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EXHIBIT A
IN THE SUPREME COURT OF
CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,

v.

JAMES MICHAEL FAYED,
Defendant and Appellant.

No. S198132

Los Angeles County Superior Court
BA346352

Filed April 2, 2020.

Justice Chin authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Corrigan, Liu, Cuéllar, Kruger, and Groban concurred.

Opinion of the Court by CHIN, J.

A Los Angeles County jury found defendant James Michael Fayed guilty of the first degree murder of his estranged wife, Pamela Fayed, (Pen. Code,¹ § 187, subd. (a)) and of conspiracy to commit murder (§ 182, subd. (a)(1)). (As discussed further below, defendant was not the actual killer but arranged for someone to kill Pamela.) The jury further found true the special

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

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circumstance allegations of financial gain (§ 190.2, subd. (a)(1)) and lying in wait (§ 190.2, subd. (a)(15)). Following the penalty phase, the jury returned a verdict of death. The trial court denied defendant's automatic application for modification of the verdict (§ 190.4, subd. (e)) and sentenced defendant to death.

This appeal is automatic. (§ 1239.) For reasons that follow, we affirm the judgment in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

A. Guilt Phase

1. Overview

Shortly after initiating divorce proceedings in October 2007, defendant arranged for Pamela Fayed's² murder by paying the couple's employee, Jose "Joey" Moya, \$25,000 to kill her. Moya, in turn, enlisted Gabriel Jay Marquez, the boyfriend of his niece, and Steven Simmons, Marquez's nephew. On July 28, 2008, Pamela was stabbed to death in a Century City parking garage, moments after she had left a meeting with defendant and their respective attorneys. At the time of her murder, defendant and Pamela were under federal investigation for allegedly laundering money for Ponzi schemes through their e-currency business.

Defendant and Pamela were married in 1999, and had one young daughter, J.F. Pamela's older daughter

² To minimize confusion and for the sake of simplicity, we have used first names when necessary. (*People v. Trujeque* (2015) 61 Cal.4th 227, 236, fn. 2.)

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from a previous marriage, Desiree G., also lived with the family. In or around 2002, the Fayeds started a business, Goldfinger Coin & Bullion (Goldfinger), in Camarillo. Goldfinger was an Internet company that provided money and precious metal transfer services for a fee. They also had an associated company, E-Bullion Company (E-Bullion), which was incorporated in the country of Panama with its business offices in California.

After the financial success of Goldfinger, the family bought a home in Camarillo and a second home on an over 200-acre ranch in Moorpark, which they called "Happy Camp Ranch." Joey Moya, who was hired to assist defendant and to help on the ranch, moved into a second house on the ranch.

In or around April 2007, Pamela spoke with her good friend, Carol Neve, who had a similar e-currency business. After Neve advised Pamela that Goldfinger needed a money transmitting license to comply with federal regulations, Pamela wrote a check for \$400,000 on October 6, 2007 to secure a license. Defendant had told Pamela that a license was not required. Defendant filed for divorce in October 2007. He banned Pamela from Goldfinger offices and fired Desiree, who had worked there for two years. In divorce filings, defendant alleged that Pamela had embezzled \$800,000 from Goldfinger.

2. Unrelated Federal Investigation of Goldfinger

In or around early 2008, before Pamela's murder, the United States Attorney's Office led by Assistant United States Attorney (AUSA) Mark Aveis began a formal investigation into Goldfinger for its involvement in a money laundering scheme. In their joint investigation of two Ponzi schemes, the FBI and the IRS discovered that money from these two schemes "was flowing through Goldfinger" and that Goldfinger had made over \$9 million in 2002 and upwards of \$160 million in 2007. Though defendant and Goldfinger were not directly involved in the Ponzi schemes, the federal government sought an indictment against them "to obtain leverage" with defendant, i.e., to allow the FBI to "monitor the flow of money to his business to ferret out and uncover illegal money transmitting activity."

On February 26, 2008, five months before Pamela's murder, defendant and Goldfinger were indicted on federal charges of operating an unlicensed money transmitting business (18 U.S.C. § 1860). Pamela was not named in the indictment, which was sealed and not made public. However, in June 2008, after the United States Attorney's Office subpoenaed the accountants involved in auditing the divorce, Pamela learned that Goldfinger and defendant were being investigated by the FBI and IRS.

About a month later, Pamela's first criminal defense attorney, David Willingham, contacted AUSA Aveis and told him that "Pamela wants to come in." Aveis took that comment to mean that Pamela wanted

to cooperate in the criminal investigation against defendant and Goldfinger, though there was no understanding, arrangement, or agreement that Pamela would do so. Before Aveis could meet with Pamela, she was killed. At that time, there was no indication defendant knew about the sealed indictment against him; Aveis admitted that the government never got around to putting pressure on defendant to cooperate.

3. Murder of Pamela Fayed

On July 28, 2008, the day of the murder, defendant and Pamela met with their respective attorneys to discuss the ongoing federal investigation into their Goldfinger business. The prearranged meeting, which took place at the Century City offices of defendant's former attorney, lasted from 3:30 p.m. until approximately 6:30 p.m. that evening. After the meeting, Pamela returned alone to her car, which was parked on the third floor in the adjacent parking structure. She was stabbed multiple times in the head, neck, and chest and had defensive wounds on her arms. The fatal stab wound was a deep cut to the front of her neck.

Witness Edwin Rivera described the assailant as a tall and skinny male, wearing a black hooded sweatshirt and jeans. Rivera, however, could not see the assailant's face.

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4. Crime Scene and Murder Investigation

Los Angeles Police Department (LAPD) Detective Eric Spear arrived shortly after Pamela's body was removed from the crime scene. Detective Spear identified a red SUV as a suspect vehicle and obtained an image of the SUV's license plate from one of the parking lot cameras. The SUV was rented from Avis Rent A Car company in Camarillo on behalf of Goldfinger and defendant. Pamela's blood was found in the interior of the SUV, which had been steam cleaned before being returned to the rental company. A fingerprint found on the parking garage ticket matched that of Simmons.

Telephone records showed that cell phones registered to Marquez and Simmons made contact with a cell tower located close to the murder scene at almost the same time as the murder. Records also showed that defendant and Moya exchanged multiple text messages shortly before and after the murder, though the messages were deleted from defendant's phone.

On August 1, several days after Pamela's murder, the federal indictment was unsealed, and defendant was arrested by federal agents. At the time, the other suspects under investigation for the murder (Moya, Marquez, and Simmons) had not yet been arrested.

5. Recorded Jailhouse Conversation with Shawn Smith

LAPD Detective Salaam Abdul was assigned to investigate Pamela's murder. On September 9, 2008, Detective Abdul received word from federal authorities

that Shawn Smith, who was sharing a cell with defendant at the men's federal detention center, wanted to speak to police. After meeting with Smith, Detective Abdul arranged for Smith to wear a wire when he returned to the cell he shared with defendant.

In their secretly recorded conversation, defendant told Smith that he had paid Moya to murder Pamela and asked Smith to solicit Smith's fictional hitman "Tony" to kill Moya to eliminate him as a witness. The jury heard the recorded conversation between defendant and Smith in its entirety and also received a written transcript of the conversation. The substance of the conversation is discussed in greater detail below as relevant to the issue defendant raises. (See *post*, at pp. 18-20.)

6. *Procedural Background*

On or about September 15, 2008, a complaint charged defendant and codefendant Moya with the first degree murder of Pamela. (§ 187, subd. (a).) It alleged the special circumstance allegations of murder for financial gain (§ 190.2, subd. (a)(1)) and murder by means of lying in wait (*id.*, subd. (a)(15)). Count 2 also charged defendant with one count of conspiracy. (§ 182, subd. (a)(1).) That same day, the United States Attorney for the Central District of California moved to dismiss the federal indictment against defendant.

On August 13, 2010, nearly two years after defendant and Moya were charged with Pamela's murder, the prosecution filed an indictment against coconspirators

Marquez and Simmons and filed a notice of joinder of all four defendants a month after. On February 11, 2011, the prosecution filed a notice seeking the death penalty against defendant only. Although the cases were initially consolidated, the trial court granted defendant's severance motion after the prosecution sought the death penalty against defendant only.³

Guilt phase jury deliberations began on May 17, 2011. After deliberating for two days, the jury found defendant guilty of first degree murder and one count of conspiracy to commit murder. It also found true the special circumstance allegations of murder for financial gain and murder by means of lying in wait. After penalty phase deliberations, the jury fixed the penalty at death. Defendant moved to modify the verdict under section 190.4, subdivision (e), which motion the trial court denied. The trial court fixed the penalty at death.

³ In a separate trial before the same trial judge, a jury convicted Moya, Marquez, and Simmons of the first degree murder of Pamela, and of conspiracy to commit murder. The jury also found true the special circumstance allegation of murder by means of lying in wait as to all three defendants (§ 190.2, subd. (a)(15)) and the special circumstance allegation of murder for financial gain with respect to Moya only (*id.*, subd. (a)(1)). The trial court sentenced all three defendants to life imprisonment without the possibility of parole for the first degree murder conviction and imposed and stayed a sentence of 25 years to life on the conviction for conspiracy to commit murder. Each defendant appealed. The Court of Appeal affirmed all three judgments in an unpublished opinion.

B. Penalty Phase

1. Prosecution Evidence

The prosecution presented victim impact evidence through the testimony of Pamela's two sisters, her brother and his wife, and Pamela's adult daughter, Desiree. Pamela's friends also testified.

Pamela's sister testified that while hearing news of Pamela's death was very difficult, hearing details about how she died from witness Edwin Rivera "was by far the hardest thing." Pamela's brother, who became J.F.'s legal guardian, testified that while J.F. knows that her mother was murdered, he did not tell her that her father did it because she still loved her father; Pamela's brother believed J.F. "is the biggest victim of all this."

Over defense objection, the prosecution presented photographs of Pamela and her family, including one of Desiree kneeling over her casket and kissing it. Desiree also read a personal letter that Pamela had left to her and J.F. in the event of her death.

2. Defense Evidence

The defense called defendant's friend and a former coworker to each testify. His friend described defendant as a hardworking man, a great friend, and a "good person." His former coworker, who had worked with defendant at the Marine Corps Air Station in El Toro, described defendant as "quiet spoken" and "mellow." The defense also called defendant's high school friend,

Melanie Jackman, who considered defendant one of her best friends. She testified that sometime before defendant started divorce proceedings, defendant had called Jackman for advice on how to make Pamela happy. Defense counsel attempted to elicit this testimony to show how defendant at one point in time cared for Pamela.

DISCUSSION

A. Guilt Phase

1. *Admission of Defendant's Recorded Jailhouse Statement with Shawn Smith*

On appeal, defendant raises numerous claims based on the admission of defendant's surreptitiously recorded jailhouse statement, asserting that its admission constituted error of constitutional dimensions. Specifically, he raises claims based on his Sixth Amendment right to counsel (see *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*)), his Fifth Amendment right to counsel and privilege against self-incrimination, his Fourth Amendment right to be free from unreasonable detention, his rights under the Sixth Amendment's confrontation clause (see *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*)), as well as attendant protections under Evidence Code sections 352 and 1101.

We discuss each challenge in turn.

a. Factual and Procedural Background

On July 29, 2008, the day after Pamela was killed, defendant was arrested for her murder. After invoking his right to remain silent, defendant refused to speak to investigators and was released two hours later. On August 1, 2008, the federal indictment was unsealed, and defendant was arrested on the federal money licensing violation. Defendant was remanded into federal custody. On September 10, 2008, while in custody, defendant made incriminating statements about Pamela's murder to his cellmate, Shawn Smith.⁴ Smith was wearing a wire and recorded his conversation with defendant.

Shortly before their conversation was recorded, Smith had told authorities that he was sharing a cell with defendant and that defendant had told Smith that he was involved in murdering his wife. Detective Abdul met with Smith and determined that additional investigation was necessary. Smith was outfitted with a "wire," a recording device placed in the inside zipper on the crotch area of Smith's pants. Detective Abdul instructed Smith to avoid the appearance of trying to elicit information from defendant and instead to have

⁴ At the time, Smith was in custody awaiting sentencing for a conviction of possession with intent to sell cocaine. Smith had previously been convicted of: (1) conspiracy to distribute cocaine in 1987 and served 18 months in prison; (2) transporting and possession for sale a controlled substance in 1990; (3) possession of a controlled substance with the intent to sell in 2003; (4) driving under the influence and hit and run in 2003; and (5) hit and run in 2006. These convictions were introduced into evidence to impeach Smith's credibility.

a regular conversation with him to see if defendant would “go ahead and reveal information that [defendant] had revealed before.” Though Detective Abdul could not recall “exactly what [he] said to Mr. Smith,” he testified he did not “counsel him on what to say.” He did, however, refer to a “previous conversation” with Smith, based on which Detective Abdul determined there was “no reason” to discuss with Smith what he should say to defendant.

On September 15, 2008, the same day defendant was charged with Pamela’s murder, the federal government dismissed its indictment against defendant to avoid interfering with the state’s murder investigation of defendant. Around the same time, although Smith was “facing a fairly substantial prison term,” he was released on unsecured bond and was later released early from custody. Detective Abdul, however, later testified that Smith’s release “had nothing to do with the state crime that [defendant] was charged with.”

Before and during his trial, defendant made several unsuccessful challenges to the admission of his recorded jailhouse statement. The prosecution played the entire tape-recorded statement to the jury. On September 12, 2011, after the jury returned a guilty verdict, defendant filed a motion for a new trial, in which he argued that the prosecution’s decision to rely on the recorded statement and not to call Smith to testify violated defendant’s rights under *Crawford*. The trial court denied the motion.

b. Defendant's Sixth Amendment Right to Counsel; Massiah Error

On appeal, defendant argues that even though he had not yet been charged for Pamela's murder, his Sixth Amendment right to counsel had attached when he was in federal custody for the money licensing violation. On that point, he asserts the federal and state prosecutions were "inextricably intertwined" and that the federal prosecution was a "sham" to hold defendant in custody while state authorities investigated the murder case against defendant. Defendant maintains that because Smith was acting as an agent for the government, any statements Smith elicited from defendant were inadmissible under *Massiah*. For reasons that follow, we deny this claim.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." (U.S. Const., 6th Amend.; see *Massiah, supra*, 377 U.S. at p. 206.) This constitutional protection "guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." (*Maine v. Moulton* (1985) 474 U.S. 159, 176; see *Massiah, supra*, 377 U.S. at p. 206.) The "clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." (*Brewer v. Williams* (1977) 430 U.S. 387, 401.)

The high court has “pegged commencement to “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”” (*Rothgery v. Gillespie County* (2008) 554 U.S. 191, 198 (*Rothgery*); see *Kirby v. Illinois* (1972) 406 U.S. 682, 689-690.) Likewise, we have held that the Sixth Amendment right to counsel “does not exist until the state initiates adversary judicial criminal proceedings, such as by formal charge or indictment.” (*People v. DePriest* (2007) 42 Cal.4th 1, 33 (*DePriest*); see *People v. Viray* (2005) 134 Cal.App.4th 1186, 1194.)

By its terms, the Sixth Amendment right to counsel is “offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced. . . . ” (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175 (*McNeil*); see *Rothgery, supra*, 554 U.S. at p. 198; *People v. Cunningham* (2015) 61 Cal.4th 609, 648; *Maine v. Moulton* (1985) 474 U.S. 159, 180.) The high court has made clear that there is no exception to this offense-specific requirement for uncharged offenses that are ““closely related”” to or ““inextricably intertwined”” with the charged offense. (*Texas v. Cobb* (2001) 532 U.S. 162, 173; see *People v. Slayton* (2001) 26 Cal.4th 1076, 1082-1083.) That said, “when the Sixth Amendment right to counsel attaches, it does encompass offenses that, *even if not formally charged*, would be considered the same offense

under the *Blockburger* test.”⁵ (*Texas v. Cobb, supra*, 532 U.S. at p. 173, italics added.)

Here, the state prosecution for Pamela’s murder had not yet commenced when defendant, who was in federal custody for the unrelated money licensing charge, made the incriminating remarks to Smith. Contrary to defendant’s suggestion, we have expressly endorsed, in recognition of the offense specific requirement, a “bright-line precharging rule against attachment of a Sixth Amendment right.” (*DePriest, supra*, 42 Cal.4th at p. 34.) Thus, “[a] defendant’s incriminating statements about offenses for which he has not been charged may be admitted consistently with his Sixth Amendment counsel guarantee notwithstanding its attachment on other charged offenses at the time.” (*Id.* at p. 33.) Defendant fails to persuade why the “bright-line precharging rule against attachment of a Sixth Amendment right” (*DePriest, supra*, 42 Cal.4th at p. 34), should not apply here.

For instance, notwithstanding the Sixth Amendment’s “offense specific” requirement (*McNeil, supra*, 501 U.S. at p. 175), defendant insists that state and

⁵ Under *Blockburger v. United States* (1932) 284 U.S. 299, “the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” (*Texas v. Cobb, supra*, 532 U.S. at p. 173, quoting *Blockburger, supra*, 284 U.S. at p. 304.) As such, the high court also described the “Sixth Amendment as ‘prosecution specific,’ insofar as it prevents discussion of charged offenses as well as offenses that, under *Blockburger* could not be the subject of a later prosecution.” (*Texas v. Cobb, supra*, 532 U.S. at p. 173, fn. 3, italics added.)

federal authorities had “worked collectively” to ensure that defendant was detained without bail in the federal case, thus making the federal licensing charge “inextricably intertwined” with the state murder charge. In support, defendant relies on principles underlying the dual sovereignty doctrine in the *Fifth* Amendment double jeopardy context. (See *Gamble v. United States* (2019) ___ U.S. ___, ___ [139 S.Ct. 1960, 1964] (*Gamble*) [“Under this ‘dual-sovereignty’ doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute”].) Specifically, defendant emphasizes that the high court left open the possibility that double jeopardy principles may ban a successive state prosecution that serves as a “sham and a cover” for the federal prosecution. (*Bartkus v. Illinois* (1959) 359 U.S. 121, 124 (*Bartkus*).)

By analogy, defendant argues that the federal prosecution for the licensing violation was in fact a “sham” used to detain defendant while the state investigated Pamela’s murder. He maintains, therefore, that his arrest and federal detention prohibited any questioning on the state murder case. Even assuming that the dual sovereignty doctrine applies in the Sixth Amendment context (see *U.S. v. Coker* (1st Cir. 2005) 433 F.3d 39, 45), and further, that the sham prosecution serves as a “potential exception” to this doctrine (*Gamble, supra*, 139 S.Ct. at p. 1994, fn. 3 (dis. opn. of Ginsburg, J.)), we conclude defendant’s claim lacks merit.

As noted, the sham prosecution theory only applies to provide defendant relief if there were successive prosecutions by two sovereigns for the *same* offense. (See *Gamble, supra*, 139 S.Ct. at p. 1964 [affirming dual sovereignty doctrine].) Here, the offenses—Pamela’s murder and the federal licensing charge—were clearly not the same. In fact, at his federal detention proceedings, defendant argued that the federal licensing charge and the as-yet charged murder were “unrelated” and “disconnected.”

Nevertheless, we agree with defendant that both federal detention hearings focused heavily on facts surrounding Pamela’s murder and defendant’s possible involvement. To the extent defendant argues that federal and state authorities “worked collectively” to have him detained in federal custody, i.e., through sharing information about the murder and providing a “detention script” prepared by the LAPD, this level of cooperation and collaboration simply represents the “conventional practice between the two sets of prosecutors throughout the country” (*Bartkus, supra*, 359 U.S. at p. 123).

“As *Bartkus* makes plain, there may be very close coordination in the prosecutions, in the employment of agents of one sovereign to help the other sovereign in its prosecution, and in the timing of the court proceedings so that the maximum assistance is mutually rendered by the sovereigns. None of this close collaboration amounts to one government being the other’s ‘tool’ or providing a ‘sham’ or ‘cover.’” (*U.S. v. Figueroa-Soto* (9th Cir. 1991) 938 F.2d 1015, 1020.)

Further, even if state authorities deliberately delayed arresting defendant for Pamela’s murder, which purportedly gave them more time in which to elicit defendant’s incriminatory statements in federal custody, this “conscious delay” does not violate his Sixth Amendment right to counsel. (*People v. Webb* (1993) 6 Cal.4th 494, 527 [no *Massiah* violation where investigators told wife to “intensify her questioning” of defendant about capital crimes while defendant was incarcerated on unrelated charges].)⁶

Finally, defendant relies on *Elkins v. United States* (1960) 364 U.S. 206, to argue specifically that concepts of due process and fundamental fairness dictate that his Sixth Amendment right to counsel had attached. Not so. *Elkins*’s abrogation of the “silver platter” doctrine—which previously allowed evidence obtained by a state agent’s unreasonable searches or seizures to be used in a federal trial—does not have any application here. (*Elkins, supra*, 364 U.S. at p. 222.) As discussed above, we reject defendant’s assertion that federal authorities acted improperly in detaining defendant; thus, the high court’s concerns of “subterfuge and

⁶ Because it is clear that defendant’s Sixth Amendment right had not attached when he made the incriminating statements to Smith, it is unnecessary to address, for purposes of defendant’s *Massiah* claim, whether Smith “(1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements.” (*In re Neely* (1993) 6 Cal.4th 901, 915.) Whether Smith’s allegedly coercive actions rendered defendant’s statements involuntary, however, is an issue we discuss below. (See *post*, at pp. 18-20.)

evasion with respect to federal-state cooperation in criminal investigation” are not realized in this case. (*Ibid.*)

Based on these reasons, we reject defendant’s claim that his Sixth Amendment right to counsel had attached to the uncharged murder when he made the incriminating statements in federal custody. (See *Texas v. Cobb*, *supra*, 532 U.S. at p. 173.)

c. Defendant’s Fifth Amendment Right Against Self-incrimination

Defendant also claims that when authorities placed Smith in defendant’s cell to ask him pointed questions about Pamela’s murder, this violated his Fifth Amendment right to remain silent. (U.S. Const., 5th Amend. [“nor shall [any person] be compelled in any criminal case to be a witness against himself”]; Cal. Const., art. I, § 15; see *Miranda v. Arizona* (1966) 384 U.S. 436; *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.) Specifically, defendant maintains that he invoked his Fifth Amendment right to counsel when taken into federal custody for the money licensing violation and that he thereby invoked his Fifth Amendment right as to this murder case.

We agree with defendant that unlike the Sixth Amendment right to counsel, his Fifth Amendment right is *not* offense specific. (*Arizona v. Roberson* (1988) 486 U.S. 675, 685.) That said, even if defendant properly invoked his Fifth Amendment right to counsel on July 29 when first arrested for Pamela’s murder the

intervening passage of time along with defendant's release and break in custody meant that his invocation did not remain in force on September 10 when he made the incriminating statements to Smith. Further, the high court has held that at least where no prior invocation is in effect, "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes is a fellow inmate. Coercion is determined from the perspective of the suspect." (*Illinois v. Perkins* (1990) 496 U.S. 292, 296.) In other words, "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. . . . [¶] *Miranda* was not meant to protect suspects from boasting about their criminal activities in front of people whom they believe to be their cellmates." (*Id.* at pp. 297-298 [defendant showed "no hint of being intimidated by the atmosphere of the jail" and "was motivated solely by the desire to impress his fellow inmates"]; see *People v. Tate* (2010) 49 Cal.4th 635, 685-686.)

Defendant briefly asserts that Smith was a government agent who used coercive, deceptive, and overreaching tactics to elicit defendant's incriminating statements in violation of due process. (See *Miller v. Fenton* (1985) 474 U.S. 104, 110 [notwithstanding *Miranda*'s prophylactic protections, "the Court has continued to measure confessions against the

requirements of due process”]; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 288 [“fear of physical violence, absent protection from his friend (and Government agent) . . . motivated Fulminante to confess”].) “The use of deceptive statements during an investigation does not invalidate a confession as involuntary unless the deception is the type likely to procure an untrue statement.” (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1088; see *People v. Mickey* (1991) 54 Cal.3d 612, 649-650.) “‘A statement is involuntary if it is not the product of “‘a rational intellect and free will.’” [Citation.] The test for determining whether a confession is voluntary is whether the defendant’s “will was overborne at the time he confessed.”’” (*People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.)

Though the details of their conversation prior to Smith wearing a wire are unknown, it is clear that defendant and Smith had already talked about enlisting Smith’s made up hitman, “Tony,” to kill Moya. While Smith may have prodded defendant to speak at times, the record does not support that defendant’s will was overborne when he expressed he wanted Moya killed.

For instance, defendant told Smith he did not “want to be worrying about this every fuckin’ minute of the day when I’m out there” and that he did not want to “sit around here for the rest of my life and worry about whether one of them is gonna fuckin’ finally decide to fess up.” Defendant purportedly drew Smith a detailed layout of his ranch to ensure the hitman went to the right house to kill Moya. Further, when an officer

passed their cell as defendant and Smith were discussing these plans, defendant remarked: “We’re planning a fucking multiple homicide bitch. Leave us alone.”

Our review of the recorded conversation reveals several instances where Smith asked defendant specific, and arguably leading, questions about Pamela’s killing, including probing whether it was defendant’s idea to take the company’s rented car which was used in the killing. Smith also appeared to ingratiate himself by expressing sympathy for defendant and commiserating with defendant on how Moya and his cohorts bungled Pamela’s murder. As the conversation went on, however, defendant confessed he wanted to kill Pamela himself, but “knew I’d never fuckin’ be able to get away with it. Never.”

