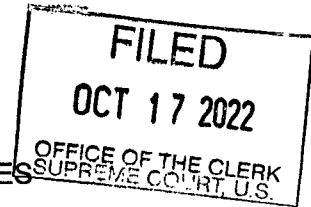


22-6526
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



ANTON KUBICA — PETITIONER
(Your Name)

vs.
THE PEOPLE OF THE STATE
OF CALIFORNIA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF CALIFORNIA

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANTON KUBICA (BM-8729)

(Your Name)

CSP-LAC P.O. BOX 8457

(Address)

LANCASTER, CA. 93539-8457

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

WAS THE APPELLANT DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHT TO DUE PROCESS, BECAUSE OF UNJUSTIFIED, PREJUDICIAL PROSECUTORIAL DELAY IN FILING THE PETITION WHICH THEN RESULTED IN THE LOSS OF MATERIAL EVIDENCE NECESSARY TO DEFEND HIS CASE?

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FOURTH APPELLATE DISTRICT, DIVISION TWO (unpublished)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Court of Appeal, 4th Appellate District court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 07/25/2022. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE PETITIONER WAS IMPROPERLY DENIED HIS FEDERAL AND STATE
CONSTITUTIONAL RIGHT TO DUE PROCESS AS A RESULT OF
UNJUSTIFIED, PREJUDICIAL PROSECUTORIAL DELAY IN
FILING THE PETITION WHICH RESULTED IN THE LOSS OF
MATERIAL EVIDENCE.

STATEMENT OF THE CASE

The Petitioner, Anton Kubica, adopts the Factual History set forth in the Opinion of The Court of Appeal of the State of California, Fourth Appellate District, Division Two - (Pages 3 - 16) for purposes of this Petition only.

See Appendix A

REASONS FOR GRANTING THE PETITION

Please see Argument at Appendix B Pages (7 - 30).

ARGUMENT

I.

APPELLANT WAS IMPROPERLY DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHT TO DUE PROCESS AS A RESULT OF UNJUSTIFIED, PREJUDICIAL PROSECUTORIAL DELAY IN FILING THE PETITION WHICH RESULTED IN THE LOSS OF MATERIAL EVIDENCE.

A. Introduction.

The sheriff's department had gathered all the documentary evidence linking the Kubicas to Ms. Darling's murder as of 1993. Yet for unexplained reasons, the prosecutor did not file charges at that time. In 2014, without any new evidence arising, Detective Bodmer reopened the case and obtained a warrant for Mr. Kubica's arrest. By that time, critical witnesses, including CJ, the other primary suspect, had died.

Mr. Kubica filed a pretrial motion to dismiss arguing his right to due process was violated by unjustifiable prosecutorial delay. The judge overhearing the pretrial hearing found that it did appear Mr. Kubica had suffered prejudice, but denied the motion without prejudice. The judge reasoned that the development of the case at trial would shed light on how much prejudice resulted from the delay.

After Mr. Kubica was convicted, he filed a posttrial motion to dismiss. The trial judge presided over this hearing. The judge found Mr. Kubica had not established prejudice because the judge

did not personally believe his exculpatory explanation that he was involved in a coin sale with Ms. Darling and nothing more. The judge also found any prejudice was outweighed by the prosecution's justification for delay.

Appellant contends the trial court abused its discretion in the denying the posttrial motion. Mr. Kubica established prejudice from the death of witnesses and loss of records that impeded his ability to defend himself. The prosecution failed to present any justification for the delay between 1993 and 2014 when the complaint was filed and the arrest warrant issued. The subsequent discovery of additional evidence (purported admissions by Mr. Kubica to others) also did not warrant waiting over two decades to file charges because the prosecutor is not permitted to leave a fully developed case on the back burner on the off chance it might improve.

Because the delay prejudiced Kubica and the delay was unjustified, the trial court abused its discretion in denying Mr. Kubica's motion. There was no way for Mr. Kubica to have a fair trial as a result of the loss of evidence. Therefore, the motion to dismiss should have been granted and the murder conviction must be reversed.

B. Standard of Review: abuse of discretion.

A trial court's ruling on a motion to dismiss for prejudicial pre-complaint delay is reviewed for abuse of discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 431 citing *People v. Morris* (1988) 46

Cal.3d 1, 38.) "The trial court's ruling in this regard will be sustained on review unless it falls outside the bounds of reason." (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1330.) All exercises of legal discretion are guided by legal principles and policies appropriate to the particular matter at issue. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

"There are two ways to show an abuse of discretion by the trial court. One way is to show the ruling was whimsical, arbitrary, or capricious, i.e., that the trial court exceeded the bounds of reason." (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 285.) "The other way is to show the trial court erred in acting on a mistaken view about the scope of its discretion." (*Ibid.*)

In determining whether a trial court abused its discretion in resolving a factual dispute, the decision is reviewed for substantial evidence. (*People v. Hill* (1984) 37 Cal.3d 491, 499.) However, whether the court applied the law to the facts correctly is reviewed independently. (See *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801.)

C. Chronology of the police investigation.

The murder occurred sometime around June 5, 1990 (the date Ms. Darling was last seen alive). Ms. Darling's body was discovered on June 28, 1990. (2 RT 413-417, 462.) Law enforcement was not able to identify any suspects at the time. (3 RT 648.)

1. Investigation between September 1991 and May 1993 identifying Mr. Kubica as a suspect in Ms. Darling's murder.

In September of 1991, the sheriff's department received a call from an attorney for Ms. Darling's heirs about Ms. Darling's Swiss bank accounts and transfers to an account in Anguilla. (1 CT 66; 2 RT 483-486.) Detective Carter of the Riverside County Sheriff's department began investigating the transfers, contacting local officials and the FBI for assistance. (1 CT 67-69.)

On July 28, 1992, an arrest warrant was issued for Mr. Kubica and CJ for grand theft related to real estate fraud with alleged victims Sharon McGuire, Patrick Maradei, Louise Di Napoli, & Grace Maradei, Pamala Strauss, Kurt De Crinis, Manny J. Kabelnig, Sidney Israelite & Mildred Spector, and Frank & Mary Helwig. (1 CT 70.)

In January of 1993, Detective Carter contacted the Scottsdale, Arizona police department in order to obtain a search warrant for the home where Mr. Kubica and CJ then lived. (1 CT 70.) The warrant mentioned investigating a murder and theft from the deceased. (1 CT 70.) Detective Carter seized numerous documents from the home. (1 CT 70-71.) He reviewed those documents between seizure and May 31, 1993 when he prepared a report. (1 CT 71.) This included evidence showing the Kubicas were in Palm Springs at the time of the murder (1 CT 74), and indicating someone had called the banks in Switzerland and Anguilla from the Kubicas'

phone in May of 1990. (1 CT 71-73.) There was also evidence that Mr. Kubica traveled to Anguilla around May 28, 1990 and again around June 10, 1990. (1 CT 74-75.) It showed transfers from Mr. Kubica's account in Anguilla to his Canadian bank account in August of 1990. (1 CT 75.)

It also included evidence that the Kubicas were having financial difficulties with a mortgage in early 1990 but paid it off in August of 1990. (1 CT 73²; 3 RT 542-543.) It also included evidence that CJ deposited \$2,000 in an account on June 5, 1990. (1 CT 73; 5 RT 1078.) The documents also included a receipt from Airport Park Secretarial Services made out to CJ Michaels dated June 5, 1990. (1 CT 73.) The author of the receipt told the investigator that CJ said she was going to Canada for several months. (1 CT 73.)

Despite this evidence, the District Attorney did not press charges at that time. They did, however, charge CJ with fraud related to a number of other victims for a ponzi scheme carried out between February 1989 and June 1990, to which she pleaded guilty in November of 1993. (4 RT 858-859.) Ms. Sharon Ritter Maguire was one of the victims in this scheme. (4 RT 858-859.)

² The motion to dismiss appears to have a typo and says the arrears were paid in August 24, 1993. The letter from Mr. Kubica to the bank is dated August 24, 1990. (3 RT 543.)

On November 5, 1993, CJ pleaded guilty to these grand theft charges. (4 RT 859.) On January 10, 1995, Mr. Kubica also pleaded guilty to grand theft for fraud for the ponzi scheme. (4 RT 858-859.)

2. Evidence is lost when numerous witnesses die after 1995.

Riverside law enforcement interviewed seventeen people between June 29, 1990 and June 16, 1994 related to the Darling murder. (1 CT 86.) Of those, eleven died between 1994 and 2013. (1 CT 86.) Of particular importance, CJ died on September 12, 2010. (1 CT 86; 1 RT 68.) The private investigator who searched Ms. Darling's house and conducted many of the preliminary interviews and evidence collection, died on June 11, 2011. (1 CT 86.) Ms. Darling's next door neighbor who alerted everyone to her disappearance, died on November 10, 2009. (1 CT 86.) Her heir, Buela Neumeister, died on August 5, 2000. (1 CT 86.)

Additionally, a number of alibi/exculpatory witnesses that Mr. Kubica might have been able to call if he had been charged also died.³ (1 RT 86, 6 RT 1331, 1333.) Mr. Kubica's father died January 4, 2015. (1 CT 87.) Mr. Kubica's neighbor in Palm Springs at the time of the murder, Dottie Metz-Stur, died July 1, 1994. (1 CT 87.)

³ Appellant addresses the relevance of these witnesses in section E below, as related to the evidence of prejudice.

3. Riverside County District Attorney files the complaint and the investigation is reopened.

Sometime in 2014, the Riverside Sheriff's department reopened the Darling murder investigation.⁴ (3 CT 672.) Detective Ryan Bodmer spoke with Ms. Ritter, who was one of the fraud victims named in the case leading to the 1993 and 1995 pleas. (1 CT 70, 86.) She had invested \$20,000 with CJ and never received the money back. (2 CT 329.) Ms. Ritter told Detective Bodmer that after she and others had gathered together and begun discussing plans to press charges, she received a call from someone who identified himself a "Tony Kubica" who threatened her and disabled son if she filed charges. (2 CT 329-330.)

On May 16, 2014, the District Attorney's office filed a complaint charging Mr. Kubica, who was now living in Canada, with Ms. Darling's murder. (1 CT 14.)

Mr. Kubica was arrested in Canada on September 20, 2017. (4 CT 1129.)

Sometime in early 2018, Mr. Michael Collins called a "WeTip" line with the Riverside Sheriff's Department. (2 CT 330.) Mr. Collins said he had heard Mr. Kubica was under arrest and

⁴ At trial, Detective Ryan Bodmer said he had developed a cold case unit in the Riverside District Attorney's office, he believed in late 2015. (4 RT 843.) However, this would have been over a year after the complaint was filed in this case. He later stated he began working on the case in 2014. (4 RT 922.) 2014 appears to be the correct date.

indicated he had “intimate knowledge of him and his business dealings and how he treats people and so forth.” (2 CT 331.) Mr. Collins told Detective Bodmer that Mr. Kubica made a threat to him during a bad deal in which Mr. Kubica said he was responsible for the killing or murders of others and that those people were buried in the California desert. (2 CT 331.) At the time of the call, Mr. Kubica and Mr. Collins were involved in litigation. (2 CT 332.) Detective Bodmer also interviewed Mr. Collin’s attorney twice in 2018. (1 CT 86.)

