No. 19-5122

In the Supreme Court of the United States

DAVID A. WESTERFIELD,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the California Supreme Court erred in applying *Sheppard v. Maxwell,* 384 U.S. 333 (1966), to petitioner's claim that the trial judge violated due process by declining to sequester the jury.

2. Whether the California Supreme Court erred in determining that probable cause supported issuance of the search warrants in petitioner's case.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Westerfield, No. S112691, judgment entered Feb. 4, 2019 (this case below).

San Diego County Superior Court:

People v. Westerfield, No. SCD 165805, judgment entered January 3, 2002 (this case below).

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CONSTITUTIONAL PROVISIONS

STATEMENT

1. On Saturday morning, February 2, 2002, the parents of seven-year-old Danielle Van Dam discovered that their child was missing from her bedroom. Pet. App. B-2. That weekend, petitioner Westerfield—who lived just two doors away from the Van Dam house—drove his motorhome to various parks in the San Diego area, acted in a way a park ranger considered secretive, and soon gave police an account of his weekend that conflicted with observations from other witnesses. *Id.* at B-2, 7, 11, 29. After execution of a series of search warrants at petitioner's motorhome and house (*id.* at B-26-32), DNA tests revealed the presence of Danielle's blood on petitioner's jacket and on a carpet in his motorhome. *Id.* at B-3, 14. Further, her handprint was found over the bed in the motorhome. *Id.* at B-3. In addition, hairs consistent with Danielle's DNA profile were found in the bathroom of the motorhome and in the washing machine, dryer, and the bedding in petitioner's house. *Id.* And fibers similar to those from her bedroom's carpeting were found by the bed and at other places in petitioner's motorhome. *Id.* On February 27, Danielle's badly decomposed body was discovered near a rural road. *Id.*

2. The State charged petitioner with first-degree murder and kidnapping. Pet. App. B-1. It also alleged—as a special circumstance making petitioner eligible for the death penalty—that he had murdered Danielle in the course of kidnapping her. *Id.*

a. Prior to the guilt phase of his trial, petitioner moved to suppress evidence discovered in searches of his house and motorhome. Pet. App. B-24-25. He argued that a series of search warrants—an initial warrant based on petitioner's conduct and four further warrants premised on items discovered in each successive search—were infirm because the original warrant had not been supported by probable cause. *Id.* at B-25.

The record shows that a police detective, testifying by telephone to a magistrate, averred that Danielle and her mother had sold Girl Scout cookies at petitioner's house a week before she had gone missing; that petitioner in speaking to police had referred to plans for Danielle to attend an upcoming father-daughter dance, even though Mr. and Mrs. Van Dam had never discussed that subject with him; that FBI specialists in child abductions had informed the detective that a ten-year study indicated that most abductors are men who live near the child's house and are familiar with the child's home and family; that petitioner's house was similar to the Van Dams'; and that petitioner, who had encountered Danielle's mother at a bar on the night Danielle went missing, had told the police that he believed a babysitter was watching Danielle that night. Pet. App. B-26-29.

The detective further testified that petitioner had consented to a police search of his residence and motorhome; that, when a police dog present for the purpose of detecting Danielle's scent had "displayed an interest" in petitioner's garage, petitioner claimed that Danielle had been both upstairs and in his

garage on the day she was selling the cookies; but that Mrs. Van Dam had told the police that her daughter had not visited those part of petitioner's property. Pet. App. B-27-28. Petitioner during the search had displayed an "unusual amount of cooperativeness by opening drawers, lifting cushions, and pointing out areas missed by detectives"; and FBI abduction profilers had informed the detective that abductors commonly appear to act in an overly cooperative way. *Id.* at B-28.