Certainly, Smith was much more than a passive listener. That said, we cannot conclude that Smith’s questions or tactics were likely to procure an untrue statement or were otherwise improper. (See *Arizona v. Fulminante*, *supra*, 499 U.S. at p. 287 [coercion due to “credible threat of physical violence” if defendant did not confess].) Though at times Smith coaxed and prodded defendant when he hesitated to speak, it is clear from the record as a whole that defendant was neither compelled into revealing his role in Pamela’s murder, nor was he coerced into hiring a hitman to kill Moya. If the “‘decision is a product of the suspect’s own balancing of competing considerations, the confession is voluntary.’” (*U.S. v. Miller* (9th Cir. 1993) 984 F.2d 1028, 1031.)

*d. Defendant's Fourth Amendment Right
Against Unlawful Search and Seizure*

Defendant argues that pursuant to the Bail Reform Act of 1984 (18 U.S.C. § 3142(f)), he should have been released on bail after his arrest on the federal licensing charge. Instead, because he was denied bail and remained in custody, that detention was unlawful, and any statements he made to Smith during that detention should be suppressed under the Fourth Amendment. Even assuming defendant was erroneously denied bail, he fails to demonstrate that the remedy for any violation of the Bail Reform Act of 1984 is to suppress the subsequent confession of the defendant. (See *United States v. Leon* (1984) 468 U.S. 897, 916 [“exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates”]; see also *Hudson v. Michigan* (2006) 547 U.S. 586, 591 [“Suppression of evidence, however, has always been our last resort, not our first impulse”].) As such, we deny this claim.

e. Defendant's Right to Confrontation

On May 11, 2011, with one remaining witness left to testify at the guilt phase, the prosecution informed the trial court that they would *not* be calling Smith to the stand. The trial court permitted the prosecution to lay the foundation for the recorded conversation between Smith and defendant through Detective Abdul's testimony. Detective Abdul testified that he placed a recording device on Smith's person. After defense counsel recounted Smith's criminal history, Detective Abdul

replied he did not know “how extensive his criminal history was.” Detective Abdul denied offering Smith any advantage or reward for cooperating with authorities and also denied counseling Smith on what to say to defendant. However, the detective admitted he knew that at the time of the recorded conversation, Smith was awaiting sentencing and “facing a fairly substantial federal prison term” after pleading guilty to selling cocaine to an undercover agent.

After Detective Abdul testified, the jury heard (and later received a transcript of) the entirety of the recorded conversation. In admitting the transcript and tape of the recorded conversation into evidence, the trial court concluded Smith’s statements were not being offered for the truth of the matter asserted and were, therefore, admissible as nonhearsay. As to defendant’s recorded statements, the trial court found that while the statements constituted hearsay, they were admissible under the exception for an admission against penal interest.

Outside the presence of the jury, defense counsel raised a “standing objection”—i.e., referring to previously raised objections based on the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution—to the admission of the recorded conversation between Smith and defendant. Defense counsel also specifically raised a hearsay objection based on *Crawford, supra*, 541 U.S. 36 and requested that the court give a clarifying instruction on the jury’s permitted use of Smith’s statements. The trial court told defense

counsel to draft an appropriate instruction, which the court said it would take up later.

On appeal, defendant focuses on Smith's statements, the admission of which he claims violated his Sixth Amendment right of confrontation and the restrictions against testimonial statements. (*Crawford, supra*, 541 U.S. at p. 59; U.S. Const., 6th Amend. ["In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"]; see Cal. Const., art. I, §§ 7, 14 & 15.) Claiming prejudice, defendant asserts Smith's statements were the "force majeure" of the prosecution's case, without which there would be little evidence against defendant.

Generally speaking, a declarant's hearsay statement is testimonial if made "with a primary purpose of creating an out-of-court substitute for trial testimony." (*Michigan v. Bryant* (2011) 562 U.S. 344, 358.) Notwithstanding the lack of a comprehensive definition of "testimonial" (*Ohio v. Clark* (2015) ___ U.S. ___, ___ [135 S.Ct. 2173, 2179]), the high court has nonetheless emphasized that only hearsay statements that are "testimonial" are subject to the confrontation clause. (*Davis v. Washington* (2006) 547 U.S. 813, 821; *Crawford, supra*, 541 U.S. at p. 53 ["even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object"].) "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Davis v. Washington, supra*, 547 U.S. at p. 821;

see *People v. Cage* (2007) 40 Cal.4th 965, 984.) The admission of *nonhearsay* statements, it follows, “raises no Confrontation Clause concerns.” (*Tennessee v. Street* (1985) 471 U.S. 409, 414; see *Crawford, supra*, 541 U.S. at p. 59, fn. 9; *People v. Cage, supra*, 40 Cal.4th at p. 975, fn. 6; Evid. Code, § 1200.)

With this legal backdrop, we have set out a two-step inquiry to determine the admissibility of out-of-court statements in criminal cases: “The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term.” (*People v. Sanchez* (2016) 63 Cal.4th 665, 680; see *People v. Blacksher* (2011) 52 Cal.4th 769, 811 (*Blacksher*).)

In the context of an interrogation, as used in the colloquial and not legal sense, “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.’ . . . An interrogator’s questions, unlike a declarant’s answers, do not assert the truth of any matter.” (*Michigan v. Bryant, supra*, 562 U.S. at p. 367, fn. 11, quoting *Davis v. Washington, supra*, 547 U.S. at p. 822, fn. 1.) In that regard, the high court has also noted that statements made unknowingly to an informant or

statements between fellow prisoners are “clearly non-testimonial.” (*Davis v. Washington*, at p. 825, citing *Bourjaily v. United States* (1987) 483 U.S. 171, 181-184, *Dutton v. Evans* (1970) 400 U.S. 74, 87-89 (plur. opn. of Stewart, J).)

In this case, the prosecution maintained that statements by Smith, an undercover informant who befriended defendant in federal detention and prompted him to confess to Pamela’s murder, were not hearsay in the first place because Smith’s statements were not offered for the truth of the matter asserted. For example, in response to defense counsel’s argument that it was Smith who “leads and cons, and . . . directs” defendant to confess, the prosecution relied on Smith’s statements to show that Smith did not threaten or intimidate defendant into making incriminating statements. Smith’s statements were nonhearsay and admissible to put defendant’s “admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth.” (*U.S. v. Tolliver* (7th Cir. 2006) 454 F.3d 660, 666, fn. omitted.)

Though conceding that the statements were originally admitted for this nonhearsay purpose, defendant claims that the prosecution “repeatedly used Smith’s statements for the truth of the matter by arguing that the jury should find Smith’s taped statements to be credible.” We reject this claim. Contrary to defendant’s contention, by telling the jury, “[I]s there anything that makes you suspect that Shawn Smith is not being

truthful? No because you can hear every syllable that comes out of his mouth,” the prosecution was not vouching for Smith’s credibility. Impermissible vouching ““involves an attempt to bolster a witness by reference to facts *outside the record.*”” (*People v. Huggins* (2006) 38 Cal.4th 175, 206, italics added.)

Here, the prosecution urged the jury to focus on the admissible evidence: “I am not asking you to take Shawn Smith’s word for anything. I am not saying, yeah, Shawn Smith says that James Fayed said this. You can hear for yourself on the DVD, on the tape.” Moreover, the issue was not the truth or falsity of Smith’s statements—for instance, whether Smith actually knew a hitman named “Tony” who would kill Moya if defendant wanted—but whether Smith had made the statements. Out-of-court statements are inadmissible hearsay “only when they are offered for the same purpose as testimony of a witness on the stand *and therefore depend for probative value on the credibility of the declarant.*” (1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 5, p. 788, italics added.) In the strictest sense, Smith’s credibility was not at issue because his out-of-court statements were not offered for their truth.

It bears emphasis that both sides thoroughly discussed Smith’s credibility (or lack thereof) at trial. When cross-examining Detective Abdul, defense counsel underscored Smith’s “extensive criminal history,” and recounted each of Smith’s convictions. In closing argument, defense counsel called Smith: “Drug addict. Convicted. Felon in possession of firearms. Drunk

driver. Hit and run driver.” In conclusion, defense counsel submitted: “[T]his man is no good. This man is evil. And no good comes from evil.”

For its part, the prosecution was not “hiding” the fact that Smith was a convicted drug dealer. Far from vouching for Smith’s credibility, the prosecution conceded that Smith was not a trustworthy individual but was instead, in the prosecution’s words, “a crook and a criminal.” Nevertheless, as the prosecution emphasized, the recorded conversation spoke for itself: “It wouldn’t matter who was in the cell next to [defendant]. Mr. Fayed, it is his words that are being used against him.” Moreover, regarding any motive for Smith to lie, the jury heard that while Detective Abdul denied that he offered Smith any benefit in exchange for recording his conversation with defendant, Detective Abdul admitted he was aware that Smith was released early after cooperating with authorities.

f. Failure To Redact Recorded Conversation

In his pretrial motion in limine to exclude the entire recorded conversation with Smith, defendant alternatively requested that the trial court redact the statement if admitted. He challenged the conversation’s references to hiring a hitman to kill Moya, certain “inflammatory” remarks Smith made, and statements defendant made on other “extraneous matters,” such as defendant’s sex life, his meetings with the National Security Agency, and his admitted forgeries of Pamela’s will and counterfeit \$100 bills. The trial

court rejected defendant's request, noting that the entire recorded conversation had probative value: "Now you can make your argument that it is an Oscar award-winning performance and it was not worth anything, but I think the People are entitled to bring that, in all of its glory, in front of the jury."

On appeal, defendant argues that the trial court's ruling was erroneous and that the admitted evidence was extraneous, inflammatory, and ultimately prejudicial to him. "A trial court's decision to admit or exclude evidence is reviewable for abuse of discretion." (*People v. Vieira* (2005) 35 Cal.4th 264, 292.)

As their recorded conversation revealed, defendant and Smith spent much time talking about defendant hiring a purported hitman Smith knew named "Tony" to kill Moya. (See *ante*, at pp. 19-20.) Defendant argues that the evidence of the uncharged conduct about hiring a hitman to kill Moya was inadmissible because he was never charged with a postoffense crime against Moya. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405.) Even if admitted for a proper purpose to show defendant's consciousness of guilt, he maintains that the evidence was unduly prejudicial under Evidence Code section 352. The evidence, defendant adds, was also "insubstantial and undependable" because it was *Smith* who "encouraged and prodded" defendant to hire a hitman Smith knew to kill Moya. Finally, this evidence purportedly showing defendant's consciousness of guilt as to Pamela's murder was cumulative because the conversation already included defendant's

statements about killing Pamela. We reject this claim on all points.

Here, the prosecution's theory was that defendant perpetrated Pamela's murder by soliciting Moya (who in turn enlisted Marquez and Simmons) to kill Pamela. Thereafter, because of fears that Moya could turn on defendant and become a witness against him, defendant sought to hire another hitman, Smith's fictional friend, "Tony," to kill Moya; in that regard, Smith took care to portray Tony as dying of cancer and therefore not a risk to defendant after killing Moya. This evidence of defendant soliciting the murder of a potential witness is highly probative of defendant's guilt of Pamela's murder. Contrary to defendant's contention, this evidence was not cumulative. Rather, it showed a common plan in that defendant sought to kill whoever threatened him or his livelihood. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Though the record does not disclose how the two first discussed the idea of defendant hiring a hitman (see *ante*, at p. 18) and defendant appeared reluctant at times when discussing the plans, defendant's assertion that the evidence, therefore, was insubstantial or undependable lacks merit. Although Smith may have prodded or coaxed defendant to talk at certain points, defendant's initial hesitation gave way to extended diatribes of how Moya and others bungled previous attempts to kill Pamela and how defendant did not want to be worried that Moya would turn on him. Moreover, any hesitation could be attributed to defendant seeking Smith's assurances that Tony would be more

competent and effective than Moya. Defendant also admitted he would have killed Pamela himself but that he would never “get away with it. Never.”

We also reject defendant’s challenge to the other admitted evidence. Smith’s pejorative references to Mexicans and women were brief and were not inflammatory; in any event, defendant fails to show how *Smith’s* offensive statements—to which defendant showed little reaction—would prejudice defendant. Likewise, defendant fails to show how Smith’s bravado and graphic details about hiring hitmen to commit various murders would prejudice defendant. Finally, any extraneous details, such as the forging of the will, lent credibility to defendant’s admissions because he trusted Smith enough to reveal this information.

In sum, we conclude the trial court did not abuse its discretion in denying defendant’s motion to redact the statement and admitting it in its entirety.

2. Jury Misconduct

Before the close of the guilt phase and in the span of one week, the trial court received several anonymous e-mails and voicemail messages alleging various instances of jury misconduct. The trial judge later remarked she had “never experienced anything like this” in her over 22 years’ experience on the bench.

The events were as follows: On May 9, 2011, after getting a voicemail on the court’s telephone from an unnamed juror about possible juror misconduct, the

trial court questioned all jurors and alternate jurors, but no one acknowledged leaving the voicemail. Two days later, the court received a note from Juror No. 5 admitting that he left the voicemail. The note explained that he had observed Juror No. 11 and Alternate Jurors No. 1 and 4 discussing “at length” the testimony of witness Edwin Rivera, who gave aid to Pamela after she was stabbed. When questioned alone by the court, Juror No. 5 explained he heard the three talk about the graphic photos the prosecution showed to witness Rivera and described how brave Rivera was, but remarked how cruel defendant was and how his actions led to his wife’s death. Juror No. 5 said that what he heard would not affect his ability to be fair and impartial.

When the trial court questioned Juror No. 11 and Alternate Jurors No. 1 and 4 separately about this, all three steadfastly denied discussing the case with other jurors. The court subsequently questioned all jurors and alternate jurors about whether they (or anyone else) had formed any opinion about defendant’s guilt or innocence. Alternate Juror No. 3 stated she heard Juror No. 11 tell another juror, “Once I make up my mind, I don’t change it”; according to Alternate Juror No. 3, she thought that Juror No. 11 had “made up her mind that the defendant is guilty.” The trial court excused Juror No. 11 and Alternate Juror No. 1; the court refused to excuse Alternate Juror No. 4. The court opined that Juror No. 5 was likely referring to Alternate Juror No. 3 and not Alternate Juror No. 4 as having the conversation with Juror No. 11. After a random

drawing of the remaining alternate jurors, Alternate Juror No. 4 was chosen to replace excused Juror No. 11.

Next, on May 12, 2011, defense counsel informed the court he received an anonymous e-mail sent to his law firm e-mail address the night before. The e-mail expressed concern that defendant get a fair trial and urged the court to remind jurors not to express opinions or search the Internet about the case. The trial court told the jurors that whoever had sent the e-mail should contact the bailiff; however, no juror approached the bailiff. That same day, the court learned of a voicemail left by an anonymous female caller who explained that jurors, specifically mentioning Juror No. 6 and Juror No. 9, were continuing to look things up on the Internet. Also, Juror No. 3 later wrote a note to the court explaining there was an “air of suspicion and doubt among the jurors as we near deliberations” because of the anonymous e-mail. Because the voicemail appeared to be from a female, the trial court first questioned separately the remaining female jurors on the panel whether anyone had left the voicemail or had sent the e-mail to counsel. The court next questioned the male jurors only if they had sent the e-mail to defense counsel.

The trial court summarized the state of the record: “[E]very single juror and alternate juror has denied sending the e-mail to Mr. Werksman’s office, has denied leaving the voicemail on the court’s telephone.” It further noted that every juror and alternate juror indicated they had not heard any juror forming or

expressing opinions regarding the case. The court concluded there was not sufficient evidence to conclude that any of the jurors or alternate jurors has engaged in misconduct. The court added it was “satisfied that these jurors are prepared to live up to the oath that they all took initially and that they’ve reacknowledged today and that we’re going to move forward.”

Finally, on May 17, 2011, defense counsel brought in a letter he received, which enclosed a campaign brochure and cover letter from Prosecutor Alan Jackson, running for Los Angeles County District Attorney. The letter raised the concern that several jurors had received these materials. After first requesting the court ask the sheriff’s department to launch a formal investigation into these attempts to undermine the judicial process, Jackson agreed with defense counsel that the trial court should ask the jury about the mailer. After no juror replied that they had seen the mailer, the trial court explained that “there is someone out there that’s trying to cause trouble” and admonished the jury to be “extremely vigilant” and to let the court know if they receive any information or correspondence.

In summary, after its investigation, the trial court concluded there was one instance of jury misconduct, i.e., the reported conversation between Juror No. 11 and Alternate Juror No. 1 (and presumably Alternate Juror No. 3), in which Juror No. 11 expressed her opinion of defendant’s guilt. The trial court excused Juror No. 11 and Alternate Juror No. 1, and defendant does not challenge the trial court’s discharge of either juror. Nor does he repeat his claim that the court should have

also excused Alternate Juror No. 4. Rather, defendant asserts that the misconduct raised the presumption of prejudice and that the trial court's investigation into the misconduct was "incomplete." He suggests the inadequate investigation "is, itself, enough to warrant reversal." His claim in essence is that the presumption of prejudice was not rebutted. We reject defendant's claims as contrary to the facts and relevant law.

A criminal defendant is constitutionally entitled to an unbiased, impartial jury. (*People v. Weatherton* (2014) 59 Cal.4th 589, 598.) "Jurors must be admonished not to form or express any opinion about the case until the cause is finally submitted to them." (§ 1122, subd. (b).) Prejudgment 'constitute[s] serious misconduct' [citation], raising a presumption of prejudice. The presumption is rebutted 'if the entire record . . . indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant.'" (*Ibid.*)

"Whether and how to investigate an allegation of juror misconduct falls within the court's discretion. [Citation.] Although a court should exercise caution to avoid threatening the sanctity of jury deliberations, it must hold a hearing when it learns of allegations which, if true, would constitute good cause for a juror's discharge. [Citation.] Failure to do so may be an abuse of discretion." (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 69-70; see *People v. Espinoza* (1992) 3 Cal.4th 806, 822 [inquiry should be sufficient "to determine if the juror should be discharged and whether

the impartiality of other jurors had been affected”’”].) Grounds for investigating or discharging a juror may be based on the juror’s statements or conduct, including events which occur during jury deliberations and are reported by fellow jurors. (*People v. Lomax* (2010) 49 Cal.4th 530, 588.)

In this case, the alleged conversation took place before the jury deliberations began in the guilt phase. Rather than immediately question all the jurors about the voicemail, the trial court preferred to take what it described as a “conservative” approach to see if someone would acknowledge the call. Notwithstanding the court’s initial reticence, once Juror No. 5 revealed he had left the voicemail message, the trial court promptly investigated the allegations of juror misconduct. Far from perfunctory, the trial court’s questioning was thorough and careful, focusing on the nature and scope of the reported misconduct.

We conclude that any presumption of prejudice was rebutted; in other words, there was no substantial likelihood that any sitting or alternate jurors were actually biased against defendant. (*People v. Weatherton, supra*, 59 Cal.4th at p. 598.) In addition to excusing the two jurors, the trial court questioned the remaining jurors and alternate jurors, who all replied they were able to fulfill their duties as jurors and agreed not to form or express any opinion about the case until the matter was submitted.

Nevertheless, defendant asserts that Juror No. 5 “lied” about leaving the voicemail or observing

misconduct when questioned with the jury as a whole. Juror No. 5 later explained he felt embarrassed about raising his hand in front of everyone; he instead wrote a note and handed it to the bailiff on his way out of the courtroom. Except for his initial hesitation, Juror No. 5 was forthcoming and detailed in his account. Alternate Juror No. 3 presumably felt the same feelings of embarrassment when questioned in a group, but also gave a detailed account of the conversation when questioned individually. Indeed, after the questioning ended, defense counsel concluded that Juror No. 5 was “credible and honest” and likewise characterized Alternate Juror No. 3 as “honest.”

With respect to the remaining alleged incidents of juror misconduct—as reported in the anonymous voicemail from a female juror left on the court’s telephone, the anonymous e-mail sent to defense counsel, and the letter with the campaign mailer of prosecutor Jackson sent to defense counsel’s law firm—we conclude the trial court’s inquiry was sufficient and agree with its conclusion that these allegations of juror misconduct were not credible. For the same reasons, we reject defendant’s claim that the trial court abused its discretion in denying defendant’s motion for a new trial based on jury misconduct (§ 1181, subd. 3). (See *People v. Williams* (1988) 45 Cal.3d 1268, 1318 [“The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears’”]; see also *People v. Dykes* (2009) 46 Cal.4th 731, 809 [regarding motion for

new trial based on jury misconduct “reviewing court should accept the trial court’s factual findings and credibility determinations if they are supported by substantial evidence”].)

On appeal, defendant raises no new arguments regarding any alleged misconduct, except to note that the court’s assumption that defendant was responsible for the misconduct was “sheer speculation.” Because the trial court found no such misconduct, it is, of course, unnecessary for us to dispel whether defendant was the source.

3. Instructional Errors

a. Third Party Culpability

Before trial, defendant indicated he intended to call his sister, Mary Mercedes, as a witness to question her if she had attempted to solicit their sister Patty Taboga’s husband, Kurt, to kill Pamela. Defendant’s theory was that it was Mercedes and not defendant who solicited Pamela’s murder. Outside the presence of the jury, Mercedes invoked her Fifth Amendment right not to incriminate herself, after which the court declared her unavailable as a witness. Based on Mercedes’s unavailability, the trial court permitted defendant to question Taboga about her conversation with Mercedes.

Appearing under a defense subpoena, Taboga testified that Mercedes had called her sometime around May 2008, several months before Pamela was killed.

Mercedes asked Taboga if Taboga's husband, a police officer in Wyoming, would kill Pamela because "money was running out" due to defendant and Pamela's divorce. Taboga was shocked and told Mercedes that she had "lost her mind" and asked how Mercedes could call her with such a "horrible request." Taboga testified that after speaking for some time, Mercedes said she had a "temporary loss of sanity" and asked that Taboga not tell anyone. Taboga did not immediately tell defendant, Kurt Taboga, or anyone else, about the telephone conversation.

Several years later, on or about March 9, 2011, while defendant was in custody awaiting trial for Pamela's murder, Taboga wrote him a letter describing her conversation with Mercedes. Only then did defense counsel purportedly first become aware of this information. In explaining why she came forward just 32 days before testifying, Taboga said it was "the first time anyone's asked me anything." Taboga did not believe she had important information that "could free" defendant but felt "all the facts need to get out." On cross-examination, Taboga explained that after her conversation with Mercedes, she did not tell Pamela she was in grave danger because she believed Mercedes "wasn't going to do anything and she just lost her mind temporarily." She also revealed she had not spoken to Mercedes since 2010 after they had a heated argument.

After Taboga testified, defendant requested the court give a special instruction on third party culpability to highlight evidence suggesting that "other persons, among them Mary Mercedes, committed the

crimes charged” and that defendant “is entitled to an acquittal if the evidence raises a reasonable doubt in your mind as to the defendant’s guilt.” Although the prosecution agreed that Taboga’s testimony was admissible, it argued the proposed instruction was improper because it not only highlighted the significance of the evidence for the jury, but the instruction also suggested that if the jury believed Taboga, there is reasonable doubt as to defendant’s guilt; in short, the instruction “almost directs the verdict to not guilty or an acquittal.” After defense counsel orally suggested possible revisions to their special instruction, the prosecution countered that no such instruction was required because CALJIC No. 2.90 already explains that the prosecution has the burden of proof and that it was up to the jury to determine what significance and weight to give to any evidence.

The trial court agreed with the prosecution and refused to give the jury an instruction on third party culpability in any form. In doing so, the court noted that there was no such standard instruction in either CALCRIM or CALJIC. Though the court made clear that defendant could make the argument that Mercedes and not defendant solicited Pamela’s murder, it pointed out that the jury “didn’t hear any evidence that Mary Mercedes induced Jose Moya at all to commit this crime. There was no evidence of that.” Defendant, however, countered that records showed that Mercedes had called Moya shortly before Pamela was killed and that the rental car used by Moya, Simmons, and

Marques to allegedly commit the murder was rented for and used by Mercedes's son.

On appeal, defendant argues there was sufficient evidence to support a third party culpability instruction. He maintains that the trial court erroneously refused to give the instruction because it was not enumerated in CALJIC or CALCRIM. Defendant points out that the parties had stipulated that third party culpability evidence was admissible.

As noted, the trial court *did* admit defendant's evidence of third party culpability. Based on this evidence, defense counsel in closing argument emphasized Patty Taboga's "credible" testimony that Mercedes had asked if Taboga's husband would kill Pamela. Counsel told the jury: "Now you heard Mary had motive. Mary had opportunity. Mary had intent." She was "totally embedded and totally vested in the success or failure of Goldfinger."

Even though the trial court ruled the evidence was admissible, it was not required to give defendant's proposed special instruction on third party culpability. (See *People v. Hartsch* (2010) 49 Cal.4th 472, 500 [pinpoint instruction not required if argumentative, duplicative, or not supported by substantial evidence].) As the trial court concluded, defendant's special instruction as originally drafted was argumentative and improper. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135 [argumentative instruction invited jury to draw inferences favorable to defendant from specified evidence on disputed question of fact].) The court's reasoning for

refusing the instruction, contrary to defendant's suggestion, was not based primarily on the lack of a standard instruction in CALJIC or CALCRIM. Finally, "because the reasonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party's liability must be considered in weighing whether the prosecution has met its burden of proof," the failure to instruct on third party culpability was not prejudicial. (*People v. Hartsch, supra*, 49 Cal.4th at p. 504)

b. Termination of Liability of Aider and Abettor

At defendant's request and over the prosecution's objection, the trial court instructed the jury on CALJIC No. 3.03 ("Termination of Liability of Aider and Abettor"). The instruction provided, in part, that to withdraw from participation of a crime and avoid liability as an aider and abettor, a defendant "must do everything in his power to prevent" the crime's commission.

