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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. SCOTT LEE PETERSON, et al., Defendant.	Case No. SC55500 (Stan. Co. 1056770) NOTICE OF MOTION AND MOTION FOR NEW TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: March 16, 2005 TIME: 9:30 a.m. PLACE: Dept. 2M

TO: STANISLAUS COUNTY DISTRICT ATTORNEY; and

TO: CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on March 16, 2005, at the hour of 9:30 a.m., or as soon thereafter as counsel can be heard, Defendant Scott Lee Peterson, through counsel Mark J. Geragos, will move this Court for a new trial under Penal Code sections 1181 and 1182.

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This Motion will be based on this Notice, the attached memorandum of points and authorities, the pleadings and records on file herein, and upon such other and further argument as may be presented to the Court at the hearing of this matter.

Dated: February 25, 2005

Respectfully submitted,
GERAGOS & GERAGOS

By: _____
MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

MOTION

Defendant Scott Lee Peterson hereby moves for a new trial on the grounds of newly discovered evidence not disclosed by the prosecution in discovery (Pen. Code, § 1181, subds. (8) and (5); various legal errors (Pen. Code, § 1181, subd. (5)); misdirection of the jury on legal issues (Pen. Code, § 1181, subd. (5)); jury misconduct (Pen. Code, § 1181, subd. (3)); receipt by the jury of evidence out of court (Pen. Code, § 1181, subd. (2)); and insufficient evidence to support the jury's verdict of guilt (Pen. Code, § 1181, subds. (6) and (7)). The above grounds substantially denied defendant his right to an impartial jury and a fair trial.

Dated: February 25, 2005

Respectfully submitted,
GERAGOS & GERAGOS

By: _____
MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

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MEMORANDUM OF POINTS AND AUTHORITIES

I. THIS COURT HAS AUTHORITY TO ORDER A NEW TRIAL ON THE VARIOUS GROUNDS ALLEGED IN THIS MOTION.

Defendant Scott Lee Peterson moves for a new trial under Penal Code sections 1181 and 1182 on the grounds set forth in the motion above. More specifically, Mr. Peterson seeks a new trial for the following reasons:

- The defense has recently discovered new evidence, which the prosecution failed to disclose during discovery (Pen. Code, § 1181, subds. (8) and (5));
- The Court erroneously denied his motion for change of venue, before both the guilt and penalty phases of trial (Pen. Code, § 1181, subd. (5));
- The Court erred by removing the first two Jurors Number 5, and by refusing to declare a mistrial when it became clear that deliberations were being influenced by matters outside the evidence presented in court (Pen. Code, § 1181, subds. (2), (3) and (5);
- The jury conducted its own, unauthorized experiment with the boat and received evidence outside of court (Pen. Code, § 1181, subd. (2));
- The evidence was insufficient to support the jury's guilty verdict (Pen. Code, § 1181, subds. (6) and (7);
- The Court erred by instructing on second degree murder, and also erred by then not instructing on manslaughter (Pen. Code, § 1181, subd. (5));
- The Court erred by instructing on flight as consciousness of guilt (Pen. Code, § 1181, subd. (5));
- The Court erred by excluding the defense's videotaped experiment which showed the boat capsizing under conditions simulating the prosecution's theory of the crime (Pen. Code, § 1181, subd. (5));
- The Court erred by admitting the prosecution's wiretap evidence (Pen. Code, § 1181, subd. (5));

- The Court erred by admitting tape recordings of Mr. Peterson's irrelevant statements to Amber Frey (Pen. Code, § 1181, subd. (5));
- The Court erred by admitting the prosecution's "dog" evidence (Pen. Code, § 1181, subd. (5));
- The Court erred by admitting evidence of Mr. Peterson's purchase of adult television programming (Pen. Code, § 1181, subd. (5));
- The Court erred by denying Mr. Peterson's motion for a separate, non-death-qualified jury for the guilt phase.

In determining whether to grant the new trial motion, this Court is not limited to the above statutory grounds. The motion may be granted on grounds not stated in section 1181 if the Court concludes that any non-statutory grounds denied the defendant a fair and impartial trial. (See, e.g., *People v. Fosselman* (1983) 33 Cal.3d 572, 582; *People v. Sherrod* (1997) 59 C.A.4th 1168, 1174.) This power derives from the trial court's constitutional obligation to ensure a criminal defendant a fair trial. (See, e.g., *People v. Davis* (1973) 31 Cal.App.3d 106, 110.)

II. THE DEFENSE HAS RECENTLY DISCOVERED NEW EXCULPATORY EVIDENCE THAT THE PROSECUTION FAILED TO PROVIDE TO IT.

A. Background Facts.

Approximately six-eight weeks before the conclusion of the trial, the prosecution produced a written letter from an inmate at a correctional facility in Modesto who claimed to have information about Laci Peterson's disappearance. Defense attorney Pat Harris and Investigator Carl Jensen drove to Modesto and interviewed the inmate about a number of topics. During the course of the interview, the inmate mentioned several names which were written down by Mr. Jensen.

A few days later, one of the defense team members, Raffi Naljian, ran the names

through the discovery database. One of the names, hereafter referred to as AT, led to a small notation in the hundreds of pages of tip sheets provided by the Modesto Police. In the notation, AT was talking with his brother, hereafter referred to as ST, who was imprisoned at the California Rehabilitation Center facility commonly known as NORCO. The notation stated that in a phone call four weeks after Laci's disappearance, AT had told ST that Laci had walked up on Stephen Todd while he was burglarizing the house next door and that he had verbally threatened her.

Investigator Jensen contacted NORCO officials and was eventually put in touch with a Lt. Xavier Aponte. Lt. Aponte stated that the tape recorded conversation, although over a year and one half old, might still be retrievable because they had put in a new system prior to that phone call that preserved tapes over a longer time period. Since then, he began making efforts to secure the tape. He also told Investigator Jensen that he recalled the conversation and had even made a separate recording because he thought it might be important at a later date. Most importantly, he had contacted Modesto Police about it at the time and they had responded a short time later. Lt. Aponte did not recall whether they came to the facility and interviewed ST directly or whether the MPD did the interview over the phone. Either way, he knew that ST was interviewed sometime in early 2003. (See signed interview of Lt. Aponte, attached as Exhibit A.)

None of the interview notes of ST or any record of Modesto Police conversations with Lt. Aponte or any follow-up interviews the police may have done were ever provided to the defense.

Investigator Jensen also tracked down AT in Modesto and spoke with him. AT acknowledged that Stephen Todd was a close friend and that Todd had approached him on the evening of December 24, 2002, about helping him with a burglary that was already started. This directly contradicts Todd's prior statement that the burglary occurred on December 26th. When Jensen began to question AT about the prison phone calls or about Todd confronting Laci Peterson, he refused to talk further.

After further conversations with Lt. Aponte, it was determined that he could not locate the taped recordings. The defense then subpoenaed the phone call records from NORCO. Officials at NORCO were very cooperative but after a lengthy search and several delays, they too were unable to locate the tapes. As a result, Investigator Jensen traveled to NORCO and interviewed Lt. Aponte in person. After completing the interview, Jensen wrote a report which Lt. Aponte then read and initialed and dated to indicate his approval. (See attached Exhibit A; see also Declaration of Pat Harris, *post.*)

B. The Court Should Grant A New Trial Based Upon This Newly Discovered Evidence.

A criminal defendant may secure a new trial based upon newly discovered evidence. (Pen. Code Section 1181(8).) The motion must be supported by declarations or affidavits - it is not necessary to produce witnesses at the hearing. (*People v. Trujillo* (1977) 67 Cal.App.3d 547, 557.)

To entitle the defendant to a new trial on the ground of newly discovered evidence, the defendant must show the following:

(1) The evidence itself, not just its materiality, is newly discovered.

(2) The evidence is not cumulative to that already presented.

(3) If the evidence were presented at a retrial, a different result would be probable.

(4) The defendant could not have discovered the evidence earlier using reasonable diligence.

(5) These facts are shown by the best evidence that can be obtained under the circumstances. (*People v. Turner* (1994) 8 Cal.4th 137, 212.)

In this case, the newly discovered evidence meets all five factors. The evidence itself was newly discovered (at least to the defense) - the tip that led to its discovery did not come until the trial was almost completed and took several weeks to piece together. It

was not until after the trial was completed that the prison officials notified the defense that the tapes, which would have confirmed the conversations, were not available.

As for the second factor, the evidence is certainly not cumulative. There was nothing in the trial related to this evidence because the defense was unaware that it existed.

If the evidence were presented at a retrial, it is highly probable a different result would have occurred. One of the often repeated phrases during the trial was that their was no alternative theory as to what happened to Laci Peterson. With the newly discovered evidence, we now have a close friend of one of the burglars who not only rebuts the prosecution theory of when the burglary occurred but also places Laci in the area at the time of the burglary. Based upon Susan Medina's testimony that she left the house at 10:30 A.M. and that the burglary occurred after that, the recently uncovered evidence points to the conclusion that Laci was alive after Scott had left for the day. It also presents a plausible explanation as to who could have murdered Laci Peterson. Furthermore, it is not clear what else the police learned when interviewing ST and others - given the failure to turn over the evidence it may well be that there are additional exculpatory statements. This evidence, and any additional evidence that could be garnered from these leads, would present serious issues for a jury to consider on retrial and would likely result in a very different outcome especially when given the tenuous nature of the other evidence relied upon by the prosecution.

The fourth factor is also met. The defense could not have discovered the evidence using reasonable diligence because the evidence was being withheld by Modesto Police. According to Lt. Aponte, MPD officers investigated the phone call and interviewed ST but never turned over any of the evidence to the defense. MPD also may have gotten a copy of the phone call which was never turned over to the defense. Obviously, given these circumstances, the defense could not have discovered the evidence no matter how diligent its efforts.

Finally, these facts are shown by the best evidence that can be obtained under the circumstances. Had the police turned over the information shortly after obtaining it, which appears to be in early 2003, the defense could have gone to NORCO and almost certainly have obtained the actual tapes. Fortunately, Lt. Aponte felt the information was important enough that he committed most of it to memory and was able to tell the defense investigator what happened over a year later. Lt. Aponte was willing to be interviewed and to sign off on the interview notes. Given the fact that the defense was not notified of the interview at the time, this is the best evidence the defense can provide.

The Modesto Police Department's failure to turn over evidence that could have potentially exonerated Mr. Peterson, an all-too-familiar pattern during the trial, now mandates granting the defendant a new trial. This newly discovered evidence provides a powerful alternative theory as to what may have happened to Laci, especially if the defense is given the full story of what the police learned. Given the lack of evidence produced at the first trial, it is highly likely that the introduction of the new evidence would produce a different result. Thus, the court should admonish the prosecution to provide the defense all material related to the NORCO investigation and grant the defendant a new trial on the basis of recently discovered evidence.

DECLARATION OF PAT HARRIS

I, PAT HARRIS, declares as follows:

1. I am an attorney duly admitted to practice law in the State of California. I have personal knowledge of the following facts and if called as a witness I could and would competently testify thereto.

2. I am co-counsel representing Scott Lee Peterson in the criminal matter currently pending before this Court.

3. Near the completion of the prosecution's case against Scott Peterson, I received a report and a letter from the Stanislaus District Attorney's Investigators about an inmate in a Stanislaus County jail who allegedly had information about the abduction of Laci Peterson.

4. Defense investigator Carl Jensen and I traveled to Modesto and met with the inmate. He provided us with several names of people he felt would be of interest. When the names were run on the computer database, it led to the discovery of a tip buried in the hundreds of pages of discovery. This tip was a very brief notation of a phone call from the state prison in NORCO to Modesto Police alerting them to a potential lead in the Laci Peterson investigation.

5. I asked Mr. Jensen to follow-up on this lead and to arrange to get tapes of the phone call. When he was unable to procure the tapes, I sent Mr. Jensen to NORCO to deliver a subpoena for the tapes and to interview the prison officials. Mr. Jensen then provided the defense with an interview of Lt. Xavier Aponte from December 24, 2004 which is included in this motion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: February 25, 2005

Pat Harris

PAT HARRIS

TO: Mr. Mark Geragos
Attorney at Law

FR: Mr. Carl W. Jensen
Carl W. Jensen Investigations Inc., PI 24032

DT: 12/1/2004

RE: People v. Scott Lee Peterson
Case No. DA-1056770

TM: 1:31 PM

PERSON INTERVIEWED: Lt. Xavier Aponte
EMPLOYMENT: California Department of Corrections
POSITION: Lieutenant
ADDRESS: California Rehabilitation Center, P.O. Box 1841, Norco, California 92860
TELEPHONE: (951) 273-2967

RESULTS OF INTERVIEW

On 12/01/2004, at 9:40 AM, Lt. Xavier Aponte was interviewed in his office at ~~Norco~~ CALIFORNIA REHABILITATION CENTER ~~State Prison~~ regarding a recorded telephone conversation between inmate [redacted] and his brother [redacted] that occurred in the month of January 2003. Lt. Aponte was asked if the interview could be tape recorded and he said he preferred that it not be recorded. Lt. Aponte provided the following information.

Lt. Aponte has been employed by the State of California, Department of Corrections for 18 years. From April 26, 1999 until February 2003, he was assigned to the Investigations Unit at ~~Norco~~ CALIF REHAB. CENTER State Prison. On February 18, 2003 he had a job change to Watch Commander.

~~Norco~~ CALIFORNIA REHAB. CENTER State Prison records inmate telephone calls to outside parties via the Inmate Monitoring and Recording System, abbreviated IMARS. Inmates are allowed to place one (1) collect call per day for 15 minutes to outside parties. When the call is placed and connected a recording comes on at the beginning advising the party called that the call is from an inmate at ~~Norco State Rehabilitation Center~~ CALIFORNIA CORRECTIONAL FACILITY and that the call is monitored (recorded). The IMARS tapes use to be recycled within 30-60 days when the system was originally installed because the tapes were expensive and the budget limited. With an expanded budget, more tapes were purchased so that recordings could be kept one (1) year. Sometime after January 2003, the IMARS was changed to a new system whereby it became easier to retrieve recorded messages over a longer period of time. The old system was basically just a recording system and if the tape was recycled or lost then the recorded conversation was permanently lost. On the new system, it is possible to retrieve the recorded conversation from a company back East.

Lt. Aponte first became aware of [redacted] talking about Laci Peterson within a couple of weeks of her missing. Shawn was talking about Laci missing while he was out in his housing unit. A housing staff person left a message on Lt. Aponte's voice mail and he immediately called the Modesto Police Department Hotline. He called a second time

XLAponte
12-1-04
1720 HRS.

within the same week because he did not receive a call back from his first telephone call. Lt. Aponte said it was at least a week before anyone got back to him. Lt. Aponte said a detective called him back and arrangements were made for the detective to interview [redacted] Lt. Aponte believes that it was after he spoke to the detective that he listened to the recorded conversation between [redacted] and his brother [redacted] To the best of his recollection, [redacted] talked to [redacted] about Laci Peterson missing and [redacted] mentioned that Laci happened to walk up while Steve Todd was doing the burglary and Todd made some type of verbal threat to Laci.

Lt. Aponte did not recall the name of the detective, however when asked about the names Craig Grogan, Al Brocchini, Mark Smith and Owens, Lt. Aponte said Grogan sounded familiar. Lt. Aponte said he recalls the names [redacted] and Steve Todd from the recorded telephone conversation. The telephone call lasted about 3-4 minutes.

The detective from MPD came down to ~~Norco~~ CALIFORNIA Rehabilitation Center and interviewed [redacted] within the first couple of weeks from his first call to the MPD hotline. Lt. Aponte did not recall the date of the interview. When [redacted] walked into Lt. Aponte's office for the interview he appeared scared. In retrospect, Lt. Aponte does not know if it was the environment [redacted] was in the made him afraid or something else. By environment, Lt. Aponte was referring to [redacted] being interviewed by the police in his office. Lt. Aponte specifically recalls [redacted] denying having a conversation with his brother [redacted] and denying knowing Steve Todd. The detective asked if there was anyway in which [redacted] activities could be monitored. Lt. Aponte said they monitored his phone calls and mail more closely.

Lt. Aponte said that to his recollection the MPD detective listened to the recorded telephone conversation. Lt. Aponte is 99% positive he made a separate recording onto a cassette tape of the telephone conversation between [redacted] and [redacted] He did this thinking it would be important at some date. Lt. Aponte does not recall if the detective took a copy of the tape or at a later date received a copy of the taped telephone conversation. Lt. Aponte said that at the time this occurred, the investigations unit was in the old Administration Building. After Lt. Aponte left the Investigative Unit, the ~~unit~~ ADMIN. BLDG was moved from a 10,000 square foot area to occupy a 3000 square foot area. In the process it has been difficult at times to locate things. Lt. Aponte said he kept a spiral notebook of calls he received which would have indicated the call from the detective, however he does not know what happened to it in the move.

Immediately following the interview with the MPD detective, [redacted] went back to his housing unit and called his mother's place to get in touch with [redacted] His brother wasn't

12-1-04
1720 HRS.

Continuation of Results of Interview
Lt. Xavier Aponte, 12/01/2004
People v. Scott Lee Peterson
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home so [redacted] talked to his mother. Lt. Aponte's recollection of the recorded telephone call was that [redacted] told his mother to tell [redacted] that the police had just interviewed him and he was to keep his mouth shut because he doesn't know who he is dealing with. Lt. Aponte said based on [redacted] conversation with his mother it did not seem that Steve Todd, [redacted] and [redacted] were friends. The telephone call lasted about 3-4 minutes about the same amount of time as when [redacted] called [redacted] Lt. Aponte said [redacted] had little or no respect for his mother based on listening to the recorded telephone conversation.

Lt. Aponte stated this was the first time he came across [redacted] and said [redacted] kept to himself. [redacted] did not appear to be a problem at Norco. Lt. Aponte said [redacted] central file possibly could be accessed through CDC Legal Affairs.

XAponte
12-1-04
1720 HRS.

III. THE DENIAL OF THE MOTION FOR CHANGE OF VENUE DEPRIVED MR. PETERSON OF A FAIR AND IMPARTIAL JURY. A NEW TRIAL SHOULD BE ORDERED BECAUSE OF THIS.

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.' With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion."

(*Irvin v. Dowd* (1961) 366 U.S. 717, 728.)

* * *

> "To expect a juror to confess prejudice is not always a reliable practice. A juror can be completely honest in denying prejudice. In the words of Alexander Pope, 'All looks yellow to the jaundiced eye."

(*State v. Shawan* (1967) 77 N.M. 354, 358.)

* * *

> "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."

(*Bridges v. State of California* (1941) 314 U.S. 252, 271.)

A. Introduction.

Shortly after arriving in Redwood City to begin pre-trial motions and jury selection, the defense raised the issue of change of venue. Having been a part of the media circus in Modesto and having seen up close the ongoing drumbeat to convict and kill Mr. Peterson, the defense repeatedly warned the court that moving the case to San Mateo was not a solution since the area was still relatively small and it was also in the same media

markets as Modesto. As if on cue, the trial participants arrived in Redwood City with billboards on the freeways asking if Peterson were "Man or Monster?" and roving billboards encouraging people to vote on his guilt or innocence. The court, in what the defense characterized as "childlike naivete," maintained that the an impartial jury could be selected without any outside influences. As alternative solutions, the defense asked the court to provide for two separate juries, sequester the jury or change the venue to southern California. The court ruled against each of these proposals.

Over the course of the next three months, over 1600 potential jurors were called in to fill out questionnaires and to be interviewed. Alarmingly, many of the jurors wrote on their questionnaire that they could be fair and, upon being questioned by the attorneys and the judge, admitted a bias or that they felt the defense must prove Peterson is not guilty. Even more alarming, three separate "stealth" jurors -people who deliberately lied on their questionnaire in order to convict the defendant - were discovered. Despite these warning signs and a renewed motion for change of venue, the court chose to plow ahead in San Mateo.

The community pressures throughout the trial were intense. The trial was front page news virtually every day in all the local papers and was the lead story on almost every local nightly newscast. Not surprisingly, when the verdict was announced, a crowd of over a thousand people gathered at the courthouse and cheered the jury for reaching a guilty verdict. After the verdict, the court expressed surprise at the huge emotional outburst and acknowledged that there was a problem. However, when asked to move the penalty phase to another jurisdiction, the court replied that, while it was a problem, "It is a problem without a solution." (RT 20852, 20853, 20856.)

B. Background Facts.

On December 24, 2002, Laci Peterson was reported missing from her Modesto, California home. At the time of her disappearance, Ms. Peterson was 32 weeks pregnant

with her first child. On or about April 18, 2003, both her body and that of the baby washed up on the shore of the San Francisco Bay. Shortly thereafter, Modesto police arrested Scott Lee Peterson, Laci's husband and the father of the child. On April 21, 2003, Mr. Peterson was charged by criminal complaint with two counts of premeditated murder. Mr. Peterson was transferred to Stanislaus County Jail where hundreds of angry Modesto citizens waved signs, screamed epithets and created a mob scene that became so unruly that police reinforcements had to be brought in.

Media accounts of Mr. Peterson's arrest sparked an enormous wave of publicity on a case that had already become a media circus. Virtually every media outlet, from so-called respected journalists to tabloid magazines, began an avalanche of stories proclaiming Scott's guilt and printing or repeating every false rumor that the scummiest tabloid's chose to print. Not wanting to be left off the "convict Scott Peterson bandwagon," California State Attorney General Bill Lockyer stated "this is a compellingly strong case. I would call the odds slam-dunk that he is going to be convicted." Mr. Peterson pleaded not guilty to two capital murder charges during his arraignment on April 21, 2003. On or about April 26, 2003, District Attorney James Brazelton announced that he would seek the death penalty for Mr. Peterson.

On October 29, 2003, the preliminary hearing began. On November 18, 2003, the Court held Mr. Peterson to stand trial. Mr. Peterson again pleaded not guilty to the murder charges at his arraignment on December 3, 2003.

Thereafter, on January 8, 2004, Judge Al Girolami of the Stanislaus County Superior Court granted Mr. Peterson's request for a change of venue. The Court held that the nature and extent of the news coverage prevented Mr. Peterson from getting a fair trial in Stanislaus County. The Administrative Office of the Courts then provided the parties a list of four counties where the trial may be held. Three of the four counties were in northern California and within less than 90 minutes of Modesto. All three shared the same media television and radio markets which also reached to Modesto. On January 20,

2004, after hearing oral arguments from both counsel, the case was transferred to San Mateo County.

Thereafter, on or about March 5, 2004, after concluding pre-trial motions, jury selection began. One thousand six hundred (1,600) veniremen were called as prospective jurors, each provided with a 23-page juror questionnaire which he or she completed. Approximately two-thirds of the prospective jurors were excused for financial or other hardships. For the remaining, voir dire began on March 22, 2004. At the end of the first stage of jury selection, approximately 80 jurors had qualified.

On May 11, 2004, the defense filed a second change of venue motion, requesting that the trial be moved from San Mateo to Southern California. The motion was based not upon potential surveys but rather upon the questionnaires and voir dire answers of actual jurors. The questionnaires showed that an astounding ninety six percent (96%) of potential jurors had either read, seen or heard something about the case. Further, over fifty five percent (55%) of prospective jurors indicated that they had formed preliminary opinions about this case. More significantly, about forty five percent (45%) of the potential jurors admitted that they had already formed opinions regarding Mr. Peterson's guilt.

Moreover, other prospective jurors who had indicated in their questionnaires that they had not formed any opinions regarding Mr. Peterson's guilt or innocence, when questioned by defense counsel, later admitted to having prejudgments towards Mr. Peterson. Worse, on three separate and unrelated occasions, it was discovered during voir dire that prospective jurors were providing the Court misleading information in order to qualify and serve on the jury for the sole purpose of convicting and killing Mr. Peterson. Despite these admissions, the court rejected the motion to change venue and the trial commenced in San Mateo on June 1, 2004. In addition, the Court also denied motions to impanel two separate juries and for the jurors to be sequestered.