Detective Bodmer interviewed Mr. Michael Kelly on April 8, 2019. At this point, Detective Bodmer learned about the discussion between Mr. Kelly and Mr. Kubica during the BBQ. (2 CT 551.)

D. The right to due process is violated where the prosecutor delays bringing charges without justification and that delay prejudices the defendant.

Due process under both the State and Federal constitutions requires that a case be dismissed where the defendant is prejudiced by unjustified prosecutorial delay between the incident and the filing of a complaint. (*People v. Cowan, supra*, 50 Cal.4th at p. 430; *People v. Nelson* (2008) 43 Cal.4th 1242, 1250.)

When evaluating due process claim based on prosecutorial delay in filing the charging documents, the court performs a balancing test. “A defendant seeking relief for undue delay in filing charges must first demonstrate resulting prejudice, such as by showing the loss of a material witness or other missing evidence, or

fading memory caused by the lapse of time." (*People v. Abel* (2012) 53 Cal.4th 891, 908.) "If the defendant establishes prejudice, the prosecution may offer justification for the delay; the court considering a motion to dismiss then balances the harm to the defendant against the justification for the delay." (*Id.* at p. 909.) Failure to conduct this balancing test is a *prima facie* abuse of discretion. (See *People v. Martinez* (1980) 106 Cal.App.3d 524, 532.)

Both intentional and negligent prosecutorial delay can result in the denial of a right to a fair trial as the result of government conduct. (*People v. Nelson*, *supra*, 43 Cal.4th at p. 1255.) "The ultimate inquiry in determining a claim based upon due process is whether the defendant will be denied a fair trial. If such deprivation results from unjustified delay by the prosecution coupled with prejudice, it makes no difference whether the delay was deliberately designed to disadvantage the defendant, or whether it was caused by negligence of law enforcement agencies or the prosecution. In both situations, the defendant will be denied his right to a fair trial as a result of government conduct." (*Ibid.*)

"The statute of limitations is usually considered the primary guarantee against overly stale criminal charges [citation omitted], but the right of due process provides additional protection, safeguarding a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and

the loss or destruction of material physical evidence [citation omitted].” (*People v. Jones* (2013) 57 Cal.4th 899, 921.)

Generally, courts find delay to be justified when it results from investigative delay where law enforcement does not discover evidence tying the defendant to the crime until well after the crime. (See *People v. Nelson*, *supra*, 43 Cal.4th at p. 1256.) In those cases, the delay will generally not warrant dismissal unless prejudice is extreme. (*Ibid.*; see also *People v. Cordova* (2015) 62 Cal.4th 104, 120.) “Sometimes a crime simply is not solved immediately but must await some break in the case...” (*People v. Cordova*, *supra*, 62 Cal.4th at p. 120.)

However, this does not mean law enforcement can simply wait for evidence and call it investigative delay. (*People v. Mirenda*, *supra*, 174 Cal.App.4th at p. 1329.) “[P]rosecutors are under no obligation to file charges as soon as probable cause exists but before they are satisfied that guilt can be proved beyond a reasonable doubt or before the resources are reasonably available to mount an effective prosecution.” (*Ibid.* quoting *People v. Boysen* (2007) 165 Cal.App.4th 761, 777.) “On the other hand, ‘[t]he [prosecutors] cannot simply place gathered evidence ... on the ‘back burner’ hoping that it will some day simmer into something more prosecutable....’” (*Ibid.*, quoting *People v. Boysen*, *supra*, 165 Cal.App.4th at p. 777)

"Nor may '[t]he requirement of a legitimate reason for the prosecutorial delay ... be met simply by showing an absence of deliberate, purposeful or oppressive police conduct.'" (*People v. Mirenda, supra*, 174 Cal.App.4th at pp. 1329-1330, quoting *Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 953.) "'Negligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney, or incompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial.'" (*Id.* at p. 1330, quoting *Penney v. Superior Court, supra*, 28 Cal.App.3d at p. 953.)

E. The court rulings on appellant's motions to dismiss.

1. The pretrial hearing on appellant's motion to dismiss.

On February 25, 2019, Magistrate Edward Forstenzer presided over the preliminary hearing and Mr. Kubica's first pretrial motion to dismiss the charges for prosecutorial delay immediately prior to the preliminary hearing. (1 ART 1.) The court found appellant had not shown sufficient evidence of prejudice other than the mere passage of time and passing of witnesses. (1 ART 26.)

Appellant renewed the motion to dismiss on April 15, 2019 and May 13, 2019. (1 ART 35.) Judge Russel Moore presided. (1 RT 1; 1 ART 35.)

Mr. Kubica testified in support of his motion. He stated that Ms. Darling was a client of his wife, CJ. (1 RT 11.) Mr. Kubica was a coin collector, and CJ brokered a sale of Mr. Kubica's coins to Ms. Darling in June of 1990. (1 RT 12.) CJ told him payment would come through an offshore bank which he would help open so that Ms. Darling could transfer money from a Swiss bank account to the Anguilla account. (1 RT 14-15.) He received \$4,000 cash the day of the sale on June 4th with the remainder paid from proceeds transferred from the Swiss account to the Anguilla account. (1 RT 16, 70.) The Kubicas' neighbor, Dottie, was at their home on June 4th during this meeting because she was watching the Kubicas' children. (1 RT 45.) Dottie spoke with Ms. Darling. (1 RT 48.)

On June 5, 1990 (the date Ms. Darling disappeared), Mr. Kubica was at his home for a first birthday party for his daughter. (1 RT 27.) Mr. Kubica's father in law and his partner attended. (1 RT 27.)

Mr. Kubica traveled to Anguilla to pick up the check as had been arranged. (1 RT 51.) He received a check for \$70,000 which covered the \$50,000 coin sale; the additional \$20,000 was something CJ and Ms. Darling had arranged. (1 RT 51.) There was also a check for \$100,000 that Mr. Kubica picked up at CJ's direction. (1 RT 52.) He did not know the purpose of those funds. (1 RT 52.) He was told that they used the transfer from a Swiss bank account to the Anguilla bank accounts for tax purposes. (1 RT 171.)

In 1992, CJ had Mr. Kubica move all of her records to a home office in Canada. (1 RT 55, 57.) They were destroyed in a house fire in 1995. (1 RT 56.) Mr. Kubica believed the records related to the transactions with Ms. Darling were likely in that office. (1 RT 56.)

CJ died in 2010 after a battle with cancer. (1 RT 67-68.) The other guests at the birthday party and the neighbor Dottie had also passed away. (1 CT 68, 76-77.) Mr. Kubica's father was aware of the coin sale because he helped Mr. Kubica arrive at the sale amount. (1 RT 13.) However, he had passed away. Additionally, Mr. Kubica's lifelong friend, Bruce Dewitt, knew about Mr. Kubica's coin collection, but had passed away. (1 RT 76.)

Judge Moore concluded that Mr. Kubica had shown prejudice, particularly from CJ's death. (1 RT 243.) But the court felt it fell far below what would be required to dismiss the case pretrial. (1 RT 243-244.) Judge Moore denied the motion without prejudice. (1 RT 244.)

2. The posttrial hearing on appellant's motion to dismiss.

Judge Hollenhorst presided over the posttrial hearing on appellant's pretrial motion to dismiss on December 4th and 5th, 2019. (6 RT 1323; 4 CT 952-954.)

Appellant again noted that witnesses had died who could have provided alibi evidence. This included CJ who knew the details about the coin dealing and foreign accounts with Ms. Darling, and CJ's records which were lost in the housefire. (6 RT

1367, 1378.) It included CJ's father and his partner, who both attended the birthday party with Mr. Kubica while the murder was alleged to have taken place. (6 RT 1328-1329, 1331-1332.) It included Dottie, their neighbor in Palm Spring neighbor who attended the birthday party and had been present during the coin transaction with Ms. Darling. (6 RT 1332-1335, 1343, 1364, 1382, 1482.)

Additionally, Mr. Kubica testified he had lost the ability to call witnesses who could have explained that the "wrecking crew" referenced by Mr. Collins was really a group of off-duty officers and martial artists who were called in to suppress bar fights. (6 RT 1346-1348.)

Mr. Kubica gave further details about his coin collection and explained how his father and Bruce Dewitt would have been able to corroborate its existence if they were still alive. (6 RT 1354-1357.) He also described his father's role in valuing the coin collection for the sale to Ms. Darling. (6 RT 1358.) Mr. Kubica also provided additional details about the arrangement that CJ and Ms. Darling came up with to pay for the coins through off shore accounts. (6 RT 1361-1363.)

In his cross-examination, Detective Bodmer also acknowledged that evidence had disappeared from police records- specifically, the airport parking ticket, the money wrapper found in Ms. Darling's home, the fingerprint cards from her home and the pictures of the coins in her floor safe. (6 RT 1500.)

Detective Bodmer confirmed that the 2014 arrest warrant for Mr. Kubica was based entirely on the evidence collected by 1993. (6 RT 1502.) He confirmed that he did not speak with Michael Collins and Michael Kelly until after Mr. Kubica had been arrested and taken into custody in Canada. (6 RT 1505-1506.)

On June 17, 2020, Judge Hollenhorst held the final hearing on the motion, listening to argument and then ruling on the motion.

The court set forth the general rule that a defendant must first show prejudice from lost evidence. (6 RT 1519.) If prejudice is shown, no matter how slight, then the People must show a justification for the delay that outweighs the prejudice to the defendant. (6 RT 1519.)

Judge Hollenhorst held Mr. Kubica had made up a story about the coin transaction. (6 RT 1520-1521.) Judge Hollenhorst relied on discrepancies between Mr. Kubica's pretrial and posttrial testimony and his opinion that the story made no sense. (6 RT 1521-1532.) As a result, Judge Hollenhorst found that because the coins sale was a made-up story, there could be no prejudice from the loss of witnesses to corroborate it. (6 RT 1533.)

Anticipating appellate review, Judge Hollenhorst also performed the balancing test. (6 RT 1533.) The court held that if there was prejudice, it was substantially outweighed by "the justification for the delay – that is, the lack of resources, manpower, and prioritizing of thousands of cold cases." (6 RT 1534.)

F. The trial court abused its discretion in denying the posttrial motion.

Here, the trial court abused its discretion both in finding appellant had failed to establish prejudice, and also in finding that if there were prejudice, the prosecutorial delay was justified.

1. The trial court erred in focusing on whether it believed Mr. Kubica's claim about the coin sale rather than on whether he had lost witnesses that could have supported his defense.

"There are two ways to show an abuse of discretion by the trial court. One way is to show the ruling was whimsical, arbitrary, or capricious, i.e., that the trial court exceeded the bounds of reason." (*Olsen v. Harbison, supra*, 134 Cal.App.4th at p. 285.) "The other way is to show the trial court erred in acting on a mistaken view about the scope of its discretion." (*Ibid.*)

The trial court's factual finding as to whether an appellant has been prejudiced by delay is reviewed for substantial evidence. (*People v. Hill, supra*, 37 Cal.3d at p. 499.) However, the court must also apply the correct legal standard to the issues. The application of law to facts standard is considered independently by the reviewing court. (*Ghirardo v. Antonioli, supra*, 8 Cal.4th at p. 800.)

Here, the court made a credibility determination – that Mr. Kubica was lying about the coin sale. The problem is, the court was not answering the right question. Therefore, the abuse of discretion

is not so much a result of the court's credibility determination,⁵ it is an abuse in incorrectly applying the legal standard.

