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SAN MATEO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

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D.A. No.1056770

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	No. SC55500 (Stan. Co.#1056770)
vs.	POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR NEW TRIAL; DECLARATIONS OF LT. XAVIER APONTE, DET. CRAIG GROGAN, JAN GAUTHIER
SCOTT LEE PETERSON, Defendant.	Date: March 16, 2005 Time: 9:00a.m. Place: Dept. 2M

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Come now the People of the State of California to submit the following POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR NEW TRIAL:

THERE IS NO NEW EXCULPATORY EVIDENCE

> "A motion for a new trial upon the ground of newly discovered evidence is looked upon with suspicion and disfavor, and a party who relies upon such ground must make a strong case both in respect to diligence on his part and as to the truth and materiality of the evidence, and if he fails in either respect his motion must be denied.
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> People v. McGraw, (1961) 191 Cal.App.2d 876, 883.

The defense claims, as always, that the "prosecution failed to provide" exculpatory evidence; yet admits that it was the discovery provided by the prosecution that supplied this "new" and so-called "exculpatory" information. The tip states: "RECEIVED INFO FROM SHAWN TENBRINK (INMATE) HE SPOKE TO BROTHER ADAM WHO SAID STEVE TODD SAID LACI WITNESSED HIM BREAKING IN. COULD NOT GIVE DATES OR TIME. APONTE HAS FURTHER INFO." The date of the tip was January 23, 2003. This tip was located at Bates page number 15311, and was provided to the defense on May 14, 2003 (**EXHIBIT 1**, date signed as being received by the defense.)

The defense states this tip was "buried" which is not true; however the reality is that the tip was there and the defense did not act upon it. The reason for this is that the defense attempted to rush this case to trial and failed to acknowledge that it was a tactical choice to refuse to waive time.

It is not ineffective for counsel to acquiesce to a client's demand for a speedy trial if it works to the defense's advantage; counsel can overrule that demand if they cannot be prepared for trial in time.

> "Who wins when an admittedly unprepared counsel seeks a continuance in order to prepare in the face of his client's refusal to waive time? My colleagues suggest the defendant's choice to go forward is controlling even though they see his refusal to waive time as only a trial tactic. The rule becomes then--at least in section 1381 cases--that a defendant who insists on his statutory right to a speedy trial waives his Sixth Amendment right to adequately prepared counsel." [dissent of Associate Justice POCHE, where he comments on the majority's holding.]
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> People v. Abdel-Malak, (1986) 186 Cal.App.3d 359, 370-371.

> "Implicit in these decisions, however, is the notion that the inherent tension between the right to a speedy trial and

> the right to competent, adequately prepared counsel is not, in itself, an impermissible infringement on the rights of the accused, including the right to a fair trial."
>
> People v. Frye, (1998) 18 Cal.4th 894, 939.

In the instant case, the defendant fully exercised his right to continue or delay proceedings in order to prepare when he felt that it was beneficial to him. This often occurred so that witnesses were inconvenienced, testimony was broken up so as to be confusing, and the prosecution's case was disrupted. The defense also implies that the prosecution was required to do many things, including investigating the case for the defense or, at a minimum, pointing out all arguably favorable information contained within the discovery provided by the prosecution. This is not the law, nor should it be.

The prosecutor has no obligation to seek out information from other agencies or sources for the benefit of the defense. The prosecutor is responsible only for that material in his possession or known to be in the possession of the investigating agency.

> "From an examination of the record of the hearing on the motion, it appears that the prosecution did not have such information, however, the defense in essence argued that it would be easier for the prosecution to obtain it and transfer it to the defense. Thus, had defendant's motion been granted, compliance would have required the prosecution to prepare the case for the defense. This is an obligation not imposed by the law."
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> People v. Gurtenstein, (1977) 69 Cal.App.3d 441, 449; similarly see People v. Cohen, (1970) 12 Cal.App.3d 298, 323.

The prosecutor has no duty to actively investigate the facts and circumstances of the case for the benefit of the accused. (People v. Beagle, (1972) 6 Cal.3d 441, 450-451; People v. Gurtenstein, supra.) Nor are the People required to make a complete

and detailed accounting to the defense of all police investigatory work on a case. (Moore v. Illinois, (1972) 408 U.S. 786, 795.)

In the instant case the defendant fails to cite Brady v. Maryland, (1963) 373 U.S. 83, because the information was provided to him:

> "Second, the prosecutor had no constitutional duty to conduct defendant's investigation for him. Because Brady and its progeny serve "to restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery," the Brady rule does not displace the adversary system as the primary means by which truth is uncovered. (United States v. Martinez-Mercado, (5th Cir.1989) 888 F.2d 1484, 1488.) Consequently, "when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." (United States v. Brown, (5th Cir.1980) 628 F.2d 471, 473; see also United States v. Stuart, (8th Cir.1998) 150 F.3d 935, 937 ["Evidence is not suppressed if the defendant has access to the evidence prior to trial by the exercise of reasonable diligence."]; United States v. Slocum, (11th Cir.1983) 708 F.2d 587, 599.)"
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> People v. Morrison, (2004) 34 Cal.4th 698, 715.

> "Brady, however, does not require the disclosure of information that is of mere speculative value. "[T]he prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (In re Littlefield, (1993) 5 Cal.4th 122, 135, italics omitted; Kyles v. Whitley, supra, 514 U.S. at pp. 436-437; People v. Jordan, supra, 108 Cal.App.4th at p. 361.) Brady did not create a general constitutional right to discovery in a criminal case. (People v. Jordan, supra, 108 Cal.App.4th at p. 361.)"
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> People v. Gutierrez, (2003) 112 Cal.App.4th 1463, 1472.

Clearly the prosecution has complied with the law, but still the defense claims that exculpatory material was withheld. This is, once again, an all to familiar tactic on the part of the defense to twist the truth and make false claims. The defense conveniently fails to provide any *admissible evidence* on this point and instead,

relies on rumor and innuendo. The person who phoned in the tip, Lt. Aponte, is not a member of the prosecution team. (See People v. Superior Court, (2000) 80 Cal.App.4th 1305, 1317, "In connection with its administrative and security responsibilities in housing California felons while they serve their sentences, CDC is not part of the prosecution team.")

Aponte's declaration [**Exhibit #2**] makes it clear that the only possible tidbit of information that could ever be claimed to be exculpatory, was reported by him to the police. The police documented his tip and turned it over to the prosecution and the defense [**See Exhibits #1, 2 and 3**]. As Lt. Aponte points out, Shawn Tenbrink denied having any information when asked by the police over the phone - under no possible circumstance could this ever amount to exculpatory information.

Lastly, the defense claims that this "newly discovered evidence" is sufficient to require a new trial. They cite People v. Trujillo, (1977) Cal.App.3d 547, 556, ("To entitle a party to have a new trial on this ground, 'it must appear, - "1. That the evidence, and not merely its materiality be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."'); and People v. Turner, (1994) 8 Cal.4th 137, 212, (" 1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a

retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.' [citing to People v. Sutton, (1887) 73 Cal. 243, 247-248.]") Under the law stated in both of the two cases cited by the defendant, his claim fails at each step.

Step 1 - The evidence was NOT newly discovered. As set forth above, it was provided to the defense five months prior to the preliminary hearing and over one year before opening statements. Even if we were to assume for the sake of argument that the prosecution had a duty to point out everything that might be beneficial for the defense (which the prosecution does not concede), the defendant has failed, because he cannot show the "materiality" of the statement.

The best spin that the defense can put on the phone call between Adam and Shawn Tenbrink is that Todd supposedly said that Laci had seen him breaking in. Neither Shawn nor Adam had any first-hand knowledge and could not testify to any claimed fact. Any claim by the defense that this fourth-hand hearsay statement is admissible against Todd pursuant to Evidence Code §1230 ignores the fact that Todd *was not* "unavailable" and could have been called by the defense. (Todd was listed as a witness on the main witness list provided to the jurors and was in Redwood City available to testify.)

Neither Shawn nor Adam Tenbrink has provided declarations. The sole information provided to this court by the defense is the declaration of counsel relating the statements of his investigator,

who was relating the statements of Lt. Aponte, who was relating the phone call between Shawn and Adam Tenbrink. In the case of People v. Earp, (1999) 20 Cal.4th 826, the court ruled on a similar third-hand claim, stating:

> "In seeking a new trial based on newly discovered evidence, defendant presented a declaration from defense investigator Barbara Lancaster-Jordan describing a conversation with a jail inmate who claimed to have overheard from a distance of two cells away a statement by Dennis Morgan that he had been at defendant's house visiting his "granddaughter," Amanda, on the day of her injuries. The declaration stated that the inmate refused to come forward because he feared retribution by the prosecutor who the inmate said had already punished him for cooperating with defendant's lawyers, by causing the loss of his work assignment and his transfer to the "worst" jail facility. The trial court denied the motion for a new trial, finding the inmate's story "inherently untrustworthy ... and not worthy of belief." Defendant argues that the denial was error.
>
> Because a ruling on a motion for new trial rests so completely within the trial court's discretion, we will not disturb it on appeal absent " ' "a manifest and unmistakable abuse of discretion." ' " (People v. Turner (1994) 8 Cal.4th 137, 212.) None appears here."
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> People v. Earp, supra, at page 890.

Step 2 - The evidence is cumulative. The defense claims that there was nothing in the trial related to this evidence. This is not completely accurate. The jury heard that Steven Todd committed the Medina burglary. (RT 10177, 10335, 20015, 20049-20061) They heard the accusation that Diane Jackson had seen the house burglarized on December 24th (RT 20060) and that a safe was in the yard on the 24th. The jury heard that Todd denied having anything "to do with that woman." They were immediately told by the court:

> THE COURT: I want to admonish the jury now. Because here's a guy who's sitting in the back seat of a police car talking to a police officer. So there's a real issue about the trustworthiness of what he's talking to this police officer, telling this police officer, right. This is not coming in for the truth, you know, this

is coming in with respect to information that this police officer received and the reasonableness of his conduct about what did he do about it. But it's certainly not coming in for the truth because there's a real issue about the trustworthiness. You think someone who is talking to a police officer is --
Go ahead.
MR. GERAGOS: Is going to give you a straight story.
THE COURT: Right.
(RT 20015-20016)

Step 3 - A different result is not probable.