After over 5 months of trial, Mr. Peterson was found guilty of the premeditated

murder of his wife and was found guilty of second degree murder of his child. Upon the announcement of the verdict, a crowd of over one thousand people who had gathered at the courthouse let out a collective cheer, honked their car horns and began to celebrate the conviction. They also applauded the jury as they left the courthouse. The defense then filed a motion requesting a new penalty jury and a change of venue for the penalty phase because of the jurors being exposed to the outpouring of community sentiment. The motion was denied. A month later, on December 13, 2004, the jury recommended that Mr. Peterson be sentenced to death.

C. The Right to a Fair Trial by an Impartial Jury Is Guaranteed by Both the United States and California Constitutions. The Denial of Mr. Peterson's Change of Venue Motions Deprived Him of That Right.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a fair trial by an impartial jury. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 148-154.) This fundamental right includes the right to a trial by a jury free from outside influences, such as prejudicial pretrial publicity. (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 362-363.) If an impartial jury cannot be impaneled, the defendant is entitled to a change of venue. (See *Groppi v. Wisconsin* (1971) 400 U.S. 505, 509-511 [the failure to afford an accused a fair hearing violates even the minimal standards of due process].)

The Due Process Clause of Article I, Section 16 of the California Constitution also guarantees a criminal defendant the right to a trial by an impartial and unprejudiced jury. (*People v. Wheeler* (1978) 22 Cal.3d 258, 265.) If no such jury can be impaneled, a change of venue must be granted to ensure the accused a fair trial. (*People v. Welch* (1972) 8 Cal.3d 106, 113.) Thus, under the California Constitution, a defendant will be denied due process if a change of venue is not granted when an impartial jury, free from outside influences, cannot be obtained.

The California Supreme court has adopted the standard set forth in *Sheppard* to

determine whether a change of venue should be granted in a criminal action. (*Maine v. Superior Court* (1968) 68 Cal.2d 375, 383.) A criminal action must be transferred if there is a "reasonable likelihood" that, in the absence of a change of venue, the accused will not receive a fair trial. (*Ibid.*)

Similarly, California Penal Code Section 1033 provides that the court must grant a motion for change of venue if "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." The phrase "reasonable likelihood" has been interpreted as requiring something less than "more probable than not," and something more than merely "possible." (*Powell v. Superior Court* (1991) 232 Cal.App.3d 785.) This determination may be based on qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency and timing of the material involved. (*Williams v. Superior Court* (1983) 34 Cal.3d 584.)

When pre-trial publicity is the grounds upon which prejudice is based, a motion for change of venue must be granted whenever it is determined that because of the dissemination of potentially prejudicial news, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. (*Smith v. Superior Court* (1969) 276 CA.2d 145.) The test is not actual prejudice, but a reasonable likelihood that a fair trial cannot be had. (*Clifton v. Superior Court* (1970) 7 CA.3d 245.) In fact, in a pretrial motion for change of venue, because the prejudicial effect of publicity before jury selection is necessarily speculative, it is settled that "any doubt as to the necessity of removal . . . should be resolved in favor of a venue change." (*Williams v. Superior Court* (1983) 34 Cal.3d 584, 588.)

As demonstrated by the juror questionnaires completed by the prospective jurors and the twenty two days of voir dire conducted in this case, the prejudicial media coverage that saturated the potential jury pool in this County established more than a "reasonable likelihood" that Mr. Peterson could not receive a fair trial in the venue of San

Mateo County.

D. Changing the Venue from Stanislaus County to San Mateo Did Not Solve the Problems of Prejudgment of Mr. Peterson but Raised the Same Issues That Compelled the Move.

The decision to move the Peterson case from Stanislaus County to San Mateo proved to be akin to the cleaning person who simply sweeps the dirt and dust from a very visible location to a slightly less visible location without ever really attempting to clean up the mess.

The purpose of a change of venue motion is to find a community where the impact of negative publicity can be diluted. That can be accomplished in numerous ways, such as moving to a much larger community, finding a community with a different media market, or moving a trial as geographically far away as possible. By taking the trial from Modesto to San Mateo, the courts managed to avoid all of these potential solutions.

To begin with, San Mateo County (population 703,000) is very comparable in size to Stanislaus County (population 472,000). In comparison, it was pointed out to the courts that any of the three major counties in southern California (San Diego, Orange, and Los Angeles Counties) were substantially larger. Common sense dictates that a juror in an area of over nine million people is going to feel much less compelled to reach a "community verdict" than one in a county of some three-quarters of a million people.

The move to San Mateo also did very little to decrease the media influence and presence. San Mateo County is served by the same Bay Area television and radio stations that serve the Stanislaus County area. In fact, the majority of the journalists subpoenaed by the prosecution worked for media outlets closer to Redwood City than to Modesto. If anything, the move to San Mateo only increased the media attention by moving it to the area where the major media outlets already covering it could have even easier access to the court proceedings.

The move to San Mateo from Modesto was also geographically ineffective. San

Mateo County is less than a 90 minute drive from Stanislaus County. In fact, a large number of Bay Area residents actually live in Modesto and make the daily commute. Furthermore, the area in the San Francisco Bay where the bodies were found is within a 30-minute drive of San Mateo. This increased the media attention in the area and, far from making it easier to get a fair trial, it made the task virtually impossible.

In the end, the only reason given for moving the trial so close to Modesto was for the convenience of the witnesses. When measured against a defendant in a death penalty case fighting for his life, the inconvenience to a witness who has to drive an extra two or three hours is insignificant.

E. The Juror Questionnaires Proved That the Prejudgment Rate for Guilt Would Prevent the Defendant from Getting a Fair Trial in San Mateo. Therefore, a Change of Venue Should Have Been Granted to Ensure Mr. Peterson a Fair Trial in this Capital Case.

The evidence submitted with the change of venue motion stated that, according to the 23-page juror questionnaires, prospective jurors in San Mateo County had already served as judge, jury and executioner in this case, and had already convicted Mr. Peterson. Over ninety six percent (96%) of potential jurors indicated that they were aware of a criminal case involving Mr. Peterson. Additionally, over fifty five percent (55%) of prospective jurors indicated that they have formed preliminary opinions about this case. Finally, and most significantly, about forty five percent (45%) of the potential jurors admitted to having prejudged Mr. Peterson guilty.

These figures, reflecting preconceived attitudes, are significantly higher than those in *Williams v. Superior Court* (1983) 34 Cal.3d 584, 590, in which a writ of mandate was granted directing the trial court to grant a change of venue. In *Williams*, of the 117 individuals surveyed, 22.4 percent claimed they had formed opinions on the guilt or innocence of the defendant. Similarly, in *People v. Williams* (1989) 48 Cal.3d 1112, the Court reversed a judgment of conviction because the prejudicial pretrial publicity had

denied the defendant a fair and impartial jury. There, of the 116 prospective jurors questioned, 52 percent had read or heard of the case, and only .08 percent had formed an opinion as to defendant's guilt. The Court held that the trial court should have granted a change of venue when it was presented with a showing of extensive pretrial publicity, and when the jury selection process later corroborated the prospective jurors' widespread familiarity with the crime. (*Id.*, at p. 1131; see also *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 589 [change of venue ordered where less than five percent had formed any opinion of the guilt or innocence of defendant, and fifteen percent believed they could not decide the case solely on the evidence that would be presented in court]; *People v. Tidwell* (1970) 3 Cal.3d 62 [change of venue ordered when thirty percent of prospective jurors admitted that they had formed an opinion concerning defendant's guilt].)

Here, ninety six percent (96%) of the jury pool had some awareness of this case and forty five percent (45%) of the jury pool admitted to having prejudged Mr. Peterson guilty, well above the prejudgment rates observed in *Williams*, *Martinez,* and *Tidwell.* These levels of prejudgment could only suggest that the residents of San Mateo County have already made up their minds and convicted Mr. Peterson of these crimes.[1]

The jury voir dire confirmed the fact that a fair and impartial trial could not be had in San Mateo County. The extent and nature of the publicity in this case caused such a buildup of prejudice that the Court could not give dispositive effect to jurors' assurances of impartiality. Several "stealth jurors" were discovered by the court and defense counsel during voir dire. Apparently, the prejudice against Mr. Peterson was so strong that potential jurors were willing to provide misleading information to the court just so they could serve on the jury and convict and sentence Mr. Peterson to death. Additionally, several other prospective jurors who had indicated in their questionnaires that they had

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[1]The testimony of one potential juror excused for cause provides a revealing insight into the impact of Mr. Peterson's case on the local community. In response to questions 90, 92 and 97 of the juror questionnaire, Juror 4795 stated in all capital letters, "I HAVE COME TO A VERDICT NOW. . . I THINK HE'S GUILTY. . .HE'S GOING DOWN."

not formed any opinions regarding Mr. Peterson's guilt or innocence, when questioned by defense counsel, later admitted to having prejudgments towards Mr. Peterson. Indeed, the prejudgment rate increased by thirty percent (30%) during voir dire itself. Finally, but equally disturbing, other prospective jurors went so far as to say that only evidence from the defense would overcome their belief in Mr. Peterson's guilt.

Although the issue of "stealth juror" has not been addressed in case law, numerous courts have cautioned against such bias when the prejudgment rates are at such a high level. The opinion in *Irvin v. Dowd* (1961) 366 U.S. 717, 727-728, is instructive. In *Irvin*, the United States Supreme Court held that a verdict of guilty by a jury which was not impartial violated the defendant's constitutional rights. Most notably however, the Supreme Court held that the nature and extent of the media coverage associated with the case, along with the strength of the opinions formed, prevented jurors from setting aside their opinion and rendering a verdict based on the evidence presented in court. The Court stated:

> "Here the build-up of prejudice is clear and convincing. . .With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. Where one's life is at stake – and accounting for the frailties of human nature – we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards. . .No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. . .With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere

undisturbed by so huge a wave of public passion."

(*Id.*, at pp. 727-728.)

Similarly, in *Corona v. Superior Court*, 24 Cal.App.3d at 878-879, the Court of Appeal noted that

> "Questioned on *voir dire* as to the effect of the media's evidentiary disclosures, one prospective juror may deny or admit awareness, another disclaim or admit prejudgment. One may falsely deny both knowledge and prejudice for the sake of a place on the jury. An honest juror may admit knowledge or tentative prejudgment and find himself excused. Many will sincerely try to set aside their preconceptions and give assurance of impartiality, yet unconsciously bend to the influence of initial impressions gained from the news media."

Likewise, in *People v. Williams*, *supra*, 48 Cal.3d at p. 1129, where a change of venue was ordered, the Supreme Court noted that, "Even though most jurors attested that they could render an impartial verdict, we concluded that the story of the crime had become so "deeply embedded in the public consciousness" that it was "more than a reasonable possibility that the case could not be viewed with the requisite impartiality."

The cases thus recognize that realistically, jurors cannot insulate their verdict from inadmissible knowledge. (See *Bruton v. United States* (1968) 391 U.S. 123, 128-130; *People v. Aranda* (1965) 63 Cal.2d 518, 525-526; *Frazier v. Superior Court*, *supra*, 5 Cal.3d at p. 294.) When prejudicial publicity has been injected into the jurors' consciousness, the courts therefore do not give dispositive effect to jurors' assurances of impartiality. (See *Sheppard v. Maxwell*, *supra*, 384 U.S. at p. 351; *Marshal v. United States*, *supra*, 360 U.S. at pp. 312-313; *Irvin v. Dowd* (1961) 366 U.S. 717.) To expect a juror to confess prejudice is not always a reliable practice. A juror can be completely honest in denying prejudice. In the words of Alexander Pope, 'All looks yellow to the jaundiced eye." (*State v. Shawan* (1967) 77 N.M. 354, 358.)

Thus here, despite the sincere expressions by prospective jurors that they can "put aside" prejudgments and maintain the presumption of a defendant's innocence, it is unrealistic to expect that any individual bombarded by the frenzy of media reports in San Mateo County would be able to do so. This was in fact corroborated by the number of "stealth jurors" and others, discussed above, who admitted their prejudgments only later during voir dire in this case.[2]

It was also confirmed by the comments of Juror Number 5, dismissed during deliberations, who indicated that the jury deliberations were being influenced by the pervasive "outside" "community" influences which had enveloped this case since its explosive onset, and by the cheering crowd outside the courthouse (and elsewhere in the community) which celebrated the jury's ultimate guilty verdict..

This was not, as the Court believed, a problem without a solution. The defense on several occasions offered the solution - a change of venue to southern California where the media interest in the case was comparatively small. The inconvenience factor that prevented such a move was minuscule in comparison to the very real threat of actual

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[2]One explanation as to why jurors in San Mateo County have prejudged Mr. Peterson and are not willing to set aside their prejudgment is explained by the California Supreme Court in *People v. Tidwell*, "On a routine basis in a small community may be affected by fears that anything less than first degree murder and death verdicts will be taken as an unfriendly or uncooperative reaction to those witnesses' attempts to aid the prosecution-or to relatives' presumed desire for a measure of retribution. When the attention of a small community is focused on a trial, testifying therein may become something of an honor, and is likely to be a subject of considerable anxiety, for many members of that community. Thus a juror's fears that a witness may take a mitigated verdict personally would not be unreasonable. And since the juror may consider himself honored and fortunate to be selected to culminate a community's anger against a stranger accused of killing respected members of that community, returning anything less than a death verdict for first degree murder might be viewed as a betrayal of both his trust as a juror and his friendship with witnesses. When a juror might reasonably fear that the cost of a mitigated verdict might be a cooled or lost friendship, the loss of regular customers, and, possibly, the alienation of an entire community, there is a danger that such fears will play a part in his deliberations. Of course, it is totally improper for such considerations to enter a juror's guilt or penalty decisions. (*People v. Purvis*, 60 Cal.2d 323, 342.) A system of law which claims it "has always endeavored to prevent even the probability of unfairness" (*Sheppard v. Maxwell*, 384 U.S. 333, 352) cannot tolerate a conviction returned by a jury composed as this one was without belying that claim." (*People v. Tidwell*, *supra*, 3 Cal.3d at p. 75.)

prejudice revealed in the juror questionnaires.

"When a defendant's life is at stake, the rule that all doubts be resolved in favor of venue change, takes on particular significance. Neither an accused whose life hangs in balance nor the authorities charged with enforcing and administering the law should be required to face the possibility of a second trial when, as here, we face acute dangers to an impartial trial and when we can avoid them by the simple expedient of a change of venue." (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 585.)

The denial of the venue motions deprived Mr. Peterson of his constitutional right to a fair and impartial jury in both his guilt and penalty trials. This Court should grant a new trial so that this case may be tried in a venue large enough, and removed enough from Modesto, to dilute the negative impact of the enormous media coverage of this case and this defendant.

IV. THE COURT ERRED BY REMOVING THE FIRST AND SECOND JURORS NUMBER 5, AND BY REFUSING TO DECLARE A MISTRIAL WHEN IT BECAME APPARENT THAT THE JURORS' DELIBERATIONS WERE BEING INFLUENCED BY MATTERS OUTSIDE THE EVIDENCE ADDUCED IN COURT. THE ERRORS MANDATE A NEW TRIAL.

A. Introduction

The Court's removal of both Jurors Number 5 was an abuse of discretion. The Court never articulated legal cause for those jurors' removal, but instead characterized each of them as a "cancer" which needed to be removed. Metaphor, however, is no substitute for valid legal grounds. In the Court's surgical zeal, it ignored the evidence of manipulation of the jury by a biased Juror Number 8, and the interference of the tabloid press. Finally, the Court ignored evidence of improper influences in jury deliberations pushing the jury to return "the community's verdict, the popular verdict, the expected verdict, the verdict that might … produce the best book." Instead of declaring a mistrial as the defense requested, the Court improperly removed the jurors in derogation of

California law and the United States Constitution's Sixth Amendment right to trial by jury. The result was a guilty verdict, which now entitles Mr. Peterson to a new trial.

B. The Court Removes Juror Number 5 at Juror Number 8's Instigation.

1. Examination of Brent Rocha and Juror Number 5.

Based on press reports over the June 19 weekend, the Court was concerned whether Juror Number 5 had told Laci Peterson's brother, Brent Rocha, something to the effect of "you lose today," when the two of them were at the courthouse security checkpoint. That Monday, June 21, 2004, the Court examined Rocha, who denied that any such words were said, and instead explained that, at the courthouse metal detector, Juror 5 may have been beside Rocha, "all he said is I got in the way of your shot for the news today." (RT 10477:7-8):

> The Court: Okay. Did he say anything to the words like You're going to lose today?
>
> Brent Rocha: No, it wasn't "lose," it was "news today."

(RT 1047714-17).

The Court also examined Juror 5, who's version of the events was identical to Rocha's:

> The Court: Can you tell me in your own words what transpired?
>
> Juror 5: We walked in the checkpoint.... And when I had got to the other side, he was there, and he said Good morning.... And I looked at him and I said Morning.... And when I saw him, the camera was right there, and I said Ah, I'm ruining all your shots, I guess you're not going to be on the news tonight. And he said Good, and walked the other way.
>
> The Court: Okay. Did you ever say You're going to lose today?
>
> Juror 5: No.
>
> The Court: Okay.

(RT 10481:11-26).

Juror 5 also said that he had heard from his girlfriend that Court TV had been falsely reporting that he had given the defense verbal encouragement:

> Juror 5: Yeah. And you know what, since I'm here, and all the other jurors want me to say this, and I want one of y'all to get on the news to say I don't say Yo, yo, what's up, Peeps to anybody. Especially -- that's the report....
>
> The Court: I know....
>
> Juror 5: My girlfriend wants to kick the crap out of the Court TV lady. She -- apparently I walked up to [Peterson] in the courtroom and said Yo, yo, peace out.... And that's stupid. I mean, I have never said two words.
>
> The Court: Okay. You've never discussed the case with anybody?
>
> Juror 5: No. No, not at all.

(RT 10482:17-10483:13, 10484:26-10485:2). With that, the inquiry concluded, and the taking of evidence continued. The Court did not instruct Juror 5 not to mention to the other jurors the subject of the Court's inquiry.

2. Juror Number 8 accuses Juror Number 5.

Two days later, however, another juror, Juror 8, successfully manipulated the Court to have Juror 5 removed. On June 23, the Court informed the parties that the bailiff had told the Court that Jurors 8 and 3 and an unidentified juror had informed the bailiff that "juror number 5 has said in the jury room that he's been watching the TV news about this trial, he's discussed the evidence contrary to court's order." (RT 10853:16-23). Later, Juror 3 vehemently denied ever reporting anything about Juror 5. (RT 10881:2-12). According to the Court, Juror 8's note stated:

> Juror number 5 constantly speaks about facts and issues in this case. For example, these are some of the facts and issues exposed to the rest of the jurors: One, comments about the anchor, which is marked in evidence....
>
> Two, comments on Detective Brocchini's testimony in which number 5 felt

had many questions to be answered. Three, comments about Laci's weight during pregnancy, which occurred on the day that her medical chart was presented into evidence. Comments on the Modesto Police Department's reports by officers and detectives regarding their inconsistency. How reports should be accurate as he is a SFO screener and has to abide by. Comments about the prosecution and their deficiency as lawyers to present this case. Comments about Court TV reports about him given to him by girlfriend, and something that's illegible, expressed comments that he has taken pride in being a loose cannon and very gregarious.... Two jurors have commented to you that you should not speak out about the facts and issues of this case. And this juror goes on to say: If juror number 5 is going prejudice himself by exposing his beliefs, other jurors may be persuaded to prejudice themselves regarding the rest of this trial. This juror says that this person takes this trial very seriously but is not willing to let these incidents go by without notice. I have spoken with Deputy Jenn, on two occasions regarding juror number 5. Signed concerned juror.

(RT 10859:9-10860:12). Examination of the jurors, however, demonstrated that Juror 8's charges were fabricated.

3. Examination of Juror Number 5.

Juror 5 denied Juror 8's accusations:

He Did Not Watch Television News: Juror 5 explained that had abided by the Court's admonition, and did not watch any television news. He had been informed by friends, however, that he had been criticized on Court TV for statements he never made. (RT 10858:10-14, 10863:12-17).

He Did Not Discuss The Evidence: Juror 5 did not discuss the anchor that had been admitted into evidence. A juror had asked whether the anchor was heavy enough for use in the ocean, and he had responded that he had not used a similar anchor in Hawaii.

(10861:14-23). Juror 5 did not believe he had ever made any comments regarding Detective Brocchini's testimony. (RT 10862:13-17). He believed that some jurors had made comments regarding Laci Peterson's weight, but did not believe that he had. (RT 10862:18-25).

He Did Not Take Pride In Being Called "Loose Cannon": Juror 5 said that other jurors had been calling him names in a joking manner related to the incident at the security checkpoint, and he had responded in a joking manner, "keep them coming." (RT 10863:26-10864:9).

He Did Not Discuss Inaccuracies In Police Reports: Juror 5 said that other jurors had spoken about reports, and one asked him a question about the preparation of reports in his work. (RT 10863:10-21). Another juror had discussed how reports were prepared in that juror's work. (RT 10865:25-10866:9).

4. Examination Of Juror Number 8.

Juror 8 made a series of accusations against Juror 5: (1) That Juror 5 "constantly" discussed the evidence in violation of the Court's admonition; (2) That Juror 5 stated to other jurors that the anchor was too small to anchor the boat in the bay; (3) That Juror 5 made comments regarding Brocchini's testimony; (4) That Juror 5 made comments about Laci's weight during her pregnancy; (5) That Juror 5 made comments criticizing the Modesto Police reports; (6) That more than once Juror 5 criticized the prosecution; (7) That Juror 5 was told by his girlfriend that Court TV had criticized him and that he took pride in being called a loose cannon, and (8) That Juror 5 had been repeatedly admonished by other jurors and had been defiant.

Juror 8 accused Juror 5 of "constantly" speaking about facts and issues in the case. (RT 10900:21-26). As an example, he said that Juror 5 had told other jurors that the anchor "couldn't anchor that boat because of the currents." (RT 10900:24-10901:16). He said that Juror 4 was involved in that specific conversation with Juror 5. (RT 10906:22-25). He also accused Juror 5 of commenting on Brocchini's testimony, that Juror 5 told

other jurors that he "'felt that there were many questions'" about Brocchini's testimony. (RT 10901:19-10902:1).

Juror 8 was very specific regarding Juror 5's alleged comments about Laci's weight:

> The Court: Comments about Laci Peterson's weight during her pregnancy. What did he say about that?
>
> Juror 8: That the weight, when they looked up the chart -- when the -- from the doctor about the -- her weight of 126 to 153, I believe, that he thought it was -- it was a lot of weight and that it might have been more than the eight months.

(RT 10902:4-8). He was also very specific in his accusation against Juror 5 regarding the Modesto Police reports' inaccuracies:

> The Court: Okay. What about comments about the Modesto Police Department reports?
>
> Juror 8: That was actually earlier in the case. We were in the hallway and he was speaking that -- that the Modesto police reports, that -- that the reports of the inacc – he thought that they should have been done a better job, because he as an SFO screener reports and they should be accurate. He went on to say that he was talking actually to number -- he was talking to [name deleted] about that.... Number 6. They sit together....
>
> Juror 8: There [sic] were in the hallway. There was only about four or five of us there at the time. I can't remember the other ones, but about the accuracy of the report, they should be accurate when they submit a report.

(RT 10902:14-10903:8). Likewise, he was specific about Juror 5's alleged comments about the prosecution:

> The Court: Okay. Did he make any comments about the prosecution and their deficiencies and manner in which they're presenting this case?
>
> Juror 8: Yes. More than one occasion.

The Court: What has he said about that?

Juror 8: That the prosecution doesn't come across gracefully, they don't -- they don't hit the point as Mr. Geragos does. It's a little to be desired. I mean, these are comments over a period of time, but -- .... even the latest comment was yesterday, about as far as after Mr. Geragos cross-examines, then if he recrosses, you know, there's, you know, he -- he points at times -- he hasn't had a chance to do this yet on re-cross on the last one, but that's what he spoke of yesterday.... The prosecution doesn't hit the points.