Mr. Kubica did not need to convince the court of the truth of the coin sale, he needed to convince the court that witnesses were lost that would have supported his defense.

Even if the court personally believed the coin transfer story was far-fetched, Mr. Kubica undisputedly established that one of the most important potential defense witnesses, his wife CJ, had died before his arrest. Moreover, CJ's records were lost in a fire in 1995. CJ was the person connected to Ms. Darling as a financial planner. She was the person who purportedly opened an answering service near the airport where Ms. Darling's car was found abandoned. (1 CT 73; 3 RT 537.) On June 5, 1990, \$2,000 was deposited into an account bearing CJ Michael's name. (5 RT 1078.) A note near the phone in Ms. Darling's home had "C.J. Michaels" written on it along with the address to the Kubicas' home. (3 RT 354-555.)

This was sufficient to establish at least slight prejudice to Mr. Kubica's defense. The loss of CJ as a witness was prejudicial even assuming arguendo that Mr. Kubica completely made up the coin story after the fact. Had Mr. Kubica never testified to the court that he had sold coins to Ms. Darling, the fact that CJ died in 2010 caused prejudice to Mr. Kubica's defense.

⁵ Though appellant discusses why this was also an abuse of discretion, below.

Mr. Kubica was not charged with committing a fraudulent transfer of Ms. Darling's money from her Swiss bank account, he was charged with her murder. While evidence tied Mr. Kubica to the bank transactions, the evidence related to the murder was all related to CJ's activities. The jury could have found that Mr. Kubica helped with fraud, while also finding there was not sufficient evidence to prove he was involved in the murder. Thus, even setting aside Mr. Kubica's testimony to the court that he was involved in an innocent coin transaction, this was not an all or nothing case. The loss of CJ as a witness prejudiced his ability to defend against murder charges by removing the witness who was most closely tied to Ms. Darling's disappearance.

Furthermore, to the extent the coin sale story was relevant, the trial court's factual finding that Mr. Kubica made up the story was not supported by substantial evidence. The court was skeptical of Mr. Kubica's credibility, skeptical of the convenient nature of the explanation and skeptical of how some details were recounted differently over time.⁶ However, the court did not point to any

⁶ The court put great emphasis on discrepancies in Mr. Kubica's testimony. While discrepancies in witness testimony do factor into credibility, they do not automatically render testimony "incredible," even when they relate to an important fact. As jurors are warned, memory is fallible. For instance, in this case, Detective Bodmer repeatedly gave different answers as to when his investigation occurred. As noted earlier, he said he began investigating the Darling murder as part of the cold case unit in 2014. (3 CT 307.) He spoke with Ms. Ritter in 2014 when he learned about the threat Tony Kubica had

evidence that directly contradicted Mr. Kubica's claim of being involved in a coin sale with Ms. Darling orchestrated by CJ.

Mr. Kubica did not need to prove to the court that a coin sale occurred. After all, if he could prove the coin sale occurred, he would not need to move to dismiss the case against him. He simply needed to demonstrate that the loss of evidence unfairly impaired his ability to defend himself.

While the court personally believed the coin sale was improbable, there was nothing in the record indicating it was impossible. And contrary to the court's factual finding that it was incredible, the evidence did in some ways support Mr. Kubica's claim. There was evidence that CJ knew the Ms. Darling collected coins as early as 1988. (2 RT 494.) Another financial planner at CJ's office was also aware that Ms. Darling collected coins and had Swiss bank accounts. (3 RT 660.) A coin was still in her bait safe. (2 RT 272.) Whoever took the \$2,000 from Ms. Darling's home left the wrapper for the cash in the waste basket. (2 RT 273.)

Of course, the prosecution contended this was evidence that the Kubicas intended to rob Ms. Darling of her coins but never found the safe. On the other hand, the evidence also supports Mr. Kubica's claim that CJ negotiated a coin sale, Ms. Darling brought

made in a phone call with her. (3 CT 329.) But he later told the jury the cold case unit was something he started in late 2015. (4 RT 844). This is an important discrepancy, and one of his statements must be wrong. Yet it does not render his testimony incredible.

\$4,000 cash with her as a down payment for the coins and took the coins home with her that day. As noted above, one item of evidence tying CJ to Ms. Darling was a note found in Ms. Darling's home listing the name CJ Michaels along with her phone number and *her home address*. (3 RT 354-355.) This supported Mr. Kubica's testimony that Ms. Darling came to his home to discuss the coin transaction.

Had Mr. Kubica been able to call CJ or his father or his deceased friend as witnesses that he did in fact collect coins and had sold them to Ms. Darling, his version of events would have appeared significantly more credible to the court. Therefore, even if the facts found by the court about Mr. Kubica's credibility warranted skepticism, they were not substantial evidence to support a finding that the coin sale was so incredible as to be impossible and therefore defeated a claim of even slight prejudice.

2. The trial court erred in finding the prosecution's justification for delay outweighed the prejudice caused by that delay.

The trial court also held that, to the extent Mr. Kubica suffered prejudice, it was outweighed by the prosecution's justification for delay. The court cited the justification for the delay as "the lack of resources, manpower, and prioritizing of thousands of cold cases." (6 RT 1534.) This finding is not supported by the record.

In 1993, the Riverside County Sheriff had collected all of the evidence it would ultimately rely on in requesting an arrest warrant of Mr. Kubica. There is nothing in the record suggesting the

Sheriff's department declined to prosecute at that time due to a lack of resources or manpower.

The case was reopened in 2014, as part of Detective Bodmer's cold case unit. Detective Bodmer obtained an arrest warrant for Mr. Kubica based solely on the evidence previously collected. The district attorney admitted that the arrest warrant was not based on any new information. (2 RT 233.) There was no newly discovered evidence, such as DNA. He simply reevaluated the evidence tying the Kubicas to the crime and decided it was enough to press charges.

Thus, there was no justification offered for why the case was not filed 21 years earlier, in 1993, well before CJ and other witnesses had died. "[I]ncompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial." (*People v. Mirenda, supra*, 174 Cal.App.4th at p. 1330, quoting *Penney v. Superior Court, supra*, 28 Cal.App.3d at p. 953.)

The district attorney argued that any lack of justification for waiting until 2014 was cured by finding new evidence in 2017 that Mr. Kubica had made a comment about killing people and burying them in the desert to Mr. Collins. (2 RT 233.) However, while this new evidence was helpful for the prosecution, it could not justify a delay in failing to file charges in 1993.

In 1993, the sheriff's department had collected information tying the Kubicas to financial crimes against Ms. Darling, had evidence placing the Kubicas in Palm Springs at the time of Ms. Darling's disappearance and had evidence placing CJ near the airport where Ms. Darling's abandoned car was found. The prosecutor could not justify delaying prosecution *in 1993* based on hopes that Mr. Kubica might someday make incriminating statements.

It is one thing to say new evidence justifies permitting a case to proceed even after lengthy delay where there was not a strong case before its discovery. It is another thing to say the prosecution can set aside a case that has sufficient evidence to proceed in order to wait indefinitely in the hopes it will improve. Prosecutors "cannot simply place gathered evidence ... on the 'back burner' hoping that it will some day simmer into something more prosecutable...." (*People v. Mirenda, supra*, 174 Cal.App.4th at p. 1329, quoting *People v. Boysen, supra*, 165 Cal.App.4th at p. 777.)

In short, the record presented nothing that justified the prosecution's choice to not file charges in 1993, well before important witnesses and other evidence were lost.

3. In light of the record presented below, the trial court abused its discretion in denying appellant's motion to dismiss.

This is not a case where the prosecution lacked technology to definitively tie a defendant to a crime at the time, but subsequently

were able to test DNA or other evidence. It was not a cold case where there were no suspects until a fortuitous DNA hit in a database. The district attorney's office, for no apparent reason, did not file charges despite all of the evidence collected between 1990 and 1993 tying the Kubicas to the financial crimes and the murder. Law enforcement sat on the evidence for 21 years and then decided to file without providing any justification for the delay.

In that time, numerous witnesses died, including one of the primary suspects. The death of CJ alone caused, at a minimum, the slight prejudice to Mr. Kubica's defense that required at least some justification for the delay.

As there was no justification for the failure to file charges in 1993, and there was, at a minimum, slight prejudice to Mr. Kubica's defense from the loss of key witnesses, Mr. Kubica's due process right to a fair trial was undermined. As such, the trial court erred in denying his posttrial motion to dismiss.

G. The murder conviction must be reversed and the case dismissed.

The trial court incorrectly found Mr. Kubica failed to establish prejudice from the 21-year delay between the Sheriff's department discovering evidence tying Mr. Kubica to the crime and filing charges. Mr. Kubica showed the loss of key witnesses, including a primary suspect, as a result of that delay.

The trial court also incorrectly found the prosecutor had established justification for the delay that outweighed the resulting prejudice. There was no reason given for waiting 21 years between discovering the primary evidence in 1993 that tied appellant and his wife to the murder and filing charges in 2014.

Furthermore, the later discovery of statements by Mr. Kubica to Mr. Collins and Mr. Kelly did not retroactively justify the delay. It is not justifiable for a prosecutor to decline to file charges, despite sufficient evidence to do so, in the hopes that a defendant might make incriminating statements that help the case decades in the future.

There was no proffered justification for prosecutor's decision to not file charges in 1993 or soon thereafter and none of the subsequent developments in the case were sufficiently justifiable to overcome the prejudice caused by over two decades of delay.

As such, the trial court abused its discretion in denying Mr. Kubica's motion to dismiss the charges for pretrial delay. Because there is no way for Mr. Kubica to have a fair trial in light of the loss of critical witnesses, his conviction of murder must be reversed and the case dismissed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature, appearing to read "JRC", is written over a horizontal line.

Date: 10-18-22

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. H. [Signature]". It is written in a cursive style and is positioned above a horizontal line.

Date: 10-18-22

SUPREME COURT
FILED

Court of Appeal, Fourth Appellate District, Division Two - No. E075850

JUL 20 2022

Jorge Navarrete Clei

S275084

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ANTON MICHAEL KUBICA, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTON MICHAEL KUBICA,

Defendant and Appellant.

E075850

(Super.Ct.No. INF1401360)

TENTATIVE OPINION

APPEAL from the Superior Court of Riverside County. Timothy J. Hollenhorst, Judge. Affirmed as modified.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

In June 1990, defendant and appellant Anton Kubica, along with his wife CJ Michaels, killed Marie Darling and buried her in a shallow grave in the desert near Palm

Springs. Kubica and CJ then forged a document that transferred funds from Darling's Swiss bank accounts into an offshore account in Anguilla opened by defendant just prior to Darling's murder. In 1993, CJ and defendant were identified as suspects in Darling's murder. They were both prosecuted for committing fraud against other victims in Palm Springs and spent time in jail. The Riverside County District Attorney's Office (RCDA) did not pursue murder charges.

In 2014, the cold case unit of the Riverside County Sheriff's Department began an investigation into the case. An arrest warrant was issued for defendant; CJ was deceased. While investigating the case, new evidence came to light that defendant had admitted to a business partner that he had buried a body in the desert in California. Defendant was located in Canada and it took until 2018 to extradite him to California to stand trial for Darling's murder.