Further, petitioner in an interview with the police claimed that, on the morning Danielle went missing, he had driven to the place where he stored his motorhome; but a neighbor told police that petitioner's motorhome had been parked at his residence the previous night. Pet. App. B-29. Petitioner also stated that "we drove back to Silver Strand"—suggesting someone else was in the motorhome with him. *Id.* When confronted about his reference to "we," petitioner said that it was "just a slip." *Id.* The testifying detective also recounted that a park ranger at petitioner's camping location had noted that petitioner acted "suspiciously" by preventing the ranger from seeing inside the motorhome when the ranger attempted to refund some money to petitioner. *Id.*

Last, the detective testified that petitioner had failed a polygraph examination. Pet. App. B-30. When petitioner was asked whether he was involved in or responsible for Danielle's disappearance, he answered "no"; but the examiner found that he had been deceptive. *Id.*

The trial judge denied the motion to suppress. Pet. App. B-25. The judge concluded, with respect to the first warrant, that the magistrate had properly considered petitioner's polygraph failure; he further concluded that, even without the polygraph evidence, sufficient probable cause supported the warrant. *Id.*

b. Also prior to trial, petitioner moved to sequester the jury, in lieu of a change of venue, based on publicity the case had received. Pet. App. B-59. The judge deferred ruling on the motion. *Id.* But, in his initial charge to the jury, the judge warned that there was a great deal of misinformation being reported about the trial, and that, if the jurors listened to and used that misinformation, it would do "'a grave disservice to both sides in this case.'" *Id.* Advising the jurors that they had been chosen because they had agreed to decide the case based solely on the evidence presented in court, the judge informed them that he was instituting a "self-policing" practice, meaning that the jurors were to take it upon themselves to refrain from viewing or listening to any publicity about the trial. *Id.*

The judge nonetheless actively monitored potential influences on the jury. For example, when courtroom spectators wore buttons depicting Danielle's image, the judge told the spectators that such items were not permitted and that the court would not tolerate any intimidation of the jury. Pet. App. B-59. When members of the public continued to wear the buttons in the courthouse hallway, the judge admonished the jury that it was "'just one more form of the

kinds of publicity or bias that [the jury had] been selected to overcome.'" *Id.* at B-59-60. Further, the judge frequently admonished the jury to avoid television and internet coverage "'at all costs.'" *Id.* at B-60. In addition, when the jurors' occupations were published in a newspaper, the judge made arrangements with the employer of one juror, who would have been easily identified by coworkers as a result, to avoid pressure from coworkers or the public. *Id.*

Similarly, when the jurors sent a note indicating they believed the victim's mother was glaring at them, the judge conducted a closed session and asked them whether the victim's parents' presence in the courtroom would affect their ability to be fair. Pet. App. B-60. No juror indicated that it would. *Id.* at B-60-61. The judge reiterated that the jury could raise any concern of interference or intimidation any time, and reemphasized that the jurors must be vigilant in "self-policing." *Id.* at B-61.

When further media attention surfaced, mostly in the form of incorrect reports of the number of child pornography images recovered from petitioner's computer, petitioner renewed his motion to sequester the jury. Pet. App. B-61. Denying the request, the judge explained that he had no reason to believe any juror had violated the order to disregard publicity. *Id.* At another point during the guilt phase, the court recessed for 11 days due to holidays and vacation schedules. *Id.* at B-61. The defense later moved for a mistrial following an 11-day holiday recess, arguing that there had occurred a "'tremendous amount of publicity'" about the case such that it was "'inescapable'" that at least some

jurors would have been exposed to it. *Id.* at B-61-62. The judge denied that motion too. *Id.* at B-62. Before the recess, the judge had admonished the jury to "'guard against, in the utmost way possible, reading or listening to'" media reports about the case. *Id.* at B-61. In denying the motion, the judge observed that the amount of media coverage had been consistent throughout the trial and that there was no reason to believe any juror had violated the court's orders to shield himself from media reports about the case. *Id.* at B-62.