In closing argument, defense counsel pointed out that before Pamela was murdered, defendant had repeatedly demanded Moya give back the \$25,000 defendant had already paid him after Moya missed four previous opportunities to kill Pamela, i.e., "four clean hits" defendant admitted that he had "set up." The prosecution countered that under CALJIC No. 3.03, defendant "has to do *everything in his power, everything in his power, everything in his power* to prevent the commission of the murder. So let's look at what Mr.

Fayed did to prevent the murder. Nothing. He didn't do anything. Not a darn thing."

On appeal, defendant argues that CALJIC No. 3.03 erroneously stated that a defendant must do "everything in his power" to withdraw as an aider and abettor in the crime, rather than requiring a defendant to do what was "practicable" or "reasonable," as suggested in the corresponding CALCRIM instruction. (See CALCRIM No. 401 [defendant must do "everything *reasonably within his or her power* to prevent the crime from being committed" (*italics added*)].) Defendant points out that in 2005, the Judicial Council endorsed CALCRIM and urged courts to use CALCRIM instead of CALJIC. The Attorney General counters that defendant forfeited the argument by failing to object that CALJIC No. 3.03 misstated the law.

Even assuming that defendant did not forfeit the claim that CALJIC No. 3.03 misstates the law, his claim lacks merit. In 2008, three years after the Judicial Council's adoption and endorsement of CALCRIM, this court explained that CALJIC No. 3.03 "is a correct statement of the law." (*People v. Richardson* (2008) 43 Cal.4th 959, 1022; see *People v. Lucas* (2014) 60 Cal.4th 153, 294.) Further, even under CALCRIM No. 401 (defendant must do "everything *reasonably* within his . . . power"), defendant does not assert, nor is there anything in the record to suggest, that defendant did *anything*—apart from demanding his money back from Moya—to stop the commission of Pamela's murder. Thus, his withdrawal claim would fail under either standard. Even assuming instructional error,

defendant fails to show prejudice. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 495 [instructional error is harmless when, beyond a reasonable doubt, it did not contribute to the verdict].)

On a related point, defendant underscores that while the trial court used this CALJIC instruction for aiding and abetting, it used CALCRIM No. 521 for first degree murder. He argues that the intermingling of CALJIC and CALCRIM instructions on this issue was improper. We conclude defendant forfeited this claim by failing to object on this ground and that the claim in any event lacks merit. (*People v. Beltran* (2013) 56 Cal.4th 935, 944, fn. 6 [“trial court may modify any proposed instruction to meet the needs of a specific trial, so long as the instruction given properly states the law and does not create confusion”].)

c. Withdrawal from Conspiracy

On the charge of conspiracy to commit murder, the trial court instructed the jury on seven overt acts allegedly committed for the purpose of furthering the object of Pamela’s murder, including defendant’s act of paying Moya \$25,000 to arrange the murder of Pamela. At defendant’s request, the court instructed the jury on CALJIC No. 6.20 (Withdrawal from Conspiracy), which provides in pertinent part: “In order to effectively withdraw from a conspiracy, there must be an affirmative and good-faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has knowledge. [¶] If a member

of a conspiracy has effectively withdrawn from the conspiracy, he is not thereafter liable for any act of the co-conspirators committed after his withdrawal from the conspiracy, but he is not relieved of responsibility for the acts of his co-conspirators committed while he was a member.”

On appeal, relying on *People v. Russo* (2001) 25 Cal.4th 1124 (*Russo*), defendant argues that the trial court erroneously failed to instruct the jury that it had to unanimously decide which specific overt act was committed before defendant could no longer withdraw from the conspiracy.

As relevant here, a “jury need not agree on a specific overt act as long as it unanimously finds beyond a reasonable doubt that some conspirator committed an overt act in furtherance of the conspiracy.” (*Russo, supra*, 25 Cal.4th at p. 1128.) In *Russo*, we raised the possibility that “some form of a unanimity instruction” may be necessary if there was evidence that a defendant had withdrawn from the conspiracy. (*Id.* at p. 1136, fn. 2.) In that instance, “the court might have to require the jury to agree an overt act was committed before the withdrawal.” (*Ibid.*) We declined to address the question because no such circumstance existed in the case. (*Ibid.*)

Defendant’s reliance on *Russo* is misplaced. There is no dispute that defendant’s alleged withdrawal from the conspiracy occurred after the first overt act took place. By demanding that Moya *return* the \$25,000 defendant had already paid him to kill Pamela—which

defendant asserts supports his claim that he withdrew from the conspiracy—defendant effectively concedes that he committed the first overt act, i.e., payment to Moya in furtherance of the conspiracy to commit murder. “[O]nce an overt act has been committed in furtherance of the conspiracy the crime of conspiracy has been completed and no subsequent action by the conspirator can change that.” (*People v. Sconce* (1991) 228 Cal.App.3d 693, 702.);

d. CALJIC No. 2.23

After the jury heard the recorded conversation between defendant and Smith, defendant asked the trial court to instruct the jury on CALJIC No. 2.23 with respect to Smith. This instruction, which concerns the believability of a witness convicted of a felony, provides in part that the jury may consider “[t]he fact that a witness has been convicted of a felony” as “one of the circumstances . . . in weighing the testimony of that witness.” The trial court told defense counsel he could still make his argument but refused to give CALJIC No. 2.23 because Smith “did not testify as a witness.” Defendant requested the same instruction at the penalty phase, and the court again refused. On appeal, defendant argues that the trial court applied an unduly narrow definition of “witness” and that the prosecution effectively treated Smith as a witness because it purportedly sought to bolster and vouch for Smith’s credibility.

As previously discussed (see *ante*, at p. 24), the prosecution did not improperly vouch for Smith’s credibility, and we reject defendant’s claim in this regard. Resolution of this issue, however, does not depend on the meaning of a “witness” and whether that term refers only to individuals who testify at trial. As a general matter, declarants whose hearsay statements are admitted but do *not* testify at trial may be subject to impeachment. (See Evid. Code, § 1202 [“Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing”].) Though this court has not addressed whether Evidence Code section 1202 permits admission of prior felony convictions to impeach the hearsay statements of a nontestifying declarant, we noted that lower courts have held that such evidence “falls within the purview of that provision.” (*People v. Brooks* (2017) 3 Cal.5th 1, 52 [citing cases].)

This line of cases does not help defendant, in any event. A declarant’s credibility is “‘important only if the prosecution was using his statement to prove the truth of its contents—in other words, his credibility mattered only if his statement was in fact inadmissible hearsay.’” (*People v. Hopson* (2017) 3 Cal.5th 424, 434; see *People v. Curl* (2009) 46 Cal.4th 339, 361-362.) As we have explained, Smith’s statements were clearly nonhearsay; they were not offered for the truth of the matter stated. Moreover, we cannot see how defendant could have been prejudiced without this jury instruction—both defense counsel and the prosecution told

the jury that Smith was a convicted felon. (See *People v. Smith* (2018) 4 Cal.5th 1134, 1171.)

e. CALJIC No. 2.06

Over defense counsel's objection, the trial court instructed the jury with CALJIC No. 2.06, which permitted the jury to consider whether defendant attempted to suppress evidence, i.e., wanting to kill Moya as a witness, as "a circumstance tending to show consciousness of guilt." In closing argument, the prosecution argued that defendant wanted to kill Moya to "tie up those loose ends" and "to avoid sitting in this chair for the murder of his wife." On appeal, defendant argues that CALJIC No. 2.06 was unnecessary and prejudicial to the defense because the trial court already instructed the jury on circumstantial evidence. (CALJIC Nos. 2.00, 2.02.) We have repeatedly rejected the claim that CALJIC No. 2.06 is repetitive of other jury instructions on circumstantial evidence. (*People v. Friend* (2009) 47 Cal.4th 1, 52-53.) We do so again here.

4. Violations of Defendant's Fourth Amendment Right To Be Free from Search and Seizure

Defendant made various pretrial motions to suppress evidence seized during several searches. He unsuccessfully argued that his Fourth Amendment right was violated based on (1) the warrantless search and seizure of his cell phone, (2) the issuance of a search warrant based on an intercepted telephone conversation between defendant's investigator and Moya, and

(3) the issuance of a search warrant of defendant's property (including his laptop computer) without probable cause. Contending that the trial court erred in refusing to suppress the evidence, defendant repeats those claims on appeal. We discuss each in turn.

"The Fourth Amendment to the federal Constitution prohibits *unreasonable* searches and seizures." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 365.) A warrantless search is per se unreasonable. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219.) "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." (*Brigham City v. Stuart* (2006) 547 U.S. 398, 403.) One such exception, as relevant here, is a search incident to arrest. (*United States v. Robinson* (1973) 414 U.S. 218, 224.) Another exception, also relevant here, is the inevitable discovery exception. (*Nix v. Williams* (1984) 467 U.S. 431, 440-450; *People v. Robles* (2000) 23 Cal.4th 789, 800-801.)

Section 1538.5 provides a defendant the "sole and exclusive" means before trial to suppress evidence obtained as a result of a search or seizure. (§ 1538.5, subd. (m); see *People v. Williams* (1999) 20 Cal.4th 119, 127.) "[D]efendants have the burden of (1) asserting the search or seizure was without a warrant, and (2) explaining why it was unreasonable under the circumstances." (*Williams*, at p. 129.) However, the burden is on the prosecution to prove evidence seized during a warrantless search falls within a recognized exception. (See *People v. Willis* (2002) 28 Cal.4th 22, 36; *Williams*,

at p. 136.) Thereafter, a defendant can respond by pointing out any inadequacies in that justification for warrantless search. (*Williams*, at p. 136.)

a. Patdown Search of Defendant and Search Incident to Arrest for Data on the Cell Phone

On July 29, 2008, the day after Pamela was killed, defendant called the Ventura County Sheriff's Office to request a welfare check on his nine-year-old daughter, J.F., who lived with Pamela in Camarillo. Earlier that morning, an LAPD detective had gone to the Camarillo residence to tell Pamela's daughters of their mother's death. After receiving word that defendant was heading over to the Ventura County Sheriff's Office with his attorneys, the detective met defendant there. He told defendant that he was under arrest for Pamela's murder and that he would be transported to the LAPD West Los Angeles Station. Officers searched defendant incident to arrest and took his Motorola cell phone, which they placed in the front seat of the vehicle. They handcuffed defendant and placed him in the backseat.

The LAPD detective drove defendant some 45 miles from Camarillo to the West Los Angeles Police Station. At the station, defendant invoked his right to remain silent and refused to speak to investigators. An LAPD officer testified that he obtained and possessed defendant's cell phone for an hour and that he "manipulated" the phone to find the number associated with the phone before handing the cell phone to an FBI

agent. Defendant was released two hours later without his Motorola cell phone. Officers returned the cell phone the following Friday when they were serving a search warrant at defendant's home.

On October 9, 2009, in addition to other defense motions discussed below, defendant filed a pretrial motion under section 1538.5 to suppress, arguing the evidence was seized from the illegal search of his Motorola cell phone on July 29, 2008. The pretrial hearing on the suppression motion took place on June 10, 2010. The trial court agreed with the prosecution that the only information officers took from that cell phone was the number itself. With this cell phone number, the LAPD in conjunction with the FBI Fugitive Task Force, sought and obtained a court order authorizing the use and installation of wiretap devices for the "Subject Telephone Number."

After hearing testimony from LAPD detectives, the trial court concluded the search of the cell phone was "illegal," even if it was incident to a valid arrest. However, it agreed with the prosecution that because there were different sources from which to discover defendant's cell phone number, including Pamela's contacts in her cell phone, the evidence was admissible based on the inevitable discovery doctrine.

On appeal, defendant makes a number of corollary claims challenging the search and his arrest on July 29, 2008.⁷ Ultimately, the Attorney General concedes

⁷ For example, he contends that police investigative reports actually classified defendant as being detained, not arrested, and

that the trial court was likely correct that the search of defendant's Motorola cell phone was unlawful. (See *Riley v. California* (2014) 573 U.S. 373, 387 ["[o]nce an officer has secured a phone and eliminated any potential physical threats . . . data on the phone can endanger no one"].) Nevertheless, as the Attorney General underscores, even if the search or arrest, or both, were unlawful, the evidence may nevertheless be admissible under the exception of inevitable discovery. (See *Nix v. Williams, supra*, 467 U.S. 431; *People v. Robles, supra*, 23 Cal.4th at pp. 800-801.)

"Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine 'is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.' (*Murray v. United States* (1988) 487 U.S. 533, 539 [108 S.Ct. 2529, 2534, 101 L.Ed.2d 472].) The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct." (*People v. Robles, supra*, 23 Cal.4th at p. 800; see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 62 [rule

that authorities conducted an unlawful patdown at the Ventura County Sheriff's Station because there was no indication that defendant was armed and dangerous. It is unnecessary to discuss these claims relating specifically to the underlying search and seizure because we conclude that the inevitable discovery doctrine applies.

ensures prosecution “is not placed in a better position” absent the illegality but “does not require it be put in a worse one”].)

The inevitable discovery rule “applies only to evidence obtained as the indirect product, or fruit, of other evidence illegally seized.” (*Hernandez v. Superior Court* (1980) 110 Cal.App.3d 355, 361.) The prosecution must prove “by a preponderance of the evidence that the information inevitably would have been discovered by lawful means.” (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 62; *People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 681 [“The test is not one of certainty, but rather of a reasonably strong probability”].) “As this is essentially a question of fact, we must uphold the trial court’s determination if supported by substantial evidence.” (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1040.)

At the suppression hearing, the prosecution presented evidence that shortly after police recovered Pamela’s cell phone at the crime scene, they accessed the phone’s list of contacts, which included the cell phone number for defendant. The police also “obtained independently” defendant’s cell phone number from a search of Moya’s cell phone. Moreover, the search of Goldfinger’s office led to defendant’s cell phone number. In light of these other sources leading to the discovery of defendant’s cell phone number, we conclude that substantial evidence supports the trial court’s finding that the inevitable discovery rule applied and that the evidence of defendant’s cell phone number was

admissible. (See *People v. Carpenter*, *supra*, 21 Cal.4th at p. 1040.)

b. Motion to Quash Search Warrant Dated July 31, 2008

On July 29, 2008, Detective Spear sought and obtained a warrant to search the premises at the Happy Camp Ranch. In the supporting affidavit, Detective Spear stated that his review of the video surveillance of the parking lot where Pamela was killed showed the alleged suspects fleeing in a red SUV rented by Goldfinger. The affidavit further explained that a suspect had left footprints at the crime scene, which would have been transferred to the vehicle. Detective Spear averred he believed the vehicle was at defendant's residence.

Detectives executed the search warrant on July 29, and found two locked safes that defendant refused to open. On July 30, after locating the red SUV at the Avis Rent A Car location, detectives searched and gathered evidence from the vehicle. Defendant did not seek to suppress evidence seized on either July 29 or July 30. On July 31, Detective Spear sought another warrant to search the premises at the Happy Camp Ranch. The supporting affidavit "incorporated . . . the entirety of" the July 29 search warrant. It also included an "amendment," adding "personal computers, laptop computers, hard drives, electronic equipment used to store files or written documentation, thumb drives, locked safes, secured lock boxes, authorization

of forced entry into locked safes, financial records, soil samples from outside the residence,” among the items to be collected. The amendment also sought “samples of saliva from James Fayed for comparison of evidence collected during the investigation.”

To justify the search for these additional items, the amendment explained that during an interview with Pamela’s adult daughter, Desiree, she revealed that “her mother kept records and documentation that incriminates James Fayed on her personal computer. Desiree [] advised that the computers that her mother used are in her father’s residence and contain valuable information.” Detectives obtained a search warrant on July 31, which was executed on that day. During the search, authorities seized several laptop computers, over \$1 million worth of gold bars, and numerous computer thumb drives. They also found \$24,980 in cash wrapped in plastic in defendant’s dresser drawer and another \$36,000 in cash in a locked metal briefcase located in defendant’s closet.

Defendant moved to quash the warrant, and suppress evidence seized during the search. He alleged that there was no probable cause to issue the warrant and that the warrant was insufficient on its face. For instance, Desiree’s statement that there was incriminating evidence on Pamela’s personal computer was conclusory and “not supported by a single fact in the affidavit.” Also, the warrant was overbroad because while the incriminating evidence was purportedly on Pamela’s laptop computer, the list of search items effectively allowed officers to “search for anything—

anywhere, with no specificity.” Further, because detectives had located and searched the red SUV the day before, there was no longer a need to search the premises for the vehicle. Finally, the affidavit on the second warrant contained no facts to support that *new* evidence had materialized *after* the first search; thus, the information in the initial affidavit was too “stale” to justify the second search.

The trial court denied defendant’s motion to quash. It found probable cause for the issuance of the warrant. The court further found that, even if there was no probable cause, the officers acted in good faith by obtaining a warrant signed by a magistrate before conducting the search. For reasons that follow, we conclude that the trial court did not err in denying defendant’s motion to quash.

When reviewing issues relating to the suppression of evidence derived from governmental searches and seizures, we defer to the court’s factual findings, express or implied, where supported by substantial evidence. (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1212.) To determine whether, based on the facts so found, a search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. (*Macabeo*, at p. 1212.) We conclude that based on the totality of the circumstances, the trial court correctly found probable cause for the issuance of the July 31 search warrant. (See *Illinois v. Gates* (1983) 462 U.S. 213, 230.)

First, defendant's challenge to Desiree's statement on the ground it was conclusory and lacking factual support to justify probable cause is meritless. As the trial court found, Desiree was presumptively reliable as a "citizen informant." (See *People v. Hill* (1974) 12 Cal.3d 731, 757.) Given her relationship to Pamela and defendant, which was clearly set out in the affidavit, Desiree would naturally be knowledgeable about Pamela's activities and would be aware that Pamela and defendant were going through a contentious divorce.

As the affidavit explained, Desiree told investigators that her mother kept documentation "on her personal computer" and she stated that "computers that her mother used are in her father's residence." Whether Pamela used one or several computers in defendant's residence, it was reasonable to describe the items in "generic terms," thus subjecting them to a "blanket seizure." (*U.S. v. Lacy* (9th Cir. 1997) 119 F.3d 742, 746; see *U.S. v. Kimbrough* (5th Cir. 1995) 69 F.3d 723, 727 ["generic language is permissible if it particularizes the *types* of items to be seized"].) Contrary to defendant's claim, the search warrant was not overbroad because it listed "personal computers" and "laptop computers" as search items and did not limit it specifically to *Pamela's* laptop computer. Authorities had no way of knowing which computer, or how many for that matter, belonged to Pamela, or which ones she may have used. It was acceptable for the search warrant to include such generic terms to describe the items. (*U.S. v. Lacy*, at p. 746.)

Further, defendant's related claim that the July warrant was "moot" because the red SUV was already located and searched is likewise meritless. After locating the SUV, there was arguably more, not less, reason to search defendant's residence because evidence began tying defendant to the murder, i.e., the recovered vehicle connected to the murder had been rented by defendant's company, Goldfinger. The supporting affidavit expressly noted that authorities had collected physical evidence from it. Armed with new physical evidence from the SUV, authorities sought soil samples outside the residence and samples of defendant's saliva "for a comparison of evidence collected during the investigation." Though just beginning, the investigation was intensifying as each day passed.

Moreover, the July 31 warrant was not based solely on obtaining evidence related to the vehicle used in the murder. The warrant also sought Pamela's computers that Desiree averred were in defendant's residence. It further sought to recover evidence from two locked safes that defendant refused to open during the July 29 search. Rather than seizing the safes first and asking for a warrant later, detectives followed proper procedure by first obtaining a magistrate's determination of probable cause.

Similarly, defendant's argument that the information in the initial affidavit became stale because authorities failed to seize items during the first search is without legal or factual support. (See *People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at p. 370 [whether warrant establishes "it is substantially

probable the evidence sought will *still* be at the location at the time of the search”].) In this case, Pamela was killed on July 28, 2008. The following day, detectives obtained the first warrant to search the premises on defendant’s Moorpark ranch. The day after that, on July 30, detectives located the red SUV, and recovered physical evidence from the vehicle. In the brief three-day period between the crime and the second search on July 31, it is substantially probable that evidence would still be located at defendant’s premises. (*Ibid.*)

Based on the foregoing, we reject defendant’s claim that the trial court erroneously denied defendant’s motion to quash the July 31 search warrant.

c. Admission of Evidence Derived from Recording of Defense Investigator’s Questioning of Witness

Early in the murder investigation, LAPD detectives applied for court-authorized wiretaps targeting the residential “hardline” (or landline) telephone and two cell phones used by defendant’s sister, Mary Mercedes, and a residential hardline telephone used by codefendant Jose Moya. A magistrate approved two wiretap applications on August 15, 2008 and August 22, 2008, respectively, and granted one extension on September 13, 2008.

As statutorily required, authorities provided the court several six-day reports containing summaries of some intercepted calls and updates on the investigation. On August 29, 2008, authorities intercepted a call

Moya made from his hardline telephone to defense investigator Glen LaPalme. During the 19-minute telephone conversation, the two went over telephone records detailing calls that Moya had made and received on his cell phone. Moya had previously told detectives he reported the cell phone lost or stolen the day after Pamela's murder. When Moya admitted to LaPalme he could not remember exactly when he lost the cell phone, LaPalme suggested: "Now if you lost, I mean if you lost the phone, like, over that weekend before all this shit hit the fan then at least we would, maybe it was somebody else that had the phone, you know what I'm saying?"

Later in the call, LaPalme told Moya he had "no doubt in my mind that [the LAPD] have the vehicle, the SUV, and they're probably doing all sorts of forensic examinations for hair, skin, all that crap, and of course there were people who were using it so you're going to find everybody's hair and skin there." Moya replied, "Except for Pam." When LaPalme indicated he did not hear what Moya had said, Moya told him: "No, except for Pam's, it wouldn't be in there, it shouldn't be in there."

On or about September 10, 2008, Detective Abdul sought a warrant to search Moya's residence at the Happy Camp Ranch in Moorpark. In the supporting affidavit, Detective Abdul recounted the intercepted call on August 29 and opined that Moya's statement that evidence of Pam's skin and hair should not be in the SUV, "[t]his statement in itself proves Moya has knowledge of the murder." Detective Abdul averred

that he “believes evidence will be recovered from Moya’s residence that will link him to the murder of Pamela Fayed.” On September 10, a magistrate approved the warrant to search the Happy Camp Ranch. The list of items to be searched included “[u]nknown type sharp objects . . . consistent with the injuries sustained by Pamela Fayed,” cell phones, and Moya’s bank records and deposit slips. During the search, authorities recovered three cell phones, which defendant later described as evidence “crucial to the government’s theory of the case.”

Before trial, on October 9, 2009, defendant filed a motion to traverse the affidavit, a motion to suppress the evidence obtained in violation of wiretap provisions, and a motion to dismiss for violation of due process. Defendant argued that the LAPD was well aware that LaPalme was a private investigator working for the defense and yet continued to record the call between him and Moya. Because LaPalme was conducting witness interviews for the defense, defendant argued the conversation between LaPalme and Moya was protected under the work product doctrine. Thus, the affidavit’s failure to disclose that LaPalme was a defense investigator was an egregious omission, one that hindered the “crucial, inference-drawing powers of the magistrate.” (*People v. Kurland* (1980) 28 Cal.3d 376, 384.)

The trial court denied defendant’s motions. It rejected defendant’s argument that the attorney work product doctrine protected the intercepted conversation between LaPalme and Moya. Moreover, it found

“ample probable cause” to support the search warrant even if the challenged information were not included. The court also agreed with the prosecution that there was no material omission in the affidavit to the magistrate. On appeal, defendant raises similar arguments as below. He claims that LaPalme and Moya’s conversation was protected under the work product doctrine and that it should be considered excised from the affidavit.

Even assuming the intercepted call was privileged and should be deemed omitted from the affidavit, we conclude the affidavit’s remaining contents supported probable cause. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1297 (*Bradford*).) In general, statements contained in an affidavit of probable cause that are proven to be false or reckless by a preponderance of the evidence, should be considered excised from the affidavit. (*Ibid.*) As relevant here, “[i]f the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to that warrant must be suppressed. [Citation.] ¶ A defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause. [Citations.] Pursuant to [California Constitution, article I,] section 28 [, subdivision] (d), materiality is evaluated by the test of *Illinois v. Gates*, [*supra*,] 462 U.S. 213, . . . which looks to the totality of the circumstances in determining whether a warrant affidavit

establishes good cause for a search.” (*Bradford, supra*, 15 Cal.4th at p. 1297.)

In this case, even without considering LaPalme and Moya’s conversation, the affidavit’s remaining contents provided probable cause for issuance of the warrant. The affidavit included evidence that Moya had access (both before and after the murder) to the red SUV seen leaving the murder scene, statements from defendant’s employee who told detectives Moya was not at the ranch at the time of Pamela’s death, and statements from another employee that said defendant directed him to give Moya \$24,000 sometime in mid-July (several weeks before the murder). Based on the totality of the circumstances, the trial court properly concluded the affidavit established probable cause to support the search warrant. (*Bradford, supra*, 15 Cal.4th at p. 1297.)