On November 19, 2019, a jury found defendant guilty of first degree murder.{CT 251, 943} He was sentenced to 25 years to life in prison.{CT 1252} He was given 1,101 days of actual custody credit and 165 days of conduct credit pursuant to Penal Code section 2933.1.¹ In addition, the trial court imposed a booking fee in the amount of \$514.58 pursuant to Government Code section 29550.{CT 1252, 1255-1256; RT 1556}

Defendant contends on appeal that (1) he was denied his federal and state constitutional rights to due process as a result of prejudicial delay in prosecution{AOB 15-38}; (2) the trial court erred by limiting his presentence conduct credits pursuant to

¹ All further statutory references are to the Penal Code unless otherwise indicated.

section 2933.1{AOB 39-42}; and (3) the booking fee imposed pursuant to Government Code section 29550 must be stricken.{AOB 42-45}

FACTUAL HISTORY

A. DARLING GOES MISSING

Joseph Nacinovich was a retired Palm Springs Police Officer.{RT 333}². He was on patrol on June 7, 1990. He responded to a residence on Sagebrush Avenue in Palm Springs to speak with Nathayelee Webster. Webster let him into the residence of her neighbor, Marie Darling. Webster had her own key.{RT 334-335, 343} Webster was concerned that Darling was missing.{RT 336} Nacinovich did not notice anything out of place in the residence.{RT 337} Darling's vehicle was not in the parking lot.{RT 337-338} He filed a missing person's report.{RT 339} Darling had told Webster she was taking a trip to the Caribbean, but not until June 17, 1990.{RT 344}

Darling was Beulah Neumeister's aunt and they were very close. Jan Benson was Neumeister's daughter. Neumeister died in 2000.{RT 350-352, 380} In June 1990, Neumeister received a call that something was wrong with Darling. Benson went to Palm Springs to check on Darling.{RT 353-354} Darling was somewhat wealthy.{RT 355-356}

Benson arrived in Palm Springs on June 13, 1990.{RT 356} Webster picked her up at the airport and took her to Darling's residence.{RT 357} There were dirty dishes in the sink as though Darling was going to come back.{RT 359}

² Nacinovich used the police report to refresh his memory.{RT 334-335}

Benson and Webster found a TV guide with shows circled that Darling was going to watch.{RT 361} A roll of duct tape was in the residence.{RT 362, 381-382} The residence did not appear to have been ransacked.{RT 363}

Retired Palm Springs Police Officer Al Franz helped investigate the disappearance of Darling.{RT 704-706} Officer Franz received the case on June 8, 1990.{RT 706} He spoke with Webster who advised him that Darling's car was missing and that newspapers were piling up in front of her residence.{RT 707} Officer Franz entered Darling's apartment on June 18, 1990, and did not notice anything significant. He went into the residence with Paul Hare, who was a private investigator hired by Neumeister and Benson.{RT 569, 708}

Agnes Kalinich found Darling's car at the Palm Springs Airport and called the police. A ticket in the car was dated June 5, 1990, at 11:36 a.m. It was given to Detective Franz.{RT 603-604, 606, 708} Hare obtained information that Darling had been seen at a polling place on the morning of June 5, 1990.{RT 604} A person working at the polling place identified Darling as being with her "maid."{RT 605}

Hare had given Officer Franz a money wrapper with the denomination of \$2,000 on it that he had found in Darling's residence on a prior occasion he went into the residence. Franz sent the cash wrapper for fingerprinting but had obtained no results.{RT 591, 682-683, 711-713} Benson went to the airport and entered into Darling's car without permission to get the parking ticket and the registration in case the car was stolen.{RT 712} Franz believed the parking ticket and registration could not be fingerprinted because they were handled by too many people.{RT 725}

After going to the residence, and discovering that Darling's car was at the airport, Franz concluded that she had left to go somewhere and just did not tell anyone.{RT 710}

B. DARLING'S REMAINS FOUND IN THE DESERT

Scott Bernal, who was 24 or 25 years old at the time, went off-road driving in the desert with friends on June 28, 1990.{RT 413, 451} They were north of the freeway in the Palm Springs area out in the dirt.{RT 414-415} They stopped driving, and he and his friends began wandering around the desert. Two of his friends came running back and said they had found a dead body.{RT 413} Bernal went to look and there was a skeleton with some clothing; it was later identified as Darling. She had tape around her legs and arms and a hole in her skull.{RT 413, 417} Parts of her body were in other areas.{RT 418} They drove to the nearest telephone and called the police.{RT 413, 419}

Riverside County Sheriff's Department Captain Carter had retired in 2010.{RT 427-428} He had been involved in the investigation of Darling's disappearance and murder in 1990 when he was a homicide detective.{RT 428-429} Retired Sheriff's Deputy Mark Barfknecht had also participated in the investigation.{RT 421} They went to the scene in the desert to help with the investigation.{RT 431-432, 609} The area where Darling was found was a remote area in the desert approximately 40 to 45 minutes from her residence.{RT 421-422, 432} There was a shallow grave where Darling's remains were found. Captain Carter surmised that Darling had been buried in the shallow grave. Darling had been wrapped in a blanket or sleeping bag. Animals had gotten to her body and scattered her remains around the grave area.{RT 422, 424-425, 433, 455} There was evidence of duct tape around her ankle.{RT 448} Captain Carter surmised

that she was bound by her ankles when she was buried.{RT 449, 459} Her skull was caved-in and fractured.{RT 450} A heavy iron pole was found nearby that had what appeared to be blood on it, which was thought to be used to hit Darling in the skull.{RT 452, 613-614} The substance was never confirmed to be blood.{RT 621-622} In addition, a piece of duct tape with hair on it was found, which was likely from her being gagged. At the time, the hair was not analyzed.{RT 455-456, 622} A substance that appeared to be kitty litter was found, which could have been used to mask any smell.{RT 457} Darling's body was so decomposed it appeared that some kind of chemical was put on her body to accelerate the decomposition.{RT 685}

An autopsy was performed on Darling in June 1990. Dental records were used to identify the body.{RT 424, 456, 751-752, 754-756, 758} The cause of death was determined to be blunt force trauma to her head.{RT 728, 730, 735, 737, 740, 743-744} Decomposition would have been aided by the heat in the desert.{RT 744-745}

C. INVESTIGATION FROM 1990 TO 1993

Captain Carter presumed that Darling had been abducted or disappeared on June 5, 1990.{RT 557-558} After Darling's body was found, Captain Carter went to her residence to investigate. He was accompanied by Benson and Michael Perdue, the family attorney.{RT 363-364, 464, 466} The residence had not been ransacked.{RT 464-465} Two safes were found. One was visible in the master bedroom and another was a floor safe under the carpet in a closet.³ The floor safe was fairly large. It contained a coin

³ Captain Carter had no actual memory of what was in the freestanding safe.{RT 476-477}

collection, which Darling and her husband apparently had for years. There were also loose diamonds, a necklace and a bracelet.{RT 365-366, 369, 370, 467-468} Benson explained that the visible safe was a decoy so intruders would not find the floor safe.{RT 470} Darling normally left the visible safe unlocked.{RT 471-472}

Benson indicated that Darling had a habit of keeping some cash around the house in a sock. It was usually around \$2,000.{RT 370-371} Based on this, Benson indicated there may be currency missing from the residence.{RT 481-482} The contents of the floor safe was transferred to a safety deposit box.{RT 372} The coins were eventually distributed to Darling's heirs.{RT 379-380}

Captain Carter also found in Darling's residence, a TV Guide with programs circled for June 4, 1990, but none thereafter.{RT 553-554} A note was found in Darling's residence with the name CJ Michaels on it and listed the address of 1203 Buena Vista in Palm Springs, which was the home belonging to defendant and CJ.{RT 554-555} On Darling's calendar, June 5, 1990, was blank. She had written of a mail hold occurring on June 15, 1990, and a hair appointment on June 16, 1990.{RT 558} On June 17, 1990, she wrote "Leave for trip."{RT 559} Darling was scheduled to leave on a cruise to the Caribbean on June 17, 1990. She would return on June 28, 1990.{RT 559-560}

Captain Carter also noticed that the furniture appeared to all have been moved and someone attempted to put it back in place, but there were indentations where it appeared the furniture had originally sat.{RT 472-474, 478, 593-594} Captain Carter had no idea when the furniture was moved.{RT 597}

Forensic analysis of Darling's car was performed and nothing of evidentiary value was found.{RT 482}

Captain Carter discovered that Darling and her husband were coin collectors and had Swiss bank accounts.{RT 660} Darling had two Swiss bank accounts.{RT 663} One of the accounts on December 31, 1989, had \$9,710.{RT 664} Another account had \$263,162.20 in it on December 31, 1983.{RT 668-669} The money was still there on June 5, 1990.{RT 671} A year after Darling's murder, on September 9, 1991, Captain Carter received a telephone call from an attorney representing Neumeister and Benson. The attorney advised him that all the money from Darling's Swiss bank accounts had been emptied out and transferred to an account in Anguilla.{RT 483-485, 688, 759-763, 767-768} Captain Carter had a difficult time accessing the foreign bank information.{RT 484-485}

In April 1993, Captain Carter finally received information that the Anguilla bank account belonged to defendant.{RT 486} Defendant had a cashier's check made out to him on the Anguilla account for \$100,000 dated June 25, 1990.{RT 689} Another check was made out to defendant on the same day in the amount of \$70,000.{RT 690}

In 1993, Captain Carter found out that defendant and CJ were living in Scottsdale, Arizona.{RT 486, 694} He went to Scottsdale and executed a search warrant on a house where defendant and CJ were living.{RT 486-487}

Captain Carter found, in what appeared to be an office, a file cabinet and boxes. He seized a lot of paperwork and brought it back to the sheriff's station in Indio.{RT 489-491} A day planner for the year 1988 belonging to CJ was seized. In the planner was a

list of names of persons that were part of a separate fraud investigation involving defendant and CJ, which Captain Carter was involved in; Darling's name was on the list. These persons on the list invested money with CJ and defendant and never received any return.{RT 493} Also in the planner was Darling's name and next to it, "gold coins."{RT 494} Darling's name was also found on the back of an envelope. The front of the envelope was addressed to defendant.{RT 495, 497}

Also found in the residence was a letter addressed to one of the fraud victims, and the phone number of another fraud victim.{RT 498-501} Defendant's passport was found. It showed he had entered Saint Maarten in the Caribbean in June 1990. Anguilla was a short boat ride from Saint Maarten.{RT 503} He also had been in Saint Maarten on May 23, 1990.{RT 503} The Anguilla bank statements were found in the Scottsdale residence. There was \$613.56 in the Anguilla bank account in December 1990.{RT 505} A transfer of \$13,000 to a bank in Canada occurred in September 1990.{RT 506} There were receipts for hotel stays in Anguilla in May 1990.{RT 507} Telephone bills found for their residence in Palm Springs revealed calls to banks in Anguilla on May 31, 1990. There were also calls to Swiss bank offices.{RT 512-514}

Captain Carter spoke with defendant during the search. Defendant claimed he was not responsible for Darling's murder because he was not in California in June 1990.{RT 487-488, 517} Defendant said he did not know Darling.{RT 517} Despite defendant claiming he was not in Palm Springs in June 1990, Captain Carter found evidence that he

purchased a jeep from Gary Fox on May 30, 1990.⁴{RT 525, 814, 826} Defendant was seen by a doctor in Palm Springs on May 29, 1990.{RT 531-532} A receipt for a two-pack of duct tape purchased on June 3, 1990, in Cathedral City was found in the Scottsdale house.{RT 533-534, 646} Also found were receipts for two cell phones purchased on June 2, 1990, and June 6, 1990, in San Bernardino.{RT 535-536}