"A defendant is not entitled to a new trial, as a matter of right, simply because he has discovered new evidence which might have been admitted on the trial if discovered earlier. The question always exists, in this connection, as to whether, under all the circumstances of the case, the newly discovered evidence is produced in such a way, and is of such a nature, that its introduction upon another trial would render a different result reasonably probable, and as to whether, in the absence of such evidence, the defendant has had a fair trial on the merits.'

In making this determination the court is entitled to consider the credibility as well as the relevance of the proffered testimony. (People v. Hayes, 220 Cal. 220, 225; People v. Byrne, 160 Cal. 217, 226; People v. Weber, 149 Cal. 325, 349; People v. Egbert, 43 Cal.App.2d 117, 118.)"

People v. Sousa, (1967) 254 Cal.App.2d 432, 435.

The defendant has proffered no admissible evidence. There are no declarations to support any of his claims. The only "claimed" witness has refused to talk to the defense (probably because he was exaggerating his knowledge to gain some importance for his incarcerated brother.)

Therefore, there is no credible or relevant proffered testimony to consider. For the sake of argument, if the proffered testimony was that Todd committed the Medina burglary - that is old news. If the claim is that Todd told someone he saw Laci this amounts to impeachment of a witness who didn't testify. This is clearly not relevant.

"It has been ruled that newly-discovered evidence which would tend merely to impeach a witness is not of itself sufficient ground for granting a new trial."

People v. Long, (1940) 15 Cal.2d 590, 607 -608.

The defense, without calling Todd as a witness, was able to place before the jury the entire circumstances of the Medina burglary with the Diane Jackson spin (see Step #2 above). Todd was impugned about the dates of the burglary (RT 20056) and his statement that he and Pearce took the safe in the morning when no media was around (RT 20058). The defense argued this scenario to the jury (RT 20480-20482).

The reason why the outcome would not change, even if this court were to find this constituted new evidence, is because the Medina burglary occurred **after** Laci went "missing" under any possible version of Karen Servas's timeline. It is without dispute that the Medina burglary had to occur after 10:33 a.m. on the 24th, since the Medinas were at home until that time (RT 9592-9593.) Karen Servas found the dog wandering in the street at 10:18 a.m. (RT 9422, 18076).

The Medina burglary was unrelated to Laci's disappearance. The Medinas' house was broken into by a "door-kick" in the backyard (RT 9720-9722). A Mercedes-Benz was left in the driveway (RT 9726). All these factors are consistent with the events as detailed by Todd and Pearce. The Medinas reported the break-in on the 26th; a $1,000.00 reward was posted January 1, 2003 (Rt 10178) and Todd and Pearce were arrested on January 2, 2003 (RT 20016). Todd and Pearce admitted their involvement in the Medina burglary (RT 20053) and most of the property was recovered. Todd and Pearce were turned in

for the Medina burglary by an informant who received the $1,000.00 reward (RT 20055) but no one ever collected the $500,000.00 reward offered for information leading to the safe return of Laci Pterson. That fact speaks volumes.

Step 4 - The defense had the information and could have produced it at trial. The defendant wants to blame MPD for his failure to read his own discovery. His claim is reminiscent of the "boy who cried wolf." The defense cannot escape the fact that they had the tip sheet.

Step 5- The defense's claimed evidence is not only not the "best evidence" it is no evidence. The Turner case cited by the defense shows that the evidence must relate to the evidence against the defendant and not to claimed third-party impeachment. Turner also dismissed the defense proffer as ambiguous. The instant case proffer suffers from the same ambiguity.

The defendant is unable to meet even one of the steps required of him for a new trial based on newly discovered evidence. It is his burden and he has failed to meet the challenge.

DENIAL OF A SECOND CHANGE OF VENUE WAS PROPER

The People first note that this is simply a rehashing of the arguments the defendant made before and during trial. The courts look upon repetitious motions seeking the same relief with disfavor. "[I]n the orderly administration of justice, and in support of a sound judicial policy, a court, in the absence of unusual or changed circumstances... is justified in its discretion, in refusing to consider repetitive applications of the same petition." (Hagen v.

Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). Since this is simply the same motion that the defendant made at trial, the court may, in its discretion, deny it outright without additional consideration. If the court wishes to address this issue on the merits, the People incorporate by reference all of its previous filings and arguments on the matter.

First and foremost the defendant was granted a change of venue. As noted by the defense, Judge Girolami granted their motion for a change of venue and transferred the case to San Mateo after a McGowan hearing. If the defendant did not "like" San Mateo, his remedy was to writ Judge Girolami's ruling. He did not.

After many weeks of jury selection, the defense brought a second change of venue based on statistics. The court, correctly, denied this second request for a change of venue citing many factors including the "nationwide" nature of the publicity.

> "It is speculation to suppose the results of jury selection would have been significantly different in any county. The media report local trials of notorious crimes in all counties. People read newspapers and watch television in all counties. (See People v. Manson, supra, 61 Cal.App.3d at pp. 176- 177.) In addition, all of the jurors who were not excused, and especially the actual jurors, stated they could be fair. The jurors need not be totally ignorant of the facts and issues involved. 'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' " (People v. Harris, supra, 28 Cal.3d at p. 950, quoting Irvin v. Dowd (1961) 366 U.S. 717, 723 .)"
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> People v. Cooper, (1991) 53 Cal.3d 771, 806 -807.

The Cooper case, a death penalty case in which a change of venue was granted and a second venue change was denied, points out the futility of moving a high-profile criminal trial. The defense

could not, at the time of the second motion, or the post-guilty/pre-penalty verdict motion, nor even now, show that Los Angeles would be any different than Stanislaus or San Mateo in terms of publicity. In fact, a book about one of the witnesses in this case is a national best-seller. The rights to the book have been purchased by CBS and a movie is being produced by Los Angeles-based Braun Entertainment Group (See www.MSNBC.MSN.com.) It would appear that the publicity surrounding this case is still nationwide.

The Cooper case also points out that what jurors say during voir dire is a factor when reviewing a denial of a change of venue. In the instant case, all of the jurors said they could be fair and render a verdict based only on the evidence. Furthermore, when the jury was empaneled the defendant did not exercise all of his peremptory challenges.

> "'It has long been the rule in California that exhaustion of peremptory challenges is a "condition precedent " to an appeal based on the composition of the jury.'"
>
> People v. Bolin, (1998) 18 Cal.4th 297, 315.

The defendant's failure to exhaust his peremptory challenges is in and of itself, a fatal blow to his motion here. The previous reasons given by the court also support the denial. This part of his motion should be denied.

THE REMOVAL OF JURORS WAS REQUIRED BY LAW

The removal of both jurors number five, Falconer, and "Doctor" were litigated during trial. Since this claim is also nothing more than a re-hashing of prior arguments, the court may, in its discretion, deny it outright without additional consideration. (See

Hagen v. Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). If the court wishes to address this issue on the merits, the People incorporate by reference all of their previous arguments on the matter.

Let's start with the standard of review:

> "A trial court's decision whether to discharge a juror for good cause under Penal Code section 1089 is subject to review under the abuse-of-discretion standard. (People v. Ashmus (1991) 54 Cal.3d 932, 986-987; In re Mendes (1979) 23 Cal.3d 847, 852.)"
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> People v. Beeler, (1995) 9 Cal.4th 953, 989.

It should be noted that the first juror number 5, Falconer, was removed before deliberations began. A judge's removal of a juror at this juncture clearly does not invade the province of jury deliberations and that line of cases cited by the defense as to this juror is not applicable. The only limitation to removal of a juror at that early juncture is that the inability of the excused juror to perform his duty "must appear in the record as a demonstrable reality." (People v. Halsey, (1993) 12 Cal.App.4th 885, 892; People v. Collins (1976) 17 Cal.3d 687, 696.)

In the instant case, Juror Falconer's inability came to light as a result of a complaint from a fellow juror. The defendant has taken such liberties with the facts in his motion that he has created a claim out of whole cloth that it was actually Juror 8 who committed misconduct. The statements made by Juror 8 were all substantiated and proved that Falconer was refusing to follow the court's instructions. The transcript actually disproves each of the defendant's claims.

First, the defense claims that the baliff should have been sworn in; however, he told the court this was not necessary:

> THE COURT: No, Jenn, told me this is what --
> MR. GERAGOS: Oh, I thought -- I thought the way you phrased it Jenn, heard something.
> THE COURT: No, no. This was reported to her.
> MR. GERAGOS: Got it. I don't have to hear from her. (RT 10855)

Next, the defendant claims that only Juror 8 provided any evidence against Falconer. This is incorrect. Many of the jurors were not present at the time of the statements; this certainly does not equate to the event not having occurred. Several other jurors agreed with Juror 8's accusations. In fact, Falconer had a hard time denying the charges against him:

> THE COURT: And are you denying that you made comments on Brocchini's testimony?
> JUROR NO. 5: I -- I don't think I did.
> THE COURT: Okay. Did you hear any comments about Laci's weight during the pregnancy?
> JUROR NO. 5: You know what, I know comments were made.
> THE COURT: Well, did you make them?
> JUROR NO. 5: But I don't think I made them. I may have responded or said something during that
> conversation, but I don't think I'm the one that made it. (RT 10861-10862)
> ***
> THE COURT: Well, have you -- have you -- as you sit there now, not -- not these comments but have you made any other comments about this trial in front of the other jurors?
> JUROR NO. 5: Not like in general. I mean maybe general.
> THE COURT: How about general or specific?
> JUROR NO. 5: Probably. I mean it's -- I can't say no to that because I think all of us have, like, mentioned one thing or another at one time. And not necessarily -- we're not in there going over evidence, if that's, you know, if that's what you mean, but like somebody will bring something up and somebody will say this and that, and that will be the end of it. (RT 10864)

To summarize the salient points from the transcript of June 23rd 2004:

> JUROR NO. 1: Excuse me. You realize I go for walks. My sciatic nerve is killing me.
> THE COURT: Okay. So you're not always in the jury room?
> JUROR NO. 1: Correct. (RT 10870)

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Juror 2 was outside most of the time (Rt 10872) but did state about Falconer:

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 NO. 2: Yes. There were comments, a couple -- couple of us said, you know, you're not supposed to discuss. (RT 10874)
***

THE COURT: Okay. Have you heard him make any comments about the prosecution and their deficiencies as lawyers to present this case?
JUROR NO. 3: Yes.
THE COURT: He's made comments about that?
JUROR NO. 3: References or inferences or --
THE COURT: What has he said? Do you recall what he said?
JUROR NO. 3: Not verbatim.
THE COURT: Well, what was the gist of what he said?
JUROR NO. 3: Comments about ability to speak and presentation style.
THE COURT: Okay. Did he make these comments to the other jurors?
JUROR NO. 3: Did he make them to other jurors?
THE COURT: To other jurors.
JUROR NO. 3: It was while we were in one of the rooms.
THE COURT: Okay. Did anybody confront him and tell him that he's not supposed to be making any comments about what he's heard in the courtroom, according to the judge's admonition?
JUROR NO. 3: I don't know if on that occasion.
THE COURT: Has there been other occasions?
JUROR NO. 3: Yes. (RT 10877-10878)
***
JUROR NO. 3: He was commenting on how he -- how I guess others view him with the media, and I don't -- a couple of days ago when there was some issue around juror number 5, the next day he was commenting on what he thought the media was saying about him.
THE COURT: Uh-huh. And what was he saying?
JUROR NO. 3: That he's being called --
THE COURT: A loose cannon?
JUROR NO. 3: -- a loose cannon and a moron, I think? Moron juror, or something. Something like that. (RT 10879-10880)
***

THE COURT: Okay. Now, yesterday did you hear whether or not juror number 5 made any comments about the anchor which is marked into evidence yesterday? Did he make any comments about that?
JUROR NO. 4: The only -- the only thing that I recall regarding an anchor was there was a question asked by one of the alternates regarding wanting to see the anchor, wanting to know how much it

weighed. And I don't know, it could have been 5, said It may only weigh this much, and I said, You know, we'll get a chance to ask that information later.
THE COURT: Uh-huh.
JUROR NO. 4: And that's -- to the best of my recollection that's what was said.
THE COURT: But did 5 answer the question? If you recall.
JUROR NO. 4: I -- your Honor, I don't recall exactly who it was.
THE COURT: Okay. That's okay. See, I have to follow-up.
JUROR NO. 4: Sir, I understand. Yes, sir.
THE COURT: Was there any comments by number 5 on Detective Brocchini's testimony? Did he make --
JUROR NO. 4: I went to lunch with number 5, number 6, number 7, and a couple of the alternates yesterday, and we went into the jury room. On the way to the jury room he asked me if I got anything out of Detective Brocchini's testimony. I said yes.
THE COURT: Okay. Did -- did he make any comments about Laci Peterson's weight during her pregnancy?
JUROR NO. 4: Not that I recall, your Honor.
THE COURT: Okay. Did he make any comments to the Modesto Police Department -- about the Modesto Police Department reports, by officers and detectives, regarding their inconsistencies?
JUROR NO. 4: Not that I can recall, your Honor.
THE COURT: Okay. Did he make any comments about the prosecution and the manner in which they are representing their case?
JUROR NO. 4: I believe there may have been something said. I don't know if it was number 5. But I -- I've really not focused much on what anybody said. (RT 10883- 10884)
***

THE COURT: Any -- have you heard him make any comments about the Modesto Police Department reports, by officers and detectives, regarding their police reports?
JUROR NO. 6: Yesterday? Or ever?
THE COURT: At any time.
JUROR NO. 6: Yes, but I don't remember what it was.
THE COURT: Was it number 5?
JUROR NO. 6: Yeah. But I don't remember what it was.
THE COURT: Okay. But he did make some comments?
JUROR NO. 6: Yeah. Just little things that -- apparently he has a law enforcement background, or something, and --
THE COURT: Okay.
JUROR NO. 6: -- just -- I don't even really remember. I just remember...
THE COURT: Okay. Do you recall whether or not number 5 made any comments about the prosecution and the way and manner in which they're presenting this case?
JUROR NO. 6: Yeah, he has.
THE COURT: Okay. What has he said about that?
JUROR NO. 6: They don't seem organized. (RT 10889)
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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 NO. 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 NO. 7: I'm sorry, I -- I don't know. (RT 10898-10899)
***

JUROR NO. 10: I'm not in the jury room.
THE COURT: You're the smoker, right?
JUROR NO. 10: Yeah. (RT 10916)
***

THE COURT: Okay.
JUROR NO. 11: So I put my head into the window, get some sunshine, I'm on the phone.
THE COURT: Okay. So you're telling me you don't pay much attention?
JUROR NO. 11: Not really. (Rt 10921)
***

ALTERNATE NO. 3: I don't really take a break in the break room here.
THE COURT: Okay. You go outside?
ALTERNATE NO. 3: I usually go outside and walk around, get some coffee. (RT 10935-10936)
***
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 NO. 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 NO. 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 NO. 3: It was very early in the trial.
THE COURT: Do you know what it was about?
ALTERNATE NO. 3: No. I really couldn't tell you. (RT 10937-10938)
***

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 JUROR SIX: Yes.
THE COURT: What did he say?

ALTERNATE JUROR SIX: He said it was smaller than he anticipated, or thought it was.
THE COURT: Smaller than he thought it would be?
ALTERNATE JUROR SIX: Yeah.
THE COURT: Did he say anything about that that anchor was too small to anchor a boat like the one we saw?
ALTERNATE JUROR SIX: 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 JUROR SIX: 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 JUROR SIX: I don't remember how the conversation got --
THE COURT: Did he bring this subject up?
ALTERNATE JUROR SIX: I think so. It emerged. I certainly didn't raise it.
THE COURT: You didn't bring it?
ALTERNATE JUROR SIX: I didn't raise it.
THE COURT: Somehow you and him, and all sudden they issue of anchors came up?
ALTERNATE JUROR SIX: (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 JUROR SIX: That was the general sense much it, yes. (RT 10949-10950)

The defense argues that there was no evidence to warrant the discharge of Falconer since he denied the charges against him; this ignores the rule of credibility:

> "We are, of course, bound by the trial court's determination of the credibility of witnesses and resolution of factual issues."
>
> People v. Brewer, (2000) 81 Cal.App.4th 442, 453.

The court here specifically made a determination as to the credibility of Falconer and Juror 8:

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. (RT 10971)
***
....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. (RT 10972-10973)

One of the few cases cited by the defense is the Halsey case, supra. It is instructive on the facts at hand. In that case the court said:

> "The morning after the prosecutor made his opening statement, a juror (Mr. Korff) asked to speak to the court. With counsel and appellant present, he said that earlier that morning a fellow juror, Mr. Margolis, made some comments in the hallway about the case. Mr. Margolis said "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." The trial court separately questioned Mr. Margolis and the other jurors. Mr. Margolis denied making the particular statements but said he did comment about the attorneys. The trial court found Mr. Margolis "evasive," determined he had made the statements attributed to him by Mr. Korff, found he had violated the court's repeated order not to discuss the case, and lacked 'ability to follow my instructions and to maintain an open mind and remain objective throughout the duration of the proceedings.'"
>
> People v. Halsey , (1993) 12 Cal.App.4th 885, 892.

The Halsey court found *it was appropriate* to remove the juror. Juror Falconer's conduct was far more egregious; he was criticizing the prosecution's style, questioning and organization (RT 10877-10878, 10903) commenting on evidence (RT 10883-10884, 10901-10902, 10949-10950), the accuracy of police reports (RT 10902) and confronting jurors who wanted him to stop making inappropriate comments. (RT 10904, 10914) The court had more than adequate reasons to discharge Falconer.

As for the Doctor, the defense cites the case of People v. Karapetyan, (2003) 106 Cal.App.4th 609, 618, which states: "A refusal to deliberate is a manifestation of an inability to perform his or her duty as required by Penal Code section 1089." The defense must concede that the doctor refused to follow the law (RT 20793), but instead attempts to spin some sinister conspiracy of "outside" influences. Once again, there is no evidence to support the defense's assertions and, thus, no error.

The court received a note from the then foreman, Juror 5, the "Doctor," on November 8th asking to be removed from the jury (RT 20673) because he didn't feel he could be true to his oath. (RT 20675) The jury had not even taken a vote at this point in deliberations. (RT 20676) The court re-instructed the jury on CALJIC 1.00, 17.40, and 17.41 and the jury elected a new foreperson. On November 10th, the court received a note written by both the Doctor and the new foreman, Juror 6. (RT 20779-20780) The court inquired of the Doctor and, once again, the Doctor asked to be removed out of some "fear." The Doctor refused to follow the law requiring his impartiality, even when asked direct questions by the court:

> THE COURT: Okay. Number 5, just a couple of questions. We just talked to Number 6. And I just want to clear this up for sure. And I am not trying to put words in your mouth. I want you to tell me the way you feel. 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. (RT 20793)

At the time of this exchange the jury still had not taken a vote. (RT 20798) From the above exchange and the fact that no vote had been

taken, it is clear that the cases cited by the defense involving hold-out jurors do not apply. The defense then claims that "improper influences from outside the evidence was being brought to bear on the jury." This is based on a vague and ambiguous statement in one of the Doctor's comments. The comments came during his discussion with the court about a conversation he had with another juror, outside of the jury room:

> THE COURT: All right.
> JUROR 5: 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. [Emphasis added.](RT 20783-20784)

The defense's attempt to show a mysterious conspiracy is more evident in the next claim that the Doctor asked to be removed because the jury was "receiving outside pressure or information to come to a guilty verdict..." There is absolutely no evidence of this and the defense has to stretch a statement of the Doctor to even make this claim:

> 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. (RT 20793-20794)

The defense also alleges that the court "failed to examine this serious allegation;" that patently is false. The court recalled the Doctor a few minutes after the above statement and inquired further:

(JUROR 5 ENTERS THE ROOM)
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.
THE COURT: Okay. Have you taken a vote in there and find out -- have you had a vote, whether it's ten to two, eight to four?
JUROR 5: No, sir. We still haven't gotten to that point. However -- however --
THE COURT: I don't want you to tell me which way --
JUROR 5: I understand.
THE COURT: -- they are indicating which way they are going here. I just want to know if you feel -- you have been the Foreman. Is there still deliberations going on?
JUROR 5: Well, we have been ordered to start again.
THE COURT: Right.
JUROR 5: So there certainly are deliberations going on. And, as I say, the people who are now running the show are doing a reasonably efficient job of starting anew. So we have been told we have been ordered to start anew. We have taken everything off the walls. We have literally stripped the walls, stripped the white boards, thrown everything out the door.
THE COURT: We ground everything up last night.
JUROR 5: And we have taken what we have learned, the mistakes that I have made as Foreperson and chucked those things. And the things that were working were reinstituted. And (REDACTED) has --

THE COURT: That's juror number?
JUROR 5: She's new Number 7.
THE COURT: New Number 7. We don't have names. We don't want to put that in the record.
JUROR 5: I apologize. The new Juror Number 7 hasn't been bashful about -
THE COURT: Voicing her opinion.
JUROR 5: Voicing her opinion and saying what issue she wants addressed. But, essentially, since we decided that we were going to provide her with the opportunity to hear the new things that came up when other people wanted issues raised that they hadn't thought of before. But some also wanted the issue discussed, or something new came in. And so she's been welcomed. She's been integrated. She's not shy.
THE COURT: She's giving her opinion?
JUROR 5: She is giving her opinions. She did look a little bit like a deer in the headlights initially.
But I think that's --
THE COURT: Now she is more comfortable?
JUROR 5: I think as time goes on people have made her more comfortable.
THE COURT: Well, let me ask you this. Is it your opinion -- impression what's going in that jury room is still a ballgame in there?
JUROR 5: Yes, sir. Yes, sir.
THE COURT: Okay. Is it your impression now that the jury is still in the deliberative process, and that other points of view are being entertained by the jury?
JUROR 5: Yes, sir. There is a healthy, ongoing debate going on. And the new Foreperson is superb in making sure, as anybody who wants an issue on the white boards, it goes up without question. And the evidence is then marshaled around, you know, whether or not an exhibit is needed, or that sort of thing. I think they are doing a superb job. (RT 20798-20801)

There is no showing in the record that any "outside" influence was affecting what the jury was doing. When the court gave the Doctor the opportunity to explain his comments, the Doctor completely retracted his claim (pages 20798 to 20801) and stated he was only speaking for himself and not any of the other jurors. What is of more significance is that at the time the Doctor made this statement in what was clearly an attempt to get off of the case, the jury still had not taken a vote (RT 20798, line 22-23)

Instead of looking for mysterious conspiracies, the court took the

more rational approach and examined the new foreman regarding the Doctor's claims of hostility:

THE COURT: Hi, Number 6. Come in and have a seat here. You are the new Foreperson right?
JUROR 6: Yes, sir.
THE COURT: Okay. Has there been any animus directed towards Juror Number 5 from any of the other jurors?
JUROR 6: I'm sorry to do this, but do you mean hostility?
THE COURT: Hostility, mean-mugging, threats?
JUROR 6: No.
THE COURT: You are the new Foreperson now, right?
JUROR 6: Yes, sir.
THE COURT: Since yesterday, has this jury been making any progress toward resolving any of the issues in this case?
JUROR 6: After we received the alternate in, we went in there. We made -- comparatively to the first time - tons of headway.
THE COURT: Okay. And do you think if this jury deliberated further that there is a probability that you may be able to arrive at a verdict?
JUROR 6: Absolutely.
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.
THE COURT: All right.
JUROR 6: None of which happened -- occurred yesterday. Yesterday was very productive, without incident at all. This hit me this morning out of the blue. I have no idea where it came from.
THE COURT: Okay. You realize there was this conversation on the bus?
JUROR 6: Un-hun.
THE COURT: And you understand that you cannot be discussing this case out of that jury room?
JUROR 6: Yes, sir.
THE COURT: You understand that?
JUROR 6: Yes, it is.
THE COURT: Okay. All right. I'm going to bring Juror Number 5 back in here again.
JUROR 6: Can I just say one thing?
THE COURT: Yes, go ahead.
JUROR 6: We -- I did not know what the original request was when he filled it out. We actually had requested -- because yesterday we came back to the table and requested that any other issues that are here, let's get them dealt with now. And we made that

very clear yesterday when we started, and everybody agreed. This morning when that came up, I had no idea what that was about. Then, in a little clarification, I thought I knew what he was talking about. I spoke to the bailiff. I spoke to him [Juror No. 5] privately in the bathroom, and we then filled this out with explanation.
THE COURT: Yes.
JUROR 6: After I filled out the bottom portion, which is what I filled out, he then filled in the other portion that said his opinion had been changed. Prior to that, both parts of -- what it was on the bus is, he admitted that in the courtroom that I brought something to light, and he changed his opinion there. In the bathroom he admitted to me that nothing happened on the bus. And then after I filled that out, and that was in Jenne's hands, he then grabbed it back and said he wanted to write something else on there, and wrote his opinion had been changed. So I don't know how that appears. But that appears very inconsistent to me on his statements to me, two times, and then his statement on that. (RT 20789-20792)

It was abundantly clear that the Doctor had a different style than that of the other jurors and was unhappy with how they conducted deliberations. The new foreman denied that there was any hostility being directed towards the Doctor. It was also apparent that the Doctor's "problems" dealt with procedure and not with substance since he admitted that he was still listening to others and changing his views. Also, the Doctor was the one that asked to be dismissed from the jury, not other jurors. This fact alone distinguishes all of the cases cited by the defense. Even assuming that the other jurors had hostility towards the Doctor, that would not prevent his proper discharge.

In the case of People v. Warren, (1986) 176 Cal.App.3d 324, 326, the court found no problem with excusing a juror who claimed to have been "intimated" by other jurors:

> "Ms. Dowd declared that she had been "intimidated" by the other jurors, that she was in disagreement with them, that she felt she was going to "break under it," that "I feel so intimidated now that I think I would vote the way the group wants to vote even though I firmly believe I shouldn't," and that "at this stage I'm afraid that I will give in and maybe I won't."

Asked by the court if she could comply with the following instruction-"You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors or any of them favor such a decision"-Ms. Dowd replied, "I can't" and "I would say, No.""

That court held:

"It is now settled law that such "good cause" exists when an impaneled juror: "could not perform her duty" as a juror (People v. Collins, supra., 17 Cal.3d 687, 696); "loses the ability to render a fair and unbiased verdict" (People v. Van Houten, 113 Cal.App.3d 280, 288); "cannot be fair and impartial" (People v. McNeal, 90 Cal.App.3d 830, 840); "loses the ability to render a fair and unbiased verdict" (People v. Farris, 66 Cal.App.3d 376, 386); and he 'states his doubt as to his ability to perform his duty justly'."

People v. Warren, supra, at page 327.

Other courts have also found removal of a juror appropriate under facts similar to the instant case:

"The extensive hearing in which the juror steadfastly maintained that she could not follow the court's instructions, that she had been upset throughout the trial and that she wanted to be excused, clearly justified a conclusion that she could not perform her duty and thus established good cause for her discharge."

People v. Collins, (1976) 17 Cal.3d 687, 696.

"The court then summarized by stating: "So you're not willing then to follow your oath?," to which the juror answered: "That is correct." In the present case there is ample evidence in the record to support the trial court's finding that Juror No. 10 was unable to perform his duties as a juror. The juror stated that he objected to the law concerning unlawful sexual intercourse and expressly confirmed that he was unwilling to abide by his oath to follow the court's instructions. The juror's inability to perform his duties thus appears in the record 'as a demonstrable reality.'"

People v. Williams, (2001) 25 Cal.4th 441, 461.

"In People v. Keenan (1988) 46 Cal.3d 478, 540, it was alleged in support of a motion for new trial that, during deliberations, a juror had confronted the lone holdout juror, an elderly woman, stating: "If you make this all for nothing, if you

say we sat here for nothing, I'll kill you and there'll be another defendant out there-it'll be me." We concluded, as a matter of law, that this incident did not amount to prejudicial misconduct impeaching the verdict, stating that, although the "outburst ... was particularly harsh and inappropriate, ... no reasonable juror could have taken it literally." (Id. at p. 541.) Recognizing that " '[j]urors may be expected to disagree during deliberations, even at times in heated fashion,' " we concluded that "the alleged 'death threat' was but an expression of frustration, temper, and strong conviction against the contrary views of another panelist." (Ibid.) We added: "Thus, '[t]o permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of individual jurors would deprive the jury room of its inherent quality of free expression.' [Citation.]" (Ibid.)"

People v. Cleveland, (2001) 25 Cal.4th 466, 475 -476.

As the cases demonstrate, even if hostilities occur in the jury room a juror must still abide by the court's instructions. Here, the Doctor stated unequivocally that he could not, and would not; thus, the court was required to remove him. The evidence of this appears in the record and there was no error in his discharge. This part of the defendant's motion should be denied.

THE EXAMINATION OF THE BOAT (EXHIBIT #299)BY THE JURY WAS PROPER

This is, once again, a repeat of the motion made by the defendant at trial; the court may, in its discretion, deny it outright without additional consideration. (See Hagen v. Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). If the court wishes to address this issue on the merits, the People incorporate by reference all of their previous arguments on the matter.

The 14-foot aluminum boat in question was part of a jury view on July 27th. (RT 13841) The court marked the boat and trailer as exhibits 299 and 300, respectively, and admitted them into evidence without

objection on November 8th. (RT 20641) The boat was also the subject of much testimony:

David Weber of Lowe Aluminum Boat Group, testified about the boat and its stability (RT 13846 - 13880); Bruce Peterson, the former owner of the boat testified about being able to have two adults stand on one side without capsizing the boat (RT 12145 12-172); and Angelo Cuanang, a professional fisherman, testified that a 150-pound fish with weights attached could be dumped out of a small boat without capsizing it. (RT 13738-13799)

The issue here is that on November 8th, during deliberations, the jury asked to view the boat for a second time. The jury was allowed to view the boat which was then in evidence as part of a second jury view. This is the equivalent to the read back of testimony and is not the taking of new evidence. The defendant's sole basis for challenge is that two of the jurors got in the boat. The defense contends that they "jumped up and down," while the court viewed them as shifting their weight. (RT 20646) It is this action that the defense contends amounted to the taking of new evidence. It was not.