(RT 10903:6-25).

Juror 8 acknowledged that Juror 5 had not watched television, but that Juror 5 had said his girlfriend had told him that television was characterizing him "as a loose cannon, gregarious, and he said Well, I sort of pride myself on that." (RT 10904:5-10). Finally, Juror 5 described tense confrontations between him and Juror 5 about not discussing evidence:

The Court: Okay. Have you confronted him with -- and told him that he shouldn't -- shouldn't be discussing this?

Juror 8: I've done that on two occasions. After that I just stopped because it's not -- it's not working. And he keeps saying If anybody has a problem with this, they should be man enough to come up to him. Well, I have, but what am I supposed to do? I can't be physical with him.

(RT 1090411-19).

5. The other jurors contradict Juror Number 8.

In the examination of the other jurors, however, Juror 8's accusations were contradicted or shown to be exaggerations. The other jurors supported Juror 5's description on almost every issue.

Juror Number 1: Juror 1 stated that Juror 5 had not discussed the facts of the case, had not commented on the anchor, had not commented on Brocchini's testimony, had not

commented on Laci's weight, had not commented on Modesto Police reports, had not commented on the prosecution, and had not been confronted by the other jurors:

The Court: Juror number 1, we report that -- we received reports from other jurors that juror number 5 apparently, according to this juror and another juror, is speaking about the facts and issues in this case in the jury room when the other jurors are present, when the bailiffs aren't there. Have you heard anything like that?

Juror 1: No. Not of the facts, no.

The Court: Okay. Has he made any comments about the anchor which was marked into evidence yesterday?

Juror 1: I didn't hear that.

The Court: Okay. Have you heard any comments on Detective Brocchini's testimony?

Juror 1: No.

The Court: By juror number 5?

Juror 1: No.

The Court: Okay. Have you heard any comments by juror number 5 about Laci's weight during her pregnancy?

Juror 1: No.

The Court: Has he mentioned anything like that?

Juror 1: (Shakes head)

The Court: Okay. Have you heard any comments about the Modesto Police Department reports? These are from juror number 5, now.

Juror 1: Not -- not -- no. No....

The Court: Have you heard, at least when in the jury room, comments about the prosecution and the way in which they're presenting their case?

Juror 1: No.

The Court: Has he made any comments about watching TV reports about him?

Juror 1: The comment I heard was his -- his girlfriend had said that he was in trouble.... That they mentioned number 5.

The Court: Okay. And has he -- has he been -- have other jurors confronted him and told him that he's not supposed to be discussing the evidence outside the courtroom?

Juror 1: Once again, other -- no. I haven't heard that....

The Court: Has anybody in your presence discussed any of the facts of this case in the jury room, that you can recall?

Juror 1: No.

(RT 10869:7-10871:6).

Juror Number 2: Juror 2 likewise answered each question in the negative. Juror 2 said that Juror 5 had not discussed the evidence, had not commented on the anchor, had not commented on Brocchini's testimony, had not commented on Laci's weight, had not commented on Modesto Police reports, had not commented on the prosecution, and had not watched TV news. Juror 2 mentioned that jurors other than Juror 5 had commented on the prosecutors' deficiencies, and said that Juror 5 had said that someone had told him he was shown on TV. Juror 2 said that some jurors had told Juror 5 not to discuss the case, and that Juror 5 had responded that he had not discussed the case or the evidence, only that he had been filmed. Juror 2 confirmed that the exchange had not involved anything to do with the evidence:

The Court: Have you ever heard juror number 5, at least while you were in there, make any comments about the evidence in this case?

Juror 2: About evidence?

The Court: For example, have you ever heard him say anything about the anchor which was marked into evidence yesterday?

Juror 2: No. Didn't hear any of that.

The Court: Okay. Have you heard any comments about Detective Brocchini's testimony by juror number 5?

Juror 2: No.

The Court: Have you heard any comments about Laci Peterson's weight during her pregnancy?

Juror 2: No.

The Court: Have you heard any comments on the Modesto Police Department reports by officers regarding their inconsistencies?

Juror 2: No.

The Court: Have you heard any comments about the prosecution and their deficiencies as lawyers to present this case?

Juror 2: From juror number 5?

The Court: Yeah.

Juror 2: I don't think specifically.

The Court: Have other jurors commented?

Juror 2: I think I heard something....

The Court: Okay. Did you ever hear juror number 5 say anything about him watching TV and watching TV reports about this trial? Did he ever say that in your presence?

Juror 2: Him -- himself watching?... No.

The Court: Okay. Has he ever made any comments that his girlfriend watched TV and called him on the phone and told him that he was in trouble because of his conduct?

Juror 2: I don't know if it was his girlfriend, but I think I heard a comment that someone called him and said Hey, you're on TV.

The Court: Okay. And in your presence, has anyone ever told him that he

should not be discussing the issues and the facts in this case and he just went ahead and just did it anyway?

Juror 2: Yes. There were comments, a couple -- couple of us said, you know, you're not supposed to discuss.

The Court: And what was his response to that?

Juror 2: I think the -- the response was in -- in order of This is -- this is not the case, it's not evidence or discussing matters. This is, like, something outside of.

The Court: Okay. But -- but from what you can understand, was he talking about testimony that you heard in the courtroom?

Juror 2: No.

The Court: Okay. What was he talking about, if you can recall?

Juror 2: I guess the -- the camera incident.

(RT 10872:25-10875:14).

Juror Number 3: Juror 3 said that Juror 5 had not discussed the evidence, had not commented on the anchor, had not commented on Brocchini's testimony, had not commented on Laci's weight, and had not commented on the Modesto Police. Juror 3 said Juror 5 had merely commented on the lawyers' presentation style to other jurors. Juror 3 reported that jurors other than Juror 5 had been cautioned to avoid some areas of discussion. Juror 3 also said that Juror 5 had mentioned that the press was criticizing him and calling him names. Juror 3 adamantly denied complaining about Juror 5, or that Juror 5 had engaged in any misconduct:

The Court: Did you -- did you mention to Jenn, the bailiff, that number 5 is sort of acting out and not following the court's instructions? Do you remember saying anything like that?

Juror 3: No. No.

The Court: Other than what I've mentioned here, have you heard him say

anything else that you thought was inappropriate or -- or discussed the case in any way in front of the other jurors?

Juror 3: No. I couldn't...

(RT 10877:1-10880:17).

Juror Number 4: Likewise, Juror 4 denied any misconduct by Juror 5. He said that one of the alternate jurors wondered how much the anchor weighed, and that another juror (whose identity she could not remember) said it may weigh "this much" and that Juror 4 said that they would be able to ask for that information later. He said that Juror 5 had asked once on the way tot the jury room returning from lunch whether he had gotten anything from Brocchini's testimony, and Juror 4 had answered "yes." Juror 4 did not remember any comments about Laci's weight, and did not remember any comments about the Modesto Police reports' inconsistencies. He recalled some comments made by jurors about the prosecution's presentation of its case, but could not recall who made the comments. Juror 4 remembered that Juror 5 said that his girlfriend had told him that a Court TV commentator was criticizing him. Finally, Juror 4 did not recall other jurors admonishing Juror 5 not to discuss the case. (RT 10883:9-10886:3).

Juror Number 6: Juror 6 also denied any misconduct by Juror 5. Juror 6 said that Juror 5 had not made any comment regarding the anchor at issue in the case:

The Court: For example, have you ever heard juror number 5 make any comments about the anchor which is marked -- which was marked into evidence in this case? Have you ever heard him say anything about the anchor?

Juror 6: Specifically that anchor, no.

The Court: Okay. How about any anchor?

Juror 6: Yes.

The Court: What has he said?

Juror 6: I don't really recall because I wasn't really paying attention. They

were just talking about an anchor and he went out boating and how it's amazing what underwater currents can do, or whatever, and pull a boat with an anchor.

The Court: Okay.

Juror 6: It wasn't actually specific to this case, as far as I know.

(RT 1088712-10888:1). Juror 6 said that a juror had said that Brocchini was "getting a reaming" in cross-examination, but could not recall which juror had made the comment. (RT 10888:7-22). He did not hear Juror 5 make any comments about Laci's weight. (RT 10888:23-26). He recalled that Juror 5 had said something about the Modesto Police reports, but could not recall what he said, describing them as "[j]ust little things." (RT 10889:12). Juror 6 said that Juror 5 had said that the prosecution did not seem organized, but broadened his answer to include the whole jury, that the "[b]asic consensus of it is they don't seem organized." (RT 10889:18-26). Finally, Juror 6 said that Juror 5 had never said that he had watched TV about the case, but added that some jurors seemed to have other information about the press coverage of the case, possibly from friends and family. (RT 10890:1-12).

Juror Number 7: The Court's examination of Juror 7 followed the same pattern, contradicting or substantially minimizing Juror 8's accusations against Juror 5:

The Court: Okay. Now, we received a report that juror number 5 in the jury room speaks about the facts and issues in this case. For example, there is a report that yesterday he commented about the anchor which was marked into evidence yesterday. Have you heard him make any comments about the anchor yesterday?

Juror 7: Yes, there was some conversation in the room about wishing that we had been able to handle the anchor, because there was maybe some interest in knowing how heavy it was.

The Court: Okay. Who made that comment? Was that juror number 5 or

6? Do you know?...

Juror 7: You know, I can't recall who said it first. There were several people that expressed an interest in the weight of it, the size of it. But I -- I can't tell you who said it first. I'm sorry.

The Court: Okay. Did you hear whether or not juror number 5 made any comments on Detective Brocchini's testimony? Did he make any comments about that?...

Juror 7: No.

The Court: Okay.... Have you heard him make any comments about Laci Peterson's weight during her pregnancy?

Juror 7: No.

The Court: Have you heard him make any comments about the Modesto Police Department reports?

Juror 7: No.

The Court: Any comments about the prosecution and the manner in which they're presenting this case?

Juror 7: No.

The Court: Any comments about him watching TV or talking to his girlfriend about TV reports?

Juror 7: Watching TV?

The Court: Court TV.

Juror 7: No.

The Court: Okay. Have you heard him say anything about this case in your presence?

Juror 7: I think the only thing I remember is what I heard yesterday about the anchor....

The Court: Have you ever heard any other juror in your presence admonish

juror number 5 not to be talking about the facts and issues in this case?

Juror 7: Well, I mean I have heard on occasion there would be maybe some conversation in the room and someone would go "Shh," and everybody would stop.

The Court: Okay. Was 5 among them that was making these comments? If you know.

Juror 7: I'm sorry, I -- I don't know.

(RT 10896:24-10899:4).

Juror Number 9: Juror 9 denied each of Juror 8's accusations of misconduct that he had created against Juror 5:

The Court: We have a report now from juror number -- from a juror reporting that juror number 5 constantly speaks about facts and issues in this case. Have you heard juror number 5 talk about things that have transpired in the courtroom?

Juror 9: As far as the case? Or --

The Court: Yeah. For example, did you hear whether or not he's made any comments about the anchor which was marked into evidence yesterday? Something to the effect that that anchor is too small to be used in a boat that -- boat like that, aluminum boat? Did you hear him ay anything like that?

Juror 9: Not really -- not talking about that one. I mean it was like a general fishing thing. It wasn't about this ... case....

The Court: Have you heard anything about did he make any comments about Detective Brocchini's testimony?

Juror 9: No....

The Court: Did he make any comments about Laci Peterson's weight during the pregnancy?

Juror 9: No.

The Court: Okay. Have you heard him make any comments on the Modesto Police Department --

Juror 9: No.

The Court: -- regarding -- okay. How about did he make any comments about the prosecution and the manner in which they presented their case?

Juror 9: No....

The Court: Okay. Have you heard him make any comments about Court TV and, you know, getting -- getting reports from his girlfriend about what transpired on Court TV and that he's been referred to as a loose cannon or is very gregarious, or something like that?

Juror 9: Yeah. Kind of. It's sort of, yeah.

The Court: Did you hear him talk about, today, about going back in the jury room and saying If -- you know, If anybody's got anything to say, they should do this man to man, or words of that effect?

Juror 9: A couple people were saying that.... We just decided that if we have something to say, we need to say it to each other.

The Court: Okay....

The Court: Have you heard either juror number 3 or number 2 comment to number 5 that he should not speak about the facts and issues of this case?

Juror 9: No.

The Court: Okay. Have you heard juror number 5 say anything about this case in your presence while you were in the jury room?

Juror 9: Not directly related to the case. Maybe about people in the courtroom or like --

The Court: I'm not concerned about that.

Juror 9: -- stuff like that.

The Court: Did he talk about the case is all I'm concerned about.

Juror 9: No, not really.

(RT 10912:16-10915:11).

Juror 10: Juror 10 said that he did not spend a great deal of time in the jury room, but his observations were similar to those of the other jurors, contradicting Juror 8's accusations of misconduct:

> The Court: At any time when you're there have you ever heard number 5 make any comments about any of the evidence in this case? For example, did you hear him make any comments about the anchor which was marked into evidence yesterday?
>
> Juror 7: No, I don't -- I didn't hear it.
>
> The Court: Okay. Did you hear him make any comments about Detective Brocchini's testimony?
>
> Juror 10: No, I did not.
>
> The Court: Any comments about Laci Peterson's weight?
>
> Juror 10: No.
>
> The Court: Any comments about the Modesto Police Department reports by officers and detectives regarding their inconsistencies?
>
> Juror 10: No.
>
> The Court: Any reports about the prosecution and the manner in which they're presenting this case?
>
> Juror 10: I don't believe so.
>
> The Court: Okay. Any comments about him getting reports from his girlfriend about what took place on Court TV and where he was described about being a loose cannon or calling himself a loose cannon?...
>
> Juror 10: He did mention that he had found out the information that he had been on television from his girlfriend, that she had called ... and said that he was on television and that it was Court TV and the woman was really

slamming him. However, exactly what she said – … about the loose cannon, I did not hear that part.

The Court: Okay. When he came -- were you in the jury room when he came back this morning?

Juror 10: Yes....

The Court: Did juror number 5, when he came back, did he make any comments to the jury in general that if anybody had anything to say about him they should, you know, step up and talk to him about it directly? Words to that effect?

Juror 10: No. Not juror number 5.

(RT 10917:1-10919:1).

Juror Number 11: The Court's examination of Juror 11 quickly contradicted each of Juror 8's accusations:

The Court: Have you ever heard him make any comments about the anchor which was marked into evidence yesterday? Remember that concrete anchor? Did you hear him say anything about that?

Juror 11: No.

The Court: Did you ever hear him make any comments about Detective Brocchini's testimony?

Juror 11: No.

The Court: Did you hear him make any comments about Laci Peterson's weight during her pregnancy?

Juror 11: No.

The Court: Any comments about the Modesto Police Department?

Juror 11: No.

The Court: Any comments about the prosecution and the manner in which they're presenting their case?

Juror 11: No.

The Court: Any comments about him getting reports about Court TV from his girlfriend where he was described by one of the commentators as being a loose cannon or very gregarious?

Juror 11: No. We. A -- Monday morning there was some comments, some jokingly comments that was made about him.

The Court: Okay.

Juror 11: But they were just jokingly, and they were laughing about it. And that was about the size of it....

The Court: Okay. Have you heard any other jurors mention to him that he shouldn't be talking about facts or things that were in issue?

Juror 11: No....

(RT 10921:10-10922:18).

Juror Number 12: Juror 12 likewise denied each of Juror 8's accusations directly and unambiguously:

The Court: Okay. We received a report here about juror number 5 talking about the facts and issues in this case. For example, did you ever hear juror number 5 yesterday make comments about the anchor which was marked into evidence yesterday?

Juror 12: No, sir.

The Court: Okay. Did you ever hear number 5 make any comments on Detective Brocchini's testimony?

Juror 12: No, sir.

The Court: Any comments about Laci Peterson's weight during her pregnancy?

Juror 12: Oh, no, sir.

The Court: Any comments on the Modesto Police Department reports by

officers and detectives regarding their inconsistencies?

Juror 12: No, sir.

The Court: Any reports about the prosecution and the manner in which they're presenting this case?

Juror 12: No, sir.

The Court: Any reports about him getting a report from his girlfriend on Court TV about his performance down at the -- down at the weapon screening station and the issues that came up accordingly?

Juror 12: Yes, sir.... [S]omething that his girlfriend told him that the Court TV anchor person was being disrespectful about him....

The Court: Has he described himself as a loose cannon to the other jurors and he's proud of that fact?

Juror 12:: To my knowledge he didn't describe himself as a loose cannon. I think he felt it was how others were perceiving him....

The Court: Have you ever heard any juror tell him that he shouldn't be discussing things like that in front of the other jurors?

Juror 12: No.

(RT 10924:4-10925:19).

Alternate 1: The examination of the alternate jurors echoed that of the others, and denied or greatly minimized Juror 8's accusations of misconduct. Alternate Juror 1 denied each of Juror 8's accusations:

The Court: [D]id you hear whether or not juror number 5 made any comments about the anchor which was marked into evidence yesterday?

Alternate 1: I did not.

The Court: Okay. Did you hear any comments from juror number 5 on Detective Brocchini's testimony?

Alternate 1: I have not.

The Court: Okay. Any comments from juror number 5 about Laci's weight during her pregnancy?

Alternate 1: No.

The Court: Okay. Any comments about the Modesto Police Department about officers and detectives regarding their inconsistencies? If you recall.

Alternate 1: No.

The Court: Okay. Did you hear any comments about the prosecution and the manner in which they're presenting this case? From 5?

Alternate 1: Not specifically, no.

The Court: Okay. Did you hear any comments about 5 about Court TV and being -- having been contacted by his girlfriend and being told that he was being disrespected on Court TV?

Alternate 1: Yes.... He made -- he said specifically that his girlfriend apparently was very upset with a reporter for Court TV, and I remember specifically him saying that she said she was going to kill this reporter, that she wouldn't tell him what it was that had made her so upset, but she had recorded it or had otherwise made a copy or would tell him later, presumably after the trial was over, and that she was keeping these types of records.

The Court: Okay. Have you heard him -- or have you heard any other jurors tell him that he shouldn't be commenting upon any of the evidence in this case in the jury room?

Alternate 1: I haven't heard anyone admonish him, no.

(RT 10927:12-10929:8).

Alternate Number 2: The Court examined Alternate 2, who admitted that she had mentioned to the other jurors that she wanted to know how much the anchor weighed. She said that various jurors responded that the jury would have the anchor when the time

came to deliberate. She did not recall whether Juror 5 had said anything in the exchange. (RT 10931:3-10932:3). Alternate 2 echoed the other jurors' denials of Juror 8's accusations against Juror 5:

> The Court: Okay. How about -- did you hear juror number 5 make any comments about Detective Brocchini's testimony?
>
> Alternate 2: No, I did not.
>
> The Court: Any comments about Laci Peterson's weight during her pregnancy?
>
> Alternate 2: No, I did not.
>
> The Court: Any comments about the Modesto Police Department police reports?
>
> Alternate 2: No.
>
> The Court: Any comments about the prosecution and the way in which they're presenting this case by number 5?
>
> Alternate 2: No.
>
> The Court: Nothing?
>
> Alternate 2: No.
>
> The Court: Any comments about his girlfriend reporting to him about Court TV and the way he apparently, in her opinion, was disrespected on Court TV because of this -- this confluence here at the --
>
> Alternate 2: Yes, I did hear him say that.
>
> The Court: What did he say about that?
>
> Alternate 2: Just that his girlfriend said that the Court TV lady, whoever she is, was slamming him.
>
> The Court: Okay. Have you heard any of the other jurors tell juror number 5 that he should not be discussing facts and issues in this case in the jury room?

Alternate 2: No....

(RT 10932:8-10933:9).

Alternate Number 3: The Court's examination of Alternate 3 was short. He likewise made short work of Juror 8's accusations:

The Court: Okay. I've got a report here that juror number 5 apparently, according to this juror, constantly speaks about facts and issues in this case. Number one, there is an allegation here that he made comments yesterday about the anchor which was marked into evidence. Did you hear him make any comments about the anchor which was marked into evidence yesterday?

Alternate 3: I didn't....

The Court: Did you hear any comments about -- juror number 5 make any comments about Detective Brocchini's testimony?

Alternate 3: No, I didn't hear anything.

The Court: Any comments about Laci['s] weight during her pregnancy?

Alternate 3: No.

The Court: Any comments about the Modesto Police Department police reports?

Alternate 3: No, I didn't.

The Court: Any comments about the prosecution and the manner in which they presented this case?

Alternate 3: No.

The Court: Any comments about Court TV where he apparently got a phone call from his girlfriend that pointed out to him that he was being disrespected by a particular commentator and that --

Alternate 3: Yes, I did hear. I did hear something on that.... Just that he felt he -- or his girlfriend felt that he was being, you know, torn up....

(RT 10935:18-10937:4). In response to some leading questions by the Court, Alternate 3

related a vague recollection that some weeks before Juror 5 had "made a comment" and someone else said that they should not discuss it. The matter was so minor that he could not even recall whether it dealt with the evidence in the case:

> The Court: While you were there, the time that you were in the jury room, after you took your little walk or something, did you hear anybody ever chastise juror number 5 and tell him he's not to speak about the facts and issues of this case?
>
> Alternate 3: Yes, I did hear someone a long time ago. Actually, I couldn't tell you who it was.
>
> The Court: So was he making comments about this case?
>
> Alternate 3: He had made a comment about something, and I think someone said, you know, we really shouldn't be talking about this.
>
> The Court: How long ago was that?
>
> Alternate 3: It was very early in the trial.
>
> The Court: Do you know what it was about?
>
> Alternate 3: No. I really couldn't tell you.
>
> The Court: Okay.
>
> Alternate 3: I don't recollect.
>
> The Court: Okay.
>
> Alternate 3: It was just some comment he had made.
>
> The Court: About the evidence?
>
> Alternate 3: Yeah. Well, I don't even know that it was about the evidence, but about the -- the case.... Something along that line.

(RT 10937:17-10938:20).

Alternate Number 4: The Court's examination of Alternate 4 was simple. She denied each of Juror 8's allegations:

> The Court: I received a report about Juror Number 5, that he is constantly

speaking about the facts and issues in this case in the jury room. Are you one that stays in there? Do you go outside, get fresh air?

Alternate 4: I stay inside.

The Court: You stay inside. Okay. Now, have you heard Juror Number 5, particularly yesterday, make any comments about the anchor which was marked in evidence?

Alternate 4: No.

The Court: Did you hear him say anything about that?

Alternate 4: No.

The Court: Did you hear Number 5 make any comments on Detective Brocchini's testimony?

Alternate 4: No.

The Court: Any comments about Laci's weight during her pregnancy?

Alternate 4: No.

The Court: Any comment on the Modesto Police Department, reports by officers and detectives, regarding the police report?

Alternate 4: No.

The Court: Any comments about the prosecution and the manner in which they are presenting this case?

Alternate 4: No.

Alternate 4: Any comments about -- making any comments about his girlfriend reporting to him about what she saw on Court TV and the way he was treated by the commentator?

Alternate 4: No....

The Court: Have you heard whether or not -- have you heard any juror in there confront him and tell him that he's not to make any comments about the facts and issues in this case in the jury room?

Alternate 4: No.

(RT 10941:10-10942:20).

Alternate Number 5: Alternate 5 had lunch with Juror 5 that day, and denied each of Juror 8's allegations:

The Court: Okay. Now, we received a report about Juror Number 5 speaking about the facts and issues in this case in the jury room in the presence of the other jurors. For example, did you hear Juror Number 5 make any comments about the anchor which was marked into evidence yesterday?

Alternate 5: No. And he was at the lunch table where I was....

The Court: Did you hear any -- did he make any comments in your presence about Detective Brocchini's testimony?

Alternate 5: I haven't heard anybody say anything about his [sic].

The Court: How about any comments about Laci Peterson's weight during her pregnancy? Did he make any comments about that, that she was too heavy, she was probably more pregnant than they figured?

Alternate 5: No.

The Court: Nothing about that? Any comments about the Modesto Police Department reports that were made by the officers?