Also found in the Scottsdale residence was a notice sent to defendant in May 1990 regarding the 1203 Buena Vista property in Palm Springs. Foreclosure of the property had been approved unless the mortgage was paid.{RT 539-540} On August 24, 1990, defendant sent a cashier's check in the amount of \$17,033.42 to the mortgage company to make the loan current.{RT 542-543}

Handwriting exemplars were taken from CJ and defendant in 1993.{RT 548-549} Captain Carter had CJ sign the name Marie Darling to see if she signed the letter authorizing transfer of funds from Darling's Swiss bank accounts to defendant's Anguilla bank account.{RT 552} Defendant's fingerprints were obtained but never compared to those found in Darling's residence or car.{RT 694}

Michael Perdue was an estate and trust attorney.{RT 389} Perdue prepared a living trust for Darling.{RT 391} Darling had given him a gold coin, which she said was part of a large collection her husband had collected.{RT 397} Darling had told him about the floor safe and he was present at her house when the police opened it.{RT 399}

⁴ Defendant bailed Fox out of jail one time and in return Fox gave defendant the jeep.{RT 821, 830}

He helped Benson put the coins in the safety deposit box.{RT 401} There was no cash in the safe.{RT 401}

Benson had taken Darling's checkbook, passport and the tickets for her Caribbean cruise out of her residence. The tickets were taken so a refund could be issued.{RT 571-572} She took the checkbook to pay bills.{RT 571-572} The valuables in the floor safe were not organized.{RT 573}

Darling's entire residence was dusted for fingerprints and 32 prints were lifted. Captain Carter stated that they were not sent anywhere because no suspect had been identified to compare the prints to, and even when defendant and CJ became suspects, their prints were not compared.{RT 575, 581, 582-583, 587} Captain Carter indicated that he had been unable to locate the pictures taken of the contents of the two safes.{RT 589-590, 592} There were no known photographs of the gold coins found in Darling's residence.{RT 601}

Captain Carter did not know what happened to all the evidence taken from Darling's car.{RT 608}

Captain Carter explained that DNA evidence was not commonly examined in 1990.{RT 608} Defendant's fingerprints or DNA were never found on any of the evidence collected.{RT 626, 648} No blood was found in Darling's apartment.{RT 680} Captain Carter had no knowledge that defendant sold gold coins to Darling.{RT 697}

Captain Carter retired in 2010.{RT 586} He performed no further investigation on the case from the time he wrote his last report.{RT 616-617}

D. FRAUD VICTIMS

Sharon Maguire was formerly Sharon Ritter.{RT 774-775} In 1990, she was married to Mr. Maguire. They had a son with special needs.{RT 776-777} In May 1990, they received a call from CJ Michaels advising Mr. Maguire she had a business investment for him.{RT 777} She told them she was a financial consultant.{RT 778} CJ advised them that her client, defendant, sought a \$20,0000 loan from them at a rate of 18 percent. In exchange for the \$20,000 they would get a second trust deed on defendant's property located at 1203 Buena Vista Drive in Palm Springs. The loan would only be for one year and they would get their money back with interest.{RT 779-781} CJ never told them that defendant was her husband or that she lived in the property.{RT 779, 782} They checked CJ's references and were shown the value of the property.{RT 782-783} They were also provided a letter that the first mortgage was in good standing.{RT 783-784} They received a recorded trust deed.{RT 785} On June 5, 1990, CJ came to the Macquire's residence and Sharon gave her a \$20,000 cashiers check. CJ had her two young daughters with her.{RT 787, 790, 792} The trust deed was not recorded until July 5, 1990.{RT 789}

In 1990, CJ sent Sharon monthly checks for the interest. The entire \$20,000 was due on June 3, 1991. Sharon tried to call CJ but CJ never called back.{RT 794-795} Sharon went to the Buena Vista property on June 10, 1991 and it looked empty.{RT 795-796} She was able to get contact information for CJ and defendant in Canada. It was then she realized that defendant and CJ were married.{RT 797-798} She talked to CJ on June 12, 1991, and told CJ that she realized they had been defrauded. CJ told her that

defendant wanted to extend the loan. Sharon told her no.{RT 799, 802} Mr. Maguire called CJ and threatened legal action.{RT 802} On June 14, 1991, defendant called and spoke with Mr. Maguire. Defendant told him to "back off" or "he would send friends to visit" them.{RT 802-804}

On June 19, 1991, defendant called Ritter and told her that she needed to back off or he would send someone to her home. He also mentioned it would not be good for her disabled son.{RT 805} She tried to go after the equity in the Buena Vista residence but discovered her trust deed was the fourth or fifth on the property and there was not enough equity.{RT 805} She never got the money back.{RT 806} All of the documents she signed were with Tony Kubica and CJ Michaels.{RT 807}

On January 10, 1995, defendant and CJ were convicted pursuant to a plea agreement of numerous counts of grand theft against Kurt DeCrinnis, Sidney Israelite, Mildred Spector, Grace and Patrick Maradei, Louise DiNapoli, Manny Karbelnig, Sharon Ritter Maguire, Pamela Strauss, Frank and Mary Helwig.{RT 858-859} All were deceased except for Ritter.{RT 859-860}

E. CASE REOPENED IN 2014

Riverside County District Attorney Investigator Ryan Bodmer started the cold case unit in the RCDA's office in 2015.{RT 842-844} In 2014, he was employed by the Riverside County Sheriff's Department in the homicide unit. He was assigned to cold case investigations. He began looking at the case involving Darling and then continued his investigation when he became an investigator at the RCDA.{RT 921-922}

Investigator Bodmer obtained all of the reports and the evidence in the case.{RT 922} The last report on the case was from 1994.{RT 1131}

A lot of the evidence was found at the sheriff's station in Indio.{RT 923} He determined fingerprints that had been lifted in the case from Darling's residence and car were missing. In addition, a metal pipe found near the gravesite was missing. The \$2,000 cash wrapper was also missing. Items from Darling's car were missing but there were photographs of the items. He looked for evidence that could be subjected to new testing based on new technology. Photographs from the standing safe and the floor safe were missing.{RT 923-924, 933-934, 1092-1098}

Investigator Bodmer had to work with the federal government and other countries to obtain all of Darling's and defendants' bank information.{RT 991-994} Darling's signature on the request to transfer funds out of her Swiss bank accounts to the bank in Anguilla was different than her signature on other documents known to be signed by her.{RT 995-996} However, a handwriting expert could not match the signature to either CJ or defendant.{RT 999} The handwriting expert was not available to come to court because he was very ill.{RT 999-1000, 1150-1151}

Investigator Bodmer submitted evidence from the case for DNA analysis in 2014 and 2019. There were DNA advances in 2019, which he thought would produce results.{RT 1056-1058} He made a decision to send the duct tape and part of the sleeping bag for DNA testing.{RT 925, 1058} In his experience, regular DNA testing did not begin until 1998.{RT 1060} The DNA was degraded and a very low sample. No conclusive DNA evidence was obtained from the items.{RT 1035-1036, 1040}

Bodmer found evidence that on June 18, 1990, defendant took a boat trip from Anguilla to Saint Maarten. This was the same day the cashier's checks in the amounts of \$100,000 and \$70,000 were issued at the Anguilla bank.{RT 1087} The two checks were cashed in Los Angeles and San Francisco on June 25, 1990, and June 27, 1990, respectively. They were endorsed on the back by defendant. There was no evidence indicating if the checks were exchanged for cash or put into another bank account.{RT 1088-1090, 1127}

No fingerprints were obtained from the pole or the parking ticket in Darling's car.{RT 1099-1100} The person who saw Darling at the voting polls on June 5, 1990, was dead.{RT 1096} No DNA testing was completed in this case between 1998 and 2014.{RT 1099} Investigator Bodmer did not know from defendant's passport where he went after leaving Anguilla on June 18, 1990.{RT 1121} Hare had visited the polling location where Darling was last seen.{RT 1135-1136} Darling had been there around 9:00 a.m.{RT 1136-1137}

David Wall was a forensic accountant employed by the RCDA.{RT 936-937} He investigated Darling's Swiss bank accounts. Darling opened a Swiss bank account in July 1985, which had two sub accounts.{RT 938, 940-941} The ending balance in 1989 in the main account was 272,000 Swiss francs.{RT 948-949} On a statement dated June 14, 1990, there was a balance of 9,708 Swiss francs in one of the sub accounts; on June 12 there was a transfer in of 10,000 Swiss francs; on the same day, 19,706 Swiss francs were transferred out to a bank account in Anguilla. This was the equivalent of \$13,566.95 in U.S. dollars.{RT 949, 958-959, 980-982} On June 13, 1990, 264,534.45

Swiss francs were transferred from the account to a bank in Anguilla. This was equivalent to \$184,152.07 in United States currency.{RT 949, 951, 955-956} The Anguilla bank account was owned by defendant; it was opened on May 24, 1990. The \$184,152.07 was deposited on June 18, 1990.{RT 957, 960, 964-966} The \$13,566.93 for the sub account did not deposit until July 20, 1990. Defendant instructed that this money be wire transferred to his account in Canada. It was transferred on August 31, 1990.{RT 983, 985-987}

F. DEFENDANT'S STATEMENTS

Michael Kelly lived in Canada near a town called Shawnigan Lake.{RT 862} Investigator Bodmer first spoke with Kelly in 2019.{RT 1129} Kelly met defendant in 2004 or 2005 when defendant hired him to do some paving work on his property.{RT 863-864} They discussed going into business together.{RT 865} At some point, defendant invited Kelly's family over to his house for a barbecue.{RT 865-866} Kelly met CJ.{RT 866-867} Kelly and defendant sat and together after dinner; defendant smoked a cigar.{RT 870} They talked about their pasts. Defendant told him he had previously lived in Palm Desert. He told him he had spent some time in jail. He claimed it had to do with them having investors who accused him and CJ of larceny.{RT 871-872} Defendant told him that he tried to pay back the investors and got caught up with a group of people who were bad that he called the "wrecking crew." He was selling drugs out of a bar.{RT 872-873} Defendant told him that the police wanted to charge him with murder for burying a body in the Indio desert.{RT 874} Kelly asked if he had murdered the person.

Defendant told him no. However, when Kelly asked if he buried the person defendant held up his hands and said, "No, that doesn't sound like something I would do."