5. *Evidentiary Rulings*

A trial court has broad discretion to admit or exclude evidence. We will not disturb its ruling unless there is a showing the court abused this discretion by acting in an arbitrary, capricious, or patently absurd manner resulting in a miscarriage of justice. (*People v. Vieira, supra*, 35 Cal.4th at p. 292.) Unless a defendant elaborates or provides a separate argument for related constitutional claims, we have declined to address any boilerplate contentions. (*People v. Mills* (2010) 48 Cal.4th 158, 194 [“The “routine application of state

evidentiary law does not implicate [a] defendant's constitutional rights''").)

On appeal, defendant challenges a number of evidentiary rulings the trial court made. We discuss each in turn.

a. Admission of Government Evidence

(1) Evidence of federal indictment against defendant

Before trial, defendant filed an in limine motion to exclude evidence of the February 26, 2008, federal indictment against him for operating an unlicensed money transmitting business (18 U.S.C. § 1960), an indictment which was originally filed under seal. Defendant sought to specifically exclude any reference to him as a terrorist, which was purportedly included in an LAPD summary report and later shared with the FBI. The terrorist reference was not included in the one-sentence federal indictment. The federal government later dismissed the indictment on September 15, 2008, the same day the prosecution filed a complaint against defendant and Moya for Pamela's murder.

Defendant's in limine motion alleged that any evidence of uncharged conduct underlying the federal indictment constituted inadmissible character evidence (Evid. Code, § 1101, subd. (d)) and was not otherwise admissible to prove motive, common plan, or identity. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.) Because it was undisputed that the federal indictment remained sealed until after Pamela's murder, defendant

argues that it could *not* have provided a motive to kill Pamela to prevent her from cooperating with federal authorities.

The trial court denied defendant's in limine motion to exclude evidence of the federal indictment and investigation. It concluded such evidence was relevant to defendant's motive to kill Pamela. It further rejected defendant's claim of prejudice under Evidence Code section 352, noting that the federal indictment "pales in comparison" to the murder for hire conspiracy charge and suggested that a limiting instruction would address defendant's concerns.

Focusing on the "lack of similarity of motive or direct connection" between the money licensing violation and the murder charge, defendant argues that evidence of the dismissed federal indictment constituted inadmissible character evidence. (See Evid. Code, § 1101, subd. (a).) He maintains that the prosecution failed to show that Pamela agreed to cooperate with federal authorities (and that defendant knew Pamela intended to cooperate), which the prosecution argued provided defendant's motive to kill Pamela. For reasons that follow, we deny defendant's evidentiary claim.

Though inadmissible to prove a defendant's criminal propensity, evidence of a defendant's prior uncharged misconduct is admissible if relevant to prove a material fact at issue in the case, "such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." (Evid. Code,

§ 1101, subd. (b).) “In general, we have explained that “[t]he admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.” (*People v. Kelly* (2007) 42 Cal.4th 763, 783.) As pertinent here, “the probative-ness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus.” (*People v. Demetru-las* (2006) 39 Cal.4th 1, 15.) It is enough that the “‘motive for the charged crime arises simply from the commission of the prior offense.’” (*People v. Thompson* (2016) 1 Cal.5th 1043, 1115 [evidence of wife’s financial fraud relevant to show motive for killing her husband].)

Here, the federal indictment was a key piece of evidence that helped explain the development of defendant’s motive to kill Pamela. Along with the indictment, the investigation related important details of events leading up to Pamela’s murder. The prosecution first described Pamela becoming worried about Goldfinger’s future in light of the federal investigation. Despite defendant’s fierce opposition, she sought to obtain a money transmitting license and withdrew at least \$400,000 from the company’s account. The prosecution explained how defendant was furious at Pamela for taking the money, trying to secure a money transmitting license despite defendant’s insistence that they did not need it, and giving federal authorities a reason

to closely scrutinize Goldfinger. After filing for divorce, defendant banned Pamela from Goldfinger, alleging that she had embezzled money from the company. Finally, in an e-mail defendant had sent to his friend, Melanie Jackman, complaining about Pamela, he wrote: "I have been letting her get away with this shit for years, and enough is enough."

The prosecution's theory on why defendant killed Pamela, in short, was not based simply on her possible cooperation with federal authorities; rather, defendant's increasing animosity and bitterness towards Pamela came to a head when Pamela's actions threatened to upend their highly profitable business. The circumstantial evidence, as the prosecution underscored, was "overwhelming."

Furthermore, whether there was evidence of an actual agreement that Pamela would cooperate with the federal authorities or whether Pamela and defendant knew about the federal indictment itself are both beside the point. Defense counsel conceded that defendant and Pamela both were aware that federal authorities were investigating Goldfinger. And while there was no evidence that Pamela had an agreement she would testify against defendant, the prosecution argued that defendant killed Pamela "to *prevent* her from making an agreement, to prevent her from doing that. That's our point."

Moreover, the record reveals evidence that Pamela at least intended to cooperate with federal authorities. Evidence further suggested that defendant was at

least suspicious, if he did not actually know, of Pamela possibly incriminating him in the federal case. “ [T]o be admissible, evidence need not absolutely confirm anything. It is axiomatic that its weight is for the jury.” (*People v. Peggese* (1980) 102 Cal.App.3d 415, 420.) Finally, as a practical matter, because the jury heard defendant’s recorded jailhouse conversation with Smith, some mention of the federal indictment was required to explain why defendant was in federal custody in the first place.

We conclude that the probative value of evidence of the dismissed federal indictment and related investigation outweighed any prejudice from admitting the evidence. Further, the trial court instructed the jury that evidence of uncharged misconduct may only be considered “for the limited purpose of determining, if it tends to show, that the defendant had a motive to commit the charged crimes.” (CALJIC No. 2.50.) We presume the jury followed the trial court’s instruction absent evidence to the contrary. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 821.)

(2) Testimony of Carol Neve

Regarding evidence of Pamela’s intent to cooperate with federal authorities on the Goldfinger investigation, the prosecution proffered the testimony of witness Carol Neve, a longtime friend and confidante of Pamela’s. After the parties vigorously debated the issue, the trial court prohibited the prosecution from eliciting Neve’s testimony that Pamela told Neve she

was going to cooperate with the federal authorities. The trial court concluded the prosecution failed to show the link between Pamela's intent to cooperate and defendant's knowledge of that intent, which the trial court described as a "pretty pivotal issue in this case." However, the trial court permitted Neve, who had a similar e-currency business and spoke to Pamela about it, to testify about Pamela's intent to obtain a money transmitting license for Goldfinger.

Over defendant's hearsay objection, Neve testified that in September or October of 2007, she had advised Pamela that "her company [Goldfinger] was at risk" and told Pamela that she should get "money transmitter licenses," even though such licenses were "very expensive" and had to be obtained through the federal government. The trial court ruled such statements did not constitute hearsay because they were not offered for their truth; rather, Neve's testimony was "what Miss Fayed was advised." Neve also testified that Pamela told her that "her intent was to obtain those money transmitter licenses."

Overruling defendant's hearsay objection, the court concluded that Pamela's hearsay statements were admissible under Evidence Code section 1250, subdivision (a)(2), as a statement of future intent "to prove or explain acts or conduct of the declarant."

On appeal, defendant argues that the trial court erred in allowing Neve's testimony. Defendant again asserts that Neve's statement regarding what she advised Pamela was hearsay. As the trial court concluded,

however, Neve's advisement to Pamela was not offered for the truth of the matter stated, i.e., to show that Pamela should have obtained the licenses, but was offered to show Pamela's reaction and conduct in response to the statement. (See Evid. Code, § 1200; *People v. Livingston* (2012) 53 Cal.4th 1145, 1162.)

Likewise, we conclude that Pamela's hearsay statement, i.e., that she told Neve she intended get the money transmitting license for Goldfinger, was admissible as a statement of the declarant's future intent under Evidence Code section 1250, subdivision (a)(2). Under this provision, "a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts." (Cal. Law Revision Com. com., Deering's Ann. Evid. Code (2004 ed.) foll. § 1250, p. 531; see *People v. Alcalde* (1944) 24 Cal.2d 177, 187-188.) Here, Pamela's statement of future intent to purchase a money transmitting license was admissible to prove that she tried to obtain the license, which in turn was relevant to show why defendant was angry at Pamela and had a motive to kill her. Contrary to defendant's suggestion, the statement was not admitted to prove Pamela's existing state of mind under Evidence Code section 1250, subdivision (a)(1), which expressly requires that the declarant's mental state be "itself an issue in the action." (See *People v. Noguera* (1991) 4 Cal.4th 599, 621.)

(3) Recorded conversation of Mary Mercedes

As previously noted, the defense intended to call Mary Mercedes as a witness to question her on whether she attempted to solicit Taboga's husband to kill Pamela Fayed. Though there was some uncertainty whether the prosecution would offer Mercedes immunity in exchange for her testimony, Mercedes ultimately invoked her Fifth Amendment privilege against self-incrimination, and the court declared her unavailable as a witness. Based on Mercedes's unavailability, the trial court permitted the defense to elicit hearsay testimony from Taboga that Mercedes had offered to pay Taboga's husband, Kurt, \$200,000 to kill Pamela. (See Evid. Code, § 1230.)

After Taboga's direct testimony, the prosecution informed the trial court it intended to introduce the out-of-court statement of Mercedes pursuant to Evidence Code section 1202. In a recorded conference call between Mercedes, Detective Abdul, and Prosecutor Jackson, Mercedes denied Taboga's allegations. This telephone conversation took place on March 30, 2011, a month before Mercedes had asserted her Fifth Amendment privilege.

Defense counsel objected, arguing in part that the prosecution "sprung" this evidence at the last minute and that they had not been given proper notice. The trial court, however, explained that "this is impeachment testimony, so they don't have to give it to you in advance." Defendant also claimed "fundamental

unfairness” in being unable to cross-examine a witness whom, he asserted, the prosecution could have given immunity to prevent her unavailability. Rejecting defendant’s contention, the trial court found the tape admissible for purposes of impeachment. After substantially redacting the statement with input from both sides, the trial court admitted Mercedes’s statement into evidence.

On appeal, defendant argues that even though this statement was used as impeachment evidence against Taboga, the prosecution sought admission of the tape itself as opposed to just using information on the tape; thus, defendant asserts, the tape constituted “real evidence” subject to timely disclosure under section 1054.1, subdivision (c). (See *People v. Tillis* (1998) 18 Cal.4th 284, 292-293; § 1054.7 [disclosure 30 days prior to trial generally required absent good cause].) Defendant maintains the trial court should have prohibited the tape’s admission as an authorized sanction under section 1054.5, subdivision (b). Even assuming that the tape constituted “real evidence” under section 1054.1, subdivision (c) that the prosecution thereby committed a discovery violation for failing to timely disclose it, and finally, that the trial court should have prohibited the presentation of this tape as a sanction, any error was harmless. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 280.)

Describing Taboga as his “star witness,” defendant argues that because the prosecution delayed disclosure of this tape, it “was able to launch a devastating counterattack at the end of trial,” one that “gutted” their

defense. Defendant overstates his case. As noted, Taboga came forward with the information about Mercedes a month before trial began, even though her telephone conversation with Mercedes took place three years earlier in May 2008, several months before Pamela was murdered. As Taboga testified, she did not believe she had information that “could free” defendant but wanted to get “the information out because it needs to be heard.” On cross-examination, the prosecution pointedly questioned Taboga why she never told anyone about Mercedes’s purported solicitation to kill Pamela. Taboga explained that she did tell Pamela to “just watch herself and be careful” but admitted she never told Pamela about her conversation with Mercedes.

Making only a brief reference to Mercedes’s denial in closing argument, the prosecution thoroughly discredited Taboga’s testimony, criticizing it as nonsensical and implausible. We find that any improper admission of Mercedes’s taped statement to impeach statements Taboga attributed to Mercedes to be harmless. Based on the overwhelming evidence of defendant’s guilt and in light of the discredited, implausible testimony of Taboga, we conclude beyond a reasonable doubt that the error, if any, in allowing such impeachment, did not contribute to the verdict. (See *People v. Pokovich* (2006) 39 Cal.4th 1240, 1255.)

*(4) Pamela's bloody clothes, eyeglasses,
and purse*

During the direct testimony of LAPD Detective Eric Spear, the prosecution displayed photographs of the crime scene, including a picture of Pamela's bloody shirt and pants. Based on the amount of blood at the crime scene, Detective Spear opined it was a "violent attack, and just brutal." He further concluded that because Pamela's purse, wallet and money were still at the crime scene, it was not a robbery. The prosecution asked Detective Spear to show the actual shirt Pamela was wearing when she was killed, which he described as a shirt "which was white at one time that is obviously soaked in blood." Detective Spear also showed the pair of pants Pamela was wearing at that time.

Objecting under Evidence Code section 352, defense counsel pointed out there was no dispute that Pamela was stabbed to death and offered to stipulate that the bloody items belonged to Pamela, so that the prosecution would not "parade one bloody item after another." He also maintained the evidence was cumulative and served only to inflame and prejudice the jury. The prosecution countered that the manner in which Pamela was killed was significant and showing the jury the actual blood-soaked items instead of pictures of them would "mak[e] the viciousness of the murder, premeditation, the deliberation, the intent to kill much more real to the jury by way of three or four minutes of testimony." The trial court permitted the prosecution to demonstrate the remaining two items to

the jury—Pamela’s eyeglasses and purse—during Detective Spear’s testimony.

On appeal, defendant argues that the *photographs* of these bloody items were more prejudicial than probative under Evidence Code section 352 because they were superfluous and served no purpose but to appeal to the jury’s emotions. Though the actual blood-stained items were presented in court and introduced into evidence through Detective Spear’s testimony, defendant’s focus is on the prejudicial effect of the admitted photographs.

“As a rule, the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances attending them even if it is grim’ (*People v. Osband* (1996) 13 Cal.4th 622, 675 [55 Cal.Rptr.2d 26, 919 P.2d 640]), and even if it ‘duplicate[s] testimony, depict[s] uncontested facts, or trigger[s] an offer to stipulate.’” (*People v. Boyce* (2014) 59 Cal.4th 672, 687.) Here, the prosecution explained that the blood-soaked shirt and pants depicted in the photographs showed the brutality of Pamela’s killing, which suggested she was killed by a hitman. We conclude the trial court did not abuse its considerable discretion in admitting the photographs of Pamela’s personal effects found at the murder scene. (See *People v. Panah* (2005) 35 Cal.4th 395, 477; *People v. Boyce, supra*, 59 Cal.4th at p. 687 [trial court abuses its discretion by acting “‘in an arbitrary, capricious, or patently absurd manner’”].)

(5) Photographs of Pamela

During the direct examination of Desiree, Pamela's then 21-year-old daughter, the prosecution showed her various family photographs to identify. These included photographs of Desiree, her half-sister, J.F., and Pamela; some photographs of just Desiree and Pamela, photographs with J.F. and Pamela, and a photograph of defendant. At one point, the prosecution asked the trial court whether he could approach Desiree and show her the photographs (instead of using a projector). Defense counsel replied that he had "no objection. If he wants to just show her, I have no objection." Desiree explained when and where the various pictures were taken, which included Desiree's high school graduation in June 2008, a month before Pamela was killed.

On appeal, defendant for the first time claims the trial court erred in allowing the photographs of Pamela and her daughters into evidence at the guilt phase because the photographs were purportedly irrelevant and superfluous. Defense counsel, however, did not object below but instead stated he had "no objection" to showing Desiree the photographs. We conclude defendant has forfeited the issue.

b. Defendant's Cross-examination Rights

AUSA Aveis testified regarding the federal government's investigation into defendant and Goldfinger. During cross-examination, defense counsel asked Aveis whether defendant had indicated what his

defense would be to the federal charge of acting as a money exchanger without the proper licensing. Aveis responded he learned that defendant would be alleging he did not get a license because he did not believe he needed one. Following up on this answer, defense counsel attempted to ask Aveis whether Aveis knew that defendant did not agree that he needed a license to operate Goldfinger and whether this issue was one Aveis anticipated litigating in court. The trial court sustained the prosecution's hearsay objections and struck Aveis's answer at the prosecution's request.

On appeal, defendant for the first time claims that the statements were admissible under Evidence Code section 1250 as circumstantial evidence of defendant's state of mind, revealing that defendant did not believe that Goldfinger needed a money transmitting license. Defendant explains that evidence of his state of mind was critical to rebut the prosecution's main theory that defendant killed Pamela because he feared she would cooperate in the federal investigation. Defendant purportedly had no reason to worry about the investigation (and therefore, had no reason to kill Pamela) because he had a valid defense to the federal charge and also because he was winding down the business and would no longer need the license.

Defendant further asserts that his inability to ask AUSA Aveis any questions about the strength of the government's case against him violated his constitutional right to confront and cross-examine witnesses, particularly when the prosecution was permitted to ask Carol Neve a similar question concerning Pamela's

belief about the necessity of the money transmitting license. The Attorney General counters that defendant forfeited the argument by failing to challenge the trial court's ruling below. Even assuming he did not forfeit the issue by failing to lay the foundation for the admission of Aveis's testimony, we conclude that any error was harmless.

Regardless of the actual strength of the government's case against defendant, there was evidence that defendant generally worried Pamela would implicate him for wrongdoing. Defendant complained to Smith that Pamela "ran her mouth too much" and that she "made all these stupid accusations and ridiculous accusations against me just to try and make me look bad." Further, contrary to defendant's assertion, the prosecution's theory on defendant's motive for killing Pamela was not simply that he wanted to prevent her from cooperating in the federal investigation. As discussed above, the prosecution presented an extended narrative of events leading up to Pamela's murder in closing argument. After outlining these events, the prosecution underscored: "*And then on top of all that he finds out that Pamela wants to cooperate with the authorities*" and that if she does, "he stood to lose everything."

c. Exclusion of Defendant's Evidence

(1) Defendant's state of mind

On appeal, defendant argues the trial court erred in sustaining the prosecution's hearsay objections to

exclude evidence he maintains was crucial to his defense. For instance, the prosecution questioned Greg Herring, a family law attorney that Pamela had hired to replace another attorney in November 2007, a month or so after defendant had filed for divorce. Herring testified that Pamela was dissatisfied with how the divorce case started off, which included stipulations between defendant and Pamela allowing defendant to control the companies and providing Pamela a modest salary. Herring also testified about the potential assets at stake in the divorce (“either hundreds of millions or maybe even a billion or more”), and his concern that defendant would liquidate assets. He also testified that the divorce proceedings had reached a “fever pitch” shortly before Pamela was murdered.

On cross-examination, defense counsel asked Herring about a letter defendant’s divorce attorney, John Foley, had sent Herring about defendant’s intention to liquidate the E-bullion and Goldfinger entities. Defense counsel questioned Herring about statements in the letter explaining defendant’s “rationale for why he is liquidating” the E-bullion and Goldfinger companies. In response to the prosecution’s hearsay objection, defense counsel explained that he would ask Herring “whether the liquidation was motivated in part by a desire to avoid having to spend the money on buying licenses that Pam was insisting on.” The trial court sustained the prosecution’s hearsay objection, and defendant did not propose that a hearsay exception applied, nor did he raise the issue again.

On appeal, defendant claims for the first time that this hearsay statement was admissible under the state of mind exception (Evid. Code, § 1250), because it would show that defendant was intending to wind down their e-currency business, purportedly negating various prosecution theories for why defendant killed Pamela. Although defense counsel explained that he intended to question Herring about the letter, he “did not show that the testimony came within an exception to the hearsay rule, and did not attempt, by offer of proof or otherwise, to lay the proper foundation for that exception.” (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.)

Even if defendant preserved this claim for review, we conclude that any error in preventing this line of questioning was harmless. Without objection, defense counsel earlier asked Herring what he thought defendant and his divorce attorney were “trying to accomplish” by informing Pamela about their intent to liquidate the E-bullion and Goldfinger entities and whether Herring’s “perspective was that he was going to threaten to liquidate the company in order to prevent you from getting Pam Fayed a proper accounting and a proper compensation.” Herring replied that he did not know what defendant “was thinking” or what his attorney “was thinking when he sent” the letter to Herring. Thus, any further questioning of Herring on this issue would have likely yielded little information.

(2) Third party culpability defense

During the direct examination of Patty Taboga, defense counsel attempted to question her about whether she spoke to Mary Mercedes about defendant and Pamela's divorce. In response to the prosecution's hearsay objection, defense counsel argued that the exception for statements against penal interest applied because Taboga was going to describe Mercedes "savaging Pam" and would testify to other statements Mercedes made showing her "animus, her intent, motive to kill Pam." The trial court explained that animus towards Pamela was not enough and that Mercedes's statements had to be against her "penal interest." However, the record does not disclose that defendant laid any foundation for admitting this evidence.

On appeal, defendant asserts that these hearsay statements were admissible to prove Mercedes's "state of mind, emotion, or physical sensation." (Evid. Code, § 1250, subd. (a)(1).) The Attorney General maintains that defendant sought admission of the statements only under Evidence Code section 1230 and "invited" any error by limiting himself to this exception. For reasons stated below, we conclude that any error in excluding Mercedes's hearsay statements that she hated Pamela was harmless.

As noted above, the trial court permitted defendant to present a third party culpability defense that Mercedes, and not defendant, solicited the murder of Pamela. Even if statements that Mercedes harbored animus towards Pamela tended to show her motive to

kill Pamela, their admission would have made little difference to the success of this defense. As discussed above (see *ante*, at p. 64), the prosecution thoroughly undercut Taboga's testimony about Mercedes's solicitation to kill Pamela, characterizing it as illogical and unbelievable. The defense itself was not plausible, and the fact that Mercedes may have hated Pamela would have done little to save the defense. Moreover, defendant was not otherwise precluded from presenting this evidence from other sources.

Defendant also points out that based on the prosecution's hearsay objection, the trial court struck Taboga's testimony that when she had asked Mercedes whether defendant knew about this phone call and her request that Taboga's husband kill Pamela, Mercedes had replied, "No." Because defendant did not argue below for the statements' admissibility, he has forfeited any claim that these hearsay statements were admissible under an exception. (See *People v. Morrison* (2004) 34 Cal.4th 698, 711.)

Finally, defendant claims that the trial court erred in excluding any evidence of Taboga's March 9, 2011 letter to defendant, in which she first accused Mercedes of soliciting Pamela's murder back in May 2008. To rebut the prosecution's assertion that Taboga was lying about Mercedes's solicitation, defendant argued the letter was a prior consistent statement under Evidence Code section 1236. (See Evid. Code, § 791.) However, the prosecution countered that it had never questioned what Taboga said in the letter was somehow inconsistent or consistent with her testimony at

trial. The trial court excluded the letter as inadmissible hearsay.

The trial court did not err in refusing to admit Taboga's March 9 letter to defendant. Contrary to defendant's contention, it is not sufficient that Taboga's consistent statement simply be made "prior to" her trial testimony. (*People v. Riccardi* (2012) 54 Cal.4th 758, 802.) Rather, the relevant time is "before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791, subd. (b).) Here, Mercedes allegedly asked Taboga in May 2008 if her husband would kill Pamela. Pamela was killed on July 28, 2008, and a complaint charging defendant with Pamela's murder was filed on September 15, 2008. Arguably, Taboga would have had a motive to fabricate Mercedes's solicitation after defendant was charged with Pamela's murder. Rather than writing this letter to defendant before or around that time, Taboga wrote the letter *three years* later. "[I]f the consistent statement was made after the time the improper motive is alleged to have arisen, the logical thrust of the evidence is lost and the statement is inadmissible." (Cal. Law Revision Com. com., Deering's Ann. Evid. Code, *supra*, foll. § 791, p. 501.)

(3) Defendant's inability to commit crime

Before trial, defendant filed an in limine motion requesting that defendant's two doctors be permitted to testify that they had prescribed defendant pain medication and to testify about the medications' likely

effects on defendant. Defendant sought to show he “was incapable of plotting a murder and could not have committed the acts that are alleged.” The prosecution countered that this evidence constituted evidence of “voluntary intoxication” and that it was only admissible in the guilt phase to show a defendant’s diminished capacity. (Former § 22, subd. (c), renumbered as § 29.4, subd. (c) by Stats. 2012, ch. 162, § 120.) Because defense counsel conceded he did not intend to offer this evidence to negate defendant’s intent, the trial court excluded the evidence. We conclude the trial court did not err.

6. *Insufficient Evidence of Special Circumstance Allegations*

a. *Insufficient Evidence of Financial Gain*

The jury found true the special circumstance that defendant murdered Pamela for financial gain. (§ 190.2, subds. (a)(1), (c); CALJIC No. 8.81.1.) The prosecution presented two theories supporting this special circumstance allegation. First, it pointed out that defendant would stand to get all—instead of just half—of the marital and business assets if Pamela were killed, rather than if they got divorced. Second, over defense objection, the prosecution also argued that defendant did not have to financially gain from the murder if he hired Moya: “In other words, if you find that Mr. Moya was going to or did gain financially to the tune of \$25,000, then that is enough to establish the special circumstance for financial gain.”