Later in the guilt phase, the judge addressed in a closed session an incident in which one juror had observed two other jurors being followed to their cars by a person believed to be affiliated with media. Pet. App. B-62-63. Upon questioning by the judge, the juror assured the court that nothing about the experience would affect his ability to be fair and impartial. *Id.* at B-63. The judge also questioned the two jurors who were followed: one indicated that he was "'not happy with it'" but that he was "'fine with it'"; the other was not aware she had been followed but indicated that the incident would not affect her ability to be fair. *Id.* The judge then openly discussed the incident with all of the jurors to inform them that law enforcement was investigating and to encourage them to report any such behavior. *Id.* He candidly noted that motions to sequester the jury had been made and that, although he did not consider sequestration to be appropriate at that time, he would continue to consider sequestration as a future possibility. *Id.* He encouraged any juror

who believed that the incident would impact his or her ability to be fair to write a note to the court. *Id.* The court received no such notes. *Id.*

The defense again moved to sequester the jury two days later, citing media coverage and television shows related to some of the testimony at trial. Pet. App. B-64. The judge denied the request, explaining that "the jurors appeared to be a hardy group, 'they don't appear intimidated by what occurred, and I continue to believe in their integrity.'" *Id.* The following day, he reminded the jurors that, while sequestration remained an option, he planned to continue without sequestration, recognizing the strain it would have on the jurors and their families. *Id.* The judge again reminded the jury that the only evidence that it was to consider was that which came from the witnesses testifying in court. *Id.* at B-64-65.

The defense made additional requests for sequestration prior to closing arguments based on media accounts, including an article disclosing "leaked" information about the case. Pet. App. B-65. The court denied the requests, again noting "its impression from dealing with the incident in which jurors had been followed that these jurors were 'a hardy group of people,' who did not 'want their lives disrupted' by sequestration," and further observing that sequestration had its "'own pitfalls.'" *Id.* at B-65-66. He reminded the jurors that his decision not to sequester them was contingent upon the jurors continuing to "self-police." *Id.* at B-66.

The jurors acted in accordance with the judge's admonitions. During closing arguments, a juror sent a note saying that he was having difficulty maintaining "'a clear mind'" due to people around him discussing the case. Pet. App. B-66. The judge addressed the entire jury, reminding the jurors that they had to avoid becoming involved in such conversations and that they were to disregard anything they accidentally overheard. *Id.* He expressed faith that the jury could abide by its obligations. *Id.* In his concluding instructions to the jury, he repeated these comments and also advised the jury that it was to alert the court if jurors desired to be isolated for deliberations. *Id.*

Similarly, during the course of deliberations, when a juror reported that he was being harassed at work, the court arranged for the jury to deliberate on each day of the week so as to provide the jurors with a valid reason not to have to report to work. Pet. App. B-67. The juror who had raised the issue stated that the scheduling accommodation resolved his concern and that nothing about the situation at his workplace affected his ability to be fair. *Id.* Also during deliberations, an alternate juror reported to the court that she believed she and a seated juror had been followed when they left the courthouse one evening. *Id.* at B-68. Both the alternate and seated juror assured the court that they could remain fair and impartial; the seated juror did not even believe they had been followed. *Id.*

Another time during the guilt phase deliberations, the defense made another motion to sequester, again based on media coverage. Pet. App. B-68.

The judge denied the request, but granted the alternative defense request of providing the jury a place to gather during breaks away from the public and media. *Id.*

The jury convicted petitioner of first-degree murder and kidnapping, and found the special-circumstance allegation to be true. Pet. App. B-1.

c. During the penalty phase of petitioner's trial, the judge continued to pay close attention to potential publicity. When releasing the jurors at the end of a day in which they had heard testimony about child molestation, the judge noted there were two professional sporting events on television that evening and suggested that the jury watch them to avoid seeing publicity about the case. Pet. App. B-145. As it turned out, however, one of the broadcasts included a halftime report about petitioner's trial, including the allegations of child molestation. *Id.* The defense renewed its request for sequestration the following day. *Id.* The judge denied it, noting that, even if jurors inadvertently saw the news coverage, it was no different than the testimony they had heard in court. *Id.*

The jury returned a verdict of death. Pet. App. B-1.