Defendant also said that he had done "some stupid stuff." Defendant led him to believe that he had buried a lady in the desert based on his tone of voice and mannerisms.{RT 874-877}

Michael Collins was a contractor who moved to Canada in 2001.{RT 892-893} He met defendant in Shawnigan Lake.{RT 893-894} In 2005, Collins hired defendant to put a septic tank on his property. Defendant had a septic tank business at the time.{RT 894} Defendant asked him if he wanted to make an easy \$5,000. Defendant told Collins to lend him \$400,000 for one week and he would give him back the money plus \$5,000.{RT 895} Collins lent the money to defendant.{RT 895} It took defendant 19 weeks to give him back the money.{RT 896}

Collins remained friendly with defendant during the 19 weeks so that he could keep an eye on defendant to make sure he got his money back.{RT 898-899} At some point in 2007, defendant told Collins that he had murdered people and buried them in the desert.{RT 913}

Defendant presented no evidence on his behalf.{RT 1159}

DISCUSSION

A. PROSECUTION DELAY

Defendant contends his state and federal due process rights were violated by the delay in prosecution resulting in the death of a potential witness and loss of other

evidence. He contends his murder conviction must be reversed and the case dismissed.{AOB 15-38}

1. *ADDITIONAL FACTUAL HISTORY*

a. First Pretrial Motion to Dismiss

The complaint was filed on May 16, 2014.{CT 14} On January 23, 2019, defendant filed his first motion to dismiss for precomplaint delay. The motion was based on the delay violating his due process rights and right to a fair trial.{CT 50} Defendant contended that Webster and Neumeister had died.{CT 52} Webster had called the police in 1990 reporting that Darling was missing.{CT 52} Another witness, Louise Hanson, died in 2009. She and Darling were scheduled to go on the Caribbean cruise together on June 17, 1990.{CT 52} Kalinich, who had found Darling's car at the airport, was dead.{CT 53} Hare, who had been hired by Neumeister and Benson, died in 2011.{CT 54} Barbara Moore worked at a carwash and saw Darling with a Mexican woman on June 5, 1990; she died in 2001.{CT 64}

Defendant also complained about missing evidence including the fingerprints from Darling's car and reports for fingerprints found in Darling's residence.{CT 63-64} No investigation of the case had occurred between 1995 and 2014.{CT 81} Defendant argued that almost 24 years had passed between Darling's death and the renewal of the investigation. There was no new evidence that had been recently uncovered that would justify the delay.{CT 91}

Defendant argued that the defense was prejudiced by the death of CJ, who was the only person known to have contact and financial dealings with Darling.{CT 93} Defendant sought to have the charge dismissed.{CT 93}

The People filed opposition on January 31, 2019.{CT 99} The People set forth all of the evidence that was available to law enforcement in 1993.{CT 101-102} However, no murder charges were brought against defendant.{CT 102} The case was reopened as a cold case in 2014. During the investigation, it was discovered that defendant and CJ continued their fraud scheme throughout the years. Defendant threatened Ritter with physical harm if she reported the fraud to law enforcement. Collins reported that defendant confessed to him that he had murdered someone and buried the body in the California desert. The complaint was filed on May 16, 2014. Defendant was in Canada and the extradition was a lengthy process. He was finally arraigned on December 19, 2018.{CT 102}

The People contended defendant had not met his burden to prove actual prejudice from the delay. Defendant listed those witnesses who were deceased but failed to explain how they aided the defense or how their absence constituted prejudice. Defendant also failed to identify any lost evidence.{CT 102} Defendant failed to present any evidence in support of his motion to dismiss. Defendant merely counted the number of witnesses who were deceased and speculated that their absence prejudiced him.{CT 104} Defendant did not explain how the fact that CJ was dead prejudiced him as he did not provide her testimony. She would have been charged with defendant and could not be a witness if she were alive.{CT 106} The People argued that even if defendant could show

some delay, the prosecution had justification for the delay.{CT 109} Dismissal of the murder charges would be unreasonable.{CT 109-110} The motion was denied without prejudice by the Honorable Edward Forstenzer on February 25, 2019.{CT 247}

b. Second Pretrial Motion to Dismiss

Defendant brought a second motion to dismiss on March 20, 2019, after the preliminary hearing.{CT 387} He set forth the facts.{CT 388-411} Defendant stated that at the preliminary hearing, Captain Carter had trouble recalling the facts of the case. Captain Carter had to rely on the police reports prepared around the time of Darling's murder. Those reports contained hearsay from persons who were deceased and could not be called to testify.{CT 412} Further, Investigator Bodmer only recently became involved in the case.{CT 414-415} Defendant argued all of the evidence was in the possession of the RCDA in 1993.{CT 418} Defendant listed all of the deceased witnesses who had not been interviewed since the original investigation.{CT 418-419} Investigator Bodmer admitted at the preliminary hearing that the only new evidence was the interviews with Collins and Ritter.{CT 420} Defendant again argued that 17 people had been interviewed about Darling's murder between 1990 and 1994. Out of the 17 people, 11 of them were deceased.{CT 427} This included CJ.{CT 427-430} Defendant argued no justification had been given for the unconscionable delay.{CT 444} No physical evidence connected defendant to Darling's murder. Because of the delay, defendant had been denied the opportunity to cross-examine the witnesses.{CT 445}

The People filed opposition to the second motion to dismiss on March 27, 2019.{CT 496} The People argued the second motion was improper; the prior ruling by

Judge Forstenzer could not be overruled.{CT 496} Defendant's remedy was either a writ or appeal.{CT 496, 500-501, 503} Further, defendant had merely stated that defense witnesses were deceased, with no evidence. Further, his alibi evidence—that he was at a party in Palm Springs on the day of Darling's murder—was not helpful as he had told police in 1993 that he had not been in Palm Springs on the day of the murder.{CT 504} Again the prosecution argued there was justification for the delay that outweighed any prejudice.{CT 506}

The People filed supplemental opposition. Kelly had come forth with the statements defendant made to him.{CT 549}

On April 22, 2019, defendant filed a response providing further legal authority.{CT 560-568} Defendant provided a declaration on April 29, 2019.{CT 632} Defendant stated that CJ had a relationship with Darling as an investment advisor. CJ met with Darling and defendant did not know what occurred during the meetings.{CT 633} CJ handled all of their finances and he no idea about any past-due mortgage payments.{CT 633} CJ could have testified about a lot of the evidence in the case but was dead.{CT 633-635} Defendant declared he sold his coin collection to Darling on June 4, 1990; Darling came to his home.{CT 635} She agreed to pay \$54,000. She would give him \$4,000 cash and the \$50,000 would be transferred to his bank account in Anguilla.{CT 635-636} On June 5, CJ and defendant had a birthday party for their daughter in Palm Springs.{CT 636} Additional money he was to pick up in Anguilla was arranged by CJ; he had no knowledge of the origin.{CT 636-637} Defendant's father could have testified about defendant's coin collecting and defendant's relationship with

CJ.{CT 638-639} His father also knew Collins.{CT 639} Other witnesses could have testified about the birthday party and defendant's coin collecting.{CT 639-641}

The Honorable Russell L. Moore heard the matter on May 13, 2019. Defendant testified.{RT 5} Pertinent to the claims here, defendant testified he met Darling through CJ. Darling collected gold coins.{RT 11} Defendant began collecting coins when he was 18 years old.{RT 12-13} He agreed to sell them to Darling for \$54,000.{RT 13} Defendant's father told him the value of his coins.{RT 13} CJ negotiated payment, which was to come from offshore bank accounts belonging to Darling.{RT 14} Defendant went to Anguilla at the direction of CJ and opened a bank account.{RT 14-15} He did recall there may have been something wrong with the mortgage on their home in Palm Springs at the time.{RT 20-21} Defendant insisted he had no access to financial records in CJ's office.{RT 25-26}

Darling came to defendant's house to purchase the coins on June 4, 1990, and brought a man with her. Defendant did not know the man's name. Darling arrived around 10:00 a.m.{RT 16, 45-46} Darling gave defendant \$4,000 cash for the coins. The remaining \$50,000 was to be transferred from Darling's Swiss bank accounts into the Anguilla account.{RT 15-17, 69-70} Darling agreed she could be available in Anguilla when the money was transferred to make sure the transaction worked.{RT 19-20} Darling had defendant put the coins in her trunk. She told defendant she kept her coins in her safe at home.{RT 46-47, 69} Defendant insisted that a neighbor, Dottie Mertz-Stur, was present and spoke with Darling.{RT 48-49} Defendant never saw Darling again.{RT 49} CJ kept the \$4,000; he did not deposit it in the bank.{RT 70}

Defendant and CJ had a birthday party for their daughter on June 5, 1990. His father-in-law, Michael Czuba; his father's partner, Mary Ellis; and their neighbor, Mertz-Stur, attended the party. They were all deceased.{RT 27-29, 68, 77-78} Defendant never left his house on June 5, 1990.{RT 30} CJ ran errands during the day for the party.{RT 30-31}

CJ and the children left for Canada for the summer on June 6, 1990.{RT 32-33} Defendant left separately on June 7.{RT 35} They owned a cabin in Canada.{RT 35} He purchased food and camping equipment to take with him. This included two rolls of duct tape. He used the duct tape to seal up the house in Palm Springs so no sand would get in the house.{RT 36} Defendant purchased a jeep from Gary Fox, who drove it up to Canada for them; defendant drove his own truck.{RT 38}

Defendant stayed in Canada until he flew to Anguilla for a second time to get the checks.{RT 39} He got a \$70,000 and a \$100,000 check from the Anguilla bank that he brought back.{RT 40, 42} Only CJ knew why the checks were in these amounts.{RT 40-41, 51} CJ cashed the checks and gave him \$50,000. He used the money to renovate their cabin.{RT 42, 51-52} The next year they did the same thing; lived in Palm Springs and then spent the summer in Canada.{RT 43-44} In 1992, they stayed in Canada and then in 1993 they went to Arizona.{RT 44}

In 1993, CJ wanted to spend the winter season in Scottsdale, Arizona.{RT 60} CJ only had some of her financial records with her in Arizona.{RT 61} During the time they were in Arizona, their home was searched by local police.{RT 62} He and CJ were taken to the police station and separated. He was asked about Darling.{RT 62} Defendant told

one of the officers about selling his coin collection to Darling and he was told she had been murdered. Defendant had no idea she had died.{RT 62} Defendant asked for a lawyer.{RT 63}

Defendant admitted he was charged with financial fraud. He pled guilty to eight counts of grand theft; he claimed it was so CJ could stay out of jail with the children.{RT 64} He insisted he had nothing to do with the transactions.{RT 64} He spent four months in state prison.{RT 65} He moved back to Canada.{RT 65-67} CJ died of cancer in 2010. They depleted much of their funds for her care. He rented a home in Canada after her death.{RT 67-68}

From 1990 to 1995 they lived in the cabin in Canada. Their financial records were in the cabin, which burned in a fire in 1995.{RT 56} Bruce Dewitt was defendant's childhood friend who knew about his coin collection but he was deceased.{RT 76}

On cross-examination, he admitted he had no idea what records CJ would have had in her office.{RT 88} He would not know if CJ had been involved in fraudulent transactions.{RT 93} He was now aware that their home in Palm Springs was in foreclosure in 1990 but he did not know then.{RT 94-95} The coins he collected were gold and silver.{RT 96} He purchased most of the coins from pawnshops.{RT 99} He gave Darling his entire collection for \$4,000 and trusted she would pay the rest.{RT 105}

Defendant initially denied that he told Captain Carter in 1993 in Arizona that he did not know Darling and was not in Palm Springs on June 4, 1990. He then admitted he told Detective Carter he was not in Palm Springs in June 1990.{RT 114}

The People offered Investigator James Dickey, who interviewed Gary Fox.{RT 195-196} Fox told the investigator that in June 1990 defendant just left Palm Springs and he never saw him again. It was his understanding he lived in Palm Spring year round at the time. He did not drive a jeep to Canada for defendant.{RT 201-202} Investigator Dickey also indicated that defendant's mother was still alive and so were his children.{RT 203} The coins found in the floor safe were given to Darling's family.{RT 216} The person who inherited the coins could testify at trial.{RT 217}