On appeal, defendant challenges this second theory, arguing that the evidence was insufficient to support the finding on this basis. Distinguishing both *People v. Bigelow* (1984) 37 Cal.3d 731 and *People v. Freeman* (1987) 193 Cal.App.3d 337, on which the prosecution relied, defendant asserts that the prosecution improperly argued it only had to show that Moya received some financial gain; the prosecution was required to, but did not, show that *Moya* was the actual killer. On review, we view the evidence in the light most favorable to the verdicts. (*People v. Johnson* (2016) 62 Cal.4th 600, 630.)

Under section 190.2, subdivision (a)(1), a defendant is subject to the special circumstance if the “murder was intentional and carried out for financial gain.” Even if the defendant is “not the actual killer,” if that defendant “with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree,” he or she is also subject to this special circumstance. (§ 190.2, subd. (c).) “Reading the two provisions together it is clear that one who intentionally aids or encourages a person in the deliberate killing of another for the killer’s own financial gain is subject to the special circumstance punishment.” (*People v. Freeman, supra*, 193 Cal.App.3d at p. 339 [construing 1978 version of § 190.2]; see *People v. Padilla* (1995) 11 Cal.4th 891, 933.) Defendant suggests that evidence of Moya’s financial gain is insufficient without evidence that he was the actual killer and not just an intermediary.

Freeman did not address a multiparty situation involving the hirer of a contract killer, the actual killer, and someone who acts as intermediary between the two. Thus, contrary to defendant's suggestion, *Freeman* does not stand for the proposition that the actual contract killer, as opposed to an intermediary, must have a financial gain from the murder. Rather, subsequent cases have rejected that interpretation. (*People v. Singer* (1990) 226 Cal.App.3d 23, 44; see *People v. Battle* (2011) 198 Cal.App.4th 50, 82 [following *People v. Singer*].) "[I]t is hard to see why, as a matter of policy, the Legislature would want to differentiate between a murder for hire where there is no intermediary and one where there is. Apart from possible causation problems where the link between the hirer and actual killer is extremely attenuated (not our case), the moral culpability of the hirer would be the same. (*People v. Freeman, supra*, 193 Cal.App.3d 337, 340.) The distinction urged by defendant would tend to snare amateurs while letting practiced killers with impersonal, large networks of thugs off the hook. It hardly makes sense." (*People v. Singer, supra*, 226 Cal.App.3d at p. 44.)

This policy argument articulated in *Singer* has particular relevance here. When responding to Smith's incredulity at how "this many people" got involved in Pamela's murder, defendant reassured Smith that he had "the insulation, cause I don't know them, and they don't know me. I never met them. I never seen them. I wouldn't recognize him." The prosecution reiterated that defendant boasted he was "insulated" because it

was Moya who had “subcontract[ed]” with Simmons and Marquez.

In sum, there was sufficient evidence to support the jury’s true finding of the financial-gain special-circumstance allegation.

b. Insufficient Evidence of Lying in Wait

The jury also found true the lying-in-wait special circumstance allegation. CALJIC No. 8.81.15.1 provides in part that the jury must find: “1. The defendant intentionally killed the victim; and [¶] 2. The murder was committed by means of lying in wait.” In closing argument, the prosecution explained that as to the second element, the question is, “[W]as the murder committed while the defendant or any co-conspirator was lying in wait? Any co-principal, any aider and abettor was lying in wait? Well, that’s the three folks in the parking garage, Simmons, Marquez and Moya. They were the ones lying in wait.” Defendant did not object to the instruction as given, did not seek to modify the instruction, and did not later object to the prosecution’s explanation of the instruction at closing argument.

On appeal, defendant insists that section 190.2, subdivision (a)(15) is ambiguous in terms of who must be lying in wait. In any event, he argues that allowing an aider and abettor—who specifically intended to kill, but did *not* intend to lie in wait, did not actually lie in wait and did not aid and abet the lying in wait—to be subject to the lying-in-wait special circumstance violates due process. Defendant asserts that the

prosecution's closing argument that evidence that any of the codefendants were lying in wait would support a true finding of the special circumstance allegation was improper. We reject this claim.

To determine whether an aider and abettor who is not the actual killer can be subject to the lying-in-wait special circumstance, "the questions are whether defendant, with the intent to kill, aided and abetted the victim's killing, and whether the actual killer intentionally killed the victim by means of lying in wait." (*People v. Johnson, supra*, 62 Cal.4th at p. 630; see *People v. Bonilla* (2007) 41 Cal.4th 313, 331 [interpreting earlier version of 190.2].) The record contains ample evidence that defendant aided and abetted Moya's killing of Pamela by lying in wait. Defendant admitted to Smith that "[t]here were four different other occasions where I had it so it was perfectly clean. Yeah, it was a rural area. I even had the times, dates, everything, location. . . . I physically made sure that it was pre-checked and cleared with, you know—and there's no—no cameras, none. But they pick the day before my fuckin' court hearing at the busiest place in LA." Indeed, when describing a prior missed opportunity for Moya to kill Pamela, defendant essentially admitted that he wanted Moya to kill her by means of lying in wait: "All he had to do was sit there, wait for her to get in the car, and jack it." Contrary to defendant's assertion, defendant's liability was based on his own intent and his own significant actions in masterminding the killing of Pamela.

Based on the foregoing, we conclude the record contains sufficient evidence to support the jury's lying-in-wait special-circumstance finding.

7. Prosecutorial Misconduct at Guilt Phase

Defendant maintains that the prosecution committed various acts of misconduct at the guilt phase, including mischaracterizing the evidence, misstating the law, making inflammatory remarks, and referring to facts outside the record.

It is prosecutorial misconduct to misstate the law. (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) It is also misconduct to misstate the evidence or go beyond the record. (*People v. Gonzalez* (2011) 51 Cal.4th 894, 947; *People v. Davis* (2005) 36 Cal.4th 510, 550.) However, the prosecution "enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom. (*People v. Hamilton* (2009) 45 Cal.4th 863, 928; *People v. Rowland* (1992) 4 Cal.4th 238, 277 ["hyperbolic and tendentious" comments, even if "harsh and unbecoming," may be reasonable if they can be inferred from the evidence].) "A defendant asserting prosecutorial misconduct must . . . establish a reasonable likelihood the jury construed the remarks in an objectionable fashion." (*People v. Duff* (2014) 58 Cal.4th 527, 568); see *People v. Dennis* (1998) 17 Cal.4th 468, 522 ["whether the prosecutor has employed deceptive or reprehensible methods to persuade either the court or the jury"]; see also *People v. Osband*, *supra*, 13 Cal.4th at p. 695

[prosecutor’s “remark was gratuitous, but his misconduct was also de minimis”].)

To preserve a claim of prosecutorial misconduct on appeal, “‘a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety. [Citations.]’ [Citation.] The failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm.” (*People v. Clark* (2011) 52 Cal.4th 856, 960 (*Clark*); see *People v. Collins* (2010) 49 Cal.4th 175, 226.) We discuss each claim of alleged prosecutorial misconduct in turn.

a. Closing Argument

During closing argument at the end of the guilt phase, Prosecutor Jackson described Pamela’s last moments after she had been stabbed and was still conscious. He next asked: “What do you think she might have been thinking? Those two or three or even four minutes when she had time to think? Time to feel? Time to realize what was happening? She would never again touch the hand of her daughter, never kiss the cheek of [J.F.], never see their smiling faces. And she had time. How long do you think a minute is? She had three or four. While all this is going through her mind, how long do you think that minute lasted? An eternity. Think about what she was going through. And I am going to ask you just to think for one minute, starting now.”

At this point, defendant objected, arguing this line of questioning only engendered prejudice that outweighed any probative value. Jackson countered that the circumstances of Pamela's death were relevant to show "the brutality of how she died, the fact that this was a personal execution." The trial court overruled defendant's objection. Afterwards, the prosecution continued and asked the jury again to think for one minute. On appeal, defendant argues that the prosecution improperly asked the jury to view the crime from the perspective of the suffering victim and that the trial court erred in overruling his objection.

"As a general rule, a prosecutor may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406.) Though we have permitted such argument at the penalty phase (see *People v. Cowan* (2010) 50 Cal.4th 401, 485-486; *People v. Wash* (1993) 6 Cal.4th 215, 263-264), asking jurors to "imagine the thoughts of the victims in their last seconds of life" is rarely a relevant inquiry at the guilt phase. (*People v. Leonard, supra*, 40 Cal.4th at p. 1407; see *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057.) The Attorney General does not dispute that the comments in this regard were improper.

Nevertheless, even though these comments were improper, defendant is not entitled to relief. Given the strength of the evidence against defendant, not the least of which was his jailhouse confession, he did not suffer prejudice from the prosecutor's comments. (See *People v. Martinez* (2010) 47 Cal.4th 911, 957.) It was

not reasonably probable that the verdict would have been more favorable without this misconduct.

b. Misstatements of Law

Defendant claims that at the end of the guilt phase, the prosecution made a number of misstatements of law in closing argument.

For instance, with respect to the issue whether defendant withdrew from the conspiracy, the prosecution reiterated that defendant must “do everything in his power” to prevent the commission of the murder. Defendant maintains that the instruction misstates a defendant’s burden of proof for withdrawal. Even assuming error, any misstatement was harmless. There was no dispute that defendant committed an overt act, i.e., paying Moya to kill Pamela, which completed the crime of conspiracy. (See *People v. Sconce*, *supra*, 228 Cal.App.3d at p. 703 [defendant’s “withdrawal from the conspiracy is not a valid defense to the completed crime of conspiracy”].)

Next, in describing defendant’s liability as an aider and abettor, the prosecution used an analogy of a backup quarterback who never gets on the field but is still part of the team. Defendant claims this example misstated the law because it suggested a defendant’s mere presence or knowledge, similar to sitting on a bench and doing nothing, is sufficient to impose liability as an aider and abettor. Defense counsel did not object to the football analogy and seek an admonition and

therefore, has forfeited the claim. (See *Clark, supra*, 52 Cal.4th at p. 960.)

Defendant also argues that the prosecution misstated the law on the lying-in-wait special circumstance (§ 190.2, subd. (a)(15)), which permits aider and abettor liability if the actual killer killed the victim while or immediately after lying in wait. (*People v. Johnson, supra*, 62 Cal.4th at p. 630; *People v. Bonilla, supra*, 41 Cal.4th at pp. 331-332 [construing identical language in § 190.2, former subd. (b) as statutory basis for aider and abettor's liability].) Defendant focuses on the prosecution's following statement about what defendant was doing right before Pamela was killed: "There is an argument that Mr. Fayed was actually lying in wait; he was sitting in a room, not five feet from Pamela Fayed thirty seconds before she was killed. So certainly he was concealing his purpose as well."

It was not reasonably likely the jury would have understood this remark to mean defendant's actions were sufficient to prove lying in wait. (*People v. Osband, supra*, 13 Cal.4th at p. 689.) The prosecution's theory was not that defendant was the actual attacker, which would require that defendant intentionally killed Pamela by means of lying in wait. (*People v. Johnson, supra*, 62 Cal.4th at p. 630.) Rather, the prosecution consistently argued that "the three folks in the parking garage, Simmons, Marquez, and Moya. They were the ones lying in wait."

c. Reference to Extra-record Evidence

(1) Statements about federal subpoena

In describing the telephone calls between defendant and Moya and Moya and his cohorts two months before Pamela's murder, the prosecution emphasized the timing of these calls, i.e., two days after the federal subpoena issued to the forensic accountants in the Fayed's divorce was "leaked" on May 27, 2008. Referring to the "leaked" subpoena at least four times (without any objection from defendant), the prosecution explained that "[y]ou get the idea that in the hours after the subpoena is leaked, these guys communicate and talk with each other by way of text message and phone to let each other know." Based on his failure to timely object and seek an admonition, defendant has forfeited a challenge to the characterization that the subpoena was "leaked." (See *People v. Collins, supra*, 49 Cal.4th at p. 226.)

(2) Statements about federal case

On a related point, defendant argues that the prosecution misstated that defendant "knew" about the sealed federal indictment before Pamela's murder and that Pamela would definitely be a witness against defendant in the Goldfinger matter. Defendant forfeited the claim by failing to timely object and request an admonition. (*People v. Collins, supra*, 49 Cal.4th at p. 209) In any event, the claim fails on the merits because the prosecution did not mischaracterize the facts but made reasonable inferences based on the record.

(See *People v. Thomas* (2011) 51 Cal.4th 449, 494-495.) The prosecution stated that defendant and Pamela “knew exactly what was going on as early as May of 2008. 154 days before her murder, the indictment comes out.” Fairly read, the statements merely underscored that defendant and Pamela were aware of the federal investigation against Goldfinger shortly before the indictment was filed. Also, Pamela’s criminal defense attorney, Willingham, testified that “Pamela wanted to be cooperative” and be a “witness” against defendant. Any technical meaning defendant affixes to “witness” does not support his claim of mischaracterization by the prosecution.

(3) Statements about defendant’s mental state

In depicting defendant’s anger at its height when Pamela tried to secure a money transmitting license, the prosecution described defendant as “enraged,” “absolutely furious,” “boiling over with rage” and “apoplectic.” Defendant claims that these descriptions are not supported by the record. Not so. These are reasonable inferences based on the record, including defendant’s outraged statements to Smith that Pamela “went out and made all these stupid accusations and ridiculous accusations against me just to try and make me look bad” and that with regard to defendant’s million dollar e-currency business, “she would’ve fucked it all up.” (See *People v. Hamilton, supra*, 45 Cal.4th at p. 928.) “Closing argument may be vigorous and may include opprobrious epithets when they are reasonably

warranted by the evidence.’” (*People v. Redd* (2010) 48 Cal.4th 691, 750.)

(4) Statements about Carol Neve

In recounting Neve’s testimony about the money transmitting license, the prosecution reminded the jury that Neve testified that the licenses were “extraordinarily expensive.” The prosecution followed up by stating that a license can cost “[l]iterally hundreds of thousands of dollars” and that the government imposes a high fee to “keep[] Madoff-type things from happening.” Also, after the prosecution reminded the jury about “the evidence that Carol Neve told you, that Pamela Fayed wanted to get a money transference license,” it claimed that Pamela later wrote a check to get the license that caused defendant “to go into a downward spiral.”

On appeal, defendant complains that Neve did not testify to the actual cost of the license or that Pamela wrote a check for one. Defendant did not object and request an admonition. As such, he has forfeited the claim challenging this testimony. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1052.)

(5) Other statements

Finally, for the first time on appeal, defendant challenges other statements in the prosecution’s closing argument including comments that Moya does not know Mercedes and would not kill Pamela on

Mercedes's behalf if "he doesn't think that she can pay up." Defendant also objects to the imagined telephone conversations and texts between Moya and defendant after Pamela was killed. Finally, he objects that the evidence regarding the state of Mercedes's finances or what Moya knew about her finances was not in the record and that the "invented" conversations between defendant and Moya were wholly outside the record. Defendant has forfeited the challenges to the statements based on his failure to timely object and seek an admonition below. "The [prosecutor's] misstatements, although bearing a potential for prejudice, were not so extreme or so divorced from the record that they could not have been cured by prompt objections and admonitions.'" (*People v. Dennis, supra*, 17 Cal.4th at p. 521.)

B. Penalty Phase

1. Evidentiary Rulings

a. Admission of Letter Written by Pamela

As victim impact evidence, the prosecution questioned Pamela's daughter, Desiree, about how the loss of her mother has affected her life. The prosecution sought to have Desiree read a letter purportedly written from her mother to both Desiree and J.F. To establish foundation, the prosecution explained the letter was found with Pamela's personal property in a storage shed available only to Pamela. Desiree had not yet seen the letter. Though initially sustaining defendant's objection that the letter was more prejudicial than

probative, the trial court later permitted Desiree to read the letter.

The letter dated July 7, 2006 was read into the record: “To my dear sweet baby girls. Please hear me and know that I am forever with you. You are the fruit of my labor in this life and I am so proud of you both. Listen for my voice to guide you. I want so much to hold you in my arms and kiss your sweet faces for eternity. Please keep my family together with gentle love and understanding. You are all that exists for me now. Never abandon. Family is truly the only thing that is important. Protect each other at all costs. Love you with all my being. Mamma.” During her direct testimony, Desiree read the letter in front of the jury. When the prosecution asked what Desiree thought as she looked into the future without her mother, she responded: “[I]t saddens me and depresses me, and it not only affects mine and [J.F.]’s life and everyone involved right now, but it affects our future families.” The prosecution also referred to the letter in its closing argument.

On appeal, defendant again argues that the letter was inadmissible hearsay and that the prosecution impermissibly “used the emotional letter as substantive evidence in closing arguments.” We conclude the letter was properly admitted to show the effect of Pamela’s death on her daughter. (*People v. Cruz* (2008) 44 Cal.4th 636, 682.)

“Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime

on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a).” (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056-1057.) The letter, which was clearly intended to be given to the girls on their mother’s death, “demonstrated the relationship lost” as a result of Pamela’s murder. (*People v. Verdugo, supra*, 50 Cal.4th at p. 299 [“Victim impact evidence is emotionally moving by its very nature, but that fact alone does not make it improper”].)

b. Admission of Photographs of Pamela’s Gravesite

During Desiree’s testimony, the prosecution showed her a picture of her kneeling over her mother’s casket and kissing it goodbye. Before Desiree testified, the prosecution had asked the trial court to rule on the admissibility of two photographs from Pamela’s gravesite, which Desiree herself provided to the prosecution. The trial court allowed the two photographs, rejecting defense counsel’s argument that the photographs were incendiary and cumulative. The two photographs were properly admitted and not unduly emotional. (See *People v. Suff* (2014) 58 Cal.4th 1013, 1076 [four photos of children leaving notes at mother’s grave admissible as “evidence of the impact her death had on them”]; see also *People v. Zamudio* (2008) 43 Cal.4th 327, 368 [photo of victim’s gravesite admissible “as ‘further evidence relating to her death and the effect upon her family’”].)

c. Exclusion of defendant's mitigating evidence

To present a “full scope of the family’s life” and show that defendant had at one time loved Pamela, defense counsel sought to elicit testimony from defendant’s high school friend, Melanie Jackman. Defense counsel asked Jackman if defendant had called her for advice on how to make Pamela happy. The trial court sustained the prosecution’s hearsay objection.

Even assuming the trial court erred in excluding this evidence, any error was harmless. (See *People v. McDowell* (2012) 54 Cal.4th 395, 434 [improper exclusion of evidence at penalty phase subject to harmless error analysis].) It is likely that the jury would have given little weight to Jackman’s testimony. The prosecution impeached Jackman’s credibility by refuting her assertion that defendant had never said anything negative about Pamela; the prosecution showed Jackman e-mails defendant had sent to her, in which he called Pamela a “sociopathic-lying-money-grubbing whore” and a “Super-Bitch.”

2. Prosecutorial Misconduct at Penalty Phase

Defendant raises two claims of prosecutorial misconduct at the penalty phase, i.e., improperly appealing to the jury’s emotions during closing argument and arguing facts not in evidence. ““The same standard applicable to prosecutorial misconduct at the guilt phase is applicable at the penalty phase. [Citation.] A defendant must timely object and request a curative

instruction or admonishment.”’ [Citation.] A defendant’s ‘failure to object and request an admonition waives a misconduct claim on appeal unless an objection would have been futile or an admonition ineffective.’” (*People v. Jackson* (2016) 1 Cal.5th 269, 367.)

a. Improperly Appealing to the Passion and Prejudice of the Jury During Closing Argument

During closing argument, the prosecution told the jury that they had a choice to make, i.e., they could either show defendant mercy and not impose the death penalty even though defendant deserves it or could impose the death penalty because it is the “appropriate” penalty: “Do you want to be the jury that gives mercy when he gave none? . . . [H]e’s going to ask you for mercy when Pam Fayed had none of these?” On appeal, defendant maintains that by suggesting that justice and mercy are incompatible, the prosecution improperly appealed to the passions and prejudices of the jury. Defendant forfeited the issue by failing to object to this argument or request an admonition. We conclude it lacks merit in any event. “We have repeatedly approved prosecutors arguing that a defendant is not entitled to mercy, and in particular arguing that whether the defendant was merciful during the crimes should affect the jury’s decision.” (*People v. Gamache* (2010) 48 Cal.4th 347, 389-390 [citing cases].)

b. Arguing Facts Not in Evidence

During closing argument, the prosecution told the jury that it will be instructed that it cannot consider sympathy for defendant's family—specifically Pamela and defendant's young daughter, J.F.—as a mitigating factor in sentencing. The prosecution underscored that defendant “cannot come in here and use his last remaining card, his daughter, and sympathy for her as a human shield. It doesn't work that way. You can't kill the child's mother and then say, don't make her an orphan because if you kill me, she doesn't have anybody left. . . . He didn't think about [J.F.] before. He had a cold, calculated, deliberate, brutal, vicious plan that he set into motion. And now to hide behind her is more cowardly than it was to dispatch your two-bit assassins to ambush your wife in that parking lot.”

Defendant claims that the prosecution referred to facts not in evidence because defendant never appealed to the jury on that basis. We conclude there was no misconduct. The prosecutor's argument was consistent with applicable law that “[t]he impact of a defendant's execution on his or her family may not be considered by the jury in mitigation.” (*People v. Bennett* (2009) 45 Cal.4th 577, 601.) To the extent the prosecution referred specifically to the impact on J.F., its argument was fair comment on J.F.'s tragic predicament of being the daughter of both the victim and the murderer.

Defendant also asserts the prosecution referred to facts outside the record by stating that Pamela “wasn't

just risking her own safety in cooperating; she was offering a very direct and concrete benefit to the community in her willingness to cooperate with the federal authorities.” Defendant reiterates that there was no evidence that Pamela was cooperating with the government and that certainly there was no evidence she was providing some “concrete benefit” to the community. Defendant also complains that the prosecution’s account of what Pamela’s last thoughts were (i.e., defendant “won. That’s what she’s thinking. He won. He got me”) was not contained in the record.

There was no misconduct. While there was no evidence of a formal agreement that Pamela would cooperate with the federal government against defendant, as the record makes clear, Pamela told her criminal defense attorney, Willingham, that she intended to testify against defendant. The prosecution’s argument was fair comment based on the evidence. Moreover, any benefit that Pamela’s cooperation would give the community—arguably, because Goldfinger would no longer provide illegal Ponzi schemes a means to launder their money—was also fair comment. Finally, any fictional depiction of what Pamela was thinking before she died was within the bounds of permissible comment. (See *People v. Wash*, *supra*, 6 Cal.4th at p. 263 [permissible to ask jury at penalty phase “‘what was going through [the] mind’ of the victim”].)

3. *Cumulative Error*

Defendant argues that the cumulative effect of the alleged guilt and penalty phase errors was prejudicial. We have determined that one instance of prosecutorial misconduct committed at the guilt phase (see *ante*, pp. 79-80) was not prejudicial. We have also assumed error in several instances (see *ante*, at pp. 39, 63-64, 68, 70-71, 80-81, 87), but found no error prejudicial. We are not persuaded there was a reasonable possibility that, absent any of these errors either alone or combined, the jury would have reached a different verdict. (See *People v. Banks* (2014) 59 Cal.4th 1113, 1208.)

4. *Conflict of Interest*

Though we conclude that defendant did not suffer prejudice from the misconduct of Prosecutor Jackson at the guilt phase, we highlight a troubling development related to this issue. Before oral argument in this matter was set to take place, we discovered that Jackson had become a named partner at defense counsel Mark Werksman's law firm. Though it is unclear exactly when this partnership formed, there is no indication that Jackson joined Werksman's firm before or at the time defense counsel filed defendant's opening brief in this appeal. Our request for supplemental briefing from the parties and the public at large, moreover, yielded no response suggesting that in light of any conflict of interest, this court should refrain from deciding the issues raised on appeal.

In any event, because the partnership between Jackson and Werksman began *after* defendant’s capital trial ended, relevant facts relating to any conflict of interest issue are not part of the record. As such, we do not address any potential conflict of interest claim here. (See *People v. Doolin* (2009) 45 Cal.4th 390, 429 [“defendant has the opportunity to expand upon the record in the context of his right to pursue a writ of habeas corpus”].) That said, the law partnership between defense counsel and the prosecutor in this case gives us great pause. (See Rules Prof. Conduct, rules 1.7, 1.11; Bus. & Prof. Code, § 6131, subd. (a).) We underscore that our resolution of defendant’s appellate claims in this case does not in any way endorse or sanction this posttrial partnership.

C. Challenges to Death Penalty

Defendant makes a number of challenges to the death penalty, all of which we have considered and rejected in the past. Because he offers no compelling reason to reconsider our long-standing precedent, we decline to do so. We will instead dispose of each claim without extended analysis.

“The death penalty is not unconstitutional for failing broadly to ‘adequately narrow the class of murderers eligible for the death penalty.’” (*People v. Simon* (2016) 1 Cal.5th 98, 149.) Contrary to defendant’s claim, we “‘repeatedly have held that consideration of the circumstances of the crime under section 190.3, factor (a) does not result in arbitrary or capricious

imposition of the death penalty.’” (*People v. Brasure* (2008) 42 Cal.4th 1037, 1066.) Nor is the death penalty unconstitutional for not requiring “findings beyond a reasonable doubt that an aggravating circumstance (other than Pen. Code, § 190.3, factor (b) or factor (c) evidence) has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence.” (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235.) This conclusion, moreover, is not undermined by the high court’s decisions in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, *Apprendi v. New Jersey* (2000) 530 U.S. 466, or *Ring v. Arizona* (2002) 536 U.S. 584. (*People v. Rangel*, at p. 1235.)