3. The California Supreme Court affirmed. Pet. App. B-1. It rejected petitioner's claim that, because of publicity and public sentiment throughout his trial, the trial judge's denial of his jury-sequestration motions violated due process. *Id.* at B-58. In doing so, the supreme court disagreed with petitioner's argument that review of the judge's sequestration rulings required application

of a standard higher than abuse of discretion. *Id.* at B-70. Petitioner cited this Court's statements in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), about prejudicial news comment: that "'trial courts must take strong measures to ensure that the balance is never weighted against the accused" and that "appellate tribunals have the duty to make an independent evaluation of the circumstances." *Id.* at B-69 (citing *Sheppard*, 384 U.S. at 362). The California Supreme Court, however, determined that the quoted *Sheppard* language did not address the appellate standard for reviewing the trial court's method for protecting the jury from outside prejudicial influences. *Id.* at B-70. Rather, the state court noted, this Court's observations arose in the context of an unsuccessful change of venue motion and the subsequent effects of pervasive media coverage on the jury and verdict. *Id.* (citing *Sheppard*, 384 U.S. at 345-349). Pointing out that *Sheppard* involved a constitutional violation resulting from "extraordinary circumstances" where "'bedlam reigned at the courthouse,'" the court explained that no such circumstances existed in this case. *Id.* The state supreme court therefore concluded that, in accordance with state statutory and case law, "a trial court's decision whether to sequester a jury is subject to an abuse of discretion standard of review." *Id.*

The court found no abuse of discretion in this case. Pet. App. B-70. First, it rejected petitioner's assertion that the trial court had abdicated its duty to decide whether sequestration was appropriate, leaving it up to the jury to choose instead. *Id.* The court noted that the trial judge told the jury that,

although it would take the jurors' concerns and preferences into account, "'it was the court's responsibility to make such a decision.'" *Id.* at B-70-71. The court also observed that, while the trial judge considered the jury's concerns and preferences, he also considered that it was apparent the jurors were "self-policing" as instructed and that sequestration came with its "'own pitfalls'." *Id.* at B-71.

Second, the court recounted the judge's extensive efforts to protect against outside influences. Pet. App. B-71. It observed that the record was replete with the trial judge's admonitions regarding "the potential impact of media coverage, peer pressure, and public sentiment," as well as statements "ordering the jurors to avoid any publicity regarding the case, admonishing them concerning their duty to decide the case solely based on the evidence presented, inquiring about the impact of outside influences on their ability to be fair and impartial, and crafting when necessary methods by which outside influences could be reduced or avoided." *Id.* It further observed that petitioner had not pointed to anything in the record suggesting that the jurors violated the court's orders or that they were insincere in their assurances that they could remain fair and impartial and decide the case solely based upon the evidence presented at trial. *Id.* The court concluded: "[I]n the absence of any evidence that the jury was materially affected by the publicity and interest that this case generated, we cannot say there was any 'substantial likelihood' that defendant did not receive a fair trial ...." *Id.*

b. The California Supreme Court also rejected petitioner's claim that the search warrants were not supported by probable cause. Pet. App. B-24-38. It expressly declined to decide whether a magistrate, in determining probable cause for a search warrant, may consider the results of a polygraph test. *Id.* at B-26. Instead, the court determined that probable cause supported the search warrants even without considering petitioner's failure of the polygraph examination. *Id.*

That evidence, the court noted, included: petitioner's lying about when he retrieved his motorhome from storage; his hurried leaving in his motorhome the day after Danielle's abduction; the absence from home for two days; his unusual cooperation with law enforcement officers; the search and rescue dog displaying interest in petitioner's garage; and the fact that, in a police interview, petitioner relayed information about Danielle that, her mother indicated, only Danielle could have told him. *Id.* at B-34-35.