The trial court denied the motion to dismiss without prejudice. The trial court noted there were additional facts that may come out at trial.{RT 230} The trial court believed there was prejudice in that defendant could not call CJ to testify, but that it was not so prejudicial to warrant dismissal of the case.{RT 230-231} Defendant argued there had been zero justification provided by the prosecution for the 20-year delay.{RT 232} The trial court believed the new evidence—testimony of Collins and Kelly—justified the delay even though the evidence came to light after filing of the complaint.{RT 233} Further, even if they did not come forward, there was still no prejudice to defendant.{RT 235} The trial court found it was not in the interests of justice at the time to dismiss the case.⁵{RT 243-244}

Defendant renewed the motion for pretrial delay on October 3, 2019, before the Honorable Timothy J. Hollenhorst.{CT 668; RT } On October 8, 2019, the trial court

⁵ Defendant filed a petition for writ of mandate in this court in case No. E072872 appealing the denial of his pretrial motion to dismiss. This court denied the petition and the California Supreme Court denied his petition for review.

reserved its ruling until after evidence as the motion to dismiss had already been denied on two separate occasions.{CT 668, 748; RT 274-276}

c. Posttrial Motion to Dismiss

After trial, on December 4, 2019, a hearing on defendant's posttrial motion to dismiss was held.{CT 952-955; RT 1325} Defendant testified at the hearing.{RT 1327} He testified at this hearing that on June 5, 1990, he and CJ were having a first birthday party for his daughter at their house.{RT 1328} CJ was gone from the house from 6:00 a.m. to 10:00 a.m. to pick up Czuba and Ellis who were both deceased.{RT 1328-1329, 1331} Mertz-Stur also came. She was deceased.{RT 1332-1333} Defendant was home all day. Ellis and Mertz-Stur were with him. CJ ran errands in the middle of the day with Czuba.{RT 1335, 1345}

The birthday party was from 5:00 to 8:00 p.m.{RT 1336, 1344-1345} They were planning to close up the Palm Springs house and leave for Canada after the party. CJ left on June 6, 1990, and he left on June 7.{RT 1335-1336, 1338} They purchased a large amount of home items to take with them because the home they had in Shawnigan Lake was in a remote area.{RT 1339} The duct tape was to use in the Canada home. Further, he used it to seal off the doors of the Palm Springs home so sand did not get in.{RT 1340-1341} CJ died before 2014.{RT 1343}

Defendant explained that the "wrecking crew" was a group of off-duty police officers and persons who did martial arts who were hired by businesses in the Palm Springs area to help if there were disturbances.{RT 1346-1347} No one in the wrecking crew buried anyone in the desert.{RT 1348}

When he met CJ, she went by CJ Edwards.{RT 1348-1349} They married in 1987 and shared time between Palm Springs and Canada.{RT 1349-1350} They returned to Palm Springs during the winter of 1990, 1991 and 1992.{RT 1351-1352}

Defendant denied he entered Darling's residence on June 5, 1990. He never went to the Palm Springs airport.{RT 1353} Defendant had collected gold coins since he was 18 years old.{RT 1354} He had gold and silver coins, and some special edition coins all placed in binders.{RT 1355-1356} Defendant's father collected with him but was deceased.{RT 1356-1357} He died just after 2014.{RT 1357} He had the coin collection in Palm Springs.{RT 1357} CJ arranged to sell the coin collection to Darling in June 1990.{RT 1358} It was worth \$60,000. He wanted to use the money to fix up their cabin in Canada.{RT 1358}

In May 1990, a person came and looked at his collection on behalf of Darling. He took pictures.{RT 1359} Darling agreed to pay him \$54,000.{RT 1360-1361} CJ reached an agreement with Darling that she would pay \$4,000 cash and the remaining \$50,000 from a Swiss bank account. CJ told defendant he had to set up a bank account in Anguilla to accept the \$50,000.{RT 1361, 1363, 1368} Defendant insisted there was a written agreement and he at one time had a copy.{RT 1361-1362} All of the documents of the transaction were lost during a fire at the Canada cabin in 1994.{RT 1367}

The coin transaction took place on June 4, 1990. Darling and the man came to their residence. Mertz-Scur was at the residence when this occurred. Darling paid them the \$4,000 cash.{RT 1364-1365} Defendant was concerned so they agreed that Darling could meet him in Anguilla to make sure the transaction went through.{RT 1366}

Darling agreed to pay for the cost of defendant's travel to Anguilla. CJ set up the payment and he had no knowledge how it was arranged.{RT 1369} He also claimed to have given all of the information to Darling how she could get to the Anguilla bank if there was a problem.{RT 1370, 1373} He claimed after his second trip to Anguilla, he returned to Canada.{RT 1371}

He received the \$70,000 which was \$50,000 for him and \$20,000 for CJ for a broker's fee; the \$100,000 was a separate deal between Darling and CJ.{RT 1374} When he arrived in Canada, his mother and father were there. He showed them the checks.{RT 1377-1378} CJ and defendant tried to cash them at a Canadian bank, but there was too much of a delay. He had already endorsed the checks. CJ went to the United States and cashed them.{RT 1391, 1460} He did not know where the money was put.{RT 1392-1393} CJ gave him a check for \$50,000 and he deposited it in a bank in British Columbia.{RT 1394}

He did not know Ritter and never threatened her.{RT 1387} During the search warrant in Scottsdale, he told a detective that he knew Darling because he sold her gold coins. When he found out she was missing, he asked to have a lawyer.{RT 1388-1389} He never spoke to Captain Carter.{RT 1389} He never signed documents as Tony Kubica.{RT 1395}

Defendant agreed that his mother knew about his coin collection and was alive. However, he insisted she was suffering from dementia.{RT 1401, 1429-1430} This hearing was the first time he stated that his mother could testify.{RT 1492} CJ arranged all of the travel arrangements to Anguilla.{RT 1424} He never asked why the money

could not be wired to the United States or a check be written to him on the Swiss bank account.{RT 1425} He never appraised his coin collection or tried to sell it to another party for a better price.{RT 1428-1429} Darling's cruise itinerary did not show her going to Saint Maarten. The closest she would be was a one hour flight.{RT 1437-1440, 1442-1443} He did not recall taking out the remaining \$14,000 that was in the Anguilla bank on June 18, 1990, that was in addition to the two cashier's checks.{RT 1457-1458} All of his knowledge of international banking came from CJ.{RT 1470} Defendant was unaware that Mertz-Stur had sold her house next-door to them in Palm Springs in March 1990.{RT 1483} He insisted she was still living there in June 1990.{RT 1483}

The prosecution presented the testimony of Investigator Bodmer.{RT 1496} He confirmed the cash wrapper, parking ticket, fingerprint cards and photographs of the coins in the floor safe were all missing from evidence.{RT 1500} The evidence presented in support of the warrant to arrest defendant in 1994 was based on evidence collected between 1990 and 1993.{RT 1502} He first looked at the case in 2014. Nothing developed between 1993 and 2014.{RT 1503} When defendant was arrested in Canada, it was then that Collins called a tip line. Collins advised Investigator Bodmer that Kelly may also have information.{RT 1506}

The trial court noted at the end of evidence that it would review all of the transcripts from the pretrial motions in making its decision.{RT 1507} The trial court stated it had the preliminary hearing transcript, the motion in front of Judge Forstenzer, and the second hearing before Judge Moore.{RT 1508}

In ruling on the posttrial motion to dismiss, the trial court noted that it was reviewing the issue as to whether it was a violation of due process under the state and federal Constitutions.{RT 1518} It noted that federal law may require a showing that the delay was for a tactical advantage.{RT 1518} Under California law, defendant had the burden to show actual prejudice.{RT 1519}

As for prejudice, the trial court noted, “this Court agrees the [prosecutor’s] point being that [defendant]’s own testimony severely, critically, and wholly diminished his credibility when it comes to his claims of actual prejudice and a denial of due process. There are simply too many inconsistencies within his two testimonies under oath, as well as both seemingly and obviously made-up-on-the-spot statements for this Court to ignore. Further, coupled with those inconsistent statements on material facts was [defendant]’s testimony regarding the most fantastical work of fiction sales transaction that this Court has ever heard.”{RT 1521} The trial court emphasized the inconsistencies in defendant’s testimony in the pretrial and posttrial hearings.{RT 1521-1522} Defendant changed his story how the checks were cashed once he was confronted with the fact he endorsed the back.{RT 1522} Even if CJ testified, the inconsistencies would remain.{RT 1523} Defendant said for the first time in the posttrial hearing that Darling paid for the first Anguilla trip.{RT 1523} Defendant’s credibility was tarnished.{RT 1524} The claim of coin sales was not believable.{RT 1524} It was incredible to accept that defendant, who appeared very intelligent, would agree to the transaction on the coins.{RT 1525} It was a “flat-out lie to the Court.”{RT 1525} It bordered on “absurdity.”{RT 1527} It was

unreasonable that he was expecting \$50,000 and received checks for \$70,000 and \$100,000.{RT 1527-1528}

The trial court also addressed the loss of corroborating witnesses to the coin sale and the alibi witnesses at the birthday party.{RT 1528-1529} The trial court noted that the jury was told defendant's version of the events on the day Darling disappeared, but the trial court had heard the evidence. No one living or dead could corroborate defendant's "outlandish" tale about the coin transaction.{RT 1528-1529} Further, even if he was at a birthday party, this did not mean he neither committed nor aided and abetted Darling's murder. Further, he told Captain Carter he had been in Canada.{RT 1530} The jury was made aware of the missing evidence and witnesses but found the evidence sufficient to convict defendant.{RT 1531} Faded memories of witnesses was present in most cases.{RT 1531} The passage of time did not result in actual prejudice to defendant.{RT 1532.}

The trial court also considered that even if there was prejudice, the delay was justified. Investigator Bodmer indicated that the cold case unit had very few investigators assigned and had limited resources.{RT 1533-1534} There was no allegation that there was purposeful delay.{RT 1534} The trial court concluded, "[t]he justification for the delay—that is, the lack of resources, manpower, and prioritizing of thousands of cold cases—significantly outweighs the prejudice."{RT 1534} The trial court also relied on the statements by Collins that came out in 2017. "The newly learned admission far outweighs any speculative or actual prejudice."{RT 1534}

Defendant filed a motion for reconsideration of the denial of the posttrial motion to dismiss or, in the alternative, a motion for new trial. {CT 1139-1243} The People filed opposition. {CT 1246-1249} The motion was denied. {CT 1251}

2. STANDARD OF REVIEW

The due process clauses of the federal and California Constitutions “protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant’s arrest and charging.” (*People v. Cowan* (2010) 50 Cal.4th 401, 430 (*Cowan*).) “[T]he right of due process protects a criminal defendant’s interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.” (Ibid.) “A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.” (Ibid.)

Under federal law, due process requires dismissal of the indictment if it is shown that delay in the case caused substantial prejudice to the defendant’s right to a fair trial and the delay was an intentional effort to gain a tactical advantage over the defendant. (*People v. Martinez* (2000) 22 Cal.4th 750, 765.) “Under the California standard, ‘negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process.’ (*Cowan, supra*, 50 Cal.4th at p. 431.)