The trial court is not required to instruct the jury that there is no burden of proof at the penalty phase. (*People v. Streeter* (2011) 52 Cal.4th 610, 268.) Nor does the trial court’s failure to instruct that there is a ““presumption of life”” violate a defendant’s constitutional rights to due process, to be free from cruel and unusual punishment, to a reliable determination of his or her sentence, and to equal protection of the laws under the Fifth, Eighth, and Fourteenth Amendments to the federal Constitution. (*People v. Cage* (2015) 62 Cal.4th 256, 293.)

“The death penalty is not unconstitutional for failing to require that the jury base any death sentence on written findings.” (*People v. Elliot* (2005) 37 Cal.4th 453, 488.) “The phrase ‘whether or not’ in section 190.3, factors (d)-(h) and (j) does not unconstitutionally suggest that the absence of a mitigating factor is to be

considered as an aggravating circumstance.” (*People v. Wall* (2017) 3 Cal.5th 1048, 1073.) “‘We have consistently held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard.’” (*Ibid.*)

“Use in the sentencing factors of such adjectives as ‘extreme’ (§ 190.3, factors (d), (g)) and ‘substantial’ (*id.*, factor (g)) does not act as a barrier to the consideration of mitigating evidence in violation of the federal Constitution.” (*People v. Avila* (2006) 38 Cal.4th 491, 614-615.) Nor does the use of unadjudicated offenses under section 190.3, factor (b) in capital proceedings, but not in noncapital matters, violate the equal protection clause or due process principles. (*People v. Delgado* (2017) 2 Cal.5th 544, 591.)

The equal protection clause does not require that the state’s capital sentencing scheme provide the same procedural protections provided to noncapital defendants. (*People v. Henriquez* (2017) 4 Cal.5th 1, 46.) Nor does the federal Constitution require intercase proportionality review. (*Ibid.*)

“International norms and treaties do not render the death penalty unconstitutional as applied in this state.” (*People v. Simon, supra*, 1 Cal.5th at p. 150.) We have consistently found that “there are no constitutional or international law infirmities in the death penalty law. . . .” (*People v. Weaver* (2012) 53 Cal.4th 1056, 1093.)

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CONCLUSION

We affirm the judgment.

CHIN, J.

We Concur:

**CANTIL-SAKAUYE, C. J.,
CORRIGAN, J.,
LIU, J.,
CUÉLLAR, J.,
KRUGER, J.
GROBAN, J.**

EXHIBIT B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES	)	CASE NO.
OF AMERICA,	)	CR 08-224-PSG
PLAINTIFF,	)	LOS ANGELES,
VS.	)	CALIFORNIA
JAMES MICHAEL	)	AUGUST 4, 2008
FAYED,	)	(3:01 P.M. TO 3:05 P.M.)
DEFENDANT.	)	(3:58 P.M. TO 4:16 P.M.)
	)	(4:28 P.M. TO 5:24 P.M.)

INITIAL APPEARANCE/DETENTION HEARING
BEFORE THE HONORABLE RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES: SEE NEXT PAGE

COURT REPORTER: RECORDED; COURT SMART
COURTROOM

DEPUTY: ILENE BERNAL

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[2] FOR THE
PLAINTIFF:

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STATES ATTORNEY
BY: MARK AVEIS
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FOR THE
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[3] INDEX

CASE NO. CR 08-224-PSG AUGUST 4, 2008

PROCEEDINGS: INITIAL APPEARANCE/
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[4] LOS ANGELES, CALIFORNIA, MONDAY, AUGUST 4, 2008; 3:01 P.M.

THE COURT: LET'S PROCEED THEN TO THE AFTERNOON MATTERS. AND BEFORE WE CALL THOSE CASES, I WANT TO ADVISE THE DEFENDANTS WHO ARE PRESENT ON THOSE MATTERS OF THEIR RIGHTS IN CONNECTION WITH THESE PROCEEDINGS.

EACH OF YOU IS HERE TODAY BECAUSE YOU'RE CHARGED WITH A CRIME AGAINST THE UNITED STATES OR WITH A PROBATION VIOLATION OR A VIOLATION OF THE CONDITIONS OF YOUR SUPERVISED RELEASE.

YOU HAVE CERTAIN RIGHTS UNDER THE FEDERAL STATUTES AND THE UNITED STATES CONSTITUTION. AND I WANT TO EXPLAIN THOSE TO YOU. I ASK YOU THAT YOU LISTEN CAREFULLY.

YOU HAVE A RIGHT TO RETAIN AND BE REPRESENTED BY AN ATTORNEY OF YOUR CHOOSING AT EACH AND EVERY STAGE OF THE PROCEEDINGS.

IF YOU CANNOT AFFORD AN ATTORNEY, YOU HAVE A RIGHT TO REQUEST THAT THE COURT APPOINT ONE FOR YOU. THE APPOINTED ATTORNEY WILL BE PAID FOR BY THE GOVERNMENT. BUT BEFORE I APPOINT COUNSEL YOU MUST QUALIFY FOR SUCH APPOINTMENT BY SUBMITTING A FINANCIAL AFFIDAVIT FOR MY APPROVAL.

YOU HAVE A RIGHT TO REMAIN SILENT. ANYTHING WHICH YOU SAY, SIGN, OR WRITE MAY BE INTRODUCED AGAINST YOU IN THIS OR IN ANY OTHER COURT PROCEEDING.

YOU HAVE A RIGHT TO HAVE THE COURT DETERMINE BAIL IN ACCORDANCE WITH THE BAIL REFORM ACT OF 1984.

[5] IF THE GOVERNMENT SEEKS TO HAVE YOU HELD IN CUSTODY, THEN, YOU HAVE THE RIGHT TO A HEARING TODAY, THE FIRST DATE OF YOUR APPEARANCE OR WITHIN THREE TO FIVE DAYS OF THE FIRST DATE OF YOUR APPEARANCE IF EITHER SIDE REQUESTS A CONTINUANCE AND I GRANT THE REQUEST.

IF YOU ARE DETAINED IN CUSTODY, YOU HAVE A RIGHT TO HAVE THAT DECISION BE REVIEWED BY THE CRIMINAL DUTY JUDGE OR

OTHER DISTRICT COURT JUDGE WHO MAY BE ASSIGNED TO YOUR CASE.

YOU MAY BE PRESENT IN ALL SUBSEQUENT HEARINGS REGARDING YOUR DETENTION OR REGARDING ANY CHANGE IN CONDITIONS WHICH ARE SET FOR YOUR RELEASE.

IF YOUR CASE BEGINS WITH A COMPLAINT, YOU HAVE A RIGHT TO A PRELIMINARY HEARING OR TO HAVE THE CASE PRESENTED TO THE GRAND JURY WITHIN TEN DAYS OF TODAY'S DATE IF YOU'RE IN CUSTODY AND 20 DAYS IF YOU ARE RELEASED.

IN A PRELIMINARY HEARING THE GOVERNMENT PRESENTS ITS EVIDENCE, AND THEN THE COURT DECIDES WHETHER THERE IS PROBABLE CAUSE TO BELIEVE THE OFFENSE CHARGED HAS BEEN COMMITTED AND THAT YOU HAVE COMMITTED IT.

IF PROBABLE CAUSE IS NOT FOUND, THE MATTER WILL BE DISMISSED. IF PROBABLE CAUSE IS FOUND, YOU WILL BE REQUIRED TO ENTER A PLEA TO THE CHARGES.

YOU HAVE RECEIVED OR YOU WILL RECEIVE A COPY OF THAT COMPLAINT AND THE AFFIDAVIT IN SUPPORT OF THE COMPLAINT.

IF YOU'RE BEFORE THE COURT ON AN INDICTMENT FROM [6] THIS DISTRICT, THEN, YOUR ARRAIGNMENT AND YOUR PLEA WILL TAKE PLACE NEXT MONDAY. TODAY THE COURT

WILL APPOINT COUNSEL IF YOU'RE NOT REPRESENTED AND ADVISE YOU OF THE NATURE OF THE CHARGES.

THERE IS ONE MATTER I KNOW ON THIS AFTERNOON WHICH ARISES OUT OF A DIFFERENT DISTRICT, THE SOUTHERN DISTRICT. AND SINCE THAT IS A VIOLATION OF SUPERVISED RELEASE, IT HAS CERTAIN SPECIAL CONDITIONS ATTACHED TO IT, AND I'LL TAKE THOSE UP AT THE TIME THAT WE CALL THE MATTER.

I DO WANT TO REMIND THE ASSISTANT UNITED STATES ATTORNEY THAT IF THERE ARE ANY ALIENS IN CUSTODY, THAT THE UNITED STATES ATTORNEY SHALL GIVE NOTIFICATION TO THE CONSULATE OF ANY TREATY OBLIGATIONS THAT ARE REQUIRED.

ALSO, I'M DIRECTING THE ASSISTANT UNITED STATES ATTORNEY TO ENSURE THAT CRIME VICTIMS ARE NOTIFIED OF THE JUSTICE FOR ALL ACT AND OF ANY RIGHTS UNDER THAT STATUTE.

ALL RIGHT. LET'S GO AHEAD AND CALL THE CALENDAR.

(PROCEEDINGS IN UNRELATED MATTERS HELD.)

THE CLERK: CASE NUMBER CR 08-224-1, UNITED STATES OF AMERICA VERSUS JAMES MICHAEL FAYED.

COUNSEL, PLEASE MAKE YOUR APPEARANCES.

MR. AVEIS: GOOD AFTERNOON, YOUR HONOR. MARK AVEIS FOR THE GOVERNMENT.

THE COURT: GOOD AFTERNOON.

MR. WERKSMAN: GOOD AFTERNOON, YOUR HONOR.

[7] MARK WERKSMAN APPEARING ON BEHALF OF THE DEFENDANT

THE COURT: GOOD AFTERNOON.

MR. WERKSMAN: – JAMES FAYED.

THE COURT: YOU'RE RETAINED, MR. WERKSMAN?

MR. WERKSMAN: I AM, YOUR HONOR.

THE COURT: ALL RIGHT.

SIR, IS JAMES MICHAEL FAYED YOUR TRUE AND CORRECT NAME?

THE DEFENDANT: YES, SIR.

THE COURT: HAVE YOU SEEN A COPY OF THE INDICTMENT FROM THIS DISTRICT CHARGING YOU WITH AN OFFENSE AGAINST THE UNITED STATES?

THE DEFENDANT: YES, SIR.

THE COURT: I'M NOT ASKING YOU TO ADMIT OR DENY ANYTHING IN THAT DOCUMENT.

DO YOU UNDERSTAND THE CHARGES AGAINST YOU?

THE DEFENDANT: YES, SIR.

THE COURT: MR. WERKSMAN, HAVE YOU SEEN THE GOVERNMENT'S REQUEST FOR DETENTION?

MR. WERKSMAN: I HAVE, YOUR HONOR.

THE COURT: ARE YOU PREPARED TO PROCEED WITH IT?

MR. WERKSMAN: I AM, YOUR HONOR.

THE COURT: MR. AVEIS, WHAT DOES THE GOVERNMENT PROFFER?

[8] MR. AVEIS: THE GOVERNMENT PROFFERS THE FOLLOWING, YOUR HONOR.

THE GOVERNMENT PROFFERS THE INDICTMENT IN THIS CASE, WHICH WAS FILED UNDER SEAL ON OR ABOUT FEBRUARY 26, 2008, AND UNSEALED ON OR ABOUT AUGUST 1ST, 2008 BY JUDGE ROSENBERG.

THE INDICTMENT CHARGES A SINGLE COUNT OF 18 USC SECTION 1960, OPERATING AN

UNLICENSED MONEY TRANSMITTING BUSINESS.

THE GOVERNMENT ALSO PROFFERS THE PRETRIAL SERVICES ADMINISTRATION REPORT.

AND THE GOVERNMENT PROFFERS THE TESTIMONY OF FBI SPECIAL AGENT TIM SWEC, S-W-E-C, OR IF HE WAS CALLED WOULD SAY THE FOLLOWING, YOUR HONOR.

THAT THE VICTIM IN THE MURDER THAT OCCURRED ON JULY 28TH, 2008 IN CENTURY CITY, PAMELA FAYED, WAS THE WIFE OF THE DEFENDANT. THEY WERE ESTRANGED PURSUANT TO A DIVORCE PROCEEDING THAT WAS FILED IN VENTURA COUNTY IN OR ABOUT OCTOBER 2007.

PAMELA FAYED WAS KILLED AFTER SHE ATTENDED A MEETING WITH HER ATTORNEY. ATTENDING THE MEETING WERE THE DEFENDANT AND HIS ATTORNEY AS WELL. THE ATTORNEYS HAD BEEN RETAINED TO REPRESENT PAMELA FAYED AND JAMES FAYED RESPECTIVELY IN CONNECTION IN PART WITH THE FEDERAL CRIMINAL INVESTIGATION THAT RESULTED IN THE INDICTMENT THAT I'VE [9] IDENTIFIED IN THIS CASE.

PAMELA FAYED WAS KILLED BY A PERPETRATOR WHO WAS LYING IN WAIT IN A PARKING STRUCTURE IN CENTURY CITY. THERE WAS NO

EVIDENCE OF AN ATTEMPTED CAR-JACKING OR OF A ROBBERY.

THE SUBJECT VEHICLE FROM WHICH THE ASSAILANT EMERGED WAS CAPTURED ON SURVEILLANCE VIDEO IN THAT PARKING STRUCTURE. THE SURVEILLANCE VIDEO IDENTIFIED A LICENSE PLATE. THAT LICENSE PLATE WAS TRACED TO A CAR THAT HAD BEEN RENTED IN CAMARILLO AT AVIS RENT-A-CAR AT A LOCATION NOT FAR FROM THE DEFENDANT'S BUSINESS USING A CREDIT CARD IN THE DEFENDANT'S NAME AND IN THE NAME OF GOLDFINGER COIN AND BULLION, WHICH I NOTE PURSUANT TO THE PRETRIAL SERVICES REPORT, IS A BUSINESS THAT THE DEFENDANT TOLD PRETRIAL THAT HE IS THE OWNER AND OPERATOR OF.

THAT SAME CREDIT CARD WAS FOUND DURING A SEARCH OF THE DEFENDANT IN HIS WALLET BY THE LAPD EARLIER THIS WEEK – EXCUSE ME – LAST WEEK.

PURSUANT TO A SEARCH WARRANT SERVED ON THE DEFENDANT'S RESIDENCE, APPROXIMATELY \$60,000 IN CASH WAS FOUND IN WHAT APPEARS TO BE HERMETICALLY SEALED WRAPPING MATERIAL.

A FRIEND OF THE VICTIM HAD TOLD THE LAPD THAT THE DEFENDANT – EXCUSE ME – THAT THE VICTIM HAD SAID THE DEFENDANT HAD BURIED CASH ON HIS PREMISES. I NOTE

THE PREMISES IS A REMOTE LOCATION IN MOORPARK ON WELL OVER A [10] HUNDRED ACRES ACCESSIBLE ONLY BY A SINGLE ROAD. OFFICERS DURING THE SEARCH ALSO FOUND \$3 MILLION IN GOLD BULLION.

DURING THE COURSE OF THAT SAME SEARCH THE DEFENDANT REACHED INTO A SAFE TO GRAB HIS PASSPORT, SAID HE NEEDED TO SEE THAT PASSPORT. HE WAS ALLOWED TO LOOK AT THE PASSPORT. HE LOOKED AT IT AND NOTICED – HE NOTICED IT HAD HIS PICTURE AND HIS NAME. HE SIGHED AND HUNG HIS HEAD.

AN INDIVIDUAL INTERVIEWED BY LAW ENFORCEMENT AUTHORITIES WHO WAS A FRIEND OF THE VICTIM SAID THAT THE VICTIM HAS SAID THAT JAMES FAYED, THIS DEFENDANT, HAD A PASSPORT WITH THAT SAME PICTURE BUT WITH A DIFFERENT NAME.

FURTHERMORE, PAMELA FAYED, THE VICTIM IN THE MURDER THAT OCCURRED LAST WEEK, RECENTLY TOLD A CLOSE FRIEND THAT THE DEFENDANT HAD TOLD HER HE WANTED TO SETTLE EVERYTHING, THAT IS, RELATING TO THE DIVORCE CASE THAT I MENTIONED WAS FILED IN OR ABOUT OCTOBER OF 2007, BECAUSE THE LAWYERS WERE COSTING HIM A LOT OF MONEY, AND THAT HE WANTED TO MEET WITH THE VICTIM AND DID SO ON OR ABOUT JULY 15TH.

THE VICTIM TOLD A FRIEND THAT DURING THAT MEETING THE DEFENDANT TOLD THE SOON-TO-BE VICTIM OF THE MURDER, I COULD HAVE YOU KILLED, AND MY HANDS WOULD BE CLEAN. AND PATTED HIS HANDS IN THAT MANNER.

DURING THE SEARCH OF THE DEFENDANT'S HOUSE BY LAPD LAST WEEK APPROXIMATELY 20 TO 25 ASSAULT RIFLES AND OTHER FIREARMS WERE FOUND ALONG WITH THOUSANDS OF ROUNDS OF [11] MATCHING AMMUNITION IN A SAFE.

ALL OF THOSE WEAPONS APPEAR TO BE LEGAL AND, THEREFORE, WOULD BE ACCESSIBLE BY THIS INDIVIDUAL IF HE WERE RELEASED.

FURTHERMORE, YOUR HONOR, AS I INDICATED, THE MEETING THAT HAD OCCURRED ON JULY 28, 2008 IN CENTURY CITY IN THE LATE AFTERNOON WAS, AGAIN, BETWEEN THIS DEFENDANT, HIS COUNSEL IN HIS CRIMINAL CASE, THAT IS, HIS FEDERAL CRIMINAL CASE, THE SOON-TO-BE VICTIM PAMELA FAYED AND HER LAWYER AT THAT TIME.

PRIOR TO THAT TIME IN CONNECTION WITH THE FAMILY LAW CASE PENDING IN VENTURA COUNTY A MEETING BEFORE AN APPOINTED JUDGE HAD BEEN SET FOR JULY 29 AT 11:00 A.M. THAT WOULD HAVE BEEN THE NEXT DAY. PAMELA FAYED WAS MURDERED AT APPROXIMATELY 6:35 P.M. ON JULY 28TH. SO, LESS THAN

24 HOURS LATER THE MEETING WAS TO OCCUR WITH A JUDGE IN RELATION TO THE FAMILY LAW MATTER THAT WOULD RELATE TO THE DEFENDANT'S, THIS DEFENDANT'S, REQUIRED DISCLOSURE OF BUSINESS RECORDS.

THE BUSINESS RECORDS WOULD RELATE TO HIS BUSINESS THAT HE'S CLAIMED, PURSUANT TO HIS STATEMENT TO PRETRIAL, THAT HE OWNS AND OPERATES. AND HE HAD BEEN RESISTING TURNING OVER THOSE BUSINESS RECORDS IN AN EFFORT TO ENSURE THAT THE VICTIM PAMELA FAYED DID NOT GET HER SHARE OF THE ESTATE, THAT IS, THE MARITAL DISSOLUTION.

FURTHERMORE. WITHIN THE LAST 30 TO 45 DAYS BUSINESS [12] SERVERS THAT ARE USED TO CAPTURE THE DIGITAL INFORMATION RELATED TO THE DEFENDANT'S BUSINESS IN CAMARILLO WERE MOVED OFFSHORE.

DURING A SEARCH OF THE BUSINESS IN THE WEE HOURS OF SATURDAY, AUGUST 2ND, THERE WAS A RACK OF SERVERS, COMPUTER SERVERS THAT WERE – WAS FOUND, AND THE SERVERS APPEAR TO HAVE NOT BEEN USED OR HAD BEEN DISCONNECTED.

FURTHER EVIDENCE INDICATES THAT SERVERS PRIOR TO THIS 30- TO 45-DAY PERIOD THAT I'VE MENTIONED HAD BEEN LOCATED SOMEWHERE IN TEXAS. BUT WITHIN THE LAST 30 TO 45 DAYS THOSE SERVERS, OR THE USE OF

THE SERVER RACK AND SERVERS WAS LOCATED OFFSHORE TO THE UK, INDICATING, IF YOU WILL, A PROGRESSION FROM THE RETENTION OF DIGITAL INFORMATION HERE IN CAMARILLO, WHICH WOULD BE EASILY ACCESSIBLE BY LAW ENFORCEMENT, TO DALLAS WHERE IT COULD BE NOT SO EASILY, BUT SIMILARLY, I GUESS, ACCESSIBLE BY LAW ENFORCEMENT, TO THE UK, WHERE IT WOULD BE VIRTUALLY INACCESSIBLE OR IT WOULD BE DIFFICULT TO ACCESS BY FEDERAL LAW ENFORCEMENT.

FINALLY, YOUR HONOR, THIS FEDERAL CRIMINAL INVESTIGATION COMMENCED WITH INVESTIGATION INTO TWO PONZI SCHEMES, TRUE VENTURES AND SOLID INVESTMENTS, IN OR ABOUT 2005 AND 2006. VICTIMS OF THOSE PONZI SCHEMES INVESTED OVER \$20 MILLION. ALL OF THEIR MONEY WAS ROUTED THROUGH BANK ACCOUNTS CONTROLLED AND OWNED BY GOLDFINGER COIN AND BULLION OVER WHICH THIS DEFENDANT AND THE VICTIM OF THE MURDER WERE [13] THE SIGNATORIES.

THE FUNDS WENT INTO THOSE ACCOUNTS, WERE MOVED TO VARIOUS OTHER ACCOUNTS CONTROLLED BY THIS DEFENDANT, AND OUT TO THE APPARENT OPERATORS OF THE PONZI SCHEME AS WELL AS POTENTIALLY THIS DEFENDANT IN THE OFFSHORE ACCOUNTS IN THE NETHERLANDS, ANTILLES, AND ELSEWHERE.

THAT IS MY PROFFER. AND I WILL DEFER FOR MY ARGUMENT.

THANK YOU.

THE COURT: ALL RIGHT. MR. WERKSMAN, LET'S JUST TAKE IT STEP BY STEP FOR THE MOMENT.

YOU ACCEPT THE PROFFER OF THE INDICTMENT I ASSUME?

MR. WERKSMAN: ACCEPT THE INDICTMENT, THAT'S CORRECT, YOUR HONOR.

THE COURT: NOW, WHAT ABOUT THE PRETRIAL REPORT?

MR. WERKSMAN: WELL, THE PRETRIAL REPORT HAS NUMEROUS ERRORS, YOUR HONOR, THAT I'D LIKE TO POINT OUT TO THE COURT. IF YOU WANT TO DO THAT IN THIS ORDER –

THE COURT: NO, I DON'T DO IT.

MR. WERKSMAN: THE FACTUAL BIOGRAPHICAL INFORMATION IS CORRECT, YOUR HONOR. THERE ARE A COUPLE OF CONCLUSIONS DRAWN AND ALLEGATIONS MADE WHICH I DISPUTE.

BUT WE ADOPT THE BASIC BIOGRAPHICAL INFORMATION.

THE COURT: ALL RIGHT. THE FACTUAL MATTERS IN THE PRETRIAL REPORT YOU DO NOT DISPUTE?

[14] MR. WERKSMAN: THAT'S CORRECT. WITH THE EXCEPTION, FOR EXAMPLE, WHEN THE PRETRIAL REPORT ASSERTS THAT APPROXIMATELY 20 TO 25 ASSAULT RIFLES AND OTHER FIREARMS WERE FOUND IN HIS SAFE, IN FACT, THERE WERE EIGHT LONG GUNS, NOT ASSAULT RIFLES, BUT LONG GUNS AND THEN A NUMBER OF OTHER – HANDGUNS.

THERE'S A DIFFERENCE BETWEEN TELLING A JUDGE THERE ARE 20 TO 25 ASSAULT RIFLES AND TELLING A JUDGE, WELL, WE FOUND EIGHT LONG GUNS AND SOME HANDGUNS. THE FORMER IS A LITTLE MORE EXPLOSIVE AND MORE PREJUDICIAL, INFLAMMATORY.

AND, SO, WE WOULD OBJECT TO THE CHARACTERIZATION OF HIS –

THE COURT: ALL RIGHT. WELL, LET ME JUST –

MR. WERKSMAN: – HIS GUN COLLECTION –

THE COURT: JUST A MOMENT.

MR. AVEIS, DO YOU AGREE THAT THERE WERE EIGHT LONG GUNS AND SOME HANDGUNS AND THAT THERE WERE NO ASSAULT RIFLES?

MR. AVEIS: I DO NOT. BECAUSE –

THE COURT: ALL RIGHT.

MR. AVEIS: – I HAVEN'T PERSONALLY SEEN THEM.

THE COURT: OKAY. ALL RIGHT.

NOW, MR. WERKSMAN, MR. AVEIS GAVE A LONG RECITATION OF WHAT THE FEDERAL AGENT WOULD TESTIFY TO IF CALLED.

MR. WERKSMAN: I'M GOING TO OBJECT TO THAT, YOUR HONOR –

[15] THE COURT: THOUGHT SO.

MR. WERKSMAN: – ON THE FOLLOWING BASIS. AS THE PROSECUTOR WAS SPEAKING, I WAS LOOKING AROUND TO SEE IF I WAS IN FEDERAL COURT OR IF I WAS IN DIVISION 30 AT THE CRIMINAL COURTS BUILDING AT AN ARRAIGNMENT –

THE COURT: SAVE YOUR ARGUMENT. ALL I NEED TO KNOW IS WHETHER YOU AGREE TO THE FACTS THAT HE STATED.