The defense cites People v. Cumpian, (1991) 1 Cal.App.4th 307, and several other cases cited by Cumpian that deal with the taking of " extrinsic evidence." However, neither Cumpian nor any of the cases it cited (also cited by the defense) prohibit what the jurors did here. A lengthy except is illustrative:

> "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 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." [citation ommitted] Here, the jury's use of the exhibit did not invade new fields nor did their experiment with the duffel bag involve matters not within the scope and purview of the evidence. In fact, the declarations state that the jury used the exhibit in a similar fashion to that testified to and demonstrated by victim Laurie. It is not the use of the exhibit which creates misconduct but its use in some manner outside the offered evidence. A very similar factual scenario was presented in People v. Cooper (1979) 95 Cal.App.3d 844. There, defendant was convicted of possession of heroin for sale after a police officer saw him reach toward his waistband and throw a shiny object which turned out to be a baggie containing heroin onto the lawn of a residence. After he was convicted, defendant filed a motion for new trial, which contained an affidavit from one of the jurors reciting three instances of alleged misconduct, one of which consisted of the jury's "reenactment" of defendant's throwing the plastic bag. The juror indicated that, based upon the reenactment, the jury " 'confirmed ... the police officer's testimony and in-court demonstrations. ...' " (Id. at p. 852.) In affirming the denial of defendant's motion for new trial on the basis that no misconduct occurred, the court stated: "It is clear ... that experiments by the jury are prohibited only where the result is the production of 'new' evidence. [Citation.] ... The general rule is that the jurors may engage in experiments which amount to no more than a careful examination of the evidence which was presented in court. [Citation.] [¶] The experiment in the present case did not result in the generation of new evidence. [Citation.] During the trial, [the officer] had demonstrated the manner in which defendant had thrown the contraband. The jurors simply repeated the officer's reenactment. Nothing requires that the jury's deliberations be entirely verbal, and we would expect a conscientious jury to closely examine the testimony of the witnesses, no less so when that testimony takes the form of a physical act. There was no error in denying the motion for new trial on this ground." (Id. at pp. 853-854.) Defendant seeks to distinguish Cooper on three grounds. First, he claims Cooper is misguided in its reliance on Higgins, because Higgins did not involve an experiment, whereas Cooper did. Defendant fails to realize, however, that our Supreme Court in Higgins expressly authorized the conducting of experiments in the jury room so long as those experiments are "within the lines of offered evidence ..." and do not "invade new fields. ..." (Higgins v. L.A. Gas & Electric Company, supra, 159 Cal. at p. 657.) Second, defendant contends Higgins contradicts the express language of section 1181, subdivision (2), which states that a new trial is proper "when the jury has received any evidence out of court. ..." However, defendant fails to realize that the jury in Higgins did not receive any evidence out of court, for if they had done so it would have constituted the invasion of new fields beyond the scope and purview of the evidence. Based on Higgins and Cooper, it is clear the concept of the receipt of evidence out of court entails evidence not presented during the trial; yet here, during the trial, there was

both verbal and demonstrative evidence concerning the way the duffel bag was slung over defendant's neck and body. The jury's reenactment of that evidence did not constitute the receipt of evidence out of court, but was merely an experiment directed at proffered evidence. Finally, defendant contends Cooper improperly relies on Higgins in adopting a standard for jury misconduct, in that Higgins was a civil case and the standard for jury misconduct is higher in criminal cases. As authority for this proposition, defendant cites Andrews v. County of Orange, supra, 130 Cal.App.3d 944 and Locksley v. Ungureanu (1986) 178 Cal.App.3d 457, both of which deal with the issue of prejudice and the People's burden to rebut prejudice once it has been presumed. Obviously, prejudice is not presumed until misconduct has been shown, and in both cases jury misconduct was demonstrated. Those cases do not discuss what constitutes misconduct. When there is no misconduct, there cannot be any prejudice. We accept the premise that the jury performed an experiment when various jurors strapped the bag onto themselves in the manner described and demonstrated at trial. However, not every experiment constitutes jury misconduct. "[J]urors must be given enough latitude in their deliberations to permit them to use common experiences and illustrations in reaching their verdicts. [Citations.]" (United States v. Avery (6th Cir. 1983) 717 F.2d 1020, 1026.) To prohibit jurors from analyzing exhibits in light of proffered testimony would obviate any reason for sending physical evidence into the jury room in the first instance."

Cumpian, supra, 315-316.

The defense also implies that the court's cautionary instruction was an admission of error. This was not the case. The court merely reminded the jury that the boat was not in the water and was still on the trailer. (RT 20645) This amounts to nothing more than a reminder to consider the evidence they had before them - the boat, and to evaluate it in view of the testimony received.

Also, the defense fails to address two cases cited by this court as part of its initial ruling denying a motion to re-open and/or for a mistrial. This court relied on People v. Turner (1971) 22 Cal.App.3d 174 and People v. Bogle (1995) 41 Cal.App.4th 770 to find that the jury had not taken new evidence.(RT 20647)

In People v. Turner, supra, 182-183, the jury used magnifying glasses to assist them in analyzing documentary evidence. The appellate

court determined that the use of magnifying glasses did not constitute either introduction of new evidence or improper experimentation. (Id. at p. 182) It reasoned that use of such an aid merely involves a " ' "more critical examination of an exhibit" ' " than was made during the trial, and is, "[a]t most, ... an extension of the jury's sense of sight." (Id. at p. 183) The use of a magnifying glass to illuminate details is directly analogous to getting into the boat in order to examine it more closely. In both instances, the jurors are simply examining previously admitted evidence from a different perspective. In People v. Bogle , supra, 41 Cal.App.4th 770 , a set of keys and a safe were introduced into evidence. The jury discovered that one of the keys on the key ring opened the safe. The appellate court concluded that the jury had not engaged in improper experimentation and that the jury's discovery of the relationship between the key and the safe did not violate defendant's constitutional rights. It explained that, in light of the testimony presented at trial, "the jury was entitled to determine, from the evidence it was given, the character and extent of the defendant's relationship to the safe. Trying the keys on the safe was an exercise in that pursuit, not a foray into a new field." (Id. at p. 780) Bogle relied in part on a Louisiana rape case, State v. Gaston (La.1982) 412 So.2d 574. There, the victim identified defendant by a skin discoloration on his shoulder that she testified was visible because he was wearing a tank top when he accosted her. During deliberations, the jury asked and was permitted to see the defendant dressed in the tank top, which had been admitted into evidence. The reviewing court concluded that the jurors had not viewed new evidence; they "merely reexamined the evidence in a slightly different context

as an aid in reaching a verdict."

In the defendant's last desperate attempt to gain a new trial, he refers to Greta Van Susteran. Her interview of one juror is exactly the kind of material prohibited from consideration by Evidence Code §1150. It is not legally admissible in content or form (no declaration from either the juror or Van Susteran.) The defendant claims that the interview proves that the jurors did something that was not authorized; this clearly ignores the law that allows jurors to closely examine the evidence before them. It was objectively reasonable for them to see if two people could have gotten into the boat (as Bruce Peterson had said) and this would certainly not invade a new field. For these reasons, this portion of the defendant's motion should be denied.

THE JURY'S FINDING OF GUILT WAS APPROPRIATE

In considering a claim of insufficiency of evidence, a reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (People v. Earp, (1999) 20 Cal.4th 826, 887) Ruling on a motion for a new trial on any grounds is a matter directed to the sound discretion of the trial court. (People v. McDaniel, (1976) 16 Cal.3d 156, 177) The trial court's decision on a motion for a new trial will not be disturbed except for an abuse of discretion. (McDaniel, supra, at p. 177)

However, the court's power to grant a new trial, or to modify a verdict, is not without limits. For instance, the trial court may not grant such a motion simply to make a defendant eligible for probation,

even if the court believed probation was appropriate. (People v. Navarro (1981) 126 Cal.App.3d 785, 796) Similarly, a trial judge may not exercise his or her own personal sense of justice to reduce charges where a fair trial resulted in a verdict of guilty to a greater charge. In People v. McClellan (1980) 107 Cal.App.3d 297, the trial court acknowledged that the evidence presented at the court trial showed the defendant violated Health and Safety Code §11379. However, to reflect defendant's lesser culpability over his crime partner, the trial court granted a motion to modify the verdict, reduced the charge to California Health and Safety Code §11377 and sentenced accordingly. The appellate court reversed and remanded for resentencing stating, "Once the defendant's guilt has been established by a fair trial, the judge's power is limited to the pronouncement of sentence." (Id., at p. 303)

In People v. Lopez (1969) 1 Cal.App.3d 78, the court said, "on a motion for a new trial the judge must weigh the evidence and exercise an independent judgment. (Citation omitted.) But, even so, the trial judge should not ignore the verdict and decide the case as if there had been no jury." Id., at p. 85. Put another way, the trial court must ask itself if this verdict was supported by credible evidence. In answering this question, the court must give due consideration to the proper function of the jury in the areas of fact-finding and credibility of witnesses.

The People assert that a detached and balanced review of the evidence, in its entirety, will lead the court to find that the jury's verdict must stand. Even the defense cannot dispute that Laci and Conner Peterson were murdered, meeting every element of the crime. The

only dispute based on the evidence presented to the jury was the identity of the killer.

The fact that the bodies of the two victims washed up near the spot where the defendant placed himself on the day of the disappearance is enough by itself to warrant a conviction. Coupled with the pre-crime statements (lost wife, first holiday without her, etc), purchase of a boat, internet bay chart research, false "fishing" story," changed alibi, hair in the pliers, blood in the truck and on the comforter, lies to police, post-crime behavior (Paris phone-call, lies to family and volunteers about his location, selling the victim's car and attempting to sell her house furnished, etc.) and flight, just to name a few items, is more than sufficient to sustain the jury's verdict. This portion of the defendant's motion should be denied.

IT WAS NOT ERROR TO INSTRUCT ON SECOND DEGREE MURDER

This is, yet again a repeat of an objection raised by the defendant at trial; the court may, in its discretion, deny it outright without additional consideration. (See Hagen v. Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). If the court wishes to address this issue on the merits, the People incorporate by reference all of their previous filings and arguments on the matter.

The trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present and there is evidence that would justify a conviction of such a lesser offense.

(People v. Bunyard (1988) 45 Cal.3d 1189, 1232) Second degree murder is a lesser included offense of first degree murder. (People v. Wickersham (1982) 32 Cal.3d 307, 326) Therefore, if there were evidence justifying a second degree murder conviction, the court had a duty to instruct on that offense.

> "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged."
>
> People v. Breverman, (1998) 19 Cal.4th 142,154

The obligation to instruct on lesser included offenses exists even when a defendant, as a matter of trial tactics, objects to their being given. (Id., at 154; People v. Cooper, supra, 53 Cal.3d 771, 827) It is clear that no error occurred and this portion of the defendant's motion should be denied.

IT WAS NOT ERROR TO INSTRUCT ON FLIGHT

Since this is simply the same motion that the defendant made at trial, the court may, in its discretion, deny it outright without additional consideration. (See Hagen v. Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). If the court wishes to address this issue on the merits, the People incorporate by reference all of their previous filings and arguments on the matter.

Generally, the flight instruction is appropriately given where the evidence shows the defendant left the crime scene under circumstances suggesting the movement was motivated by consciousness of guilt. (People v. Smithey (1999) 20 Cal.4th 936, 982; People v. Roybal (1998) 19 Cal.4th 481, 517.) The flight instruction's cautionary nature benefits the defense, admonishing the jury to circumspectly consider evidence that might otherwise be considered decisively inculpatory. (People v. Boyette, (2002) 29 Cal.4th 381, 438, citing People v. Jackson (1996) 13 Cal.4th 1164, 1224.) Where substantial evidence supports the instruction, it is properly given. (People v. Boyette, supra, at p. 439)

When evidence of flight is relied upon by the prosecution as tending to show guilt, an instruction on flight must be given sua sponte. (Pen. Code, § 1127, subd. (c); People v. Turner (1990) 50 Cal.3d 668; People v. Williams (1960) 179 Cal.App.2d 487, cert. den. 364 U.S. 866) CALJIC 2.52 has been repeatedly challenged and upheld. (See, e.g., People v. Cannady (1972) 8 Cal.3d 379, 391-392; People v. Hedrington (1985) 171 Cal.App.3d 517, 520-522) Whether defendant's conduct constituted flight within the meaning of CALJIC 2.52 was properly a matter for the jury's determination. (People v. Caldera (1959) 173 Cal.App.2d 98, 101) Even cases in which defendants surrender voluntarily have been deemed appropriate for flight instructions, leaving the issue to the jury. (People v. Hughes (1951) 107 Cal.App.2d 487, 492; People v. Reese (1944) 65 Cal.App.2d 329, 347)

Moreover, the test for error in the case of arguably ambiguous instructions is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the

consideration of constitutionally relevant evidence." (Boyde v. California (1990) 494 U.S. 370) It was not error to instruct on "flight" and this part of the motion should be denied.

IT WAS NOT ERROR TO EXCLUDE THE DEFENSE'S BOAT EXPERIMENT

Once again, since this is simply the same motion that the defendant made at trial, the court may, in its discretion, deny it outright without additional consideration. (See Hagen v. Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). If the court wishes to address this issue on the merits, the People incorporate by reference all of their previous arguments on the matter.

The determination whether the conditions of an experiment were substantially similar to make the experiment of any value in aiding the jury is a matter resting in the sound discretion of the judge. (People v. Ely, (1928) 203 Cal.628, 633 and People v. Skinner, (1954) 123 Cal.App. 2d 741,751)

The defense once again misstates the facts, and conveniently omits significant details. The defense claims that they used an identical boat to the defendant's, which had the registration numbers concealed, preventing the prosecution from verifying any information about the boat.(RT 19402) Additionally, the boat used by the defense had a plywood platform in it that raised the center of balance of the boat and affected its stability.(RT 19402, 19404, 19407, 19418) The plywood was not connected to the boat and no explanation was ever given to explain why it was there. (RT 19047)

The court then offered suggestions as to how the defense could re-

do the test with the actual boat (RT 19408), which suggestions were not well received by the defense (calling the ruling an outrage and absurd.)(RT 19408-19409) The court then told the defense it could not have the actual boat, but re-visited the issue a few minutes later and offered the defense the opportunity to have the actual boat. (RT 19413-19414) The defense never accepted the court's offer.

One of the cases cited by the defense is inapposite of its position:

> "The standard that must be met in determining whether the proponent of the experiment has met the burden of proof of establishing the preliminary fact essential to the admissibility of the experimental evidence is whether the conditions were *substantially identical, not absolutely identical.* [Citation.]" (Italics added.)" [Emphasis in original.]
>
> People v. Roehler (1985) 167 Cal.App.3d 353, 385 -386.

The defendant also cites to People v. Rodriques, (1994) 8 Cal. 4th 1060, 1114-1115 for the proposition that inaccuracies made no difference since the prosecution in that case "made no attempt to pass the videotape off as depicting exactly what the defendant saw." (Motion page 88, l.16-17.) However, that was not what that court held and not the facts in this case. The Rodriques court stated:

> "Relying on People v. Boyd, supra, 222 Cal.App.3d 541, and People v. Vaiza, supra, 244 Cal.App.2d 121, defendant contends that the difference in lighting conditions precluded admission of the videotape. Unlike the instant situation, however, those cases involved photographs or films that purported to show lighting conditions at the time of the incidents in question. Because the purpose of the evidence in those cases was to demonstrate to the jury the lighting conditions under which witnesses were able to view the events of the crime, those conditions assumed great significance in assessing the admissibility of the evidence. (See People v. Boyd, supra, 222 Cal.App.3d at p. 566; People v. Vaiza, supra, 244 Cal.App.2d at p. 127.) But here the videotape was not offered for the purpose of showing lighting conditions on the

night in question. Therefore, defendant's reliance on the above cases is misplaced."

People v. Rodrigues, supra at 1115 .

In the instant case, the defense was ostensibly offering the video to show the stability of the boat, so as set forth above in Boyd and Vaiza that condition assumed greater significance in assessing the admissibility of the evidence. The defense's use of the plywood platform in the boat altered the boat thus making it different and not substantially identical to the actual boat. The court noted this alteration and excluded the evidence under Evidence Code §352 (RT 19407) This portion of the defendant's motion should also be denied.

WIRETAP EVIDENCE WAS PROPERLY ADMITTED

Since this is simply the same motion that the defendant made at trial, the court may, in its discretion, deny it outright without additional consideration. (See Hagen v. Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). If the court wishes to address this issue on the merits, the People incorporate by reference all of their previous filings and arguments on the matter.

In the case of People v. Zepeda, (2001) 87 Cal.App.4th 1183, at 1195-1207, the court discussed the necessity requirement as it related to a state wiretap authorized in a murder investigation. Federal law is also instructive in this regard. The "[n]ecessity requirement can be satisfied by a showing in the application that ordinary investigative procedures, employed in good faith, would likely be ineffective in the particular case." (U.S. v. McGuire (9th Cir. 2002)

307 F.3d 1192, 1196, citing U.S. v. Brone (9th Cir. 1986) 792 F.2d 1504, 1506.) The necessity requirement is to be interpreted by a reviewing court in a "practical and commonsense fashion." (U.S. v. Bennett, (9th Cir. 2000) 219 F.3d 1117, 1122, citing U.S. v. Bailey, 607 F.2d 237, 241 (9th Cir. 1979). See also, U.S. v. Blackmon (9th Cir. 2000) 273 F.3d 1204, 1207)

The court authorizing a wiretap has considerable discretion, U.S. v. McGuire (9th Cir. 2002) 307 F.3d 1192, 1197, citing United States v. Martin, (9th Cir.) 599 F.2d 880, 886-887, cert. denied, 441 U.S. 962, so the standard of review is deferential.

The trial court's determination that the "necessity" requirement was met is reviewed only for abuse of discretion. (Zepeda, supra at 1204. See also, U.S. v. Bennett (9th Cir. 2000) 219 F.3d 1117, 1121; U.S. v. Carneiro, 861 F.2d 1171, 1176; U.S. v. Blackmon (9th Cir. 2000) 273 F.3d 1204; U.S. v. Brone (9th Cir. 1986) 792 F.2d 1504, 1506; U.S. v. McGuire (9th Cir. 2002) 307 F.3d 1192, 1197.)

The defendant seeks to have this court review the "necessity" of the wiretaps for a third time. (RT 1977 and 13934-13935) The second time the court said:

> THE COURT: All right. The Court's read and considered that issue also, and that motion will also be denied; because, even if the Court went to the point of redacting the -- what is alleged to be erroneous, there is still is plenty of information in there to establish necessity to order the wiretaps. The Court will not revisit the issue of the wiretap motions. That deals with that. (RT 13934-13935)

The People agree with the court that this issue should not be re-visited.

The defendant also raises the issue of minimization, but fails to cite any authority other than his general displeasure. Since defendant

cites no authority for his legal theory, this contention is deemed without foundation and requires no discussion. (See People v. Foote (2001) 91 Cal.App.4th Supp. 7, 12)

The law in brief is that minimization of non-pertinent calls is required (Penal Code Sec. 629.58). However, the procedure for minimization of non-pertinent calls is not specified in the statute. For guidelines, the court must look to federal law. Many non-privileged calls contain elements of both pertinent and non-pertinent information and agents must make subjective judgments regarding when to minimize throughout the duration of the call. Monitoring agents are human beings, who must constantly make quick, subjective judgments regarding the information contained in each call. No special software or investigative tricks exist to allow agents to make perfect decisions at all times. Nor does the law require such perfection. (See United States v. Charles, (2000) 213 F.3d 10, 22 [regarding the reasonableness standard for minimization; "...Equally important, "[t]he government is held to a standard of honest effort; perfection is usually not attainable, and is certainly not legally required."].)

The Federal standard regarding minimization of calls made during the course of a wiretap is one of reasonableness. In Scott v. United States (1978) 436 U.S. 128, 137-140, the Supreme Court adopted a standard of "objective reasonableness" for assessing minimization violations. Under Scott, the critical inquiry is whether the minimization effort was managed reasonably in light of the totality of the circumstances. Scott, supra, at 140. (See United States v. Hoffman, (1st Cir. 1987) 832 F.2d 1299, 1307; see also United States v. Uribe,

(1st Cir. 1989) 890 F.2d 554, 557 ("The touchstone in assessing minimization is the objective reasonableness of the interceptor's conduct."))