The showing of prejudice must be made on competent evidence and “must be supported by particular facts and not . . . by bare conclusionary statements.” (*Crockett v. Superior Court* (1975) 14 Cal.3d 433, 442; see also *People v. Jones* (2013) 57 Cal.4th 899, 923 [affirming denial of motion where the “evidence of prejudice is speculative”].) “We review for abuse of discretion a trial court’s ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if substantial evidence supports them.” (*Cowan, supra*, 50 Cal.4th at p. 431.)

3. PREJUDICE

a. Defendant’s Credibility

Defendant first contends the trial court erred by applying the wrong legal standard by considering his credibility. He insists that he did not have to convince the trial court of the truth of the coin sale to Darling, but rather that witnesses were lost who would have supported his defense. {AOB 30-33} There was nothing in the record that the coin sale was “impossible.” {RT 33}

As noted by the People, defendant provides no authority for his proposition that the trial court could not consider his credibility in assessing prejudice. {RB 47} There is no dispute that defendant testified differently at the hearing on the pretrial motion dismiss and the posttrial motion to dismiss. Defendant testified posttrial for the first time that Darling paid for his trip to Anguilla and that he tried to cash the cashier’s checks with CJ in Canada first and that is why they were endorsed by him. {RT 1369, 1391, 1460} Moreover, the trial court found that it was unbelievable that defendant would make two trips to Anguilla to get the money owed to him by Darling, when he could have

legitimately made the transfers from Palm Springs. In fact, he later was able to wire transfer money from the Anguilla bank to his account in Canada. {RT 983, 985-987}

The backbone of a claim of a due process violation based on delay is that the defendant be given a fair trial. (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 507 [“The ultimate inquiry in determining a claim based upon due process is whether the defendant will be denied a fair trial”]) Defendant had the burden of showing that the failure to raise this defense with supporting witnesses rendered his trial unfair. However, defendant’s outlandish defense would not be believed by the jurors even with witnesses. No juror would believe that defendant had to set up offshore accounts in order to be paid for his coin collection, or that he would trust Darling to pay him the \$50,000. Even if he could have proven he possessed a coin collection, which is the testimony he sought from his father and friend, his testimony of the transfer of those coins to Darling was unbelievable.

Further, nothing stopped defendant from presenting this defense to the jury without these witnesses, or he could have presented his mother’s testimony that he had a coin collection.

Finally, further evidence that his defense would not have been believed by the jury, was that his coin transaction testimony was contradicted by Captain Carter’s testimony that defendant told him in 1993 that he was not in Palm Springs in 1990. Defendant has not shown prejudice for being unable to present evidence supporting his claim that he sold his coin collection to Darling and did not murder her.

b. CJ

Defendant further contends he was prejudiced by the loss of CJ's testimony and the records burned in a fire at their Canada cabin. He insists that CJ was the one connected to Darling as a financial planner. It was CJ who deposited the \$2,000 into her bank account on June 5, 1990. Further, a note found near Darling's phone in her residence had the name CJ Michaels. He insists that the loss of CJ as a witness was prejudicial even if the coin story was made up by him after the fact. {AOB 31-32}

Defendant's claim that CJ would have helped his defense is pure speculation. Based on the evidence presented at trial, CJ was undoubtedly involved in the scheme to empty Darling's Swiss bank accounts and her murder. The prosecutor stated that if CJ was alive, she would be charged with defendant. As such, it is unlikely that CJ would have testified on behalf of defendant.

Further, based on the two of them being involved in the crimes together, her credibility would be questionable if she testified to try to exonerate herself and/or defendant. Defendant's speculation that CJ would have provided evidence beneficial to his defense does not support prejudice. He insists that she may have confessed to the crimes. {ARB 6} This is pure speculation and would not absolve defendant, who traveled twice to Anguilla on his own and collected the money transferred from Darling's Swiss bank accounts. Defendant was inextricably involved in the scheme to get Darling's money and her murder. Any potential testimony from CJ would not exonerate him. As such, her absence does not support that he was prejudiced by the delay.

c. Other Witnesses

Defendant never elaborates as to what records were missing that prejudiced him. Although he briefly mentions that the records in CJ's office were destroyed, he does not provide any argument as to what those records may have provided to help his defense. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Further, he briefly states that had he been able to call his "father" or his "deceased friend" as a witness about his coin collecting, he would have appeared more credible to the court. However, defendant also stated that his mother was aware of his coin collecting and was still alive. Defendant has failed to establish that the only means he had to prove he had the coin collection was through the testimony of CJ, his father, and another friend. It is inconceivable that defendant had not told anyone else about his coin collection or that there were no other records of the collection. Defendant has not shown actual prejudice from the death of his father and friend.

Although defendant states that 11 of the 17 witnesses died before 2014, he provides no further argument as to how they would have helped his defense other than CJ. We need not consider the impact on defendant's defense by the loss of these other witnesses. (*Badie v. Bank of America, supra*, 67 Cal.App.4th at pp. 784-785.)

We therefore find the trial court did not abuse its discretion in finding no prejudice. "Because we conclude the trial court acted within its broad discretion in finding defendant was not prejudiced by the delay in charging him . . . we need not

address defendant's further argument challenging the prosecutor's multiple justifications for the delay or the trial court's acceptance of those reasons." (*People v. Jones, supra*, 57 Cal.4th at p. 924.)

Moreover, even if we were to consider that there was some prejudice to defendant, dismissal is not warranted. "'[W]hether the delay was purposeful or negligent is relevant to the balancing process. Purposeful delay to gain advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.' [Citation.] The justification for the delay is strong when there is 'investigative delay, nothing else.''" (*Cowan, supra*, 50 Cal.4th at p. 431.)

The Supreme Court has further found, "'[a] court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges. 'The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with the prosecutor's decision as to when to seek an indictment. . . . Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.'" [Citations.] Indeed, "'[a] prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt.'"'" (*Cowan, supra*, 50 Cal.4th at p. 435.)

“ ‘It is not enough for a defendant to argue that if the prosecutorial agencies had made his [or her] case a higher priority . . . they would have solved the case sooner.’ ” (*Cowan, supra*, 50 Cal.4th at p. 435.) “A court may not find negligence by second-guessing how the state allocates its resources or how law enforcement agencies could have investigated a given case.” (*People v. Nelson* (2008) 43 Cal.4th 1242, 1256) “ ‘[T]he difficulty in allocating scarce prosecutorial resources (as opposed to clearly intentional or negligent conduct) [is] a valid justification for delay.’ ” (*Id.* at pp. 1256-1257.)

The court’s summary in *Cowan* is pertinent in this case: “[T]he investigation of the . . . murders was not perfect; no investigation is. Like the trial court, however, we find no evidence that law enforcement or the prosecution deliberately delayed the investigation in order to gain a tactical advantage over defendant. Nor do we find evidence of negligence. Rather, at worst the . . . Sheriff’s Department simply erred. . . . That being the case, balancing defendant’s weak showing of prejudice against the strong justification for the delay [citation], we find no due process violation. Accordingly, the trial court did not abuse its discretion when it denied defendant’s . . . motion[] to dismiss due to prearrest delay.” (*Cowan, supra*, 50 Cal.4th at p. 436.)

Here, even if we were to find there was weak evidence of prejudice from the delay, we find that the delay was not to gain a tactical advantage. At most, in 1993, the RCDA determined that it was not going to charge defendant with murder at the time based on its review of the evidence. However, in 2014, Investigator Bodmer reviewed the evidence and determined there was sufficient evidence to charge defendant. This was

furthered by Collins and Kelly coming forward. Investigator Bodmer explained that the delay in looking at the case again was due to scarce resources. The trial court properly determined that there was justification for the delay that outweighed any prejudice. The trial court did not abuse its discretion by denying the posttrial motion to dismiss.

B. PRESENTENCE CONDUCT CREDITS

Defendant contends the trial court erred by calculating his presentence conduct credits under section 2933.1 because he committed his crime in June 1990, and section 2933.1 was not effective until September 21, 1994.⁶ {AOB 39-42} The People agree. {RB 58-59}

Section 2933.1 limits conduct credits to 15 percent for those who commit violent felonies. (§ 2933.1) Section 2933.1 was effective September 21, 1994. (Stats. 1994, ch. 713 (AB 2716) § 1, eff. Sept. 21, 1994.) Subdivision (d) of section 2933.1 provides the limitation only applies to violent felonies committed “after the date on which this section becomes operative.”

The trial court awarded defendant 1,101 days of actual time in custody and 165 days of conduct credit. The trial court erred by limiting the conduct credits to 15 percent and should have calculated the conduct credits pursuant to the version of section 4019

⁶ On July 13, 2021, defendant filed a request for judicial notice of the bill enacting section 2933.1 and its amendments. We grant the request.

that would have been operative in 1990.⁷ The conduct credits should have been awarded in the amount of 550 days.

C. BOOKING FEE

Defendant contends this court should strike the order imposing a \$514.58 booking fee pursuant to Government Code section 29550.{AOB 42-45} He insists that as of July 1, 2021, Government Code section 29550 has been repealed by Assembly Bill No. 1869 (2019-2020 Reg. Sess.) §§ 22-26 (AB 1869).⁸ The People agree that as of July 1, 2021, a booking fee can no longer be imposed but any portion of the booking fee that was paid prior to July 1, 2021, was lawful and authorized.{RB 59-61}

Section 2 of AB 1869 provides: “It is the intent of the Legislature to eliminate the range of administrative fees that agencies and courts are authorized to impose to fund elements of the criminal legal system and to eliminate all outstanding debt incurred as a result of the imposition of administrative fees.” (Stats. 2020, ch. 92, § 2.) Among other provisions, AB 1869 added Government Code section 6111 to further this intent. That section provides: “On and after July 1, 2021, the unpaid balance of any court-imposed costs pursuant to Section 27712, subdivision (c) or (f) of Section 29550, and Sections 29550.1, 29550.2, and 29550.3, as those sections read on June 30, 2021, is unenforceable and uncollectible and any portion of a judgment imposing those costs shall be vacated.”

⁷ The parties agree that the credits should have been calculated based on the actual days in custody being divided by four; that number then is rounded down to the nearest whole number; and then is multiplied by two.{AOB 41; RB 59}

⁸ On July 13, 2021, defendant requested that this court take judicial notice of AB 1869. We grant the request.

(Gov. Code, § 6111, subd. (a).) Section 6111, subdivision (b), provides that “[t]his section shall become operative on July 1, 2021.”

Based on the plain language of Government Code section 6111, the unpaid balance of the booking fee is unenforceable and uncollectible, and the portion of the judgment against defendant imposing such fee must be vacated. (Gov. Code, 6111, subd. (a); see also *People v. Clark* (2021) 67 Cal.App.5th 248, 259.)

DISPOSITION

The judgment is modified to strike any unpaid balance, as of July 1, 2021, of the booking fee imposed under Government Code section 29550. The trial court is DIRECTED to amend the abstract of judgment to reflect this modification. In addition, the trial court shall modify the abstract of judgment and minute order from sentencing to reflect that defendant’s conduct credits are 550 days, he has 1,101 actual days of custody credits, for a total of 1,651 days total credit. The trial court is directed to forward a certified copy of the amended abstract to the appropriate authorities. (*People v. Quinonez* (2020) 46 Cal.App.5th 457, 467.) In all other respects, the judgment is affirmed.

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