Alternate 5: No.

The Court: Any comments about the prosecution and the manner in which they are presenting this case?

Alternate 5: Kind of.

The Court: Okay. Do you remember what he said?

Alternate 5: I don't remember him saying anything. I just remember right after the opening statements there was a comparison contrast. And a response was, they have different roles. That's the only thing that I

remember.

The Court: You don't know if Five said anything?

Alternate 5: I don't remember if it was, who it was.

The Court: Do you recall whether or not number five made any comments about him receiving a phone call from his girlfriend about this incident at the -- at the check in, weapons screening station, and where he was allegedly trashed by the commentator or disrespected buy the commentator?

Alternate 5: Correct.

The Court: You heard that?

Alternate 5: I heard him say that his girlfriend told him. I didn't know if it was on the phone, or --

The Court: But he was told by his girlfriend what took place?

Alternate 5: That the Court TV lady was a bitch.

The Court: All right. Have you heard any jurors there admonish him about discussing the facts of this case in the jury room in front of the other jurors, contrary to the Court's instructions? Hear anybody tell him that?

Alternate 5: I have not heard him singled out....

The Court: [Y]ou never heard anybody make any direct comments to Juror Number 5?

Alternate 5: Correct.

(RT 10944:3-10946:21).

Alternate Number 6: The Court asked leading questions of Alternate Juror 6 regarding whether he and Juror 5 discussed whether the anchor was sufficient for the aluminum boat in the case. Alternate Juror 6, however, said that he asked the question about the anchor, not Juror 5. In every other area of inquiry, Alternate Juror 6 contradicted Juror 8's story:

The Court: Let me ask you this. Did you hear Number 5 make any

comments about the anchor which was marked into evidence yesterday?

Alternate 6: Yes.

The Court: What did he say?

Alternate 6: He said it was smaller than he anticipated, or thought it was.

The Court: Smaller than he thought it would be?

Alternate 6: Yeah.

The Court: Did he say anything about that that anchor was too small to anchor a boat like the one we saw?

Alternate 6: Yes, he did.

The Court: He did say that? Okay. Any other comments about the anchor that you can recall? If you can recall.

Alternate 6: No. He and I talked about anchors that one would use for fishing. I think I asked him, would you use an anchor like that in the Bay, and he said, no, probably not.

The Court: Why would you ask him?

Alternate 6: I don't remember how the conversation got --

The Court: Did he bring this subject up?

Alternate 6: I think so. It emerged. I certainly didn't raise it.

The Court: You didn't bring it?

Alternate 6: I didn't raise it.

The Court: Somehow you and him, and all sudden they [sic] issue of anchors came up?

Alternate 6: (Nods head affirmatively).

The Court: You asked him if he would use an anchor like that in the Bay, and he said no. And he said words to the effect that he thought that was too small an anchor to be able to moor a boat that size?

Alternate 6: That was the general sense much it [sic], yes.

The Court: Did you hear him make any comments about Detective Brocchini's testimony in which he felt any questions that had to be answered yet?

Alternate 6: No, I don't remember anything about that.

The Court: Any comments about Laci's weight during her pregnancy?

Alternate 6: I don't remember hearing anything about that.

The Court: Did you hear him make any comments about the Modesto Police Department reports that were made, regarding any inconsistencies, and so forth, saying I work for the San Francisco Airport, and I can't be making reports like that, these are shoddy reports, or anything like that?

Alternate 6: No, I didn't hear that.

The Court: Did you hear him make any comments about the prosecution and the manner in which they are presenting this case?

Alternate 6: I don't remember it.... I couldn't identify them as from him. There has been comments that have floated around the jury room about, you know, about general responses to -- or opinions about somebody doing something particularly well, or --

The Court: The lawyers, for example?

Alternate 6: Or not. I'm trying to be polite, since everybody is in the room.

The Court: They have commented upon the lawyers' performance?

Alternate 6: It's been very kind of tentative. You know how -- it's hard to not. This is a whole group of people that are trying to avoid having the conversation, for the reason that they are all there. So it's --

The Court: Did you hear Juror Number 5 make any comments about Court TV, about him getting phone calls from his -- a phone call from his girlfriend with the incident at the weapons screening station, and that he

was trashed, or he was disrespected by the commentator?

Alternate 6: Nothing about a phone call from girlfriend. But he did make some comments about Court TV.

The Court: What did you hear?

Alternate 6: That he knew that he was being trashed by someone at Court TV, is what I recall.

The Court:: You recall that? Okay. Do you recall anybody in your presence ever admonishing him or cautioning him about speaking about the facts and issues of this case in the jury room?

Alternate 6: I don't. I don't think anyone that I have heard say anything. (RT 10949:4-10952:19).

6. The court removes Juror Number 5 and denies the motion for mistrial.

The Court ordered Juror 5 removed from the jury. It did not articulate, however, a good cause finding. The Court relied substantially on alleged statements of the bailiff, who was never put under oath and never examined, relied on hearsay and speculation that was not in the record, and mischaracterized the testimony of the other jurors:

The Court: Problem with this is this. The other jurors that have, since the beginning of this case, according to their testimony, been telling Juror Number 5 not to talk about the facts. This is not just about the isolated anchor. This is about all of these different things that they are talking about. And it's -- so, again, it's saying that we're not looking at the evidence. We look at all of the evidence from all of the jurors and what they just told us.

Mr. Geragos: Juror Number 3 denied it. Juror Number 8 is the only one who said it.... Juror Number 3 denied it and said that she didn't think it was him, that it was others. And the last --

The Court: Mr. Geragos, it's interesting to say that Jenne told me that one

of the jurors who was complaining about his conduct was Juror Number 3, to Jenne. That she came in here, and she didn't complaint.

Mr. Geragos: And that's why you have people under oath.

The Court: But I suspect that maybe she was intimidated by coming in here, and maybe she felt that she was going to be held responsible for her comments.

Mr. Geragos: We can't suspect that. It's evidence. I know you know human nature, but see, sometimes –

The Court: Here is one of the jurors that was complaining.

(RT 10968:24-10969:26).

Instead of setting forth good cause, the Court complained about the attention the press paid to that juror, repeated alleged hearsay statements that were never put into the record or examined, and justified Juror 5's removal by describing him as a "loose cannon" and a "cancer:"

The Court: So it's 11:30. I'm of the opinion that this guy is, in fact, a loose cannon in there, number one; and, number two, I think having a talk to him -- talking to him about Jesus is not going to make much difference, because this guy describes himself as a loose cannon. And apparently he's proud that he is a loose cannon.

Mr. Geragos: That's because she was calling him a loose cannon on Court TV and on the talk radio. He was -- again, the guy's got to have an ego.

The Court: I know. Speaking of egos.

Mr. Geragos: This is such a bad path to go down.

The Court: Okay. But I'm going to go down there. That's why I get paid the big bucks. Okay? So I think talking to this guy is not going to do any good. He's like a bull in a China shop in there. And, apparently, from what I can tell, this has been going on, some of these other or that he's made

comments earlier in the proceedings when people have told him to be quiet, not to make comments. We have -- this is the second incident we have had with this particular juror. We had an incident with him down at the screening station, which, as you said, the press made an issue out of. And now we have this other juror reporting that he's -- this type of conduct – what was interesting is, I pointed out already that Juror Number 3, who now has gone back -- or apparently what she said, but she was one of the jurors that was complaining about his conduct, and there was a third unnamed juror that Jenne said was complaining about his conduct also. So when they came in here, all of a sudden this didn't happen.

Mr. Geragos: But that's why we have people under oath. We don't have Jenne under oath. And so what are we doing? Look, we're letting hearsay trump testimony?

The Court: So, as I was saying --

Mr. Geragos: I believe that would be an abuse of discretion.

The Court: I don't think so. Because I have talked to every one of these jurors, and --

Mr. Geragos: We don't have any evidence.

The Court: I have evidence. I have the testimony of Juror Number 8, and I'm more inclined to believe Juror Number 8 than I am to believe Juror Number 5.

Mr. Geragos: Juror Number 8 is a head case.

The Court: What are you going -- I'm making my ruling.... My opinion, if I leave this guy in there, this is – I'm leaving a cancer in that jury room. I'm of the opinion that this guy is not following the Court's admonitions. He's not about to follow the Court's admonitions. He's talking about this anchor. I don't care who brought it up, but he's apparently taking the position that he

knows about this. I think that's detrimental to your client. That would indicate to some of these other jurors that maybe these anchors were used to weigh down Laci Peterson. If that's not, you can draw your own inferences and conclusions. So that's the way I feel about this guy. I think that he's a total cancer in this jury. And I find that there is good cause to remove this juror. I think it's just a matter of time that this guy -- I'm satisfied by watching his demeanor, and watching the demeanor of Number 8 and some of these other people. I think the manner -- they were reluctant. One the alternates also told us about some of these situations that he was involved in. So I think he's going to be unhappy about this. But so be it. We have a trial to worry about here.

Mr. Geragos: I'm moving for mistrial.

The Court: All right. That's denied.

Mr. Geragos: Secondarily moving for sequestration, moving --

The Court: Denied. Bring in Juror Number 5.

Mr. Geragos: If there is a cancer in the jury, the cancer is Number 8. That is where the cancer is.

The Court: You should be happy then.

Mr. Geragos: Why? You should bounce eight. Bounce eight.

The Court: No, I'm not going to bounce eight.

(RT 10970:6-10973:20)

C. The Court Removes the Second Juror Number 5 During Deliberations and Denies the Defense Motion for Mistrial.

During deliberations, on November 10, the Court received a strange note from two of the jurors:

Now, when I got here this morning at five after seven, there was one hour of peace and quiet. And the jury got here at a little after eight. And three

minutes after the jury arrived they presented the Court with a note. First note. A juror has had a conversation outside the jury deliberation room that may constitute a violation of the admonition. Does the Court wish to hear more? Should we continue to deliberate? I told them be quiet, not to deliberate until we deal with this. It was signed Number 5. This appears to be Juror Number Five's handwriting, and then the 5 was turned into a 6. Shortly thereafter, about five minutes thereafter, I received another note through Jenne. Here is what it says now. This is in Juror Number Five's handwriting. I, Juror Number 5, approached Juror Number 6 regarding a question raised in the jury deliberation room. I changed my position on the question based on the conversation. Then there is another paragraph. Apparently this is in the handwriting of Juror Number 6, who appeared to be the new Foreperson, since they were told yesterday to start all over again.

And here is what he says. When I, Juror Number 6, was approached by Juror Number 5, I was under the impression that he was concerned about having potentially upset me regarding a difference in opinion. I was not upset, and I did not go into any further details regarding the topic brought up. Signed Number 6.

(RT 20778:25-20780:1).

The Court examined Juror 5. Juror 5 expressed a desire to be removed from the jury and reported some alarming things. He believed that the jury's attitude changed "based on something which happened outside of the jury room." He said that he felt physically threatened based on statements made by others, "There have been comments made to me personally – that have made me reflect on whether or not my safety is at issue here." The Court failed to investigate this troubling report, instead focusing on a vague and innocuous exchange between Juror 5 and Juror 6, the new jury foreman:

The Court: You tell me what happened, doctor.

Juror 5: On Monday afternoon, that day, we had a discussion, a round-table discussion regarding the conflicting opinions between Doctor DeVore and Doctor March; and Doctor Galloway was included. That discussion was far-ranging, and I had some certain opinions and thoughts on it. And, in fact, was at the easel making some drawings. Others had different opinions as to what they heard. We had a discussion on that. And that was, I think, toward the conclusion of the day. And I think we resolved to table that issue at some point. And on the way home I was sitting with Juror Number 6, and he had brought up what I thought were some opinions that I didn't understand.

The Court: In the jury room?

Juror 5: In the jury room. And I -- and he also brought up points which I thought were quite meaningful and ones I hadn't understood --

The Court: In the jury room?

Juror 5: In the jury room.... I questioned him about those opinions.

The Court: On the bus?

Juror 5: On the bus. And because -- well, I mean the reasons are probably irrelevant. But it was a good discussion and an interesting discussion. And I continued to want to pursue this line of discussion. He had had the points -- we were sitting together. I raised the question. He responded in answering my questions. And I wasn't thinking at the time. But we did go back and forth a little bit on the bus. And when I wrote in the second note there that I changed my opinion based on the conversations on the bus, that's true. What he told me with regard to his thoughts on what Doctor Devore was saying at a particular time, I did find pertinent and relevant. And my position or opinion changed. And the weight that I was giving those two experts did change as a result of that conversation.

Now, yesterday there was obviously change in jurors based on something which happened outside of the jury room. Last night I recalled this conversation and felt that I needed to bring it up. And it's created some extraordinary consternation, frustration, hostility in the jury room. Everything from the fact that Cap is now the new Foreperson, and I'm trying to take him down, and I've wanted off the jury now for quite some time. There is just an enormous amount of hostility now focused at me because of this.

The Court: Okay. Now, let me ask you a couple of questions. Is this -- when you said you changed your opinion after this conversation, was it based on what he said, or was it also including things that were discussed in the jury room?

Juror 5: It's based on what he said....

The Court: Okay. What about this hostility in there now? Did you think that it's going to be impossible for this jury to deliberate further because of this alleged animosity between maybe you and the rest of the jurors?

Juror 5: I think it's going to be impossible -- well, I think it would be infinitely better if I were not the focus of some of this hostility. And, as I say, my motives have been impugned. And there are other issues. I'm not sure that my safety is even not --

The Court: What's troubling me, is this degenerating into some pettiness between the jurors, rather than -- to me, it's more a dispute about the process rather than getting into the merit of this case. Is that what's going on in there?

Juror 5: No, sir. I think that if I weren't there this jury would buckle down in a substantive way. We made substantial progress. We changed Forepersons. We took everything off the wall. We started again. The new Foreperson is

doing an excellent job. Issues are up on the white board, the easel is being prepared. Then this issue with regard to Juror Number 7 yesterday came up. I had this fit of conscience, or whatever. And now we're back to frustration again. But, to answer your question, I think that the jury is very focused when it's -- when the time is appropriate, and people are focused. I think they are doing a terrific job.

The Court: But it's not -- I don't think it's a good idea for me to substitute you out as a juror just because you can't get along, or some people have some animus toward you. If I have to bring every juror back in here, I'm going to tell them that, you know, they are supposed to be concentrating on the facts and the jury instructions in this case in arriving at a decision.

Juror 5: Your Honor, I think they can do that. I'm not sure I can do that at this point.

The Court: Well --

Juror 5: As I say, there have been comments made to me personally that -- that have made me reflect on whether or not my safety is at issue here.

The Court: You have been threatened bodily?

Juror 5: I have not been threatened bodily, but the comments, the looks --

The Court: Who is responsible for these comments?

Juror 5: Your Honor, I prefer not to do that, or go there, except to say that I have tried mightily. I think I'm at an end of what I can do reasonably with this jury to weigh this evidence fairly. I don't think I can weigh it fairly any longer.

(RT 20782:11-20786:11, emphasis added).

The defense moved for a mistrial based on the jury's processes degenerating to the point where the jury was not deliberating on the evidence, but had resorted to implicitly threatening other jurors. (RT 20787:4-19).

The Court examined the new foreman, Juror Number 6, and falsely stated that Juror 5 had characterized himself as a "cancer in that jury room." Juror Number 6 claimed ignorance:

> The Court: Okay. Now Number 5 is having some problems. He's expressed the opinion that he should be excused because he feels that he is a cancer in that jury room. Can you explain what's been going on with Juror Number 5?
> Juror 6: I can't really explain why he feels that way, other than speculation, where he wants to talk a lot more than other people. And we're trying to give people fair and equitable time to voice their thoughts, and everything else. And he tends to take a very long time. But, other than that, everybody gets a certain amount of time, they get cut off. So they take a certain amount of time to make their point and then they get cut off. That's the only thing that I can think of.... This hit me this morning out of the blue. I have no idea where it came from.

(RT 20790:9-20791:2).

The Court examined Juror Number 5 again, and elicited an explanation for why the rest of the jury, including the new foreman, would not be forthcoming with the truth of how they were reaching their verdict- they were not basing their deliberations on the evidence, but what they believed the public wanted:

> The Court: As you sit there now, do you feel, if you were to continue to deliberate in this case, that you could be a fair and impartial juror in this case?
> Juror 5: No.
> The Court: If you deliberated further, do you feel you would be able to follow the jury's instructions and reach a just verdict in this case?
> Juror 5: No.
> The Court: Okay. We'll put you back outside. One other question. Can you

give me the reason for that, why you feel that way?

Juror 5: When I took the oath, I understood it to mean that I needed to be able to weigh both sides fairly, openly. And given what's transpired, my individual ability to do that I think has been compromised to a degree that I would never know personally whether or not I was giving the community's verdict, the popular verdict, the expected verdict, the verdict that might, I don't know, produce the best book.

I'm not going to speak to the media. I don't ever want to personally profit from this case in any way, directly or indirectly. I think I'm going to get on an airplane if you grant relief, literally.... But, your Honor, I did my level best.

(RT 20793:16-20794:15).

Juror 5 praised the efficiency with which the jury was deliberating. The Court, however, never pressed Juror 5 to explain his report that he was being pressed to come to a verdict to please public opinion. He refused to answer a direct question on that point, and the Court did not demand an answer:

The Court: Just a couple other questions. You mentioned the word community's verdict. Are you suggesting that the jury is result-driven, that they are all trying to drive this toward a certain verdict when you talk about community?

Juror 5: I can't -- I'm unable really to speak for all the jurors, or other jurors.

The Court: You don't know what the other jurors are thinking, correct?

Juror 5: I know that there are jurors who have made up their minds.

The Court: Some jurors have certain opinions?

Juror 5: Exactly.

The Court: Other jurors have other opinions?

Juror 5: That's unclear.

(RT 20798:4-18) The Court removed Juror Number 5 – again without articulating a finding of good cause – and denied the defense's motion for a mistrial:

> The Court: Juror Number 5 wanted to get off this case from the second day [of deliberations]. Remember he talked about, it was hostility toward him in the second day already. And I brought him in, and I instructed him on the 1.00 and 17.40 and 17.41. Apparently hasn't done any good. I don't know what's going on in here, but there is a real problem with this one particular juror now. He says, he cannot be a fair and impartial juror for whatever reason. If this is -- I don't know if these -- I think he's suggesting that the deliberations are result-driven.
>
> Mr. Geragos: Exactly what he's suggesting. And he is suggesting that there is result driven to meet with the community's passion.
>
> Mr. Distaso: But that's, of course, not -- that's slightly in conflict from the Juror Number 6 who says that the jury is progressing exactly as juries are supposed to progress.
>
> Mr. Geragos: Well, no. He says said that they are making progress towards getting a community verdict. And if they do, that's not what he said -- 6 said at all. 6 says they are making progress getting to where they want to be. If they eliminate him, then they will get to where they want to be.
>
> The Court: Well, you know, Mr. Geragos, I'm going to bite the bullet again as I have been doing for the last five and a half months. I'm going to excuse Number 5. I'm going to gag him. If he wants to get on an airplane and fly to Bangkok, go ahead. You have your record here. And if there is a conviction, we'll see what happens.

(RT 20796:23-20797:20-25).

Shortly thereafter, the jury returned a verdict of guilty.

D. The Court Committed Error by Removing Both Jurors Number 5.

California Penal Code section 1089 provides the standard for removing a juror:

> If ... upon ... good cause shown to the court [a juror] is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

(Pen. Code, § 1089.)

Although a trial court has discretion to determine good cause for removal of a juror, that discretion is limited, and in order for the Court's removal of a juror to be upheld, "the juror's inability to perform as a juror must appear in the record as a demonstrable reality." (*People v. Karapetyan* (2003) 106 Cal.App.4th 609, 617-18.) If a juror asks to be excused, the court may not excuse him without a finding of good cause, and that "determination of good cause must be supported by substantial evidence." *(People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856.) Not only is the removal of a juror without good cause grounds for reversal under California law, it is also a violation of a defendant's right to a fair trial by an impartial and unanimous jury under the Sixth Amendment to the United States Constitution.

Here, the record demonstrates that both Jurors Number 5 were perfectly able to perform their duties, and that neither was dismissed for good cause. The record also demonstrates, however, that there was serious misconduct by other jurors, misconduct that the Court willfully ignored. Juror 8, in explicit or implicit cooperation with the press, used untruths and innuendo to manipulate the Court into removing the initial Juror Number 5. Number 8 and the press decided that Juror Number 5 appeared to be too independent for their liking, and too likely to interfere with his desired guilty verdict. The Court complied with their wishes, and dismissed Juror Number 5 based on the Court's

metaphorical characterization of the juror as a "cancer," and relying on hearsay statements, supposedly from the bailiff, which are absent from the record.

The Court's removal of the second Juror Number 5 is at least equally disturbing. The reason that juror gave for wishing to be removed was that he felt that his safety was threatened, that something had happened outside of the jury room to change the jury's attitude, and that given what was being expressed to him he would not know whether the verdict would be "the community's verdict, the popular verdict, the expected verdict, the verdict that might, I don't know, produce the best book." Despite all of the evidence of improper influence on jury deliberations, the Court dismissed the second Juror Number 5 without articulating a finding of good cause, but again relying on metaphor, calling the second Juror Number 5 a "cancer."

1. It Was Error To Remove The First Juror Number 5.

The Court's discharge of Juror Number 5 at the behest of Juror Number 8 and the press was an abuse of discretion. For the Court's removal of a juror to be upheld, the juror's inability to perform as a juror must appear in the record as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474(2001); *Karapetyan*, *supra*, 106 Cal.App.4th at pp. 617-18; *People v. Halsey* (1993) 12 Cal.App.4th 855, 892.) For example, in *Halsey* a juror testified that a fellow juror had stated that "'he did not feel the opening statement by the district attorney was very effective' and 'this was an easier case than he thought it would be.'" *(Halsey,* 12 Cal.App.4th at p. 892.) The Court determined that the juror had violated court orders and, more importantly he lacked "'ability to follow my instructions and to maintain an open mind and remain objective throughout the duration of the proceedings.'" (*Ibid.*) Under those circumstances, the trial court's discretion in dismissing a juror was upheld.

The court's discretion is, however, substantially "bridled to the extent the juror's inability to perform his or her functions must appear in the record as a 'demonstrable

reality,' and courts must not presume the worst of a juror." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 731-732.) Given that courts are mandated to tread lightly in the removal of jurors, a court may not remove a juror who committed misconduct unless such misconduct was serious and willful. (*Id.*, at p. 731 ["Although misconduct can constitute grounds to believe that a juror will be unable to fulfill his or her functions as a juror, such misconduct must be 'serious and wilful'"].) The removal of the first Juror Number 5 did not satisfy this high standard.

Each of Juror Number 8's accusations was shown to be either false or a gross exaggeration. Every juror confirmed that Juror Number 5 had not suggested that he had received any information regarding the merits of the case from outside the evidence. He had heard that he had been criticized in the press, particularly by false and scurrilous reports by Nancy Grace of Court TV. The Court, however, despite multiple opportunities, never admonished Juror Number 5 to refrain from mentioning that incident.

Juror 8's accusation that Juror number 5 "constantly speaks about facts and issues in this case" was refuted by the other jurors, who stated categorically that they had heard nothing from Juror Number 5 that could be considered comments about the facts or issues of the case. Some of the jurors stated that there was a general feeling among the jury that the defense presentation was smoother than the prosecution's. There was testimony about Juror Number 5 being asked by other jurors about seamanship, and testimony about a single question and answer about the anchor in the case.

There was absolutely no support for Juror 8's accusation that Juror Number 5 had made comments about Laci's weight and the term of her pregnancy, every juror denied that accusation emphatically. A few of the other jurors recalled some comment about reports, but no one supported Juror 8's accusation that Juror 5 had criticized the Modesto Police to the other jurors. There was no "constant" speech about facts and issues in the case.