MR. WERKSMAN: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. WERKSMAN: I BELIEVE THE PROSECUTOR HAS RECITED

THE COURT: OKAY.

MR. WERKSMAN: – UNCORROBORATED HEARSAY. HE'S PROFFERED NO SPECIFIC FACTS OR EVIDENCE TO THIS COURT OR TO DEFENSE COUNSEL REGARDING ANY OF THESE ALLEGATIONS.

THE COURT: MR. WERKSMAN, ALL I NEEDED WAS YES OR NO.

MR. WERKSMAN: THE ANSWER THEN IS, YES, YOUR HONOR, I OBJECT TO THE FACTUAL BASIS.

THE COURT: ALL RIGHT. NOW, HOW LONG WOULD YOU ANTICIPATE THE TESTIMONY OF THIS AGENT WILL TAKE, MR. AVEIS?

MR. AVEIS: I THINK THAT MAY VERY WELL BE A FUNCTION OF HOW LONG THE CROSS-EXAMINATION MAY BE, HOW LONG IT –

THE COURT: WELL, LET'S PUT IT THIS WAY, MR. [16] WERKSMAN. WOULD YOU AGREE THAT MR. AVEIS' RECITATION COULD STAND AS THE DIRECT TESTIMONY OF THE AGENT?

MR. WERKSMAN: I WOULD, YOUR HONOR, BUT I WOULD ALSO ASK THE COURT –

THE COURT: ALL RIGHT. SO THAT ALL WE WOULD NEED IS YOUR CROSS-EXAMINATION.

AND I TURN TO YOU AND ASK FOR AN ESTIMATE OF HOW LONG IT WILL TAKE YOU TO CROSS-EXAMINE.

MR. WERKSMAN: WELL, YOUR HONOR –

THE COURT: WE HAVE ANOTHER MATTER. I'M TRYING TO FIGURE OUT HOW TO HANDLE THIS.

MR. WERKSMAN: WOULD THE COURT ALLOW ME TO CROSS-EXAMINE THE AGENT AT THIS TIME? IS HE HERE? IS HE PRESENT?

THE COURT: HE IS.

MR. WERKSMAN: MAY I HAVE A MOMENT WITH COUNSEL?

THE COURT: YES.

MR. WERKSMAN: IN FACT, YOUR HONOR, DOES THE COURT WANT TO PASS THIS MATTER? DOES THE COURT HAVE ONE MORE MATTER?

THE COURT: I DO HAVE ONE MORE MATTER. I'M TRYING TO GET A HANDLE ON HOW LONG THIS ONE IS GOING TO TAKE.

MR. WERKSMAN: IF I COULD HAVE A MOMENT WITH THE PROSECUTOR?

THE COURT: YES.

[17] (COUNSEL CONFERRING.)

MR. WERKSMAN: YOUR HONOR, I WOULD REQUEST APPROXIMATELY A HALF AN HOUR TO CROSS-EXAMINE THE AGENT, IF I MAY, JUST TO CLARIFY WHAT HE'LL BE TESTIFYING ABOUT. I BELIEVE THAT THE FBI AGENT IS NOT

PERSONALLY INVOLVED IN THE MURDER INVESTIGATION HIMSELF, BUT, RATHER, HE IS GIVING EVIDENCE THAT HE'S BEEN TOLD BY LOS ANGELES POLICE DETECTIVES.

IS THAT CORRECT?

THE COURT: NO. WAIT, WAIT, WAIT. WE DON'T DO IT THAT WAY IN THIS COURT, MR. WERKSMAN. WE DON'T HAVE ATTORNEYS ASKING EACH OTHER QUESTIONS IN FRONT OF THE COURT.

MR. WERKSMAN: I THINK, YOUR HONOR, IF THE AGENT IS MERELY RECITING WHAT HE'S BEEN TOLD –

THE COURT: WE'RE GOING TO DO THIS. WE'RE NOT GOING TO LET HIS PROFFER STAND. WE'RE GOING TO HAVE HIM TESTIFY, AND THAT WAY THERE WON'T BE ANY QUESTION AS TO WHO SAYS WHAT. ALL RIGHT.

MR. WERKSMAN: YOUR HONOR, I –

THE COURT: NO, NO, NO. WE'RE GOING TO GET A CLEAN RECORD ON THIS.

SO, I THINK WE'RE LOOKING AT CONSIDERABLY MORE THAN HALF AN HOUR. AND NOW THE QUESTION IS WHETHER WE DO IT TODAY OR WHETHER WE DO IT TOMORROW.

MR. AVEIS: MAY I ADD SOMETHING, PLEASE. MAY I ASK [18] WHETHER I CAN CONFER WITH COUNSEL. AND IF I SEE WHERE HE'S

GOING, PERHAPS WE CAN REACH A STIPULATION. IF IN FACT THE AGENT IS SIMPLY GOING TO TESTIFY ABOUT WHAT OTHERS SAID, AND COUNSEL IS WILLING TO ACCEPT THAT STIPULATION, HE MAY HAVE NOTHING TO ASK.

MR. WERKSMAN: YOUR HONOR, THAT'S WHAT I WAS DRIVING AT, YOUR HONOR. I THINK MY CROSS-EXAMINATION WILL BE VERY BRIEF IF, IN FACT, THE AGENT IS GOING TO BE TESTIFYING ABOUT REPRESENTATIONS MADE TO HIM FROM THE LOS ANGELES POLICE DEPARTMENT. THAT SIMPLY IS MY QUESTION. IF THAT'S THE CASE, I WOULD LIKE AN OPPORTUNITY TO CROSS-EXAMINE HIM. BUT I THINK THE CROSS-EXAMINATION WILL BE RELATIVELY BRIEF IN THAT CASE.

THE COURT: ALL RIGHT. IN EITHER EVENT I THINK WHAT WE'RE GOING TO DO IS – WELL, FIRST, I'M GOING TO GO AHEAD AND SET THE MATTER FOR POST-INDICTMENT ARRAIGNMENT BECAUSE IT'S AN INDICTED CASE. SO, NO MATTER WHAT HAPPENS WITH REGARD TO THE DETENTION REQUEST, THE CASE WILL BE SET FOR POST-INDICTMENT ARRAIGNMENT FOR NEXT MONDAY.

MR. AVEIS: I BELIEVE, YOUR HONOR – IF IT'S OKAY WITH THE COURT, WE'VE AGREED AND WOULD REQUEST THAT WE GO TO AUGUST 18TH.

THE COURT: ANY OBJECTION, MR. –

MR. WERKSMAN: NO, YOUR HONOR.
THAT'S A DATE WE –

THE COURT: ALL RIGHT. I'M GOING TO
SET THE [19] POST-INDICTMENT ARRAIGNMENT
FOR AUGUST 18TH AT 8:30 A.M. IN THIS COURT-
ROOM, COURTROOM 341, OF THE ROYBAL FED-
ERAL BUILDING.

NOW, I THINK WHAT WE'LL DO IS WE'LL
PASS THE REST OF THIS MATTER, AND LET ME
DEAL WITH THE LAST CASE. AND, THEN, WE'LL
RETURN TO THIS MATTER AND SEE WHERE WE
STAND.

IS EITHER OF YOU APPEARING ON THE
OTHER CASE?

MR. AVEIS: I'M SORRY?

THE COURT: YOU'RE NOT APPEARING
ON THE OTHER –

MR. AVEIS: NO.

THE COURT: ALL RIGHT. SO, YOU'LL
HAVE AN OPPORTUNITY TO CONFER WITH
EACH OTHER WHILE WE'RE CALLING THE
OTHER CASE.

MR. AVEIS: SURE.

(PROCEEDINGS IN UNRELATED MATTER
HELD.)

(4:14 TO 4:28 P.M.)

THE CLERK: PLEASE REMAIN SEATED AND COME TO ORDER. THIS COURT IS AGAIN IN SESSION.

THE COURT: ALL RIGHT. LET'S RECALL THE FAYED MATTER.

THE CLERK: RECALLING CASE NUMBER CR 08-224-1, UNITED STATES OF AMERICA VERSUS JAMES MICHAEL FAYED.

COUNSEL, PLEASE MAKE YOUR APPEARANCES.

MR. AVEIS: GOOD AFTERNOON AGAIN, YOUR HONOR.

MARK AVEIS FOR THE GOVERNMENT.

[20] MR. WERKSMAN: GOOD AFTERNOON AGAIN, YOUR HONOR.

MARK WERKSMAN APPEARING ON BEHALF OF MR. FAYED, WHO'S PRESENT IN CUSTODY.

THE COURT: ALL RIGHT. WHERE DO WE STAND, GENTLEMEN?

MR. AVEIS: I WOULD SUGGEST THE FOLLOWING, YOUR HONOR. THAT THE PARTIES STIPULATE THAT THE PROFFER THAT I PROVIDED, WHICH IS A SUMMARY OF THE TESTIMONY OF SPECIAL AGENT TIM SWEC, BE RECEIVED AS THE DIRECT TESTIMONY, AND THAT COUNSEL MAY CROSS-EXAMINE THE

AGENT BASED UPON THAT DIRECT TESTIMONY
AND LIMITED BY THE SCOPE OF IT.

MR. WERKSMAN: I WOULD JOIN IN
THAT STIPULATION, YOUR HONOR.

THE COURT: ALL RIGHT. CALL YOUR
WITNESS.

MR. AVEIS: VERY GOOD.

THE GOVERNMENT CALLS TIM SWEC.

THE CLERK: PLEASE RAISE YOUR
RIGHT HAND.

TIM SWEC, GOVERNMENT WITNESS,
SWORN:

THE WITNESS: I DO.

THE CLERK: PLEASE BE SEATED.

PLEASE STATE AND SPELL YOUR NAME FOR
THE RECORD.

THE WITNESS: TIMOTHY L. SWEC, S-W-E-C.

THE CLERK: THANK YOU.

THE COURT: GO AHEAD, MR. AVEIS.

MR. AVEIS: THANK YOU.

[21] THE PARTIES HAVING STIPULATED
THAT THE PROFFER WOULD BE DEEMED THE
DIRECT TESTIMONY OF THIS WITNESS, I WOULD

TURN THE WITNESS' TESTIMONY IN FOR CROSS-EXAMINATION.

THE COURT: WELL, PERHAPS FOR THE RECORD YOU SHOULD VERIFY THAT THE WITNESS ADOPTS YOUR CHARACTERIZATION OF HIS TESTIMONY.

MR. AVEIS: ALL RIGHT. FAIR ENOUGH.

DIRECT EXAMINATION

BY MR. AVEIS:

Q MR. SWEC, WERE YOU PRESENT IN THE ROOM WHEN I RECITED THE GOVERNMENT'S PROFFER?

A I WAS, YES.

Q AND YOU HEARD THE STIPULATION OF THE PARTIES?

A I DID.

Q AND DO YOU ADOPT AS YOUR DIRECT TESTIMONY, IF YOU WILL, THE PROFFER THAT I PROVIDED PURSUANT TO THAT STIPULATION?

A I DO, WITH ONE MINOR CHANGE IN DETAIL.

Q VERY GOOD. WHAT WOULD THAT BE?

A THE SEQUENCE OF EVENTS WHEN THE DEFENDANT – ON THE ISSUE OF HIS PASSPORT. AS I UNDERSTOOD, HE WAS NOT PERMITTED TO

SEE HIS PASSPORT INITIALLY. AT THAT POINT HE HUNG HIS HEAD AND SIGHED. HE WAS LATER ALLOWED TO LOOK AT HIS PASSPORT –

Q VERY GOOD. THANK YOU.

THAT'S THE ONLY CHANGE?

[22] A IT IS.

Q VERY GOOD. THANK YOU.

THE COURT: ALL RIGHT. MR. WERKSMAN, WOULD YOU BE ABLE TO CROSS-EXAMINE HIM FROM THE PODIUM, OR DO YOU NEED ACCESS TO YOUR CLIENT?

MR. WERKSMAN: NO. IT MIGHT BE EASIER RIGHT HERE THAN THERE.

THE COURT: I THINK THAT MIGHT BE A LITTLE –

MR. WERKSMAN: WOULD THE COURT ALLOW MY CLIENT TO BE TRANSPORTED OVER HERE? I HATE TO SURPRISE THE SECURITY GENTLEMAN HERE, BUT IT MIGHT BE MORE EFFECTIVE FOR ME TO HAVE MY CLIENT WITH ME BUT EASIER TO CROSS-EXAMINE FROM THERE.

THE COURT: ANY OBJECTION FROM THE MARSHAL?

THE UNITED STATES MARSHAL: NO, YOUR HONOR.

MR. WERKSMAN: THANK YOU.

THE COURT: ALL RIGHT.

CROSS-EXAMINATION

BY MR. WERKSMAN:

Q MR. SWEC –

THE COURT: WAIT JUST A MOMENT.
LET'S GET YOUR CLIENT SEATED.

(PAUSE IN PROCEEDINGS.)

THE COURT: YOU CAN SIT DOWN, MR.
FAYED.

THE DEFENDANT: THANK YOU, SIR.

THE COURT: ALL RIGHT. GO AHEAD,
MR. WERKSMAN.

[23] BY MR. WERKSMAN:

Q MR. SWEC, HOW LONG HAVE YOU BEEN
A SPECIAL AGENT WITH THE FBI?

A FOUR MONTHS.

Q SO, WOULD YOU SAY THAT YOU'RE A
BRAND NEW ROOKIE AGENT?

A I'M A NEW AGENT, YES, SIR.

Q AND ARE YOU ASSIGNED TO THE INVE-
STIGATION INTO SOME ALLEGED CRIMINAL AC-
TIVITIES OF JAMES FAYED?

A NO.

Q WERE YOU BROUGHT IN HERE TODAY BY
THE ASSISTANT U.S. ATTORNEY FOR THE SOLE

PURPOSE OF GIVING A DECLARATION ABOUT FACTS WHICH WERE READ INTO THE RECORD BY MR. AVEIS?

A NO, SIR. I WAS BROUGHT HERE TODAY SIMPLY TO TRANSPORT THE DEFENDANT AND TO HELP WITH THE INITIAL APPEARANCE.

Q ALL RIGHT. SO, YOUR SOLE CONNECTION WITH THE INVESTIGATION AND PROSECUTION OF JAMES FAYED IS THAT YOU TRANSPORTED HIM TO COURT THIS MORNING FROM – WHERE? – FROM THE VENTURA COUNTY JAIL?

A THAT'S CORRECT.

Q SO, YOU WENT UP THERE EARLY THIS MORNING TO THE VENTURA COUNTY JAIL, CORRECT?

A YES.

Q AND YOU BROUGHT HIM DOWN HERE?

A YES, SIR.

Q AND SOMETIME AFTER TRANSPORTING HIM TO THIS BUILDING YOU [24] WERE ASKED TO BE THE AFFIANT OR THE DECLARANT ABOUT THE FACTS WHICH WERE READ INTO THE RECORD BY MR. AVEIS, CORRECT?

A THAT'S CORRECT.

Q NOW, THE FACTS THAT WERE READ INTO THE RECORD BY MR. AVEIS WHAT WAS YOUR SOURCE FOR ALL OF THOSE FACTS?

A I SPOKE TO TWO LAPD DETECTIVES THAT ARE HAVE BEEN INVOLVED AND THREE FBI AGENTS THAT ARE INVOLVED IN THE INVESTIGATION.

Q WHAT ARE THE NAMES OF THE TWO LAPD DETECTIVES THAT YOU SPOKE TO?

A DETECTIVE PORCHE AND I CAN'T RECALL THE SECOND DETECTIVE'S NAME.

Q DID YOU MAKE NOTES ABOUT YOUR CONVERSATIONS WITH –

A I HAD NOTES AND I CONFIRMED THOSE NOTES WITH THEM.

Q AND HOW LONG AGO DID YOU PREPARE THOSE NOTES?

A I'VE HAD THEM FOR THREE HOURS.

Q SO, YOU SPOKE TO THE DETECTIVES TODAY SINCE AROUND ONE O'CLOCK THIS AFTERNOON?

A THAT'S CORRECT.

Q AND YOU MADE SOME NOTES. AND WHO DID YOU TURN THOSE NOTES OVER TO?

A I HAVE THEM.

Q OH, YOU DO? OKAY.

HAVE YOU PREPARED A REPORT ABOUT YOUR INTERVIEW WITH THESE DETECTIVES?

[25] A NO.

Q ARE THEY THE TWO GENTLEMEN SEATED HERE AT THE END OF THIS SEAT, THE FAR LEFT IN THE MIDDLE? ARE THESE THE TWO DETECTIVES?

A THEY ARE.

Q OKAY. NOW, WHICH ONE IS DETECTIVE PORCHE?

A THE ONE ON THE END.

Q AND DO YOU KNOW THE NAME OF THE OTHER ONE?

A I DON'T RECALL HIS NAME.

Q DID YOU TALK TO HIM ABOUT THE FACTS OF THIS CASE?

A I MAINLY SPOKE TO DETECTIVE PORCHE.

Q ALL RIGHT. AND DO YOU THINK IF YOU TOOK NOTES ABOUT THE FACTS RELATED TO YOU BY THE OTHER DETECTIVE YOU MIGHT HAVE WRITTEN HIS NAME DOWN SOMEWHERE?

A I - I'M NOT SURE. COULD YOU REPEAT THAT.

Q YOU THINK YOU MIGHT HAVE WRITTEN DOWN THE NAME OF THE OTHER DETECTIVE, OR AS YOU SIT HERE TODAY, DO YOU HAVE ANY IDEA WHETHER YOU EVER KNEW THE NAME OF THE OTHER DETECTIVE?

A I WAS INTRODUCED. I DON'T RECALL.

Q SO, YOU HAD NOT ACTUALLY BEEN TO THE HOME IN MOORPARK WHERE MR. FAYED WAS ARRESTED ON FRIDAY NIGHT, CORRECT?

A THAT'S CORRECT.

Q YOU WEREN'T THERE WHEN HIS SAFE WAS OPENED, CORRECT?

A CORRECT.

Q YOU NEVER SAW HIS REACTION TO ANYTHING THAT WAS TAKEN [26] FROM THE SAFE, CORRECT?

A CORRECT.

Q YOU HAVE NO IDEA AS YOU SIT HERE TODAY WHETHER OR NOT HE BEHAVED UNUSUAL IN ANY WAY IN RESPONSE TO HIS PASSPORT BEING TAKEN OUT, CORRECT?

A I WAS – JUST WHAT HAS BEEN CONFIRMED WITH THE PEOPLE WHO WERE THERE.

Q ALL RIGHT. DID YOU UNDERTAKE TO CHECK WITH THE UNITED STATES DEPARTMENT OF STATE TO SEE WHETHER MORE THAN

ONE PASSPORT HAS BEEN ISSUED TO JAMES FAYED?

A NO.

Q AS FAR AS YOU KNOW, HE ONLY HAS ONE PASSPORT, AND THAT IS IN THE CUSTODY OF THE LOS ANGELES POLICE DEPARTMENT, CORRECT?

A AS FAR AS I KNOW –

Q AND YOU DIDN'T GO TO THE PROPERTY TO SEARCH FOR BURIED CASH, CORRECT?

A I WAS NOT THERE.

Q IN FACT, WERE YOU TOLD THAT THE DETECTIVES SPENT HOURS LOOKING ALL OVER THE PROPERTY FOR BURIED CASH AND FOUND NO BURIED CASH?

A I WAS NOT TOLD THAT.

Q ARE YOU AWARE FROM ANY SOURCE AS YOU SIT HERE TODAY THAT NO CASH WAS FOUND BURIED ANYWHERE ON THE MOORPARK PROPERTY?

A I'M SORRY. COULD YOU REPEAT THAT.

[27] Q ARE YOU AWARE AS YOU SIT HERE TODAY THAT NO CASH WAS FOUND BURIED ANYWHERE ON THE MOORPARK PROPERTY?

A I WAS NOT AWARE OF THAT, SIR.

Q YOU ARE AWARE THAT NO PROPERTY – NO CASH WAS FOUND? YES OR NO?

A YES, I'M AWARE.

THE COURT: YOU HAVE A DOUBLE NEGATIVE HERE, MR. WERKSMAN.

MR. WERKSMAN: WELL, THAT'S JUST A TRIPLE POSITIVE, YOUR HONOR.

BY MR. WERKSMAN:

Q YES, YOU'RE AWARE THAT THERE WAS NO – ALL RIGHT.

LET ME START UP AGAIN. IT'S LATE IN THE DAY, BUT I WANT TO GET THIS STRAIGHT.

YOU HAVE NO IDEA – WELL – ALL RIGHT. WAS ANY CASH FOUND BURIED ON THE PROPERTY?

A NOT TO MY KNOWLEDGE.

Q WERE YOU TOLD THAT NO CASH WAS FOUND ON THE PROPERTY? YES OR NO?

A NO, I DON'T BELIEVE I WAS TOLD IN THAT WAY.

Q DID SOMEBODY TELL YOU THAT NO CASH WAS FOUND – OR GIVE YOU THAT IMPRESSION THAT NO CASH WAS FOUND BURIED?

A I DID NOT GET THE IMPRESSION THAT ANY CASH WAS FOUND BURIED.

Q DID ANYBODY – DID YOU TALK TO ANY WITNESSES WHO [28] PROVIDED ANY INFORMATION THAT WAS PASSED ALONG TO YOU BY THE LAPD DETECTIVES?

A I ONLY SPOKE TO THE LAPD DETECTIVES AND FBI AGENTS.

Q SO, IF SOME FRIEND OF PAMELA FAYED TOLD SOMEBODY THAT SHE SAID SOMETHING THAT WAS RELATED BY THE PROSECUTOR HERE TODAY, YOU WOULD HAVE NO INDEPENDENT CORROBORATION OF THAT?

A CORRECT, NOT PERSONALLY.

Q AND THERE WAS SOME TESTIMONY ATTRIBUTED TO YOU THAT A VEHICLE REGISTERED TO GOLDFINGER WAS OBSERVED ON SURVEILLANCE AT THE SCENE OF THE MURDER; IS THAT CORRECT?

A NO, SIR.

Q WHAT IS THAT INFORMATION THAT YOU DECLARED?

A THAT THE VEHICLE THAT WAS AT THE SCENE OF THE MURDER WAS CAUGHT ON SURVEILLANCE, THAT IT WAS TRACED BACK TO AVIS RENT-A-CAR, AND THAT RENTAL CAR HAD BEEN RENTED WITH A CREDIT CARD IN THE DEFENDANT'S NAME – IN HIS COMPANY'S NAME.

Q ALL RIGHT. SO, THE CREDIT CARD WAS IN THE NAME OF THE DEFENDANT OR THE COMPANY OR BOTH?

A BOTH.

Q BOTH. ALL RIGHT. DO YOU KNOW WHO SIGNED THE CREDIT CARD RECEIPT ASSOCIATED WITH THE RENTAL OF THAT VEHICLE?

A NO, I DO NOT.

Q DO YOU KNOW IF IT WAS SOMEONE OTHER THAN JAMES FAYED?

A I DO NOT.

Q IF I TOLD YOU IT WAS SOMEONE OTHER THAN JAMES FAYED, [29] WOULD YOU HAVE ANY BASIS TO KNOW WHETHER THAT'S TRUE OR NOT?

A NO, I DON'T.

Q AND, OF COURSE, YOU DO KNOW THAT MR. FAYED WAS NOT OBSERVED ON SURVEILLANCE COMMITTING ANY ACTS OF VIOLENCE AGAINST PAMELA FAYED, CORRECT?

A (INAUDIBLE.)

Q WELL –

THE COURT: JUST A MOMENT. I DIDN'T HEAR YOUR ANSWER.

THE WITNESS: I HAVE NO KNOWLEDGE OF THAT.

BY MR. WERKSMAN:

Q WELL, I'D LIKE TO ASK YOU IF YOU COULD BE A LITTLE MORE – A LITTLE MORE DECLARATIVE.

A YES. AS I UNDERSTAND IT, HE WAS NOT ON ANY SURVEILLANCE.

Q ALL RIGHT. AND AS YOU UNDERSTAND IT, THERE WAS NO ALLEGATION BY ANYBODY THAT HE PERSONALLY ASSAULTED PAMELA FAYED, TRUE?

A TRUE.

Q NOW, ARE YOU AWARE OF ANY ELECTRONIC SURVEILLANCE THAT MAY HAVE BEEN CONDUCTED TO OVERHEAR CONVERSATIONS BY MR. FAYED AND OTHERS?

A I AM.

Q OKAY. WHAT DO YOU KNOW ABOUT THE EXISTENCE OF ELECTRONIC SURVEILLANCE THAT WOULD DETECT CONVERSATIONS [30] BETWEEN MR. FAYED AND OTHERS. TELL US.

MR. AVEIS: OBJECT TO THE QUESTION –

THE COURT: JUST A MOMENT.

MR. AVEIS: – BEYOND THE SCOPE OF THE DIRECT EXAMINATION.

THE COURT: I THINK THAT'S RIGHT, MR. WERKSMAN. THERE WASN'T ANY DIRECT PROFFER ABOUT ANY ELECTRONIC SURVEILLANCE.

MR. WERKSMAN: THERE WASN'T, YOUR HONOR. I WANTED TO EXPLORE THE SCOPE OF HIS KNOWLEDGE.