The court also observed that petitioner's explanation of his whereabouts, and his suspicious behavior at the camp site following Danielle's disappearance, further supported the warrants. Pet. App. B-35. Specifically, petitioner paid for several nights of camping, and actually overpaid, yet he later told detectives he did not have his wallet with him. *Id.* When the ranger returned the overpayment, the motorhome's blinds were all closed, petitioner acted strangely, and petitioner departed shortly afterward despite having paid for multiple nights. *Id.* Finally, when explaining how he arrived at that

campsite, petitioner said, "*we* drove back to Silver Strand," suggesting that someone else was with him on his trip. *Id.*

ARGUMENT

1. Relying on *Sheppard v. Maxwell,* 384 U.S. 333, 362 (1966), petitioner argues that the California Supreme Court improperly applied a deferential standard of review, rather than undertaking independent review, in evaluating his challenge to the trial court's refusals to sequester the jury. Pet. 15. The state court's analysis, however, comported with *Sheppard.* Petitioner acknowledges that "[t]here is not a good deal of jurisprudence on this aspect of *Sheppard"* (Pet. 17), and he fails to show any conflict with decisions of other appellate courts. The state court correctly rejected petitioner's fact-bound claim that sequestration was required in this case, and there is no reason for further review.

In *Sheppard v. Maxwell,* 384 U.S. at 362-363, this Court addressed whether the defendant was deprived of a fair trial "because of the trial judge's failure to protect [him] sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution." *Sheppard,* 384 U.S. at 335. *Sheppard* involved extraordinary circumstances that this Court described as "bedlam." *Id.* at 355. The news media took over the courtroom and "hounded" participants, the defendant in particular. *Id.* In an "unprecedented" step, the trial judge accommodated a table, a few feet away from the jury box, at which 20 reporters sat taking notes and staring at the defendant. *Id.* Reporters

photographed and handled exhibits that lay on counsels' table. *Id.* at 358. Much of the information reported about the case was not based on testimony presented at trial. *Id.* at 356-357. Jurors had to "run a gauntlet of reporters and photographers each time they entered or left the courtroom" and were permitted to make phone calls during deliberations. *Id.* at 355.

The *Sheppard* Court determined that the trial judge had "lost his ability to supervise" his courtroom, suffering frequent disruptions. *Sheppard,* 384 U.S. at 355. The only ameliorative action was that, "[a]t intervals during the trial, the judge simply repeated his 'suggestions' and 'requests' that the jurors not expose themselves to comment upon the case." *Id.* at 353. The Court concluded that, while it could not say that a due process violation resulted from the trial judge's refusal to take precautions against the influence of media publicity alone, the arrangements made by the judge with the news media resulted in a due process violation. *Id.* at 355.

The Court explained that the error was compounded by the trial court's mistaken belief that it lacked the power to control the circumstances of the trial. *Sheppard*, 384 U.S. at 357. The judge had repeatedly stated that he was unable to restrict the prejudicial news reports. *Id.* at 357-358. But the Court identified many ways in which the judge could have avoided the "carnival atmosphere" in his courthouse and courtroom: limiting the presence of the press in the courtroom; insulating the witnesses from reporters; and making

an effort to control leaks of information or extrajudicial statements to the press by law enforcement, witnesses, court employees, and counsel. *Id.* 358-362.

Against this backdrop, the Court reiterated the long-standing principle of due process that "the accused [must] receive a trial by an impartial jury free from outside influences." *Sheppard*, 384 U.S. at 362. "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measure to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances." *Id.* The Court cautioned that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," the trial judge should take ameliorative measure such as continuing the case, changing the venue, or sequestering the jury. *Id.* at 363.