Juror 8's accusation that Juror Number 5 reacted with hostility to reminders to

watch his speech was also shown to be untrue. The other jurors testified that they would generally remind one another not to speak about the case, and no one except Juror 8 singled out Juror Number 5. As for Juror 8's accusation that Juror Number 5 "prided himself" on being a "loose cannon," those jurors who recalled the comment said that it arose as a result of joking among the jurors.

In short, there was no evidence in the record that Juror Number 5 committed substantive misconduct. Certainly there was no evidence in the record that Juror Number 5 committed such "serious and willful" misconduct to warrant removal. (See *Bowers*, *supra*, 87 Cal.App.4th at p. 722.)

This case does not even approach the circumstances in *Halsey*. In *Halsey*, the removed juror was quoted as having substantially prejudged the case before receiving evidence, commenting that the prosecution's opening argument was poor, and "'this was an easier case than he thought it would be.'" (*Halsey*, *supra*, 12 Cal.App.4th at p. 892.) There was no similar evidence here that Juror Number 5 had improperly prejudged the case.

There was, however, evidence that Juror 8 had improperly prejudged that case, and that he targeted Juror Number 5 for removal because he was not susceptible to bullying and was showing leadership ability among the other jurors:

> The Court: Okay. Has anything you've heard about this in the jury room affected your ability to be a fair juror?
>
> Juror 8: Not mine, but my only thought as I sit in there, I see him with the clique, and that -- meaning that three or four people that are constantly with him, talking.... That maybe just him speaking, maybe they'll take that into their own presence as they view this case so early. I mean obviously we still have a lot of testimony to go.... We still have to be fair to both sides, but if somebody is going to base their opinions on how it is presented in the court, we can't do that. It's based on facts.... So, you know, his belief is

out there, thrown out there, and two -- or one or two capture that belief, they're going to go ahead and be prejudiced through the rest of the trial. I'm not a psychologist --

The Court: Yeah.

Juror 8: -- but I can see that happening just in the conversation. Now, you know, they become more palsy and sort of cover for him. I mean when I spoke about Hey, you should take care of yourself first, [name deleted] popped off, No they should come to the person, and -- and the redhead. I mean they're all together. If they're in there, they'll to be together, all three of them, mostly, one time....

The Court: I can see you're concerned.

Juror 8: Right. Because I don't want to sit here -- I wouldn't waste the court's time if this is all for naught. I mean, you know, if it's a ballgame, we're only in about the third Inning, right?

The Court: That's right.

Juror 8: I mean, we've got a long ways to go. I've got to be fair to both sides. I mean, we haven't even heard, you know, the whole pack. I can't -- there's no decision at this point.

The Court: Okay. We'll excuse you. Thanks very much.

Juror 8: Oh, you're welcome.

(RT 10908:7-10911:10).

In the absence of evidence on the record, the Court relied on hearsay from the bailiff that other jurors had complained about Juror Number 5 – despite those jurors denying under oath that any of them complained. Moreover, the Court failed to articulate how Juror Number 5 was unable to perform his duties. Instead, the Court relied on medical metaphor, comparing the juror to a "cancer" and himself, implicitly, as a surgeon.

Metaphor, however, is not a substitute for jurisprudence. Juror Number 5 was able

to perform his duty, and the Court committed serious error in removing him.

2. It Was Error To Remove The Second Juror Number 5.

The Court's discharge of the second Juror Number 5 during deliberations was also serious error. Under California Penal Code section 1089, "if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged." If a juror requests to be excused, the court may not excuse him without a finding of good cause, and that "determination of good cause must be supported by substantial evidence." (*People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856.) There was no good cause to discharge the second Juror Number 5, but there was good cause to declare a mistrial.

The law directs trial courts to be cautious in removing jurors during deliberations. In *People v. Cleveland* (2001) 25 Cal.4th 466, the Court mandated great caution in deciding whether to excuse a juror in order to protect the defendant's right to a unanimous jury and ensure that the juror is not removed because of the juror's dissenting view of the evidence. The mandate to proceed with caution is rooted in a criminal defendant's constitutional right to a unanimous and impartial jury. In *U.S. v. Symington* (9th Cir. 1999) 195 F. 3d 1080, the trial court dismissed a juror for being "either unwilling or unable to deliberate. The Ninth Circuit reversed the defendant's conviction, holding that "if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial." (*Id.*, at p. 1087, emphasis in original.)

In *People v. Karapetyan*, *supra*, 106 Cal.App.4th 609, a conviction was reversed where the trial court's removal of a juror was not for good cause but was merely a camouflaged effort to remove a juror who was holding out for a not-guilty verdict:

The real problem, which should have been apparent to everyone in the

courtroom, was that, after more than five days of deliberation, the jury was deadlocked at 11 to one for guilt of second degree murder.... Juror No. 12 indicated he was not going to vote for a conviction. It was at that point that the other jurors and the court decided Juror No. 12 was refusing to deliberate.

(*Id.*, at p. 621.)

The circumstances here are even more disturbing. What should have been apparent to anyone who was in chambers during Juror Number 5's examination, and what is apparent on the record, is that some improper influence from outside the evidence was being brought to bear on the jury. The Court, however, refused to inquire into it in any genuine fashion. Juror Number 5 testified that "yesterday there was obviously change in jurors based on something which happened outside of the jury room...." He said that he felt physically threatened:

As I say, there have been comments made to me personally that -- that have made me reflect on whether or not my safety is at issue here....

The Court: Who is responsible for these comments?

Juror 5: Your Honor, I prefer not to do that, or go there, except to say that I have tried mightily. I think I'm at an end of what I can do reasonably with this jury to weigh this evidence fairly. I don't think I can weigh it fairly any longer.

(RT 20782:11-20786:11, emphasis added). The Court did not follow-up this extremely serious accusation.

Most tellingly, Juror Number 5 signaled to the Court the fundamental issue providing the impetus for his request to be removed from the case - that the jury was receiving outside pressure or information to come to a guilty verdict which he did not believe was justified:

When I took the oath, I understood it to mean that I needed to be able to

> weigh both sides fairly, openly. And given what's transpired, my individual ability to do that I think has been compromised to a degree that I would never know personally whether or not I was giving the community's verdict, the popular verdict, the expected verdict, the verdict that might, I don't know, produce the best book.

The Court failed to examine this serious allegation. The Court denied the defense motion for mistrial and instead excised Juror Number 5 without articulating good cause for doing so. After less than a full day of deliberations with his replacement, the jury returned with a verdict of guilt.

The proper remedy here was not removal of Juror Number 5, but the granting of the defense's motion for a mistrial. (See *Symington*, *supra*, 195 F.3d at p. 1087.) Scott Peterson should be given a new trial, free from interference and pressure on the jury.

V. THE JURY CONDUCTED ITS OWN, UNAUTHORIZED EXPERIMENT WITH THE BOAT AND IN SO DOING RECEIVED EVIDENCE OUTSIDE OF COURT WHICH MR. PETERSON WAS NOT PROVIDED AN OPPORTUNITY TO MEET OR EXPLAIN, AND WHICH PREJUDICED HIS DEFENSE. A NEW TRIAL SHOULD THEREFORE BE GRANTED.

A. Background Facts.

On the 3rd day of jury deliberations, the Court received a note from the jury foreperson asking to view Mr. Peterson's 14-foot aluminum boat. The boat was being stored on a trailer in the courthouse parking lot. The Court allowed the jurors to do so, with the Court, the prosecutors, defense counsel, and Mr. Peterson present, solely to ascertain whether a body could be placed in the boat. Because evidence had been admitted during trial regarding the placement of a body in the boat, the Court authorized the jurors to enter the boat to evaluate this evidence.

The prosecution had contended that Mr. Peterson disposed of the victim's body in the rough waters of the San Francisco Bay from his lightweight 14-foot aluminum boat. The stability and buoyancy of the boat was therefore a vital issue in the case. The prosecution refused to conduct an experiment of the boat's stability and buoyancy, however, and the defense was prohibited from introducing their videotape experiment into evidence (see discussion below). The jurors therefore took it upon themselves to test the boat. During the examination, they requested and were permitted by the Court to get inside the boat. Once inside, they jumped up and down and rocked the boat back and forth to test its stability and buoyancy and to assess whether Mr. Peterson could have dumped the victim's body from the boat without the boat capsizing.

The experiment was of course not an accurate reenactment of the events that allegedly occurred, as the boat was not in the rough waters of the bay but rather was on a trailer on land. More importantly, the experiment fell outside the scope and purview of the experimentation authorized by the Court. As the Court itself stated:

> The reason why the Court permitted the jury to get into the boat initially – I didn't know they were going to jump up and down on the boat – was the

fact that the District Attorney had presented an experiment where they had – a representative of the District Attorney's Office had actually laid down flat in the boat. And I thought it was important for the jury to take a look, see if there was enough room for somebody to sit – lay down flat in the boat. That was not, in my opinion, taking additional evidence because it was already set forth on the record.

(RT 20645.)

In an interview of Juror #1 Gregory Bertalis, conducted by "Fox News: On the Record with Greta Van Susteran," Mr. Bertalis made clear that the scope of the jurors' experimentation went far beyond what the Court had authorized:

GRETA: Why did you want to get in the boat?

BERTALIS: Because there were questions about the stability of the boat that when we listened to the experts, I don't think those questions were answered in our minds. We needed to have a little bit more to that. And I climbed in the boat. You know, to look, like everybody was saying, at pictures, didn't mean much to us. And not being able to get in the boat originally for some – we walked out there, we were, like, hands off, and kind of walked around with your hands in our pockets. And we didn't know what we could do....It was a matter of just getting an idea of the boat. Looking at it in a picture didn't speak much.

GRETA: Greg, the description the judge gave in court is that you got in it and you rocked back and forth or I think jumped up and down. How would you describe what was done in that boat?

BERTALIS: We tried rocking it. One of them was standing – one person was standing up, and another person was kneeling. I was the person kneeling. And we were trying to show what was the buoyancy."

(Dec. 14, 2004.)

After the jurors completed their testing of the boat, Mr. Peterson moved for a mistrial or, in the alternative, to be permitted to introduce his videotape demonstration of the boat.[3] Although the Court acknowledged that the jurors' experimentation exceeded what was intended or authorized, the Court believed that a mere cautionary statement would suffice. The Court refused to admit the defense's evidence regarding the boat's stability and buoyancy, and denied the request for a mistrial.

As explained below, the jurors' unauthorized experimentation of the boat's stability and buoyancy constituted an unlawful jury experiment under California law and the United States Constitution. The experiment prejudiced Mr. Peterson because it was not within the lines of the offered evidence and because Mr. Peterson was not given an opportunity to meet, answer, or explain the resulting evidence received outside of court. The jury's experimentation went far beyond what was authorized, and amounted to serious misconduct, prejudicing Mr. Peterson's right to a fair trial

B. Argument.

> It is a fundamental rule that all evidence shall be taken in open court and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him. It is this fundamental rule which is to govern the use of . . . exhibits by the jury. They may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. They may carry out experiments within the lines of

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[3] "MR. GERAGOS: I want to reopen, and I want to show the demonstration. And there is – it's a major problem, because we have a situation where jurors now have gotten inside the boat. One juror literally - - actually more than one juror stood in the boat and started to rock back and forth in the boat. That's the taking of evidence, and that is a juror demonstration. And they are forbidden to do that under CALJIC. You read the instruction to them. They have now done precisely what you forbid them to do. THE COURT: With the Court's connivance, incidentally." (RT at 20643-20644.)

offered evidence, but if their experiments shall invade new fields and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain."

(*Higgins v. L.A. Gas & Electric Co.* (1911) 159 Cal. 651, 656-657.)[4]

"Jury misconduct raises a presumption of prejudice, and 'unless the prosecution rebuts that presumption..., the defendant is entitled to a new trial.' [citations omitted]." "The presumption of prejudice 'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party...'[citations omitted]." "Whether a defendant has been prejudiced...depends upon 'whether the jury's impartiality has been adversely affected, whether the prosecution's burden of proof has been lightened and whether any asserted defense has been contradicted.'[citations omitted]."

(*People v. Cumpian* (1991) 1 Cal.App.4th 307, 312.)

In *People v. Conkling* (1896) 111 Cal. 616, two jurors borrowed a rifle similar to the one by which the deceased had been killed, and experimented by firing the rifle to determine the distance that powder marks would be carried by the fire, an issue in the

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[4]Consistent with this principle, upon commencement of trial, the Court advised the jury on two separate occasions that "You must not independently investigate the facts or the law, or consider or discuss facts as to which there is no evidence. This means, for example, that you must not, on your own, visit the scene, *conduct experiments*, or consult reference works or persons for additional information." (RT 8415, 8418 [italics added.) Prior to deliberations, the Court again advised the jury not to conduct any experiments, and provided the jury with copies of the instructions.

case. The Supreme Court reversed the defendant's conviction stating that the experimenting jurors were too zealous, and that their misconduct required retrial. The court held that:

> "***[The jurors] were evidently honest, and desirous of getting at the truth of the matter; but they were too zealous, and their misconduct in this particular demands a retrial of the case.*** Jurors cannot be permitted to investigate the case outside the courtroom. They must decide the guilt or the innocence of the defendant upon the evidence introduced at the trial. It is impossible for this court to say that this outside investigation did not affect the result as to the character of the verdict rendered. For, when misconduct of jurors is shown, it is presumed to be injurious to defendant, unless the contrary appears."

(*Id.*, at pp. 627-628, emphasis added; see also, e.g., *Bell v. California* (1998) 63 Cal.App.4th 919, 934 [order granting new trial affirmed because the trial court would not have allowed a courtroom experiment depicting the manner in which respondent's hands and arms had been pinned behind his back. A juror's improper experimentation during deliberations was sufficient to grant a new trial]; *People v. Castro* (1986) 184 Cal.App.3d 849 [court reversed appellant's conviction because a juror's experiment affected the jury's impartiality, lessened state's burden of proof, contradicted appellant's defense, and prejudiced appellant's right to a fair trial].)

Here, as noted above, the jury had been instructed more than once not to conduct its own experiments. The sole reason the jurors were even permitted to enter the boat was because the Court had admitted the prosecution's demonstration regarding the placement of a body in the boat. As discussed, the Court would not have allowed the jurors to get inside the boat, which was parked on land, had it known they were going to rock it back and forth to test its stability. Recognizing that the jurors were conducting an unauthorized experiment of the boat's stability, the court *sua sponte* issued a cautionary

instruction to remind the jurors that the stability of the boat is not the same on a trailer as it is in the water. The instruction did not remedy the problem, however, for the jurors obviously knew the boat was on a trailer on land yet went forward with their testing of its stability anyway. Consequently, the experimentation by the jurors resulted in the production of new evidence, i.e., the stability and buoyancy of the boat. (Compare *People v. Cooper* (1979) 95 Cal.App.3d 844, 853-854 [the jurors may engage in experiments which amount to *no more than a careful examination* of the evidence which was presented in court].)

Because the buoyancy of the boat was a vital issue in the case, the jurors' experiment lessened the state's burden of proof and contradicted Mr. Peterson's defense. This problem was further compounded by the fact that Mr. Peterson was denied his opportunity to admit into evidence his videotape demonstration of the boat. Given that, it is evident that the experiment by the jurors was beyond the scope of the evidence and not "within the lines of offered evidence."

Finally, the Court's statement that it was unclear whether the jury misconduct would hurt or help the defense is not an acceptable rational for not taking any effective remedial measures or granting a mistrial. Needless to say, since the jurors voted for a conviction, the improper experiment obviously did not produce a result favorable to Mr. Peterson. Stated otherwise, it is substantially likely that the jurors' receipt of evidence outside of court prejudiced Mr. Peterson. (See, e.g., *In re Carpenter* (1995) 9 Cal.4th 634, 653-655.)

VI. THIS COURT SHOULD RULE THAT THE EVIDENCE IN THIS CASE WAS INSUFFICIENT TO SUPPORT THE JURY'S FINDING OF GUILT BEYOND A REASONABLE DOUBT.

This Court can grant a new trial under section 1181, subdivisions (6) and/or (7) where, as here, the evidence is not sufficient to support the jury's guilty verdict. (See, e.g., *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6; *People v. Robarge* (1953) 41

Cal.2d 628, 633-634.) This conclusion can result from one (or both) of two analyses. First, the Court can conclude that the evidence is not sufficient as a matter of law to support the verdict – i.e., a "substantial evidence" analysis. Second, even assuming substantial evidence, the Court will then independently assess the evidence to decide – sitting as a so-called "thirteenth juror" – whether the evidence warrants a finding of guilt beyond a reasonable doubt. (See, e.g., *People v. Lagunas*, *supra*, 8 Cal.4th at p. 1038, fn. 6; *People v. Oliver* (1975) 46 C.A.3d 747, 752; *People v. Robarge*, *supra*, 41 Cal.2d at pp. 633-634.)

Although this Court essentially rejected the "substantial evidence" argument when denying Mr. Peterson's motion for acquittal under Penal Code section 1118.1 at the close of the prosecution's case, we renew that argument here. Evidence sufficient to support a judgment must be substantial, of solid value, and must reasonably inspire confidence. (See, e.g., *People v. Raley* (1992) 2 Cal.4th 870, 891; *People v. Reyes* (1974) 12 Cal.3d 486, 497.) The term "substantial evidence" does not refer to just *any* evidence, but instead signifies proof which is "of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* ((1996) 44 Cal.App.4th 634, 651.) It must be "substantial proof of the essentials which the law requires." (*Ibid.*) Thus a conviction may not be based on mere suspicion, conjecture, speculation, or guesswork. (See, e.g., *People v. Reyes*, *supra*, 12 Cal.3d at p. 500; *People v. Redmond* (1969) 71 Cal.2d 745, 755; see also *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 837; *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 831 ("the evidence must include sufficient probative facts from which a rational factfinder applying the reasonable doubt standard could choose the hypothesis that supports a finding of guilt rather than hypotheses that are consistent with innocence"). A conviction should not be sustained on the basis of isolated pieces of evidence extracted from the record as a whole. (*People v. Johnson* (1980) 26 Cal.3d 557, 577; *People v. Bassett* (1968) 69 Cal.2d 122, 138 ["not enough for the respondent simply to point to `some' evidence supporting the finding"];

(*Roddenberry v. Roddenberry*, *supra*, 44 Cal.App.4th at p. 652.)

These limiting considerations are consistent with the overriding due process guarantee that "prohibits the criminal conviction of any person except upon proof beyond a reasonable doubt." (*In re Winship* (1970) 397 U.S. 358, 362 [25 L.Ed.2d 368, 90 S.Ct. 1068]; see also U.S. Const., 5th and 14th Amendments; Cal. Const., Art. I, §§ 7, 15.)

Thus in *People v. Reyes*, *supra*, 12 Cal.3d 486, the Supreme Court held that the mere fact that one defendant had been seen with the codefendant before and after the crime and could have been a participant did no more than "generate a suspicion which will not support a conviction." (*Id.*, at p. 500.) The Court found significant that when the particular defendant was arrested the morning of the crime there were no physical signs on him of a struggle, no clothes of his were ever recovered with bloodstains on them, and his fingerprints were not discovered in the victim's apartment. (*Ibid.*) "In short," the Court concluded, "there is a conspicuous lack of incriminatory evidence," and

> "viewed in a light most favorable to the prosecution, the evidence against Venegas at most gives rise to a bare suspicion of his complicity in the murder. As we stated in *Redmond*, "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." (71 Cal.2d at p. 755.) "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." (*People* v. *Hall* (1964) *supra*, 62 Cal.2d 104, 112.) The case against Venegas is so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt. Accordingly, we conclude the judgment as to Venegas must be reversed because the evidence is insufficient as a matter of law to support the verdict."

(*Ibid.*)

The same conclusion is mandated here. The only arguably inculpatory evidence against Mr. Peterson was the fact that the bodies of Laci and Connor were found within a couple of miles of where Mr. Peterson had been fishing the morning of December 24, 2002. That simply is not enough in itself to give rise to an affirmative conclusion, beyond a reasonable doubt, that Mr. Peterson caused their deaths. In other words, while it is potentially *some* evidence, it is not *substantial* evidence.

Nothing else even remotely connects Mr. Peterson to the killing of his wife and unborn son. The remaining evidence introduced by the prosecution relates to Mr. Peterson's conduct after Laci's disappearance – i.e., "consciousness of guilt" evidence. But without independent and substantial inculpatory evidence, consciousness of guilt evidence is meaningless. California courts have consistently held that consciousness of guilt evidence — such as flight and false statements — is corroborative only, and not sufficient in itself to prove guilt. (See. e.g., *People v. Holloway* (2004) 33 Cal.4th 96, 142.) This makes sense, for without affirmative evidence linking the defendant to a crime, there can be no reasonable certainty that the "guilt" supposedly being manifested relates to the commission of the crime charged as opposed to some other perceived wrongdoing. (See, e.g., *People v. Williams* (1988) 44 Cal.3d 1127, 1143, fn. 9; *People v. Rankin* (1992) 9 Cal.App.4th 430, 435-436.)

Here, Mr. Peterson was having an affair when his wife disappeared. Much if not all of his allegedly guilty behavior can be attributed to that fact.

Nevertheless, if this Court determines that there was substantial evidence as a matter of law to support the jury's guilty verdict, the Court should then *independently* assess the evidence as a "thirteenth Juror" and conclude in that capacity that the jury verdict is unwarranted by the evidence adduced at trial. In other words, the Court's *independent evaluation of the weight of the prosecution's evidence* should lead it to conclude that there simply was not enough here to convince *the Court* beyond a

reasonable doubt that Mr. Peterson killed his wife and unborn son. And for that reason the Court should order a new trial.

"While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict." (*People v. Robarge*, *supra*, 46 Cal.2d at p. 633; see also, e.g., *People v. Serrato* (1973) 9 C.3d 753, 761 ["In ruling upon a motion for a new trial, the trial court is required to independently weigh the evidence"].)

Hence in *Robarge*, *supra*, the Supreme Court reversed the denial of the defendant's new trial motion where the trial court had indicated that although it had not believed much of the testimony of the prosecution's identifying witness, the jury was the sole judge of the credibility of that witness. The Supreme Court held that "the trial court failed to give defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict." (*People v. Robarge*, *supra*, 46 Cal.2d at p. 634; see also, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 364 [trial judge must conduct independent evaluation of evidence on motion for new trial].)

Here, as discussed above and as this Court is well aware, the prosecution's evidence reduced essentially to speculation, conjecture, and guesswork. The conviction of Mr. Peterson on no more than mere suspicion should not stand. We thus urge this Court to grant a new trial on the basis of insufficient evidence to support the guilty verdict.

VII. BECAUSE NO EVIDENCE SUPPORTED AN INSTRUCTION ON SECOND DEGREE, NON-PREMEDITATED MURDER, IT WAS ERROR FOR THE COURT TO GIVE IT. MOREVER, HAVING INSTRUCTED THE JURY ON SECOND DEGREE MURDER, THE COURT SHOULD ALSO HAVE INSTRUCTED ON MANSLAUGHTER.

Over defense objection, the Court instructed the jury on CALJIC No. 8.30, second

degree unpremeditated murder. The defense had objected to the instruction because there was no evidence from which the jury could find Mr. Peterson guilty of that crime. The Court's duty to instruct on lesser included offenses is not triggered "when there is no evidence that the offense was less than that charged." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1345.) Accordingly, where the record does not contain substantial evidence from which a jury could reasonably conclude that a defendant was not guilty of first degree murder but was guilty of second degree murder, instruction on that lesser theory of guilt is not proper. (See *ibid.*) Thus in *Bradford, supra*, the instruction on second degree murder was held proper because the Supreme Court did find substantial evidence, *based upon the circumstances of the crime itself*, to support a conviction of that crime. (*Ibid.*)

That was not the situation in the present case. As the Court is aware, *there is no evidence of how the actual killing here took place*. The prosecution's claim of premeditation is therefore, of necessity, based upon its theory of motive. In other words, absent motive, there has been no evidence presented to the jury which would enable it to determine the particular intent — or lack thereof — with which the defendant allegedly committed the killings charged here. Because there is no evidence of how the crimes were committed, any finding by the jury that Mr. Peterson allegedly acted with some mental state other than "deliberate and premeditated" would require the jury to rely on pure – and impermissible – speculation.