Basically, the agents must have acted in good faith regarding minimization throughout the conduct of the wiretap. The touchstone of minimization is "reasonableness." (United States v. Abascal, (9th Cir. 1977) 564 F.2d 821, 827) The reasonableness standard is determined from the facts of each case. (United States v. Chavez, (9th Cir., 1976) 533 F.2d 491, cert. denied, 426 U.S. 911)

The first time this court ruled on this issue it found that the agents had been "reasonable," stating:

> The Court further finds that the investigators were reasonable in their attempts to monitor all of the calls, including privileged ones, and the Court further finds that there was no action on the part of the DA or the investigators that was so egregious as to require the exclusion of the witnesses, a dismissal of the charges, suppression of the wiretap. (RT 1979)

This part of the defendant's motion should be denied.

THE AMBER FREY TAPES WERE PROPERLY ADMITTED

The People are unable to locate any specific objection to the recordings by the defense other than the need to redact the opinions of the typist. (RT 14534-14544) Failure to object waives any claim of error on appeal (People v. Clark , (1990) 50 Cal.3d 583, 618) At one point the defense did state:

> MR. GERAGOS: I was going to say, do you mind if I just absent myself? Because I don't see any relevance to this. I do have objections to all of her testimony, because I believe it to be irrelevant and 352.
> THE COURT: All right. And the Court will overrule your objection. The Court is of the opinion that the probative value outweighs the prejudicial value. So it will come in, again, as circumstantial evidence of the defendant's state of mind. (RT 14547-14548)

Assuming that this objection applied to the tape recordings, it was ruled on, and the evidence was properly admitted. The tapes were highly relevant and showed that the defendant had predicted his wife's loss weeks before it happened, that the defendant was lying about his activities and was not grieving as the defense had claimed. In fact, the defense offered several of the calls between the defendant and Ms. Frey (RT 15730) These tapes allowed the defendant to profess his innocence without having to testify and be subjected to cross-examination. There was no abuse of discretion in the admission of these tapes. For all of these reasons, this portion of the defendant's motion should be denied.

THE DOG TRACK EVIDENCE WAS PROPERLY ADMITTED

Since this is simply the exact same motion that the defendant made at trial, the court may, in its discretion, deny it outright without additional consideration. (See Hagen v. Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). If the court wishes to address this issue on the merits, the People incorporate by reference all of their previous filings and arguments on the matter.

The defense, again, is mistaken about the facts. The defense raised an objection to "dog tracking" as part of an Evidence Code §402 hearing prior to trial. This hearing lasted for at least two days and resulted in the exclusion of some of the tracks, and the admission of the Marina track because the court found corroboration. As the court said (RT 2002):

> So we have a scent, ostensibly the scent of Miss Peterson at the marina. This is a question now for the jury to decide; but the

corroboration that the Court finds is that within months, the body of Miss Peterson and her young son were found washed up in the Bay. And the evidence is that this is two to two and a half miles from the marina.

The defense claims they found out that Ms. Anderson had not been certified in 2004 after they issued a subpoena to CARDA. This is not true. The prosecution learned of this and filed a notice to the defendant and the court which resulted in the first of several in-camera hearings on 7-26-04. (RT 13714-13715) At the first hearing, the defense indicated they wanted the CARDA records (RT 13714, lines 20-23) and would again file a motion to exclude her dog track evidence.

In the current defense motion another "misstatement" is that the dog failed the test "shortly after the Marina trailing incident." (Motion page 102, line 12.) The dog was certified in 2002, re-certified in 2003 and had a test "called on time" in 2004 ("failed" test). (RT 13716) The Marina trail took place on 12/28/02 and it can hardly be argued that a test in 2004 was "shortly after."

The court was also apprised that the dog was still "OES" certified, just not CARDA certified in 2004 (Rt. 13716-13721) and had recently been involved in a missing person/abduction investigation that resulted in finding the victim's body who had been driven away in a car and killed. (RT 13720, 14956-14959) The court ruled that the defense could go into the failed test despite the remoteness, but, if the defense did, the prosecution would be allowed to enter the successful real-life track of a dead victim in a car (RT 15729)

The defense never asked Anderson about the "failed" test when she testified. Instead another dog expert was called to say he found no scent at the marina. The defense expert did concede on cross-

examination that Anderson's dog could have been correct, meaning that Laci's scent was at the Marina. (RT 19662)

Dog trailing evidence has been admitted in thirty-seven (37) states and the District of Columbia. (81 A.L.R. 5th 563, (2000)§3.) California is one of the states where dog-trailing evidence has been found to be admissible. The use of dog-trailing evidence in California has resulted in a jury instruction, CALJIC 2.16.

CALJIC 2.16 can be traced back to the case of People v. Craig, (1978) 86 Cal.App.3d 905; in that case the court rejected a challenge that a "Kelly" hearing should be required before dog-tracking evidence was admitted. The Craig court found that "Kelly" did not apply and instead found that the admissibility of the evidence would be determined by the experience of the dog handler. This "prima facie" showing of reliability test was adopted in the case of People v. Malgren (1983) 139 Cal. App.3d 234. (See CALJIC 2.16 use note.)The Fifth District has approved of Malgren in the case of People v. Gonzales, (1990) 218 Cal.App.3d 403.

Case law allows this evidence to be admitted, with corroboration, which was found by the court to be present with the Marina track. The defense' expert admitted that this track could have been valid and Anderson was the best person to explain that to the jury. There was no error in the admission of this evidence and this part of the motion should be denied.

THERE WAS NO ERROR IN ADMISSION OF THE ADULT PROGRAMMING

Again, this is simply the same motion that the defendant made at trial, and the court may, in its discretion, deny it outright without

additional consideration. (See Hagen v. Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). If the court wishes to address this issue on the merits, the People incorporate by reference all of their previous filings and arguments on the matter.

The defense once again objects to the admission of this material and this time attempts to argue that Laci would have approved the defendant's purchase of the DirectTV "adult programing" packages. They make this argument because there was "adult oriented materials" on Laci's computers. As the defense is aware, the "adult oriented materials" was found on the defendant's computers, from the work computers or the laptop he used for work. However, this argument was made by the defendant as part of a §402 hearing. (RT 14194)

As part of the §402 the court went through the moving papers, listened to both sides and then made sure he was clear on the evidence being offered:

> THE COURT: Let me ask you this. The reason why you're offering this evidence is to show that Laci Peterson on March 13th ordered satellite television service for their home March 13th, 2001; she did not include adult pornography channels.
> MR. DISTASO: That's correct.
> THE COURT: And then on January the 8th, 2003, approximately a little over a week after Laci disappeared, the account -- the status of the account was changed to add -- include a Playboy channel. And then on February 18th, at the time the -- the Modesto Police Department was serving a search warrant, the service was discontinued.
> MR. DISTASO: That's right.
> THE COURT: And it's to -- your position that this -- this evidence comes in to show that Scott Peterson was aware that his wife wasn't coming back because Laci Peterson didn't order a pornographic channel; he did, and when the police got there he had it disconnected.
> MR. DISTASO: Yes, that's right, your Honor. (RT 14198-14199)

This evidence was offered on August 3rd, 2004 and the defense had

stated through two months of testimony that the defendant was grieving privately. The People's evidence showed he was not grieving, but was selling the victim's car, attempting to sell her house "furnished" and changing his viewing habits because he knew Laci was not going to be coming home. As the judge said, it was for the jury to decide whatever inference was appropriate. (RT 14201) The defense also implies that this evidence was cumulative and the court failed to make a §352 determination. The court did so and ruled against the defense. (RT 14202-14203) This part of the defendant's new trial motion should be denied.

THE COURT DID NOT ERR IN DENYING A NON-DEATH QUALIFIED JURY

The court may, in its discretion, deny this motion outright without additional consideration. (See Hagen v. Superior Court (1962) 57 Cal.2d 767, 770-771; similarly see Griffing v. Municipal Court (1977) 20 Cal.3d 300, 305, fn. 9). If the court wishes to address this issue on the merits, the People incorporate by reference all of their previous filings and arguments on the matter.

The defendant cites the case of People v. Carpenter, (1997) 15 Cal.4th 312, 315 as authority for a second separate jury in a capital case. However, the Carpenter case never discussed this issue, but merely recited the fact: "At defense request, the court selected separate guilt and penalty juries." (Id., at page 351.)

There are many cases that uphold the denial of a second jury; one such case has said:

> "In People v. Nicolaus (1991) 54 Cal.3d 551, we recognized that Penal Code section 190.4, subdivision (c), "expresses a clear legislative intent that both the guilt and penalty phases of a capital trial be tried by the same jury.""

People v. Rowland (1992) 4 Cal.4th 238, 268.

The defendant cites Penal Code §190.4(c) and states "for good cause" a second jury may be empaneled. He then cites People v. Malone (1988) 47 Cal.3d 1, 27-28 and People v. Hart (1999) 20 Cal. 4th 546, 640-641 for the notion that "good cause" under subdivision (c) is elusive. However, the California Supreme Court has said:

> "As we observed in Gates, "[t]here is no direct authority on the meaning of 'good cause' in this context. There are, however, cases involving the question of good cause for discharge of a juror under sections 1123 and 1089. As to the latter statutes, the facts must 'show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality.' [Citation.]" (People v. Gates, supra, 43 Cal.3d 1168, 1199.) Moreover, a showing of good cause is a prerequisite to granting the motion to discharge the jury or to reopen voir dire. The trial court is not obliged to reopen voir dire based upon mere speculation that good cause to discharge the jury thereby may be discovered."
>
> People v. Bradford (1997) 15 Cal.4th 1229, 1354.

The issue raised by the defendant has been raised and rejected before. As stated by the Supreme Court:

> "The appropriate standard of review when considering a trial court's denial of a separate jury under section 190.4 is the abuse of discretion standard. (People v. Rowland (1992) 4 Cal.4th 238, 268."
>
> People v. Weaver (2001) 26 Cal.4th 876, 947.