The California Supreme Court's ruling on petitioner's jury-sequestration claim fully comported with *Sheppard*. Noting that *Sheppard* had discussed the tension between prejudicial media coverage and the defendant's right to a fair trial, the state court acknowledged this Court's statements in *Sheppard* "'that trial courts must take strong measures to ensure that the balance is never weighed against the accused'" and that "'appellate courts have the duty to make an independent evaluation of the circumstances.'" Pet. App. B-69 (quoting *Sheppard*, 384 U.S. at 362-363). And it concluded its careful analysis of the circumstances of petitioner's case with its own determination that there

was no "'substantial likelihood'" that petitioner was denied a fair trial. *Id.* at B-71.

The state court's conclusion correctly followed from its discernment of "the absence of any evidence that the jury was materially affected by the publicity and interest that this case generated...." Pet. App. B-71. The record does not show that any non-testimonial information about the case reached the jury during the trial, or that any juror felt pressure from outside influence. Instead, the record shows a responsible jury that, as it was repeatedly instructed, brought any concerns to the court's attention, and an alert trial judge who addressed each instance appropriately.

Moreover, the trial judge admonished the jury, frequently and thoroughly, about its duty to avoid the publicity surrounding petitioner's trial. Pet. App. B-71. As the supreme court observed, the judge "carefully and repeatedly addressed the potential impact of media coverage, peer pressure, and public sentiment by ordering the jurors to avoid any publicity regarding the case, admonishing them concerning their duty to decide the case solely based on the evidence presented, inquiring about the impact of outside influences on their ability to be fair and impartial, and crafting when necessary methods by which outside influences could be reduced or avoided." *Id.* Finally, the court noted that petitioner had pointed to nothing in the record suggesting that the jury was materially affected in any way by any publicity or outside influence. *Id.*

The California Supreme Court also correctly concluded that *Sheppard* did not require heightened appellate review of a trial court's refusal to adopt any particular method for ameliorating outside influence. Pet. App. B-70. Rather, *Sheppard* addressed a situation in which the particular circumstances under which a trial was held were prejudicial due to the circus atmosphere and the trial judge's complete failure to restrain disruptive influences in the courtroom. Under those circumstances, the probability of unfairness required the trial court to employ some suitable safeguards to ensure a fair trial. *Sheppard*, 384 U.S. at 363. But this Court did not suggest that trial courts presiding over future proceedings would lack their normal discretion to select the appropriate means for addressing whatever concerns might arise in the course of a particular case.

The circuit court decisions petitioner cites (Pet. 16-17) do not stand for any contrary proposition. In *United States v. Campa*, 459 F.3d 1121, 1150 (11th Cir. 2006), the appellate court applied a deferential standard of review in determining that trial judge properly denied a change of venue motion. The court of appeals note that it would "not disturb the district court's broad discretion in ruling that this is not one of those cases in which juror prejudice can be presumed." *Id.* In *United States v. Capo*, 595 F.2d 1086, 1091 (5th Cir. 1979), the appellate court reviewed the record and exhibits and concluded that the defendants were not subject to inherently prejudicial publicity and had failed to show any actual prejudice, as the trial court took elaborate measures

to ensure the fairness of the proceedings. And *United States v. Jones*, 542 F.2d 186, 194-195 (4th Cir. 1976), held that while a reviewing court must independently review the circumstances relevant to determining whether publicity was inherently prejudicial, it should accord deference to the trial judge's exercise of discretion in taking appropriate specific measures to ensure a fair trial. None of these decisions conflicts with the decision below.

The analysis conducted by the California Supreme Court in this case shows appropriate appellate review. The state court carefully compared petitioner's case to *Sheppard* and looked carefully at the measures taken by the trial court and the jurors' apparent adherence to those measures. Pet. App. B-59-68, 70. Noting the absence of any evidence that the jury had been materially affected by outside influence, the court correctly concluded that there was no substantial likelihood that petitioner was denied a fair trial. *Id.* at B-71. That fact-bound determination does not warrant further review.