Nevertheless, given that the Court did instruct on second degree murder, it should also have instructed on voluntary and involuntary manslaughter as lesser included offenses as well, as the defense argued. (See, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 422 [voluntary and involuntary manslaughter as lesser included offenses to murder].) There was no discernable basis upon which the jury could have found that Mr. Peterson committed the killings intentionally but without premeditation (second degree murder), but then *not also find* that he (1) committed the killings intentionally but without malice (voluntary manslaughter) or (2) committed the killings unintentionally. Once the Court

opened the door by ruling the evidence in this case supported an instruction on second degree murder — which in essence gave the jury free rein to find any mental state it desires — it should also have instructed on manslaughter as well.

The giving of the instruction on non-premeditated murder without correlative manslaughter instructions prejudiced Mr. Peterson. While the jury did find him guilty of first degree murder for the killing of Laci, it found him guilty of second degree murder for the baby's death. Without that option, the jury would have found Mr. Peterson not guilty for the death of the baby – i.e., without a finding of premeditation, there would have been no basis upon which he could have been found guilty for Connor's death – which would have made this case no longer a special circumstances case.

Moreover, the jury's finding that Mr. Peterson had not premeditated the death of his unborn son even though he had planned killing Laci means that the jury believed that he didn't know that killing Laci would also kill the baby. How can this be? The only scenario that would support that theory is a manslaughter one – that is, the killing of Laci was either in a heat of passion, or unintentional. Given those options, the jury could very well have convicted Mr. Peterson of some form of manslaughter for both purported killings. Conversely, the Court's refusal to give those instructions substantially impaired his entitlement to a properly-instructed jury, in derogation of his state and federal constitutional rights. (See, e.g, *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [federal constitutional violation where an erroneous instruction so infects the trial as to deny due process]; *Bashor v. Risley* (9th Cir. 1984) 730 F.2d 1228, 1240 [failure to instruct on lesser included offense can violate federal due process].)

A new trial should be granted.

VIII. THE COURT ERRED BY INSTRUCTING THE JURY ON "FLIGHT."

Over defense objection, the Court instructed the jury in CALJIC No. 2.52, the

California "flight" instruction.[5] This was error, and given the nature of the prosecution's evidence in this case, it substantially impaired Mr. Peterson's ability to obtain a fair adjudication of his guilt or innocence.

Penal Code section 1127c authorizes an instruction on the defendant's "flight" whenever the prosecution relies upon evidence of such flight, as tending to show guilt, after either the commission of a crime or the defendant's being accused of the crime. The instruction should *not* be given, however, where there is no evidence of flight. (See, e.g., *People v. Watson* (1978) 75 Cal.App.3d 384, 403.) To rule otherwise would be to permit the jury to draw an impermissible inference of guilt. (See *People v. Pensinger* (1991) 52 Cal.3d 1210 [a flight instruction is correctly given when there is substantial evidence of flight by the defendant from which the jury could reasonably infer a consciousness of guilt].)

Thus in *People v. Watson*, *supra*, 75 Cal.App.3d 384, the Court of Appeal held that "the mere fact of defendant's arrest nearly two days later and miles away from the crime scene standing alone is not evidence of flight that may support an inference of guilt," and that the giving of the flight instruction under such circumstances was error. (*Id.*, at p. 403; see also, e.g., *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1243 ["evidence that the accused left the scene and went home is not evidence of flight that necessarily supports an inference of consciousness of guilt"]; *People v. Goldstein* (1956) 146 Cal.App.2d 268, 275-276 [evidence that defendant left on a prolonged vacation a year after the acts in question, and his failure to immediately return from Mexico when he was first accused, did not support flight instruction].)

In other words, "flight" is not the same as the defendant traveling from one location to another. The evidence must instead permit the jury to find that the defendant

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[5]Although the Court adopted some of the changes to the instruction proposed by the defense, those changes were submitted as "fallbacks" – i.e., the defense objected to *any* flight instruction being given at all, but if the Court did decide to give the instruction, the defense's proposed changes were an attempt to mitigate the harmful effect of the instruction. Obviously, that attempt failed.

actually fled arrest after the commission of a crime. That factual nexus is what potentially allows the jury to find that the defendant's actions reflect a consciousness of guilt. (See, e.g., *People v. Crandell* (1988) 46 Cal.3d 833, 869.) "Flight manifestly does require . . . a purpose to avoid being observed or arrested." (*Ibid.*)

Here, no evidence manifested such purpose by Mr. Peterson, and it was therefore error to give the instruction. There was no evidence that Mr. Peterson fled authorities to avoid being arrested. There is no evidence from which the jury could find that he had imminent plans to flee the police. The mere fact that Mr. Peterson was in San Diego visiting family, or that he was living out of his car, or that he had cash on him is not enough to warrant an inference of consciousness of guilt. To the contrary, the evidence introduced at trial established that Mr. Peterson had met with authorities just weeks before his arrest, had filed his state and federal taxes, and in fact had an appointment with his family to play golf that morning (not to mention Mr. Peterson was headed northbound when arrested and not southbound towards Mexico).

It bears re-emphasis that, as this Court knows, Mr. Peterson became the primary suspect both in the eyes of the police and the general public soon after Laci's disappearance. As a result, multiple search warrants were executed at Mr. Peterson's residence, several of his vehicles were impounded for lengthy periods of time, and Mr. Peterson was under constant surveillance by the police and private investigators working for the media, the victim of constant abuse and harassment. Because of these pressures, Mr. Peterson resorted to a nomadic existence, constantly traveling from one friend or family member's residence to another. That is not "flight."

The Court's giving of the instruction permitted the jury to draw an impermissible inference of guilt and thereby lessened the prosecution's burden in violation of the Sixth and Fourteenth Amendments to the federal Constitution and articles 14 and 15 of the California Constitution. A new trial should be granted.

IX. THE TRIAL COURT ERRED BY EXCLUDING DEMONSTRATIVE EVIDENCE – A VIDEOTAPED EXPERIMENT SHOWING THE INSTABILITY OF THE BOAT – OFFERED BY THE DEFENSE.

A. Background Facts

Throughout its case the prosecution contended that Mr. Peterson disposed of Laci's body in the San Francisco Bay on or about December 24, 2002. More specifically, the prosecution contended that Mr. Peterson was able to dispose of the 150 pound body with four weights estimated at 8 pounds each attached to the body, out of a 14-foot boat without the boat overturning in the rough waters of the bay, allowing Mr. Peterson a safe return to shore. The defense consistently attempted to point out the impossibility of the prosecution theory. Simply put, Mr. Peterson could not have dumped Laci's body with weights attached from the 14-foot boat amidst the high currents of the bay without the boat overturning or capsizing.

In order to conclusively prove the impossibility of the prosecution's theory of the case, the defense decided to conduct the one experiment the prosecution refused to do. On October 16, 2004, the defense replicated what, according to the prosecution, had allegedly taken place in the San Francisco Bay. The defense had earlier purchased a 14-foot Gamefisher aluminum boat, identical to the one allegedly used by Mr. Peterson. For the experiment, the defense placed this boat near Brooks Island in the San Francisco Bay, which was the area where the prosecution's experts testified that Laci's body was disposed. The testing was videotaped by Nareg Gourjian, a lawyer employed by defense attorney Mark J. Geragos. While being videotaped, Raffi Naljian, another employee of the defense attorney, threw overboard a dummy with four weights attached to it into the bay. For purposes of the experiment, Mr. Naljian was similar in size and weight as Mr. Peterson.[6] The dummy used was similar in weight to Laci and had four weights estimated

[6]Mr. Naljian weighed approximately 178 pounds the morning of the experiment and wore a weight

at 8 pounds each attached to it. The boat was identical to that owned by Mr. Peterson, and contained the same items, i.e., tackle box, anchors, and weights, as the prosecution alleged were in Mr. Peterson's boat in December 2002. Most importantly, the seas were calmer in October 2004, when the experiment was conducted, than they had been in December 2002, when the alleged crime occurred. (This was confirmed by prosecution expert, Dr. Ralph Cheng.)

During the first attempt to throw the dummy out of the boat, the boat overturned, leaving Mr. Naljian stranded in the water.

After a brief hearing on the admissibility of the videotape of this experiment, the trial court excluded it on the grounds that the weather conditions during the experiment were not substantially similar to those in December of 2002, the boat used in the experiment was not the actual boat used by Mr. Peterson, the experiment was conducted by an employee of the defense attorney, and there was no testimony as to how the body was actually disposed of from the boat. When defense counsel objected that the reasons cited by the court were not sufficient grounds to exclude the experiment, the court responded, "I don't have to explain my damn rulings. I made my rulings. I made this ruling, and that's the ruling, period. All right. I'm not giving you the boat either."

As explained below, the trial court erred as a matter of law in excluding the evidence.

B. Argument.

> Questions as to the admissibility of evidence frequently arise, and in the hurry of a . . . trial the best Judge may err. . . .[Whenever] the evidence proposed by the defense is not plainly inadmissible, it is better to let it go in, since, in nine cases out of ten, a single equivocal fact, of doubtful bearing upon the case, would have no effect upon the judgment of the jurors, who

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belt making him a total of 198 pounds, the weight of Mr. Peterson in December 2002.

are usually disposed to pass . . . upon the general merits. . . .' In other words, trial judges in criminal cases should give a defendant the benefit of any reasonable doubt when passing on the admissibility of evidence as well as in determining its weight.

(*People v. Murphy* (1963) 59 Cal.2d 818, 829.)

Experimental evidence has long been permitted in California. (See *People v. Spencer* (1922) 58 Cal.App.197.) Admissibility of experimental evidence depends upon the following: [1] the experiment must be relevant; [2] the experiment must have been conducted under substantially similar conditions as those of the actual occurrence; and [3] the evidence of the experiment must not consume undue time, confuse the issues or mislead the jury. (*Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521; *People v. Roehler* (1985) 167 Cal.App.3d 353, 374.) The videotape demonstration in this case satisfies each requirement of that test.

1. The experiment was relevant.

Evidence of an experiment is relevant if the experiment has any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) Here, the videotape was offered as demonstrative evidence to show the jurors that the prosecution's theory of disposing a 150 pound body with weights attached to it from a 14-foot aluminum boat was not possible. As such, the characteristics of the boat, its stability, its tendency to capsize, overturn or right itself under certain conditions, was a "disputed fact" where the jury was resolving a fundamental issue as to whether certain events had occurred as part of a murder plan. The disposal of the body from the boat was the crux of the prosecutor's case, and the defendant should have been allowed to present evidence to refute that allegation.

2. The experiment was conducted under substantially similar conditions as those of the actual occurrence.

In addition to being relevant, the experiment must be a reasonable interpretation of that which it is alleged to portray. Within these limits, "the physical conditions which existed at the time the event in question occurred need not be duplicated with precision nor is it required that no change has occurred between the happening of the event and the time the [videotape] is taken." (*DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1232-1233.)

In *People v. Roehler*, *supra*, 167 Cal.App.3d 353, the defendant was convicted of first degree murder for the deaths of his wife and son. The prosecution alleged that the defendant had thrown his wife and son overboard off the Santa Barbara Coast. (*Id.*, at p. 362.) Defendant maintained that the deaths had occurred accidentally when the boat they were riding in overturned. (*Ibid.*) Prior to trial, the prosecution tested the craft to determine its stability under the conditions alleged by the defendant. (*Id.*, at p. 369.) The testing was videotaped. (*Ibid.*) The three individuals who participated in the tests were similar in size and weight to the defendant, his wife and son. (*Ibid.*) Although the seas were rougher during the testing than they had been during the fatal events, in the first three tests the craft would not overturn. (*Ibid.*) The trial court admitted testimony concerning the testing of the boat.

The defendant argued on appeal that the trial court erred in permitting the jury to consider the experiment as evidence. (*Id.*, at p. 387.) He maintained, among other things, that the weather conditions during the testing were not substantially similar to those during the alleged incident. (*Ibid.*) The court disagreed and stated: "the assessment accepted by the trial judge was that the conditions were at least no rougher than those of July 1981, and more likely than not the July conditions presented more difficulty for the dory than those in January." (*Ibid.*) The court held "the prosecution was not under a duty to test the dory under the worst possible weather conditions, but merely to meet the

requirement that the test be conducted under substantially similar conditions." (*Ibid.*) "'Substantially similar' does not mean precise duplication. We have determined that the dory testing experiment testimony was relevant, involved substantially similar conditions, and that the probative value outweighed the possible prejudicial effect." (*Ibid.*)

Similarly, in *People v. Rodrigues* (1994) 8 Cal.4th 1060, the defendant argued that a videotape should have been excluded because the scenes in the tape were inaccurate reenactments of what the defendant witnessed the night of the murder. (*Id.* at 1114.) The defendant claimed that the scenes featured in the videotape were inaccurate because the scenes were each shot in broad daylight, whereas the actual events occurred in the middle of the night and that one scene incorrectly showed the defendant's vantage point. (*Ibid.*) The defendant argued that these inaccuracies were prejudicial in that they created a misleading impression of what the defendant witnessed. (*Ibid.*) In rejecting defendant's claim that the videotape's inaccuracies created a misleading impression of the events, the court held that "the inaccuracies either were obvious to the jurors or, if not so, were specifically brought to their attention." (*Id.*, at p. 1115.) The court noted that the prosecutor made no attempt to pass the videotape off as depicting exactly what the defendant saw the night of the murder. (*Ibid.*) The court, therefore, held that "any potentially prejudicial effects of the inaccuracies were minimized, if not virtually eliminated." (*Ibid.*) "Under circumstances such as these, we must assume that the jurors were intelligent people and that they understood and took into account the differences identified by defendant on appeal." (*Ibid.*)

Here, the experiment was conducted under *substantially similar* conditions as those of the actual occurrence. Mr. Naljian was similar in weight and height as Mr. Peterson. The dummy was similar in weight as Laci and had four weights attached to it similar to the prosecution's theory. More importantly, the boat used in the experiment

was identical to the boat allegedly used by Mr. Peterson.[7] (See *People v. Roehler*, *supra*, 167 Cal.App.3d at p. 387 [use of the identical equipment is not a requirement to introduce experimental evidence].) Although the weather and tide conditions at the time of the experiment were not identical to the conditions when the alleged crime occurred, the conditions were calmer during the experiment and therefore more helpful to the prosecution's theory. The conditions in October made it less likely that the boat would overturn than those in December.

Moreover, "substantially similar" does not mean precise duplication. (*Ibid.*) Additionally, the fact that Mr. Naljian, an employee of Mr. Geragos, conducted the experiment is not material to the experiment. Indeed, in *Roehler* the experiments were conducted by a Santa Barbara detective and an employee of the sheriff's department. (*Id.*, at p. 369.)[8] Finally, Mr. Peterson did not attempt to pass the videotape off as depicting exactly what had occurred on the day of the alleged crime. "Under circumstances such as these, we must assume that the jurors were intelligent people and that they understood and took into account the differences identified by defendant on appeal." (*Rodrigues,* 8 Cal.4th at 1115.)

3. The evidence would not have consumed undue time, confuse the issues, or mislead the jury.

The use of the videotape would not have confused the issues or misled the jury; rather, it would have assisted the jurors in their determination of the facts of the case.

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[7]The Modesto Police Department seized Mr. Peterson's boat on December 26, 2002 and had possession of it until the time it was introduced as evidence at trial.

[8]The court did admit photographs of a demonstration conducted by the prosecution in which an employee of the district attorney's office was a participant. The employee was shown laying down in different positions in the boat and in a toolbox in the bed of Mr. Peterson's truck presumably to show that a woman with Laci's size could have been placed in those areas. Apparently, the court did not have a concern that an employee of the prosecutor's office was a participant in the experiment.

The experiment was conducted in a manner according to the evidence adduced at trial. The prosecution's theory was that Laci was disposed from Mr. Peterson's boat after having weights attached to her body. The experiment replicated just that. *Its value and weight were for the jury to determine.*

In sum, the Court's refusal to admit the videotaped experiment was a significant error which deprived Mr. Peterson of a fair trial concerning a crucial aspect of both sides' theories of the case. Admission of the videotape would likely have changed the trial's outcome. This is particularly so because, as discussed earlier in this motion, the jury conducted its own experiment, albeit unauthorized and legally improper, concerning the stability and buoyancy of the boat which we can presume – given the verdict – the jury did not resolve in Mr. Peterson's favor.

X. THE PROSECUTION'S WIRETAP EVIDENCE WAS ERRONEOUSLY ADMITTED.

A. Background.

On January 9, 2003 Investigator Steven P. Jacobsen of the Stanislaus County District Attorney's Office filed an affadavit with Judge Wray Ladine of Stanislaus County Superior Court requesting that the law enforcement be permitted to wiretap Mr. Peterson's home phone and cellular phone. The request was granted and the Modesto Police Department immediately commenced the wiretap. A number of police officers and investigators were involved in the actual wiretapping process but because the training records were not turned over to the defense, it is unclear what proficiency and legal training each officer possessed in tapping phones and to what degree they understood the law regarding monitoring phone calls.

Mr. Peterson's conversations, including those with his close friends and family, were monitored and taped for more than a month, resulting in over 3000 recorded phone

calls. A majority of these phone calls were to family members and friends and involved nothing more than innocuous talk about family matters. Despite the fact that these phone calls were unrelated to the case, the supervisors of the wiretap chose not to minimize the calls as required by law. As a result, the prosecution dug through hour upon hour of personal conversations of Mr. Peterson trying to find evidence of his guilt or clues as to Ms. Peterson's disappearance. When this failed miserably (in the over 3000 phone calls, Mr. Peterson did not make even one remark that could be interpreted as admitting guilt) they relied on a secondary strategy - pull any phone call or snippet from a phone call that would make the jury dislike the defendant. Thus, a phone call where he lies to his mother about his location on a January afternoon, although having nothing to do with whether or not he committed the crime, became a evidence that he is a murderer, because he lied to his mother.

On or about August 5, 2003 Mr. Peterson filed a Motion to Suppress Illegally Obtained Wiretap Evidence. The Motion argued that the wiretap evidence must be excluded on the grounds that (a) the affidavits in support of the wiretap failed to establish necessity, (b) the affidavits omitted material information, and (c) constitutional violations in connection with the wiretaps required suppression. The People filed an opposition to the motion arguing that the necessity requirement had been met. The motion was continued and then heard by this Court prior to the commencement of the trial. The Court ordered in camera hearings be held with Investigator Jacobsen questioned as to the "necessity" issue. After the hearing, the trial court denied Mr. Peterson's motion to exclude the wiretap evidence. The court was satisfied that the affidavits sufficiently showed that the necessity requirement had been met and that normal investigative procedures had been tried and failed and that other investigative procedures, which had not been tried, reasonably appeared to be unlikely to succeed if tried.

B. Argument.

1. The Prosecution did not establish the wiretaps were necessary.

Wiretaps are to be used sparingly. As noted in *People v. Munoz* (2001) 87 Cal.App.4th 239, 242:

> A wiretap overhears all sides of all communications. . .Even where there is probable cause risks overhearing communications unconnected with the facts supporting the finding of probable cause. . .Because of these privacy interests, attempts to pass wiretap authorization in California were unsuccessful until 1988, even though federal law had authorized wiretapping since 1968. . .The California wiretap legislation is modeled after federal law, *but is more restrictive. In particular, California imposes additional restrictions on the wiretap application process.*

(Emphasis added.)

Although California law is more restrictive than federal law in terms of when the government may use wiretaps, both federal and state law require a showing of necessity. This showing is generally made by the filing of an affidavit with the application for a wiretap.[9]

People v. Zepeda (2001) 87 Cal.App.4th 1183, appears to be the only reported California case to address the necessity requirement. In *Zepeda*, the Court of Appeal found that the necessity requirement had been met. After reviewing several federal authorities, the *Zepeda* court found that several factors supported the trial court's finding

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[9]Specifically, Penal Code section 629.50, subdivision (a)(4)(B) requires a showing of "the fact that conventional investigative techniques had been tried and were unsuccessful, or why the reasonably appear to be unlikely to succeed or to be too dangerous." Federal law requires a showing that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. " (See 18 U.S.C. section 2518(3)©).)

of necessity for the wiretap.[10] (See *Zepeda* at 202.) However, a review of the six factors relied upon by the *Zepeda* court reveal that *Zepeda* is easily distinguished from the instant matter.

Because *Zepeda* is readily distinguishable, this Court may review federal authority as to the necessity requirement. There are several illuminating cases.

First, in *United States v. Kalustian* (9th Cir. 1975) 529 F.2d 585, 589, the Ninth Circuit, in finding that the government failed to demonstrated necessity, stated:

> [T]he utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III. The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny. Our view of wiretap orders must ensure that the issuing magistrate properly performed his function and did not serve merely as a rubber stamp for the police.

(Internal citations and quotation marks omitted)

In *Kalustian*, the Ninth Circuit found that investigating officials had improperly decided that electronic surveillance was imperative:

> They discarded alternative means of further investigation because 'knowledge and experience' in investigating other gambling cases convinced them that 'normal investigative procedures' were unlikely to succeed. Agent Bren recites that searches are often fruitless because gamblers keep no records, destroy them, or maintain them in undecipherable codes. Use of the phone company's records alone is inconclusive.
>
> The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature

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[10]The six factors were: (1) The case against defendant was entirely circumstantial; (2) It appeared that witnesses were reluctant to come forward other than in an anonymous manner; (3) The detective believed that questioning defendant about the shooting was unlikely to produce any additional evidence; (4) The defendant was unaware that he was the focus of the murder investigation; (5) The defendant was unaware the police had seized evidence from his room and his vehicle; and (6) The detective believed that the defendant was likely to alert others and ask them to destroy other evidence.

Here, *Zepeda* factors 2, 4, 5, and 6 were clearly not present. Factor 1 was present because there can be no showing of non-circumstantial evidence since Mr. Peterson is factually innocent. Moreover, if this factor alone made a wiretap permissible virtually every murder investigation could employ a wiretap from the outset until the prosecution had obtained concrete evidence against a suspect. This absurd result would be inconsistent with California's (and the United States') preference for normal, less invasive investigative techniques.

> or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view.

(*Kalustian* at 589.)

Although *Kalustian* involved gambling, the Ninth Circuit's comments are instructive. Here, the affidavit of Stephen P. Jacobson ("Jacobson Affidavit") filed in support of the wiretap application states, *inter alia*:

> Normal investigative techniques *have been tried and have been successful in identifying and securing evidence against the Target Subjects.*

(Jacobson Affidavit at paragraph 11(c), emphasis added.)

* * *

> As set forth, *law enforcement has obtained a great deal of information pertaining to this investigation.* At present, I believe there is circumstantial evidence against Scott Peterson. *This evidence, if used in court proceedings, may be enough to obtain proof beyond a reasonable doubt against Scott Peterson.*

(Jacobson Affidavit at paragraph 26, emphasis added.)

From these two items alone, it is clear the government believed it had great success in obtaining evidence - - so much evidence that Jacobson was willing to state his belief that they had enough evidence to prove guilt beyond a reasonable doubt. On its face, the Jacobson Affidavit not only failed to establish necessity, the Affidavit pointed to the opposite conclusion - - namely, that in the prosecutor's opinion, they could already prove Mr. Peterson's guilt beyond a reasonable doubt.

Moreover, the fact that a judge would find a showing on necessity despite the above demonstrates that the judge was serving merely as a rubber stamp for the police as condemned by the *Kalustian* court. The Jacobson Affidavit also fell short of the requisite *Kalustian* standards in that it failed to set forth any reasons as to why this alleged murder case (at the time it should properly have been referred to as a missing person case) would be any different than other investigations in which the prosecutor did not need nor request a wiretap. In any case, the Jacobson Affidavit failed to satisfy the showing of necessity required by *Kalustian*.