The defendant implies that he has a right to a separate jury in this case, however that is not the law:

> "Defendant has no right to be tried by separate juries (ibid.) or to voir dire one way for the guilt phase and another way for the penalty phase."
>
> People v. Mendoza (2000) 24 Cal.4th 130, 168-169.

The defendant argues that some researchers claim that "death qualified jurors are guilt prone," but this argument has also been

rejected in California:

> "The Legislature has clearly articulated its preference for a single jury to decide both guilt and penalty (People v. Fauber (1992) 2 Cal.4th 792, 845), and, provided the chosen procedure satisfies basic principles of fairness, we are aware of no rule requiring the Legislature to select the process psychologically designed to render jurors most favorably disposed toward a defendant."
>
> People v. Kraft (2000) 23 Cal.4th 978, 1070.

The defendant again asks this court to follow the logic of the Federal District Court in Grigsby v. Mabry (1985) 569 F.Supp. 1273, 1322-1323, as creating some future constitutional right to a separate non-death qualified jury. However, as the defendant points out, and rightly so, that case was reversed by the U.S. Supreme Court in Lockhart v. McCree (1986) 476 U.S. 162. The court in Lockhart rejected the same kind of claimed constitutional right made here and held:

> "'Death qualification,' unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial."
>
> Lockhart v. McCree (1986) 476 U.S. 162, 175-176.

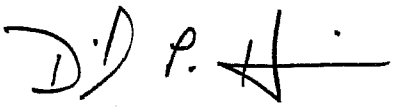
Finally, the defense cites U.S v. Green (D. Mass., 2004) 343 F. Supp. 2d 23 and U.S. v. Green, (D.Mass., 2004) 324 F.Supp.2d 311 as new legal authority. Both of these decisions involve one case, and the later decision is in fact nothing more than a supplemental finding relating to the earlier ruling. Both decisions deal exclusively with the federal death penalty statute and are not applicable here. For these reasons, this part of the motion should be denied.

Conclusion

Many of the points raised by the defendant in this motion are repetitive and can, and should, be denied without revisiting them again. The remainder are not supported by any admissible evidence and/or appropriate authority. The People therefore request that this court deny each and every part of this motion and deny defendant's request for a new trial.

Dated: 3-9-05

Respectfully submitted,



David P. Harris
Sr. Deputy District Attorney

EXHIBIT #1

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Attorney for Plaintiff

SAN MATEO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

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D.A. No.1056770

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. SCOTT LEE PETERSON, Defendant.	No. SC55500 (Stan. Co.#1056770) DECLARATION OF JAN GAUTHIER Date: March 16, 2005 Time: 9:00a.m. Place: Dept. 2M

----------o0o----------

I, JAN GAUTHIER, declare the following:

1. I am employed by the Stanislaus County District Attorney. In that capacity I was assigned the responsibility for the Laci Peterson case discovery.

2. Written materials from the police were scanned into an electronic format and then burned to a CD for discovery.

3. I was asked to review the discovery history of bates page number 15311, which was a Modesto Police Department tip sheet. This discovery was prepared by me on 5-13-03. The tip sheet was bates stamped number 15311 and this was burned to CD #6. CD #6 was

provided to the defense on 5-14-03. Bill Pavelic picked up the CD on 5-14-03 and signed for it on that date. Bill Pavelic worked for or with Mr. Geragos, the defense attorney on this case. Mr. Pavelic picked up a lot of discovery from me for Mr. Geragos.

I declare under penalty of perjury that the foregoing is true and as to matters stated on information and belief, I believe them to be true.

Dated: March 8, 2005

Jan Gauthier

EXHIBIT #2

JAMES C. BRAZELTON
District Attorney
Stanislaus County
Courthouse
Modesto, California
Telephone: 525-5550

Attorney for Plaintiff

SAN MATEO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

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D.A. No.1056770 THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. SCOTT LEE PETERSON, Defendant.	No. SC55500 (Stan. Co.#1056770) DECLARATION OF Lt. Xavier APONTE Date: March 16, 2005 Time: 9:00a.m. Place: Dept. 2M

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I, Lt. Xavier Aponte, declare the following:

1. I am employed by the California Department of Corrections as a Lieutenant and was assigned to an investigative unit at the California Rehabilitation Center in Norco California in January of 2003.

2. During January of 2003 I was contacted by a dorm officer at the prison, who was one of

several people responsible for monitoring recorded collect telephone calls by inmates within a particular dorm. I do not recall who that officer was any longer. The dorm officer brought to my attention a recording of a telephone conversation between an inmate, Shawn Tenbrink and a male believed to be his brother, Adam Tenbrink.

3. I listened to this recording and heard Adam Tenbrink tell Shawn Tenbrink something about the Laci Peterson case. Adam said he was told by someone, presumably Steven Todd as his name was mentioned during the call, that Laci Peterson had seen Todd and others committing a burglary in the neighborhood. Adam's statement to Shawn did not sound as though Adam was present at the burglary, nor that he had any first hand knowledge of the facts. Shawn's only knowledge of the incident sounded as thought it was based only on Adam's statement.

4. I made a recording of the conversation and contacted the Modesto Police tip line. I left a message on a recording for the tip line. After a period of days I received no return telephone call from the Modesto Police Department. I telephoned the tip line again and left another message.

5. I received a return telephone call from a Modesto Police detective a short time later. The detective asked that I arrange a telephonic interview between the inmate Shawn Tenbrink and the detective. I do not recall the detective's name, but I do recall the voice of the detective sounded male in gender.

6. I had Shawn Tenbrink brought to an office at the facility and met with him. I was dressed in plain clothes at the time and was not wearing a Corrections Department uniform. I monitored a telephonic interview between the Modesto Police Department detective and Shawn Tenbrink. Shawn Tenbrink denied any knowledge about Laci Peterson's disappearance, and was not very cooperative with the detective.

7. Shawn Tenbrink was returned to his unit at the prison after the interview. I do not recall mailing a copy of the audio tape recording of the conversation between Shawn and Adam Tenbrink, nor do I recall if the detective asked me to do so. I am not aware of any Modesto police officer visiting the California Rehabilitation Center to interview Shawn Tenbrink. The telephonic interview with Shawn is the only interview that took place to my knowledge.

8. In April or March of 2003, the administration building at this facility was condemned and our offices were moved to a smaller building. I have also changed assignments, and supervise a different unit within the prison. I have made a search for the audiotape of the conversation between Shawn and Adam Tenbrink, but have been unable to locate it in archives. The telephone recording system has also changed at the facility and I tried to access the old system to see if the recording could be retrieved but those recording no longer exist. I have also searched for a log, which may have had the detective's name that conducted the interview, and that search has met with negative results.

9. The only information possessed by me, that an inmate (Shawn Tenbrink) had spoken to someone I believed to be his brother (Adam) who had said that someone (I believe to be Steve Todd) said Laci witnessed him breaking in. I called the Modesto Police Department and gave them this same information, but could not give dates or time.

10. In February, 2005 I have confirmed with Det. Craig Grogan of the Modesto Police Department that my tip was received by them on January 22, 2003 and included in a tip sheet. The tip sheet bears a bates page number of 15255 at the top and 15311 at the bottom.

I declare under penalty of perjury that the foregoing is true and as to matters stated on information and belief, I believe them to be true.

Xavier L. Aponte, Lt. Dated: MARCH 03, 2005

Lt. Xavier Aponte

EXHIBIT #3

JAMES C. BRAZELTON
District Attorney
Stanislaus County
Courthouse
Modesto, California
Telephone: 525-5550

Attorney for Plaintiff

SAN MATEO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

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D.A. No.1056770

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. SCOTT LEE PETERSON, Defendant.	No. SC55500 (Stan. Co.#1056770) DECLARATION OF DET. CRAIG GROGAN Date: March 16, 2005 Time: 9:00a.m. Place: Dept. 2M

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I Craig Grogan declare the following:

1. I am employed by the Modesto Police Department as a police detective. I was working in that capacity in December of 2002 when I was assigned investigative responsibility for the Laci Peterson case.

2. Per a request by the Stanislaus County District Attorney's Office I searched the computerized files for the Peterson Case looking for the tip listing Shawn Tenbrink referred to by the defense in their motion. I found a tip dated 01/22/03 which included information from Lieutenant Aponte. The tip included the following

information: Aponte's telephone number, the fact he is an employed at " CRC Norco," the inmate's name and the name of the inmate's brother. This tip was documented on a "tip Sheet." The tip sheet which contained this tip is located at bate stamp number 15311 and it was discovered to both the prosecution and defense.

3. I also completed a hand search of handwritten reports, which are not searchable in the automated report format. I have found no other reports mentioning Aponte or Tenbrink. I have not found any audiotapes in possession of the Modesto Police Department that contain a conversation recorded between Adam and Shawn Tenbrink. I sent an e-mail to detectives, officers and supervisors involved in the Peterson investigation requesting information about an interview between an officer or detective and Shawn Tenbrink. I have not received any information from any investigator as a result of that e-mail.

4. I did not go to the California Rehabilitation Center in Norco at any point during this investigation, nor did any other officer or detective to my knowledge. I have inquired with supervisors in the Investigative Services Unit and they do not recall any officer being sent to that facility for an interview related to the Laci Peterson case.

5. I faxed a copy of the tip sheet (Bates number 15311) to Lt.

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Aponte to make sure it was the same tip he had called in.

I declare under penalty of perjury that the foregoing is true and as to matters stated on information and belief, I believe them to be true.

Dated: MARCH 9TH 2005

Det. Craig Grogan

AFFIDAVIT OF SERVICE BY FAX

STATE OF CALIFORNIA)
(ss.
COUNTY OF STANISLAUS)

I, the undersigned, say:

I was at the time of service of the attached POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR NEW TRIAL; DECLARATIONS OF LT. XAVIER APONTE, DETECTIVE CRAIG GROGAN, JAN GAUTHIER the age of eighteen years. I served by fax a copy of the above-entitled document(s) on the 9th day of March, 2005, delivering a copy thereof to the office(s) of:

Mark Garagos
Attorney for Scott Lee Peterson
Fax No. 213/625-1600

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

Executed this 9th day of March, 2005, at Modesto, California.

dmh