2. Petitioner also argues that, under the Fourth Amendment, evidence resulting from a polygraph examination may not be "decisive for the magistrate's issuance of a search warrant." Pet. 3; *see* Pet. 18-26. This case, however, does not present that question, which the California Supreme Court expressly declined to address. Pet. App. B-26. Instead, the state court correctly held that, on the facts of this case, ample other evidence supported issuance of the initial warrant at issue. *Id.* Petitioner's disagreement with that determination (Pet. 21-26) does not warrant further review.

In challenging the state court's probable-cause determination, petitioner argues that other courts have rejected showings based primarily on the fact that a victim was last seen with the suspect. Pet. 23-25 (citing *Miley v. State*, 614 S.E.2d 744 (Ga. 2005), and *People v. Dace*, 506 N.E.2d 332 (Ill. App. 1987)). Here, however, there was much more. As the court below pointed out, the detective's testimony to the magistrate set forth strong evidence of petitioner's proximity to Danielle's home; his belief that her parents were out of the home and that she was being watched by a babysitter; his knowledge of a father-daughter dance that should have been known only to Danielle's family and a different neighbor; his marked attempts to appear to be cooperating with law enforcement; his odd and secretive behavior with the park ranger; his verbal "slip" revealing that he was not alone when driving back to his campsite; and multiple apparent falsehoods contradicted by other witnesses, including his statements to detectives about when he retrieved his motorhome from storage and not having his wallet with him despite paying for several nights of camping. *See* Pet. App. B-34-35. The state supreme court correctly concluded that these circumstances, taken together, sufficed to support the issuance of a warrant, without regard to any evidence resulting from defendant's polygraph examination. *Id.* at B-35.

Moreover, even a different ultimate holding on that issue would not change the result in this case, because it was reasonable for officers to rely on the magistrate's issuance of the initial warrant. *See United States v. Leon*, 468

U.S. 897, 920-921, 926 (1984).[1] Petitioner argues that there is "a dearth of authority regarding the status of polygraph evidence to establish probable cause for a warrant" (Pet. 20); but the non-polygraph evidence summarized above and the existing authority on the polygraph question are certainly ample to justify reliance on an issued warrant.

For instance, while the Fifth Circuit has acknowledged the risks inherent in admitting polygraph evidence at trial, it has recognized that the warrant situation is different—given the magistrate's legal expertise (as compared to a lay juror), the improbability that the magistrate would assign undue value to polygraph evidence, and the fact that magistrates generally are permitted to determine probable cause based on evidence otherwise inadmissible at trial, such as hearsay. *Bennett v. Grand Prairie*, 883 F.2d 400, 405 (5th Cir. 1989). Other state and federal courts have reached similar conclusions. *See, e.g.*, *Gomez v. Atkins*, 296 F.3d 253, 264 & n.7 (4th Cir. 2002) (reasonable officer may consider polygraph results in determining probable cause); *Craig v. Singletary*, 127 F.3d 1030, 1046 (11th Cir. 1997) ("Indications of deception on a polygraph examination may be taken into account in determining whether probable cause exists."); *State v. Henry*, 263 Kan. 118, 128 (1997) (use of polygraph test results does not invalidate search warrant where totality of circumstances demonstrates probable cause); *Oregon v. Coffey*, 309 Ore. 342,

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[1] The state supreme court did not address this alternative argument. *See* Pet. App. B-26, 38.

346-348 (1990) (judge considering application for a search warrant may consider opinion of polygraph examiner to establish reliability of information from unnamed informant); *State v. Clark*, 143 Wash.2d 731, 749-750 (2001) (concerns over admitting polygraph evidence at trial not present in search warrant proceedings); *cf. Cervantes v. Jones* 188 F.3d 805, 813 n.9 (7th Cir. 1999) (recognizing that Illinois has barred use of polygraph evidence for all purposes including determination of probable cause). Given this authority, together with the non-polygraph evidence relied on by both the trial court and the California Supreme Court (*see* Pet. App. B-25, 35), the officers in this case cannot be faulted for relying on the warrant that they sought and obtained. *See Leon*, 468 U.S. at 920-921, 926.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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