More recently, the Ninth Circuit further explained the necessity requirement in *United States v. Blackmon* (9th Cir. 2001) 273 F.3d 1204, in which the court therein found that suppression of wiretap evidence was warranted. The *Blackmon* court stated:

> Taken together, §§ 2518(1)(c) and (3)(c) require a full and complete statement establishing necessity. The purpose of these requirements is to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose crime. *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974). [¶] Thus, we require a full and complete statement of specific allegations indicating why normal investigative procedures failed or would fail in the particular case.

(*Blackmon* at p. 1207.)

Like *Kalustian*, the *Blackmon* court recognized that if traditional investigative techniques will be effective, a wiretap is prohibited. As noted above, the Jacobson Affidavit did the opposite by affirmatively asserting that the prosecution has what it believes is proof beyond a reasonable doubt. As such, the wiretap should never have been authorized.

Blackmon also reiterates the need for a complete statement specifically delineating the reasons purportedly necessitating the wiretap. The Jacobson Affidavit fails to succeed in this regard:

> [N]ormal investigative techniques have failed or appear reasonably unlikely to succeed if tried, or are too dangerous.

(Jacobson Affidavit at paragraph 28.)

* * *

> Traditional investigative techniques have taken place. . . However, insofar as those traditional means of investigation noted below have failed to uncover the direct evidence in this investigation. . .I believe that the investigative goals set forth in paragraph 11(b) above likely not be achieved in the future through alternative investigative techniques alone.

(Jacobson Affidavit at paragraph 29.)

* * *

> I believe that physical surveillance, without the aid of wire and electronic interception, will not achieve the current investigative goals.

(Jacobson Affidavit at paragraph 33.)

* * *

> It is my opinion that after telling Scott Peterson she was reporting their affair to authorities, Scott Peterson may not trust Amber Frey enough to make a confession or make admissions to her.

(Jacobson Affidavit at paragraph 37.)

* * *

> I do not believe that the use of any undercover agent can achieve the goals of this investigation.

(Jacobson Affidavit at paragraph 41.)

* * *

> Based on my training and experience, I believe that futher interviews, if Scott Peterson does consent, will not be successful in developing evidence to identify and locate Laci Peterson's whereabouts. I believe that no other person, with the exception of Scott Peterson has information about the entire scope of Laci Peterson's disappearance.[11]

(Jacobson Affidavit at paragraph 42.)

* * *

> I do not believe that the execution of search warrants have or will achieve all of the goals of this investigation.

(Jacobson Affidavit at paragraph 45.)

* * *

> For all the reasons stated above, pen registers, trap and trace and toll analysis, are all valuable tools, but will not by themselves achieve the goals of this investigation.

(Jacobson Affidavit at paragraph 48.)

* * *

> Therefore, your affiant does not believe that any further trash searches will achieve the goals of this investigation.

(Jacobson Affidavit at paragraph 52.)

Through the above-quoted portions of the Jacobson Affidavit, the prosecution attempted to demonstrate necessity. A closer review of the Jacobson Affidavit in fact reveals the "reasons" given by Jacobson are conclusory boilerplate allegations. Through the above Jacobson purports to establish that physical surveillance; interviews, grand jury subpoenas and immunity; confidential informants; undercover agents; interviews of suspect; search warrants; toll records; and trash searches are futile. Jacobson's assertions are ludicrous, particularly when put under scrutiny.

For example, although Jacobson claimed that the wiretaps were necessary, he entirely neglected two key facts. First, Jacobson acknowledged the collection of blood and hair samples which had yet to be fully analyzed at the time of the application. (Jacobson Affidavit at paragraph 27.) Second, Jacobson admitted that on January 9, 2003, the day before the wiretap application:

> a possible body ha[s] been located in the San Francisco Bay, near the Berkeley Marina. This potential body was located by accurate sonar equipment utilized in the search of the bay by authorities in this case. *In the*

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[11]This statement conclusively demonstrates that as of January 10, 2003, *at the latest*, the prosecution was focusing its entire efforts and investigation on Scott Peterson.

event that this is confirmed as the body of Laci Peterson, after recovery attempts are made on Saturday, January 11, 2003. . .[the day after the wiretap application]

(Jacobson Affidavit at paragraph 35, emphasis added.)

The law on necessity is unambiguous - - "the purpose of [the necessity] requirement[] is to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." (See *United States v. Kahn* (1974) 415 U.S. 143, 153, n. 12.) In light of the prosecution's possession of DNA samples as well as the possible recovery of the body, there was no necessity at the time Jacobson composed his affidavit and the wiretap authorization. The application for the wiretap was nothing more than an additional tool sought by the prosecution in its one-man targeted capital investigation.

In addition, the wiretap affidavit was also disingenuous in referring to other police methods as being futile. The very evidence presented by the prosecution at trial in order to convict Mr. Peterson (the Amber tapes, the physical surveillance, the interviews) is the same evidence that Jacobsen tells the court has been futile in proving the defendant's guilt. Either Jacobsen is lying about the other police methods being futile or the prosecution put on a case in which they were aware the evidence was lacking.

In sum, because there was no necessity the order authorizing the wiretap was invalid and all wiretap evidence should have been excluded. The prejudice that the admission of this irrelevant evidence caused Mr. Peterson at trial now warrants the granting of a new trial based upon this error.

2. The monitors's failure to minimize personal conversations between Mr. Peterson and his family constituted gross misconduct by law enforcement.

Both Investigator Jacobsen and Deputy District Attorney Rick Distaso stated the wiretap monitors were instructed as to California law regarding wiretaps, including the requirement of minimizing personal phone calls that are not related to the investigation. (Insert California Law on minimization) Although how much training the officers had in

wiretap monitoring is unclear (since defense requests for training records were never met), Investigator Jacobsen and DDA Distaso asserted that the monitors were aware of minimization requirements and how to perform this task.

Despite their ability to physically minimize the calls, it appears that the monitors were either confused as to when to apply it or were deliberately ignoring the law in their desperate quest to find some type of actual evidence against Mr. Peterson. Of the over 3000 phone calls taped, a large portion of the calls were with family and friends and contained nothing more than the small talk. Beyond any doubt, these phone calls should have been minimized as soon as the monitor realized the nature of the call. Instead, the phone calls were listened to and recorded in their entirety. Law enforcement then combed through the tapes looking for any clue as to Mr. Peterson's admitting guilt or providing a clue as to Laci Peterson's disappearance. Not surprisingly they found none. Instead, what these phone calls produced were a kind of Keystone Kops routine with Investigator Jacobsen alternately determining that Scott was getting ready to flee (misinterpreting a business trip to Mexico) then opining on the defendant's choice of television programs (Scott turned down the opportunity to watch an episode of Murder She Wrote) as evidence of a guilty mind.

Undeterred, the prosecution presented at trial a series of phone calls between the defendant and his family and friends none of which were related to the actual issue of whether or not the defendant committed the crime. For example, one of the prosecution's chief arguments was that on January 10, 2003, Mr. Peterson was on phone calls with several friends and family members (including his mother) and told them he was in Bakersfield when he was in fact 150 miles away in Gilroy, California. Although the prosecution could not come up with a plausible theory as to why this had any connection to the disappearance of Mr. Peterson's wife, it allowed the prosecution to repeatedly argue that he lied to his own mother. This "evidence" did nothing more than to ratchet up the personal animus against the defendant which was obviously the intent all along.

Further exacerbating the situation was the refusal to allow the defense to submit tapes demonstrating strong character traits by the defendant. Such tapes – where the defendant talked to his brother-in-law of his love and affection for his wife – were rejected as being irrelevant.

From the beginning the wiretaps were nothing more than a law enforcement tactic to try to bolster what they knew was not a strong case. Rather than continue normal police investigative techniques which the law requires unless there is a necessity, the Modesto Police Department simply bypassed the law and applied for a wiretapping warrant. When that yielded nothing incriminatory, they chose to listen and tape all phone conversations, including ones that clearly should have been minimized, in the hopes of finding conversations that would portray Mr. Peterson in an unfavorable light. Given the restrictive nature that the courts require of wiretap applications, the wiretaps in this case should never have been admitted. Their admission plainly harmed Mr. Peterson, and now require a new trial.

XI. THE COURT ERRED BY ADMITTING TAPE RECORDINGS OF MR. PETERSON'S IRRELEVANT STATEMENTS TO AMBER FREY.

A. Introduction

This Court again abused its discretion when it admitted into evidence Mr. Peterson's statements to his mistress Amber Frey. The statements were neither relevant nor material to the issues in the case. The statements did not amount to admissions or confessions, and did not concern the crime charged. Reasonably viewed, the evasions and ambiguous statements to the mistress were nothing more than what they appeared to be, statements that an unfaithful husband might be expected to make to maintain an affair. They did not support an inference of murder. Rather, these statements published to the jury were highly inflammatory and prejudicial to Mr. Peterson.

B. Argument.

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The trial court has broad discretion in determining the relevance of evidence but lacks discretion to admit irrelevant evidence." (*People v. Scheid* (1998) 16 Cal.4th 1, 13 - 14, internal citations omitted.) "[E]vidence presented on a [n]ondisputed issue is irrelevant and, hence [i]nadmissible . . . ." (*People v. Coleman* (1979) 89 Cal.App.3d 312, 321, citing, e.g., *Krouse v. Graham* (1977) 19 Cal.3d 59.)

Mr. Peterson's statements to his mistress had absolutely no probative value to the issues raised in the case – that is, whether Mr. Peterson committed capital murder. The statements did not amount to admissions or confessions. The statements were not proof of murder; they were proof of adultery, and no more. Mr. Peterson's adulterous relationship with Amber Frey was not a disputed issue. Thus, under the above authority, the statements were irrelevant and inadmissible.

Even assuming for argument's sake, however, that Mr. Peterson's statements to his mistress were relevant to the crime charged, that evidence's undue prejudicial impact far outweighed its probative value. (See Evid. Code, § 352.) The vast majority of potential jurors will likely dislike a man who started an affair when his wife was nearly eight months pregnant. This evidence was no doubt introduced for the sole purpose of inflaming the passions of the jury against Mr. Peterson, passions and prejudices which in fact resulted in a guilty verdict despite the lack of sufficient evidence. Additionally, this evidence was cumulative in that the prosecution called Amber Frey as a witness who testified about her adulterous relationship with Mr. Peterson. Failure to exclude this irrelevant yet highly prejudicial evidence under Evidence Code section 352 was an abuse of discretion.

The erroneous admission of this evidence was plainly so prejudicial that it now entitles Mr. Peterson to a new trial.

XII. THE COURT ERRED BY ADMITTING THE "DOG" EVIDENCE.

A. Introduction.

On December 26, 2002, the Modesto Police Department contacted Christopher Boyer, a member of the Contra Costa County Volunteer Sheriff's Search and Rescue Team and asked him to provide tracking dogs to find Laci Peterson. Mr. Boyer came to Modesto with Cindee Valentin who works as a trailing dog handler in missing persons searches. Ms. Valentin and Mr. Boyer collected scent items at the Peterson home although their testimony during the pre-trial motions contradicted each other as to exactly how the items were collected. Boyer says he picked up and handled an eyeglass case along with several other personal items while Ms. Valentin says she was the one who picked up and handled the eyeglass case, along with a pair of brown slippers that belonged to Scott Peterson. Ms. Valentin acknowledged that she does not remember changing gloves and that she should have done so to make sure that Scott's scent from the slippers did not transfer to the eyeglass case. Two days later, on December 28, 2002, (four days after Ms. Peterson's disappearance), Mr. Boyer was again contacted by Modesto Police and asked to provide tracking dogs at the Berkeley Marina. Boyer contacted Eloise Anderson who works as a volunteer dog handler at the Contra Costa Sheriff's Department. Ms. Anderson trained a trailing dog, Trimble, who at the time was certified by the California Rescue Dog Association (CARDA)

In addition to Ms. Anderson and Trimble, Boyer contacted Ronald Seitz another volunteer dog handler and asked him to bring his trailing dog to the Marina on the 28th. Mr. Seitz arrived first and was given one of Laci Peterson's slippers as a scent article for the dog to smell. The dog searched the area around the launch ramp twice and did not alert on Laci's scent. A few minutes later Ms. Anderson arrived with Trimble. The dog was scented with

the eyeglass case. Shortly thereafter, the dog went down one of the docks next to the boat ramp, sniffed around, stared at the water and then barked.

During pre-trial motions on February 22-24, the prosecution sought to enter Trimble's actions as evidence that the dog was picking up Laci's scent at the marina. The defense objected and argued that, in order to believe this theory, a juror would have to be convinced that a dog picked up the scent of a woman who had been dead for four days after the deceased body had traveled over 90 miles in a closed vehicle. The Court ruled that because the dog allegedly picked up the scent near the location where Ms. Peterson's body was found, the evidence of the dog's actions at the Marina could be admitted at trial.

Before Ms. Anderson was called as a witness at the trial, the defense subpoenaed training records from CARDA and were surprised to find that Trimble had failed a re-certification test shortly after the Marina trailing incident. These records had never been provided to the defense nor had Ms. Anderson told the court this during her testimony at the pre-trial hearings. Defense counsel again asked to have her testimony excluded or, in the alternative, to be able to tell the jury about the dog failing the certification test. The Court ruled that the testimony would not be excluded and that, if the defense wished to present evidence of the dog's failure, the prosecution would be allowed to present evidence of recent successes by the dog.

Ms. Anderson testified at trial about Trimble's activities and stated that her interpretation of Trimble's behavior was that the dog had picked up Laci Peterson's scent at the marina. She also testified that her dog could trail human scent while vehicle tracking and that Trimble had no problem picking up the scent of a person who had been dead for four days even though he was not a cadaver dog. Upon cross-examination, Ms. Anderson was shown a videotape of Trimble in a training class, miserably failing a vehicle trailing exercise, but stubbornly maintained that her dog had passed that test and possessed the requisite skills to track vehicles.

B. Argument.

There are only three published California appellate decisions concerning dog trailing: *People v. Craig* (1976) 86 Cal.App.3d 905, *People v. Malgren* (1983) 139 Cal.App.3d 234, and *People v. Gonzales* (1990) 218 Cal.App.3d 403. All three cases involve situations where dogs were placed on the track of criminal suspects within one hour of the criminal activity. In other words, in all three cases the scent was fresh.

Furthermore, in two out of three cases, the dogs followed a scent to its presumptive source, i.e., a human being. In the first, *People v. Craig*, *supra*, 86 Cal.App.3d 905, three men in a white Nova robbed a gas station. Station employees pursued the men to an apartment complex, where the men stopped and ran inside. When police officers arrived at the complex, they saw three men who matched the descriptions of the suspects and ultimately detained them in or around the apartment complex. (*Id.*, at pp. 909-910.) The robbery victim was brought to the scene, where he identified the defendant. When the Nova was searched, incriminating evidence from a separate robbery which had occurred earlier that evening was found inside. (*Id.*, at pp. 910-911.) An officer and his trained police dog were ordered to track from the interior of the Nova. After being allowed to smell inside the Nova, the dog followed the path of the suspects from that point to the point where the detention of the suspects occurred, which was a relatively short distance as both the Nova and the place of the detention were in or around the complex. (*Id.*, at p. 911.)

The *Craig* court held this evidence of canine tracking was admissible and not subject to the foundational requirements for scientific evidence set forth in *People v. Kelly* (1976) 17 Cal.3d 24. In so holding the court distinguished between "gadgetry" and "animate objects", i.e., dogs. This ground for finding the *Kelly* formulation inapposite has since been rejected. In *People v. Shirley* (1982) 31 Cal.3d 18, the court found hypnosis procedure a proper subject for the Kelly rule. Likewise, in *People v. Stoll* (1989) 49 Cal.3d 1136, the court found that psychological testimony based on personality tests came within the *Kelly* rule.

> *Kelly/Frye* also has been applied to less tangible new procedures which carry an equally undeserved aura of certainty. In *People v. Shirley*, *supra*, 31 Cal.3d at page 66, we applied the *Kelly/Frye* rule to, and barred admission of, "post-hypnotic" testimony of a rape complainant. We explicitly rejected the Attorney General's claim in that case that the *Kelly/Frye* rule was limited to techniques analyzing "physical evidence". (*Id.*, at p. 52.) We noted that, given the rule's prophylactic purpose, nothing precludes its application to "a new scientific process operating on purely psychological evidence". (*Id.*, at p. 53.) As thoroughly explained in Justice Mosk's majority opinion, the danger of hypnotically refreshed testimony lies in the tendency of the process to "actively contribute[] to the formation of pseudo-memories, to the witness' abiding belief in their veracity, and to the inability of the witness (or anyone else) to distinguish between the two." (*Id.*, at p. 53.)

(*People v. Stoll*, *supra*, 49 Cal.3d at p. 1156.

In *People v. Malgren, supra*, 139 Cal.App.3d 234, 237, victims returned to their home one evening, noticed that items had been moved, heard a loud noise in a bedroom, and saw someone run down the hall and out the rear door into the backyard. An officer and his tracking dog responded to the victims' call, arriving at the house less than a half-hour later. From inside the house, the dog was commanded to "track". The dog ran down the hallway, into the bedroom, and out the same door as the suspect, continuing across the backyard into an adjacent game reserve. The dog tracked through the damp grassy game reserve for approximately 35 minutes and over about seven-tenths of a mile, and then ran into some high bushes and began to growl and bite. The defendant was found in the bushes. Although the night was cold, appellant was panting and perspiring, as if he had been running. His pant legs were wet, and his tennis shoes were muddy and wet and grass-stained, which the appellate court found supported "the reasonable inference that he had just run from the home through the game reserve". (*Id.*, at pp. 237-240.) Other evidence included burglar's tools found on the trail.

The court in *Malgren* held that dog tracking evidence alone when used to establish identity is insufficient to support conviction. Prior to the admissibility to the tracking evidence, the court set forth the following foundation at page 238:

> We conclude that the following must be shown before dog trailing evidence is admissible: (1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated. [Citations omitted]

Malgren stressed that even if all the factors concerning the trustworthiness of the dog's ability to track are met, additional evidence other than what the dog did must be shown demonstrating the dog's accuracy in the case before the court.

The *Malgren* case is also significant because the dog-training officer, Gyselbrecht, testified that during his training of the dog, "[s]ometimes the trail was interrupted by obstacles such as deep creeks or rooftops, or by the suspect's flight in an auto; on other occasions the officer called the dog back because he didn't want it to track across a freeway". (*Id.*, at p. 238, emphasis added.) The People's evidence consists exclusively of a dog purporting to track the scent of Laci Peterson four days after she was deceased and after she had traveled 90 miles in a vehicle.

Finally, in *People v. Gonzales* (1990) 218 Cal.App.3d 403, as in *Malgren*, a qualified handler and tracking dog were put on the trail of a burglary suspect within a half-hour after he had fled. There, an alarm went off at a rural home. A responding deputy entered the house and saw a man piling goods in the center of the living room. The man fled; the deputy then heard, in another section of the house, the sound of breaking glass. He went to the bedroom in the front of the house, looked out the broken window and saw a man running away from the house. Some time after this, a man drove by in a white truck and reported seeing a Mexican male running east.

Approximately 25 minutes after the call for a backup unit was sent, Deputy Blagg and his dog "Rookie" arrived at the scene. A pillowcase from the house was found outside the home containing some household articles. It was located near where the running man had last been seen. Rookie smelled the pillowcase and ran off, unleashed, ahead of Deputy Blagg in an easterly direction. Footprints were observed leading away from the pillowcase in the direction taken by the dog; the shoe impressions reappeared intermittently along the path taken by Rookie where the person leaving them had gone off the hardpan into the plowed dirt. Along the route, a clean dime was found.

After traveling approximately nine-tenths of a mile, Rookie crossed over into an unplowed vineyard with three to four feet of weeds growing between the rows. The officer spotted appellant lying prone in the tall grass across the area between the rows with his arms extended in front of him up on the berm of the vineyard. *(People v. Gonzales, supra*, 218 Cal.App.3d at pp. 405-407.)

The court in *Gonzales* noted that historically many courts have looked on dog-tracking evidence as that of the "weakest character". *People v. Gonzales, supra*, 218 Cal.App.3d at p. 413. Emphasizing the need for corroboration, the court stated: "The difficulty is that we want to assure ourselves the dog did not err either in picking up the scent of the person who handled the pillowcase or in following that scent to the person found." *(People v. Gonzales, supra*, 218 Cal.App.3d at p. 412.) In discussing the requirements of the *Malgren* case, the court in *Gonzales* stated the following:

> The factors referred to in the instruction in the instant case, 'whether the dog was placed on the track where circumstances have shown the guilty party to have been' and whether the trail had 'become stale or contaminated' are factors that help to ensure the dog has a fresh scent, but they do not, as claimed by respondent, corroborate that the person located is the person who was tracked. The dog's actions in locating an individual require assurance that the person located is the person pursued, as well as being the person who in fact left the initial scent followed by the dog.

(People v. Gonzales, supra, 218 Cal.App.3d at p. 409.)

Based on *Craig, Malgren, and Gonzales,* CALJIC has added an instruction concerning dog-tracking evidence. CALJIC 2.16 states:

> Evidence of dog tracking has been received for the purpose of showing, if it does, that the defendant is [the] [a] perpetrator of the crime of _____. This evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crime of _____. 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 crime of _____. The corroborating evidence need not be evidence which independently links the 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.

As the use note to CALJIC 2.16 states, "this instruction must be given sua sponte when dog-tracking evidence is relied upon in part to prove identity".

This review of the published California cases dealing with dog trailing evidence fails to reveal any cases supporting the novel theory which was advanced in this case. The cases all deal with evidence tracking the *perpetrator* of the crime, and in all three cases the dog trailing evidence is offered to prove that person's *identity* as the perpetrator. This was not the situation here. Here, the prosecution put before the jury evidence of the dogs trailing the victim – not the perpetrator – which tracking was done for the purpose of attempting to find Laci Peterson or her body. Moreover, this dog trailing presupposes a person traveled in a car, not on foot, further distinguishing it from the reported cases. And finally, these dogs never led their handlers to Ms. Peterson or her body – which distinguishes it entirely from the cases which have allowed dog trailing evidence in California.

To recap – the California cases permitting dog trailing evidence involved situations where the dog has been put on a fresh track and has led directly either to human suspects or to a spot where such suspects were known to have been within the last half-hour. Out-of-state cases admitting such evidence have similar factual circumstances.

(See, e.g., *State v. Loucks* (1983) 98 Wash.2d 563, 656 P.2d 480, 482; *People v. McPherson* (1978) 85 Mich.App. 341, 271 N.W.2d 228, 229-230; *People v. Centolella* (1969) 61 Misc.2d 723, 305 N.Y.S.2d 279, 283.) The novel theory of dog trailing presented by the prosecution in this case had no basis in either scientific fact or California case law. The prosecution cited no authority, from any jurisdiction, which allowed the type of speculative, unscientific dog trailing evidence admitted in this case. No court has recognized dog trailing of vehicles or of a trailing dog (not a cadaver dog) picking up the scent of a dead body four days later.

Given the prejudicial nature of this erroneously admitted evidence, a new trial should be granted.

XIII. THE COURT ERRONEOUSLY ADMITTED TESTIMONY REGARDING MR. PETERSON'S PURCHASE OF ADULT PROGRAMMING.

A. Introduction

This Court abused its discretion in permitting the prosecution to introduce highly prejudicial and irrelevant testimony. Specifically, this Court allowed the prosecution to introduce into evidence testimony regarding Mr. Peterson's purchase of adult programming on cable television. The Court reasoned that the purchase of adult programming two weeks after Laci's disappearance was probative of Mr. Peterson's guilt.

The evidence, however, was irrelevant and highly prejudicial to Mr. Peterson. The prosecution failed to establish any evidentiary link between the adult programming and commission of the alleged crimes. The prosecution failed to present any specific facts which showed Laci would have approved or disapproved of having adult programming available on cable television. Nor was there any evidence that Laci would have objected to Mr. Peterson viewing adult programming. On the contrary, both Mr. Peterson's and Laci's computers, at home and at work, contained adult oriented materials. Absent any evidence that Laci objected to adult programming prior to that date, the inference the

prosecution sought from the evidence – that Mr. Peterson did not expect Laci to return home – is far too speculative to establish relevance. (See Evid. Code, § 350.) Moreover, the evidence was highly inflammatory and created a substantial danger of undue prejudice, which clearly outweighed any slight, arguable probative value. Failure to exclude the evidence under Evidence Code section 352 was thus at the very least an abuse of discretion.

