason that the proceedings serve an investigatory purpose only. For instance, search warrant affidavits may contain hearsay (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239 [103 S.Ct. 2317; 76 L.Ed.2d 527]), which, like polygraph evidence, would be inadmissible at trial. Logically, hearsay statements in support of a search warrant are permitted because of the investigatory nature of the proceeding. To procure a search warrant, a law enforcement officer must establish probable cause such that a magistrate may assess the reasonableness of the officer's suspicion and determine whether there is sufficient basis to permit an intrusion into an individual's privacy. The showing required is that of probable cause, and the determination made by the court is the "practical, common-sense decision" as to whether the officer's suspicion is reasonable (*Id.* at p. 239), even if that reasonable suspicion ultimately is incorrect (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 184 [110 S. Ct. 2793; 111 L.Ed.2d 148].) Because it is not guilt that is being determined, but simply probable cause to believe that evidence of a crime will be found in a particular place, search warrants are procured ex parte without any adversarial testing, and may be based upon evidence otherwise inadmissible at trial, including hearsay statements. (See *Illinois v. Gates*, *supra*, 462 U.S. 213; *Illinois v. Rodriguez, supra,* 497 U.S. 177; *Draper v. U.S.* (1959) 358 U.S. 307 [79 S.Ct. 329; 3 L.Ed.2d 327].) The same reasoning should apply to the results of polygraph tests.

No language in Evidence Code section 351.1 precludes the use of polygraph tests for investigatory purposes. To the contrary, courts have long recognized their usefulness for precisely that purpose. (*People v.*

Lara, supra, 12 Cal.3d at p. 909; *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 320-321 [probation condition requiring defendant convicted of stalking to submit to polygraph testing valid as tests are valuable investigation tool]; *People v. Miller* (1989) 208 Cal.App.3d 1311, 1314-1315 [in case where defendant was convicted of a sex offense, court upheld a probation condition requiring he submit to polygraph testing to monitor compliance with different probation condition prohibiting contact with young females, court observed Evid. Code, § 351.1 "is an evidentiary rule and does not preclude the use of such tests for investigative purposes" and "polygraphs are commonly used and have value as an investigative tool"].)

In any event, as explained in Respondent's Brief at pages 45-46, and therefore only summarized here, there was more than sufficient probable cause to believe that Westerfield was involved in Danielle Van Dam's abduction independent of his failing performance on the polygraph examination. A reviewing court should resolve even a doubtful or marginal case in favor of the law's preference for warrants. (*People v. Weiss* (1999) 20 Cal.4th 1073, 1082-1083) The showing of probable cause in this case is far from doubtful or marginal. Even if Judge Bashant improperly considered the polygraph evidence, she properly considered the proximity of Westerfield's home to the Van Dam home (4 CT 760), the scent dog's interest in Westerfield's garage door (4 CT 750-751), the fact that Westerfield was so quick to offer to investigating officers that any scent the dog tracked could be explained by Danielle's having been in his home recently selling Girl Scout cookies (4 CT 752-753), Westerfield's overly cooperative behavior with law enforcement officers in suggesting they conduct a more thorough search of his home (4 CT 753), the encounter Westerfield had with Brenda Van Dam at Dad's and Westerfield's explanation of that encounter wherein he volunteered that Brenda told him

a babysitter was watching the children (4 CT 756), and most importantly Westerfield's description of the bizarre trip he took the weekend of Danielle's disappearance from his home to the Silver Strand in Coronado, to Glamis near the Arizona border, to Borrego Springs, back to the Silver Strand, and then back to his home in the span of two days. (4 CT 752, 756-758.) In light of these facts demonstrating probable cause to issue the search warrant, an opinion that Westerfield failed the polygraph examination paled in comparison.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court reject the contention raised in Westerfield's supplemental opening brief and affirm the judgment in its entirety.

Dated: March 22, 2013

Respectfully submitted,

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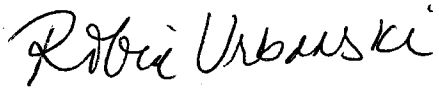

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 2,354 words.

Dated: March 22, 2013

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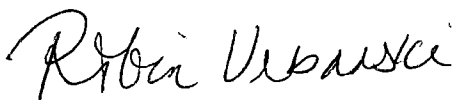

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 25, 2013, at San Diego, California.

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