B. Argument

No evidence is admissible except relevant evidence. (Evid. Code § 350.) Relevant evidence is evidence having any tendency in reason to prove or disprove any disputed fact. (Evid. Code, § 210.) The trial court is vested with wide discretion in determining the relevance of evidence. The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable reference' to establish material facts such as identity, intent, or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) However, the court has no discretion to admit irrelevant evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681-682.)

Where evidence is determined to be relevant to prove a material fact in issue, it is for the trial court in the exercise of its judicial discretion to determine whether its probative value is outweighed by its possible prejudicial effect and to admit or exclude it accordingly. (Evid. Code, § 352; *People v. Kerry* (1967) 249 Cal.App.2d 246, 252.)

This discretion is not a "capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia , but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*People v. Harris* (1988) 60 Cal.App.4th 727, 736-737 citing *Bailey v. Taaffee* (1866) 29 Cal. 422, 424.)

Moreover, the "prejudice" referred to in section 352 applies to evidence which "uniquely tends to evoke an emotional bias against one party as an individual and which

has very little effect on the issues [citation omitted]." "Thus, the balancing process mandated by § 352 respecting probative value and undue prejudice requires 'consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case.'" (*People v. Wright* (1985) 39 Cal.3d 576, 585 citing *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.)

The evidence at issue - the purchase of adult programming - did not tend to prove any issue in the case. As explained above, there was absolutely nothing of evidentiary value in Mr. Peterson ordering and viewing adult programming on cable television. The prosecution failed to introduce any evidence that Laci approved or disapproved of having adult programming on television. The record does not even reflect whether Laci objected to Mr. Peterson viewing adult programming. In fact, Mr. Peterson and Laci had several adult oriented materials on their individual computers. The introduction of the evidence therefore forced the defendant to make the Hobson's choice of either introducing more evidence of pornography which existed on both Laci and his computers or allow the false impression created by the prosecution to stand. The prosecution's attempt to characterize the evidence as probative of Mr. Peterson's state of mind is disingenuous. The prosecution contended the evidence showed that Mr. Peterson did not expect Laci to return home. However, absent any evidentiary link between the evidence and the alleged crimes, no criminal state of mind could be inferred from Mr. Peterson merely ordering and viewing adult programming. The prosecution simply failed to establish any connection between the evidence and the alleged offenses. Because the evidence of adult programming had no probative value in establishing a disputed issue, it was irrelevant and should have been excluded. (Evid. Code, §§ 210, 350.)

Assuming solely for argument sake the adult programming had some relevance, its prejudice far outweighed any slight probative vale. (Evid. Code § 352.) Placing before the jury evidence that Mr. Peterson purchased adult programming two weeks after his wife's disappearance undisputably evokes an emotional bias against Mr. Peterson. The

prejudicial nature of this evidence is obvious; it was intended to outrage the jurors. Additionally, this evidence was cumulative in that there was other evidence introduced at trial which tended to show Mr. Peterson did not expect Laci to return home (i.e., the sale of her vehicle and placing their house for sale.)

The evidence was simply unrelated to any issue in the case. It was introduced solely for the purpose of inflaming the passions of the jury and to cast Mr. Peterson in an extremely negative light before the jury. This irrelevant evidence was far from neutral. It was prejudicial.

XIV. THE COURT ERRED BY DENYING MR. PETERSON'S MOTION TO HAVE HIS GUILT OR INNOCENCE DETERMINED BY A JURY THAT WAS NOT DEATH-QUALIFIED.

A. Introduction.

Before trial, Mr. Peterson moved under Penal Code section 190.4 to have separate juries for the guilt and, if applicable, penalty phases of his trial. He based this motion on a combination of factors: the enormous amount of pretrial publicity adverse to Mr. Peterson, the unusually high number of people who have prejudged him guilty, and the fact the process of death qualification creates a jury that leans in favor of the prosecution and conviction. He argued that the aggregate of the three factors made it extremely unlikely that he would obtain a jury which is not conviction-prone, and that the simple expedient of empanelling two juries – or, alternatively, selecting sufficient death-qualified alternate jurors to replace non-death-qualified jurors if it becomes necessary to move on to the penalty phase – would greatly help to reduce that likelihood. He pointed out that Penal Code section 190.4, subdivision (c), gives the Court discretion to empanel separate juries for the guilt and penalty phases for good cause.

At the same time, Mr. Peterson also raised a constitutional challenge to the death qualification process in itself, explaining that numerous studies over the past 20 years

have established that death qualification unfairly skews the jury's fact-finding function, posing "a substantial threat to the ability of a capital defendant to receive a fair trial on the issue of his guilt or innocence." (*Lockhart v. McCree* (1986) 476 U.S. 162, 185 ("*Lockhart*") (dis.opn. Marshall, J.)

The Court denied the motion, and a single, death-qualified jury found Mr. Peterson guilty and recommended he be sentenced to death. As the discussion above concerning the removal of the second juror number 5 during deliberations demonstrates, however, Mr. Peterson's fears regarding the propensity of the jury – particularly in the media circus that surrounded the case – were justified. In the context of what has transpired since this motion was first made, Mr. Peterson now argues – upon the legal grounds raised before – that the denial of his motion was error warranting a new trial with a separate guilt phase jury which has not been death-qualified.

In addition, Mr. Peterson brings to the Court's attention new legal authority issued since the denial of the motion. (See *United States v. Green* (D.Mass. 2004) 343 F.Supp.2d 23; *United States v. Green* (D.Mass. 2004) 324 F.Supp.2d 311.)

B. Argument.

1. The Court should have exercised its discretion under section 190.4 to empanel a separate, non-death-qualified jury for the guilt phase.

Section 190.4, subdivision (c) gives the trial court in a capital case discretion to empanel, for good cause, a second jury for the penalty phase of trial. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 351 [request for separate jury granted].) A motion requesting the court to exercise its discretion under the statute may be brought before the guilt phase begins, as was done here. (*People v. Rowland* (1992) 4 Cal.4th 238, 268.)

Although there is no authority affirmatively defining what constitutes "good cause" under this provision, nor how it may be shown (see, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 27 -28; *People v. Hart* (1999) 20 Cal.4th 546, 640 -641), empanelling

separate guilt and penalty juries *in this case* would necessarily have been a reasonable exercise of the court's discretion, for several reasons.

First, as is now beyond dispute, the publicity in this case was unprecedented, not only in its amount and widespread nature, but also in its hostility towards Mr. Peterson. Moreover, as set forth in the venue section above, the number of potential jurors who prejudged Mr. Peterson and found him guilty based solely upon the press was enormous.

The above two factors unique to this case interacted with an element common to all death penalty cases – the above-mentioned death qualification of the jurors who will hear penalty phase proceedings should they prove necessary. "Death qualification" is "the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial."[12] (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 165.) As discussed more fully below, empirical studies uniformly indicate a death-qualified jury is more prone to convict a capital defendant than is a non-death-qualified jury.

For purposes of the specific request for separate juries under section 190.4, subdivision (c), however, this Court did not need to – and still need not – reach the constitutional issue. Here, the death-qualification process (and its impact on the guilt phase jury) was one of several factors which combined to form a compelling reason to grant separate juries as an exercise of discretion under the statute. The vast adverse publicity, the abnormally high prejudging of guilt, and the strong statistical showings that

[12]Such jurors are sometimes called "Witherspoon excludables" (or "WE's"), referring to the Court's earlier decision in *Witherspoon v. Illinois* (1968) 391 U.S. 510. In that case the Court held that the state could constitutionally exclude from jury service only those individuals who "made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment," or would not be able to assess the capital defendant's guilt or innocence impartially. (*Id.*, at pp. 522-523, fn. 21.)

a death-qualified jury tilts in favor of the prosecution likely had a severe impact on the nature of the jury ultimately selected to decide Mr. Peterson's guilt or innocence, and which found him guilty.

Stated differently – this confluence of circumstances made it more likely than not that Mr. Peterson was found guilty by a jury that was inclined to favor the prosecution. Although section 190.4 does evidence a legislative presumption in favor of a single jury in death cases, in this case any such presumption was rebutted by the overwhelming likelihood that separate juries would have helped ensure a fair trial. For that reason, the Court should have granted Mr. Peterson's request.

2. Death-qualifying the guilt phase jury violated Mr. Peterson's federal and state constitutional right to an impartial and representative jury.

Both the United States and California Constitutions guarantee a criminal defendant the right to be tried by an impartial jury selected from a representative cross section of the community. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; see also, e.g., *Taylor v. Louisiana* (1975) 419 U.S. 522, 530; *Turner v. Louisiana* (1965) 379 U.S. 466, 472; *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266; *Rubio v. Superior Court* (1990) 24 Cal.3d 93, 97.) In *Lockhart v. McCree*, *supra*, 476 U.S. 162, the Supreme Court considered whether these constitutional guarantees prohibited the removal for cause of Witherspoon excludables for the guilt phase of a capital trial.

The District Court in *Lockhart* had granted habeas corpus relief after holding an evidentiary hearing during which it admitted numerous studies. Based upon such evidence, the District Court concluded "that persons who favor the death penalty are 'uncommonly' predisposed to find for the prosecution and against the defendant, and that death qualification thus "created juries that 'were more prone to convict' capital defendants than were 'non-death-qualified' juries." (*Grigsby v. Mabry* (1985) 569 F.Supp. 1273, 1322-1323, reversed by *Lockhart v. McCree*, *supra*, 476 U.S. 162.) The

District Court also found that, for constitutional purposes, the group of excluded jurors is "distinctive and identifiable, since members of this group are currently excluded on the basis of their distinctive and identifiable attitudes toward the death penalty." (*Id.*, at p. 1323.) Paraphrasing *Adams v. Texas* (1980) 448 U.S. 38, the court held that "if prospective jurors in capital cases are barred over the defendant's objection from jury service because of their views on capital punishment on any broader basis than inability to follow the law or to abide by their oaths, the guilty verdict must be set aside."[13] (*Id.*, at p. 1323.)

The Supreme Court reversed. (*Lockhart*, *supra*, 476 U.S. at p. 184.) Although expressing serious reservations about the studies the District Court relied upon for its factual findings (see *id.*, at pp. 168-173), the Court ultimately assumed for purposes of analysis that those studies did "establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries. (*Id.*, at p. 173.) The Court then held, nevertheless, that the Constitution does not bar such result. (*Ibid.*)

First addressing the claim that death qualification violated the defendant's Sixth and Fourteenth Amendment right to a jury which represents a cross section of the community, the Court stated that the analysis must focus on the entire venire, not the petit jury or individual peremptory or for-cause challenges. (*Id.*, at pp. 173-174.) And in any event, the Court said, the particular excluded jurors did not constitute a "distinctive" group in the community for purposes of the "cross section" analysis, essentially because death qualification is not a means to arbitrarily skew the composition of the jury and because Witherspoon excludables are identified for a trait that is within their control. (*Id.*, at pp. 174-176.)[14]

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[13]The Eight Circuit affirmed the District Court's grant of habeas corpus relief. (*Grigsby v. Mabry* (8th Cir. 1985) 758 F.2d 226.)

[14]The Court stated "We have never attempted to precisely define the term 'distinctive group,' and we do not undertake to do so today." (*Id.*, at p. 174.)

To establish a prima facie violation of the fair cross-section requirement, a defendant must show that: (1) the group allegedly excluded is a "distinctive" group in the community; (2) the group's representation in jury venires is not fair and reasonable in relation to the number of such

The *Lockhart* court next held that the fact that death qualification produced a jury more prone to side with the prosecution did not render it impartial for constitutional purposes. Constitutional impartiality, the Court stated, could not be defined "by reference to some hypothetical mix of individual viewpoints. . . . [T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." (*Id.*, at pp. 183-184; see also, e.g, *People v. Steele*, *supra*, 27 Cal.4th at p.1242 [rejecting constitutional challenges to death qualification].)

Justice Marshall, joined by Justices Brennan and Stevens, wrote a scathing dissent, chastising the Court for its "glib nonchalance" in upholding "a practice that allows the State a special advantage in those prosecutions where the charges are the most serious and the possible punishments, the most severe." (*Id.*, at p. 185.) Under the majority's decision, the dissent observed, the "State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will . . . give the prosecution license to empanel a jury especially likely to return that very verdict." (*Ibid.*)

Justice Marshall pointed out that "overwhelming evidence" – relied upon by the District Court and assumed to be true by the majority for purposes of its analysis – showed that death-qualified juries are more likely to convict than are juries on which "unalterable opponents of capital punishment are permitted to serve." (*Id.*, at p. 184.) He lamented the majority's "disregard for the clear import of the evidence" and resulting tragic misconstruing of "the settled constitutional principles that guarantee a defendant the right to a fair trial and an impartial jury whose composition is not biased toward the prosecution." (*Id.*, at p. 192.) The question in light of the evidence, Justice Marshall emphasized, is whether a defendant is entitled to "have his guilt or innocence determined

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persons in the community; and (3) the under-representation is due to the systematic exclusion of such persons in the jury selection process. (*Duren v. Missouri* (1979) 439 U.S. 357, 364.)

by a jury like those that sit in noncapital cases – one whose composition has not been tilted in favor of the prosecution by the exclusion of a group of prospective jurors uncommonly aware of an accused's constitutional rights but quite capable of determining his culpability without favor or bias." (*Id.*, at p. 185.)

The dissent noted the "essential unanimity" of the evidence produced in the trial court, and the fact that, as the Court of Appeal had found, "all of the documented studies support the district court's findings." (*Id.*, at p. 190; see also *id.*, at pp. 187-190.) It also observed that the evidence "confirms, and is itself corroborated by, the more intuitive judgments of scholars and of so many of the participants in capital trials – judges, defense attorneys, and prosecutors."[15] (*Id.*, at p. 188, citing 569 F.Supp. at p. 1322.)

Concerning the constitutional analysis of impartiality itself, Justice Marshall first clarified the actual claim at issue – not whether any particular juror was impartial, but whether, "by systematically excluding a class of potential jurors less prone than the population at large to vote for conviction, the State gave itself an unconstitutional advantage" at trial. (*Id.*, at p. 193.) In other words, it is the *process* combined with its likely result which is constitutionally infirm, not the result itself. Justice Marshall found precedent for this conclusion in the Court's own prior decision in *Witherspoon* where, as noted, the Court concluded "'that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.'"[16] (*Id.*, at pp. 194, 197, quoting *Witherspoon*, *supra*, 391 U.S. at p. 521.) The dissent found that *Adams v. Texas*, *supra*, 448 U.S. 38, provided "clear precedent" for applying the

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[15]The fact that it is the courts themselves who bar defendants from documenting the prejudicial effect of death qualification in *actual* trials should not prevent defendants from relying on the next best thing – recreations. (*Id.*, at p. 189.)

[16]The *Lockhart* majority stated that if the guilt jury in this case had been randomly selected, the same 12 jurors might have been seated – i.e., the defendant might have ended up with a death-qualified jury albeit unintentionally. The dissent emphasized the Court's inconsistency in this regard, reminding the majority that in *Witherspoon* the Court had addressed the exclusion of anti-death penalty jurors and concluded, concerning the penalty phase, that the manner of selecting the jury had "stacked the deck" against the defendant. (391 U.S. at p. 523.) But as in *Lockhart*, if the penalty jury in *Witherspoon* had been selected by the luck of the draw, it is possible the same 12 jurors who actually sat on the case might have been selected.

Witherspoon analysis to the guilt phase of a capital trial. (*Id.*, at p. 197; see also *Ballew v. Georgia* (1978) 435 U.S. 223, 236 [Court discusses "counterbalancing of various biases" as critical to the effective functioning of juries, and questions "any jury procedure that systematically operated to the 'detriment of . . . the defense'"].)

Lockhart was written during a time "when capital punishment systems in this nation functioned as if there were no real likelihood that we would execute an innocent person." (Rosen, *Innocence and Death* (2003) 82 N.C. L. Rev. 61, 62.) In *Herrera v. Collins* (1993) 506 U.S. 390, for example, Justice O'Connor stated that "the Constitution offers unparalleled protections against convicting the innocent." (*Id.*, at p. 420.)

Times have changed.

During the past 10 years, the public has become painfully aware of the tragic reality observed by Justice Marshall – innocent people are being convicted and executed.[17] (See *Furman v. Georgia*, *supra*, 408 U.S. at pp. 366-369 (conc. opn. of Marshall, J.) The sanguine confidence reflected in the above quotation of Justice O'Connor has been replaced by a mounting skepticism in the reliability of our capital justice system. (See, e.g., Rosen, *Innocence and Death*, *supra*, 82 N.C. L. Rev. at p. 79; Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California* (2003) 44 Santa Clara L. Rev. 101 (hereinafter *"Comparison"*); White, *Errors and Ethics: Dilemmas in Death* (2001) 29 Hofstra L. Rev. 1265-1274; Dwyer, Neufeld & Scheck, Actual Innocence: Five Days to Execution and Other Dispatches frm the Wrongly Convicted (2000); Gross, *Lost Lives: Miscarriages of Justice in Capital Cases* (1998) 61-AUT Law & Contemp. Probs. 125.)

In response, various organizations, including the American Bar Association, have recommended a moratoriums on the death penalty. In January 2000 Illinois Governor George H. Ryan declared a moratorium on executions in his state and appointed a

[17]In a 2001 poll, 73 percent of adults surveyed believed that innocent people had been executed during the prior five years. (Rosen, *Innocence and Death*, *supra*, 82 N.C. L. Rev. at p. 62, fn. 4.)

commission to study its death penalty system. He took this action because 13 people who had been sentenced to death in Illinois were subsequently found to be innocent. Three years later, Governor Ryan commuted all death sentences in his state to life imprisonment without the possibility of parole. In so doing, he stated:

> "I must act. Our capital system is haunted by the demon of error – error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death row inmates."[18]

(Sanger, *Comparison, supra*, 44 Santa Clara L. Rev. at p. 102.)

California has the largest death row population of any state in the nation. (*Id.*, at p. 105.) Given the data gathered in other states, such as Illinois, and the relative numbers involved, it is reasonable to presume that innocent people have likely been sentenced to death in our state as well. (*Id.*, p. 114.)

This overall change in awareness, which has permeated all segments of society, now warrants a reevaluation of the constitutional validity of death-qualifying the guilt phase jury in a capital case.[19] Most important will be a renewed valuing (and updating if necessary) of the data relied upon by the District Court decision in *Lockhart,* which evidence in turn formed the backbone of Justice Marshall's dissent. (See *Grigsby v. Mabry, supra*, 569 F.Supp. 1273.) This data did and still suggests that death-qualified

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[18]Even the Supreme Court has reacted to this influx of information showing the failures of our system to decide the guilt and innocence of capital defendants. (See, e.g., *Atkins v. Virginia, supra*, 536 U.S. at p. 320, fn. 25 [noting "disturbing" number of inmates on death row who have been exonerated]; see also, e.g., *McFarland v. Scott* (1994) 512 U.S. 1256, 1264 (dis. opn. of Blackman, J., from den. of cert.) [stating he now had "grave doubt" concerning the reliability of capital convictions]; *Callins v. Collins* (1994) 510 U.S. 1141, 1145 (dis. opn. of Blackman, J., from den. of cert.) [stating "from this day forward, I no longer shall tinker with the machinery of death"].)

[19]See, e.g., *Ring v. Arizona* (2202) 536 U.S. 584, 608 ["[o]ur precedents are not sacrosanct . . . [W]e have overruled prior decisions where the necessity and propriety of doing so has been established. . . . We are satisfied that this is such a case"]; *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 860 (conc. opn. Scalia, J.) ["That was then, this is now"].

juries tend to favor the prosecution.[20] (See also, e.g., Rosen, *Innocence and Death*, *supra*, 82 N.C. L. Rev. at p. 98 ["Jurors who survive the death qualification questioning are more prone to convict than the regular juror.... We could prohibit the use of that procedure, or we could require a separate, non-death-qualified jury for the guilt/innocence trial"]; Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, *supra*, 61-AUT Law & Contemp. Probs. at pp. 146-147 & fn. 103 ["many studies have shown" that death qualification produces "juries that are more likely to convict"].)

Although the *Lockhart* majority concluded that "conviction-proneness does not constitute partiality, . . . [f]or impartiality to retain some cogent definition as a legal concept . . . it must be affected by evidence that a jury is predisposed to rule in favor of one party." (Byrne, *Lockhart v. McCree: Conviction-proneness and the Constitutionality of Death-Qualified Juries* (1986) 36 Cath. U. L. Rev. 287, 316-317.) At the very least, the data adduced should have shifted the burden to the State to present "definitive proof of the impartiality of capital juries. . . ." (*Id.*, at p. 317.)

In *United States v. Green*, *supra*, 343 F.Supp.2d 23, the District Court, incorporating its earlier order in *United States v. Green*, *supra*, 324 F.Supp.2d 311, ruled that *the facts of the case before it* warranted the empaneling of a non-death-qualified jury for the guilt phase and, should a conviction result, a separate death-qualified jury for the penalty phase. The court's decision was heavily influenced by studies which suggested that "death-qualification leads to the exclusion of a disproportionate number of black and female jurors" – two cognizable groups under the Fourteenth Amendment. (343 F.Supp.2d at pp. 33-34, citing prior order at 324 F.Supp.2d at pp. 329, 332.)

Moreover, the District Court in *Green* – although not relying on this ground – noted that updated data since the Supreme Court's decision in *Lockhart* continue to "raise the serious concern that death-qualified juries are more conviction prone." (343 F.Supp.2d at p. 34.) "Updated data," the Court observed, "overwhelmingly shows that

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[20]As Justice Marshall stated, whether it *proves* the premise is not the point when we are talking about the right to an impartial jury in a capital trial.

death-qualified jurors are significantly more conviction prone than jurors who are not death qualified." (*Id.*, at pp. 34, citing representative findings constituting "just a sliver of the recent data indicating that death-qualified jurors are skewed to be conviction-prone.")

The District Court judge in *Green* concluded that although her decision did not rest on the constitutional implications of a conviction-prone guilt-phase jury, "it surely affects my obligations as a trial judge. Death penalty qualification hinders my responsibility to facilitate, to the best of my ability, a fair trial on guilt. It provides an additional 'good cause' justifying bifurcating the juries in the trials of the capital defendants before me." (*United States v. Green*, *supra*, 343 F.Supp.2d at p. 35.)

That is precisely the analysis and conclusion Mr. Peterson advocates in this case. Through whichever lens it is viewed, the use of a death-qualified jury to determine whether he was guilty or innocent most certainly deprived him of a fair trial.

Lastly, this Court can rule that the *California* Constitution does not permit death-qualifying the guilt phase jury because the process infringes the defendant's right to an impartial jury. Although, admittedly, numerous California Supreme Court decisions have rejected that argument, a closer reading of those opinions – including a historical tracing of the precedent cited – reveals that in fact the seminal California decision of *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, did not actually discuss the constitutional issue on its merits but found instead that the *evidence* submitted was not sufficient to sustain the claim. Thus California decisions instead rely upon *Lockhart* for the "impartiality" aspect of the analysis. Therefore, given that the data now available establishes that a death-qualified jury is conviction-prone, and given the recent and growing awareness of substantial defects in the adjudication of guilt or innocence in capital cases, this Court can find that the California Constitution does *not* permit death qualification of the guilt phase jury, and that Mr. Peterson is therefore entitled to a new trial before a separate, non-death-qualified guilt phase jury.

CONCLUSION

For all the above reasons, viewed separately and cumulatively, defendant Scott Lee Peterson respectfully requests a new trial.

Dated: February 25, 2005

Respectfully submitted,
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