BY MR. WERKSMAN:

Q DO YOU –

THE COURT: I THINK HE'S TESTIFIED THAT HE DOESN'T HAVE ANY INDEPENDENT KNOWLEDGE OF ANY OF THIS.

MR. WERKSMAN: OKAY.

THE COURT: THE OBJECTION'S SUSTAINED.

BY MR. WERKSMAN:

Q MR. SWEC, BEFORE INTERVIEWING DETECTIVE PORCHE AND THE OTHER DETECTIVE WHOSE NAME IS UNKNOWN, DID YOU ASK EITHER OF THEM ABOUT THEIR BACKGROUND OR CREDENTIALS OR QUALIFICATIONS?

A NO.

Q SO, YOU WOULD HAVE NO IDEA AS YOU SIT HERE TODAY, AND YOU WOULD HAVE NO IDEA AS YOU DECLARED THROUGH THE ASSISTANT U.S. ATTORNEY WHAT MEASURE OF

TRAINING, EDUCATION OR EXPERIENCE ANY OF THOSE DETECTIVES HAVE, CORRECT?

[31] A CORRECT.

Q THEY COULD BE FOUR-MONTH ROOKIES ON THE LAPD JUST AS YOU ARE A FOUR-MONTH ROOKIE ON THE FBI, CORRECT?

A I HAVE NO KNOWLEDGE OF THE EXPERIENCE THEY HAVE.

Q AND YOU MENTIONED THAT YOU TALKED TO SOME OTHER FBI AGENTS?

A THAT'S CORRECT.

Q WHO WERE THEY?

A SPECIAL AGENT CONNIE SMITH, SPECIAL AGENT JENSEN, SPECIAL AGENT MAURA KELLEY.

Q NOW, DID YOU – DID ANY OF THEM PROVIDE YOU WITH ANY FIRSTHAND KNOWLEDGE ABOUT THE FACTS THAT YOU DECLARED?

A SOME OF THE – SOME OF THE FACTS, YES.

Q DID THEY PROVIDE YOU WITH INFORMATION ABOUT THE SERVERS THAT WERE FOUND AT THE BUSINESS THAT'S BEING SEARCHED AS WE SPEAK?

A THEY DID.

Q ALL RIGHT. ARE YOU AWARE THAT THE COMPANY IS BEING SEARCHED AS WE SPEAK?

A I'M NOT.

Q YOU'RE NOT AWARE THAT THEY'RE GOING ON THEIR FOURTH DAY OF SEARCHING AT THE –

A I HAVE –

Q GOLDFINGER PREMISES?

A I HAVE HEARD THAT THEY WERE GOING TO CONDUCT A SEARCH [32] TODAY, BUT I HAD NOT HEARD ANY UPDATES ABOUT IT.

Q AND DID YOU TALK – DO YOU KNOW IF CONNIE SMITH IS THE AGENT IN CHARGE OF THE SEARCH?

A I DON'T KNOW.

Q DO YOU KNOW WHO IS THE AGENT IN CHARGE?

A NO, I DON'T.

Q DID YOU TALK TO THE AGENT IN CHARGE?

A TODAY'S SEARCH, NO.

Q DID YOU ASK WHO'S IN CHARGE?

A OF TODAY'S SEARCH, NO, SIR.

Q DID THE AGENTS WHO TALKED TO YOU TELL YOU WHAT THEIR ROLE IS IN THE SEARCH?

A NO, SIR.

Q SO, YOU HAVE NO IDEA WHERE THOSE FBI AGENTS, SMITH OR – I'M SORRY – WAS A GUSHE?

A JENSEN.

Q JENSEN. YOU HAVE NO IDEA WHERE SMITH OR JENSEN GOT THEIR INFORMATION, CORRECT?

A WELL, MY UNDERSTANDING IS THEY – IT WAS FROM THEIR OWN INVESTIGATION. I DON'T –

Q WELL, THAT'S WHAT THEY TOLD YOU. THEY SAID WE ARE INVESTIGATING, AND THIS IS WHAT WE FOUND, CORRECT?

A THAT'S CORRECT.

Q BUT DID THEY TELL YOU HOW LONG THEY'D BEEN INVESTIGATING OR WHAT THEIR BASIS OF PERSONAL KNOWLEDGE IS ABOUT THE THINGS [33] THEY TOLD YOU?

A THEY DID NOT TELL ME HOW LONG THEY HAD BEEN INVESTIGATING.

Q DID YOU ASK TO SEE THE REPORTS?

A NO, SIR.

Q DID THEY TELL YOU HOW THEY CAME TO CONCLUDE THAT THE SERVERS HAD BEEN MOVED OFFSHORE WITHIN THE LAST 30 TO 45 DAYS?

A AGENT JENSEN WENT INTO IT A LITTLE BIT REGARDING SOME OF THE COMPUTER WORK HE HAD DONE. I COULDN'T RELAY –

Q WOULD YOU ACKNOWLEDGE THAT YOU ARE NOT AN EXPERT –

THE COURT: JUST A MOMENT. JUST A MOMENT. I DON'T THINK HE HAD FINISHED.

YOU CAN RELAY IT WITH ANY –

THE WITNESS: WITH ANY COMPETENCE RELAYING CORRECTLY HOW HE DID IT.

BY MR. WERKSMAN:

Q DO YOU HAVE ANY EXPERTISE OR TRAINING IN CYBER TECHNOLOGY IN COMPUTERS?

A I DO, SIR.

Q DID SMITH OR ANYBODY FROM THE FBI EXPLAIN TO YOU HOW THEY DETERMINED THAT SERVERS HAD BEEN MOVED OFFSHORE IN THE LAST 30 TO 45 DAYS?

A THEY TOLD ME THAT THEY HAD RECEIVED I.P. ADDRESSES AND WERE ABLE TO TRACE THE I.P. ADDRESSES TO OFFSHORE.

[34] Q DID THEY TELL YOU HOW THEY CONCLUDED THAT THOSE OFFSHORE I.P. ADDRESSES HAD BEEN MOVED OFFSHORE IN THE LAST 30 TO 45 DAYS?

A NOT SPECIFICALLY IN THE LAST 30 TO 45 DAYS, NO, SIR.

Q SO, IN YOUR DECLARATION WHEN YOU SAID THAT YOU HAD INFORMATION THAT THE ISP NUMBERS WERE OFFSHORE, YOU HAVE CONFIDENCE THAT THAT'S THE CASE JUST BECAUSE THAT'S WHAT YOU'RE TOLD?

MR. AVEIS: I'M SORRY. FOR THE RECORD IT WOULD BE I.P., NOT I.S.P.

BY MR. WERKSMAN:

Q I'M SORRY. I.P. ADDRESSES.

YOU LEARNED THAT THE I.P. ADDRESSES WERE OFFSHORE, CORRECT?

A FROM THE AGENT DOING THE INVESTIGATION, YES.

Q DID THE AGENTS DOING THE INVESTIGATION TELL YOU THAT THEY WERE MOVED OFFSHORE IN THE LAST 30 TO 45 DAYS?

A THEY DID TELL ME THAT.

Q AND DID THE AGENT WHO TOLD YOU THAT – WHO WAS THAT AGENT?

A THAT WAS AGENT JENSEN.

Q DID JENSEN TELL YOU HOW – IS IT A HE OR SHE?

A HE.

Q DID HE TELL YOU HOW HE CONCLUDED THAT?

A ARE YOU TALKING ABOUT WITH THE TIMING?

[35] Q YEAH, THE TIMING.

A NO, HE DID NOT.

Q DID HE OFFER AN EXPLANATION IN CYBER TALK THAT WENT IN ONE EAR AND OUT THE OTHER?

A NOT ABOUT THE TIMING, NO, SIR.

Q HAVE YOU CONDUCTED A SEARCH OF THE WEBSITE OF THE GOLDFINGER BUSINESS OR ANY BUSINESSES AFFILIATED WITH MR. FAYED?

A NO.

Q ARE YOU AWARE OF WHETHER MR. FAYED'S BUSINESSES ADVERTISE ON THEIR WEBSITE THAT THEIR SERVERS ARE, IN FACT, OFFSHORE, AND THAT IT'S NOT A SECRET?

A I'M NOT AWARE.

Q AND THAT THEY'VE ALWAYS BEEN OFF-SHORE. ARE YOU AWARE OF THAT?

A NO.

Q YOU ALSO PROFFERED TESTIMONY ABOUT ASSAULT RIFLES. HOW MANY – HOW MANY – WHAT WERE YOU TOLD ABOUT THE EXISTENCE OF FIREARMS IN THE SAFE AT THE MOORPARK PROPERTY?

A I WAS TOLD THAT ON THE PROPERTY 20 TO 25 ASSAULT RIFLES AND OTHER FIREARMS WERE FOUND.

Q NOW, I DON'T MEAN PARSE WORDS HERE. BUT WHEN YOU WERE TOLD THERE WAS TO 20 TO 25, QUOTE, ASSAULT RIFLES AND OTHER FIREARMS," MEANING IT'S A MIXTURE OF ALL OF THEM?

A YES, SIR.

[36] Q OR WERE YOU TOLD THERE WERE 20 TO 25 ASSAULT RIFLES, PERIOD? AND, COMMA, THERE ARE ALSO OTHER FIREARMS?

A I WAS TOLD THAT IT WAS A COMBINATION.

Q ALL RIGHT.

A 20 TO 25 FIREARMS INCLUDING ASSAULT RIFLES.

Q ALL RIGHT. SO, IF SOMEBODY WERE TO CONCLUDE THAT THERE WERE 20 TO 25 ASSAULT RIFLES, PAUSE, AND THAT THERE WERE

OTHER FIREARMS THERE, THAT WOULD BE INCORRECT?

A AS FAR AS MY UNDERSTANDING, YES, SIR.

Q HOW MANY – NOW, WHAT CONSTITUTES AN ASSAULT RIFLE? DO YOU KNOW THE DEFINITION OF AN ASSAULT RIFLE AS WE'RE USING IT?

A I COULDN'T GIVE A TECHNICAL DEFINITION.

Q ARE YOU AWARE THAT AN ASSAULT RIFLE HAS A CERTAIN DEFINITION THAT MAY INCLUDE BEING SEMI-AUTOMATIC?

A I'M NOT AWARE.

Q ARE YOU AWARE OF WHETHER ANY OF THE – DO YOU KNOW WHAT A LONG GUN IS?

A YES, SIR.

Q WHAT'S A LONG – IS A LONG GUN A RIFLE BASICALLY?

A YES, SIR.

Q IT'S ANYTHING MORE THAN A CERTAIN NUMBER OF INCHES?

A I DON'T KNOW THE EXACT DEFINITION –

Q AND IT'S A SINGLE-SHOT RIFLE?

A I DON'T KNOW.

[37] Q DO YOU KNOW HOW MANY – DO YOU KNOW WHETHER THERE WERE ANY ASSAULT RIFLES AT MR. FAYED’S?

A I KNOW THAT I WAS TOLD THERE WERE 20 TO 25 ASSAULT RIFLES AND OTHER FIRE-ARMS.

Q DO YOU KNOW IF THERE WERE ONLY EIGHT LONG GUNS AND THE REST OF THE 20 TO 25 WERE HANDGUNS?

A I DON’T KNOW.

Q YOU DON’T KNOW FOR SURE?

A NO, SIR.

Q WHO IS THE SOURCE OF THAT INFORMATION?

THE COURT: WHAT INFORMATION?

BY MR. WERKSMAN:

Q ABOUT THE GUNS.

A LAPD DETECTIVE PORCHE.

Q THERE WAS ALSO –

MR. WERKSMAN: THIS IS MY LAST QUESTION, YOUR HONOR. I DON’T WANT TO BELABOR THE POINT, BUT I THINK WE NEED TO COVER THE MAJOR AREAS.

BY MR. WERKSMAN:

Q YOU TESTIFIED ABOUT \$60,000 IN CASH THAT WAS – DID YOU USE THE WORDS “HERMETICALLY SEALED”?

A (NO AUDIBLE RESPONSE.)

Q WHAT DOES THAT MEAN?

A I DON’T KNOW.

Q YOU DON’T KNOW? WELL, YOU’RE THE ONE WHO SAID IT WAS [38] HERMETICALLY SEALED.

A MY UNDERSTANDING IT WAS SEALED IN PLASTIC.

Q WAS IT WRAPPED IN PLASTIC?

A I DON’T KNOW EXACTLY –

Q WAS IT HEAT WRAPPED LIKE WHEN YOU GO TO THE – LIKE A DELI, AND THEY HAVE LOX, AND IT’S ALL LIKE – YOU KNOW, YOU HAVE TO USE A SCISSOR TO CUT INTO IT.

A I DON’T KNOW, SIR.

Q SO, YOU DON’T KNOW REALLY – WHY DON’T YOU TELL US EVERYTHING YOU KNOW ABOUT THE CASH IN THE SAFE RIGHT NOW.

A I WAS TOLD THAT \$60,000 WAS FOUND DURING THE SEARCH OF THE PREMISES, SOME OF WHICH WAS SEALED IN PLASTIC. ALL RIGHT.

Q SO, NOT ALL THE 60? NOT ALL THE 60 WAS WRAPPED IN PLASTIC?

A THAT'S CORRECT, SIR.

Q SO – NOW, WRAPPED IN PLASTIC COULD MEAN ANYTHING, RIGHT? I MEAN, YOU REALLY DON'T KNOW WHAT –

A HERMETICALLY SEALED IS WHAT I WAS TOLD. I DON'T –

Q OKAY. HERMETICALLY SEALED MEANING WHAT? SHRINK PROOF?

A I DON'T KNOW.

MR. WERKSMAN: YOUR HONOR, I HAVE NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT. THANK YOU.

MR. AVEIS, ANY REDIRECT?

[39] MR. AVEIS: NO, THANK YOU.

THE COURT: THANK YOU, SIR. YOU MAY STEP DOWN.

MR. AVEIS, DID YOU HAVE ANY OTHER WITNESSES?

MR. AVEIS: NO, THANK YOU.

THE COURT: SO, THE GOVERNMENT RESTS?

MR. AVEIS: YES.

THE COURT: MR. WERKSMAN, DID YOU HAVE ANY WITNESSES YOU WISH TO CALL?

MR. WERKSMAN: NO, YOUR HONOR.

THE COURT: DO YOU HAVE ANY EVIDENCE YOU WISH TO PROFFER?

MR. WERKSMAN: NOT AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT. I GUESS IT'S TIME FOR ARGUMENT.

MR. AVEIS, YOU GET TO GO FIRST.

YOU WANT TO SIT DOWN, MR. WERKSMAN. YOU'RE WELCOME TO.

MR. AVEIS: IF I COULD JUST STAND AT THE COUNSEL TABLE, PLEASE?

THE COURT: WILL THE MICROPHONES PICK IT UP, ILENE?

(THE COURT CONFERRING WITH CLERK.)

THE COURT: OKAY. GO AHEAD, MR. AVEIS.

MR. AVEIS: THANK YOU.

YOUR HONOR, THE EVIDENCE SHOWS THAT THIS DEFENDANT HAD A MOTIVE TO HIRE OR RETAIN PEOPLE TO KILL PAMELA FAYED. [40] HE WAS UNDER INVESTIGATION FOR A PERIOD OF TIME BY THE FBI RELATED TO

HIS FINANCIAL DEALINGS. HE ADMITTED HE IS THE OWNER AND OPERATOR OF THE ENTITIES THAT WERE UNDER INVESTIGATION.

THE COURT HAS SEEN HIS PRETRIAL – HIS STATEMENTS TO PRETRIAL THAT RELATE TO HIS ASSETS, A SUBSTANTIAL NUMBER OF ASSETS. A HUGE DOLLAR VOLUME OF ASSETS. 25,000-DOLLAR A MONTH IN CLAIMED INCOME.

THE EVIDENCE IS UNEQUIVOCAL I BELIEVE FOR THE PURPOSES OF THIS HEARING THAT HE WAS OPERATING THESE BUSINESSES, AND THEY TOOK IN MONEY AND THEY SENT MONEY OUT.

THE GOVERNMENT IS INVESTIGATING FURTHER BEYOND JUST THE UNLICENSED MONEY TRANSMITTING ASPECT OF THIS CASE, FOR WHICH HE'S BEEN INDICTED. A FEDERAL OFFENSE FOR WHICH HE'S FACING FIVE YEARS' IMPRISONMENT. THAT HE WAS A MONEY LAUNDERER AND ENGAGED IN FRAUD.

THE SUBSTANTIAL FEAR OF THIS INVESTIGATION COUPLED WITH HIS ESTRANGED WIFE'S STATEMENTS AND HER OWN FEAR OF HIM; AND STATEMENTS THAT SHE BELIEVED THAT HE HAD SOUGHT HER OUT, AND THAT THEY HAD GONE TO A MEETING WHERE CONVENIENTLY HE HAD AN ALIBI – HE WAS NOT PRESENT AT A TIME WHEN SHE WAS BRUTALLY MURDERED BY SOMEBODY WHO JUMPED OUT OF A VEHICLE THAT HAD BEEN RENTED IN THE

NAME OF THIS DEFENDANT. AND THAT SAME CREDIT CARD WAS FOUND IN HIS WALLET.

COUPLED WITH ALL OF THE OTHER FACTS FOR THE [41] PURPOSES OF THIS HEARING AT LEAST SHOWS THAT THE GOVERNMENT HAS PREVAILED, OR SHOULD PREVAIL RATHER, WITH RESPECT TO WHETHER OR NOT THIS DEFENDANT OUGHT TO BE DETAINED AT THIS TIME.

WE HAVE MET OUR STANDARD OF PROOF FOR THE PURPOSES OF THIS HEARING, YOUR HONOR. AND I WOULD SUBMIT ON THAT. AND WE RESERVE THE REST FOR REBUTTAL.

THANK YOU.

THE COURT: LET ME ASK YOU A QUESTION OR TWO, MR. AVEIS.

THIS IS NOT A MURDER CASE IN THIS COURT.

MR. AVEIS: WELL, LET ME ADDRESS THAT DIRECTLY HEAD ON, YOUR HONOR. IT ISN'T RIGHT NOW, BUT UNDER 18 USC 1512 AND 1513(A) (1) IT IS A FEDERAL OFFENSE PUNISHABLE POTENTIALLY BY DEATH TO KILL OR ARRANGE THE MURDER OF A WITNESS IN A FEDERAL CASE.

I HAVE EVERY REASON TO BELIEVE AN INFERENCE CAN BE DRAWN FROM THIS, THAT THIS DEFENDANT HAD EVERY REASON TO

WANT TO KILL HIS WIFE SO THAT SHE COULD NOT TESTIFY AGAINST HIM IN A FEDERAL INVESTIGATION THAT WILL BLOSSOM BY WAY OF A SUPERSEDING INDICTMENT INTO MONEY LAUNDERING –

THE COURT: WAS THERE SOMETHING IN MR. – IN AGENT SWEC'S TESTIMONY THAT POINTED TO THAT?

MR. AVEIS: THE INFERENCE IS TO BE DRAWN, THE NATURE OF THE ARRANGEMENTS FOR THE MEETING, THE CONVENIENCE [42] OF HAVING HER THERE IN A PLACE WHERE HE WAS –

THE COURT: NO, NO, NO. WHAT I'M ASKING – MAYBE I WASN'T CLEAR IN MY QUESTION. FORGIVE ME FOR INTERRUPTING.

WHAT I'M ASKING IS IS THERE SOMETHING YOU CAN POINT ME TO FROM WHICH AN INFERENCE CAN BE DRAWN THAT THE MURDER HAD TO DO WITH POTENTIAL TESTIMONY THAT MRS. FAYED WOULD GIVE CONCERNING THIS INDICTMENT – NOT CONCERNING THE DIVORCE – CONCERNING THE CHARGES IN THIS CASE?

MR. AVEIS: WE DON'T KNOW WHAT THE SUBSTANCE OF THE MEETING WAS THAT OCCURRED AT THE LAW OFFICES OF DEFENDANT'S COUNSEL ON JULY 28TH.

THE COURT: SIT DOWN, MR. WERKSMAN, YOU'LL HAVE YOUR CHANCE.

MR. WERKSMAN: YOUR HONOR –

THE COURT: SIT DOWN. YOU'LL HAVE YOUR CHANCE.

MR. WERKSMAN: I JUST WANT TO RAISE A STIPULATION – I JUST WANTED TO MAKE A POINT. I'M NOT CONTESTING WHAT HE'S SAYING, YOUR HONOR, BUT I THINK IT SHOULD BE SOMETHING THAT SHOULD BE PUT ON THE RECORD.

THE COURT: YOU'LL HAVE YOUR CHANCE.

GO AHEAD, MR. AVEIS.

MR. AVEIS: WE REALLY DON'T KNOW THE SUBSTANCE OR CONTENT OF THAT MEETING.

THE COURT: BUT MY QUESTION IS, IS THERE SOMETHING IN THE EVIDENCE BEFORE ME, THAT IS, AGENT SWEC'S TESTIMONY, [43] FROM WHICH I COULD DRAW AN INFERENCE THAT THE MURDER WAS AN ATTEMPT TO OBSTRUCT THE TESTIMONY THAT WAS NEEDED OR POTENTIALLY FORTHCOMING CONCERNING THE INDICTMENT IN THIS CASE?

MR. AVEIS: NOT DIRECTLY. ONLY –

THE COURT: INDIRECTLY?

MR. AVEIS: YES, BECAUSE –

THE COURT: TELL ME.

MR. AVEIS: YES. JULY 29TH, 11:00 A.M. WAS TO BE A HEARING IN THE FAMILY LAW PROCEEDING THAT RELATED TO THE GIVING UP, IF YOU WILL, OF THE MARITAL ESTATE.

THE COURT: YES.

MR. AVEIS: AND IN CONNECTION WITH THAT, OF COURSE, THERE WOULD BE A JUDGE. THERE WOULD BE LAWYERS. THERE WOULD BE THE WITNESSES WHO WOULD HAVE TO MAKE STATEMENTS.

ALL OF THAT RELATED TO, I BELIEVE, THE REASON FOR HAVING THE MEETING THE DAY BEFORE AT THE LAW OFFICE TO DISCUSS WHAT THEY MIGHT DO.

AND, THEN, OF COURSE, BACK UP, REWIND IF YOU WILL TO JULY 15TH WHEN THE DEFENDANT ACCORDING TO THE PROFFER MET WITH THE VICTIM-TO-BE AND INDICATED THAT THEY SHOULD SETTLE BECAUSE THE LAWYERS WERE COSTING A LOT OF MONEY.

THE COURT: BUT THAT HAD TO DO WITH THE DIVORCE.

MR. AVEIS: YES. BUT I THINK THE INFERENCE IS THAT BECAUSE SHE WAS NOT CO-OPERATING WITH HIS GAME PLAN OF THE [44] DIVORCE, THAT BECAUSE SHE WAS NOT DOING THAT, HE DECIDED TO HAVE HER KILLED.

THE COURT: AND MY QUESTION IS, CAN YOU TIE THAT SOMEHOW TO THE INDICTMENT IN THIS CASE WHICH CHARGES THAT HE WAS OPERATING AS AN UNLICENSED MONEY TRANSMITTING BUSINESS.

MR. AVEIS: YES. THE BUSINESS RECORDS THAT WERE THE SUBJECT OF THE DIVORCE AT THIS TIME AND PURSUANT TO THE HEARING THAT WAS SET FOR JULY 29TH WERE THE BUSINESS RECORDS THAT SUPPORT THIS CASE.

THE COURT: ALL RIGHT. NOW, THE INDICTMENT WAS RETURNED FEBRUARY 26TH. YOU TOLD ME IT WAS SEALED?

MR. AVEIS: THAT'S CORRECT. SEALED AT THAT TIME. AND NO ARREST WARRANT WAS SOUGHT AT THAT TIME.

THE COURT: WHEN WAS IT UNSEALED?

MR. AVEIS: IT WAS UNSEALED ON AUGUST 1ST AT ABOUT 11:00 P.M.

THE COURT: HAD THERE BEEN ANY – HAD THE DEFENDANT BEEN CALLED BEFORE THE GRAND JURY?

MR. AVEIS: NO.

THE COURT: HAD THERE BEEN ANY NEGOTIATIONS WITH MR. WERKSMAN PRIOR TO AUGUST 1ST?

MR. AVEIS: NO.

THE COURT: ANY DISCUSSIONS WITH HIM ABOUT THE CASE AT ALL?

MR. AVEIS: NO. AS FAR AS I KNOW THIS DEFENDANT [45] WAS TOTALLY UNAWARE UNTIL PROBABLY THIS WEEKEND THAT THERE HAD BEEN AN INDICTMENT HANDED DOWN AGAINST HIM IN FEBRUARY.

THE COURT: ALL RIGHT. ANYTHING ELSE YOU WANT TO SAY, MR. AVEIS?

MR. AVEIS: NO. I RESERVE. THANK YOU.

THE COURT: ALL RIGHT. MR. WERKSMAN, YOU'VE BEEN HOPPING UP AND DOWN. SO, NOW IS YOUR CHANCE.

MR. WERKSMAN: WELL, YOUR HONOR, WHAT I WANTED TO MAKE CLEAR WAS – AND YOUR HONOR ASKED ABOUT IT – I JUST WANT THE RECORD TO REFLECT, AND I THINK THE PROSECUTOR WILL JOIN IN THE STIPULATION, THAT I WAS NOT THE ATTORNEY AT WHOSE OFFICE A MEETING OCCURRED ON THE NIGHT OF THE MURDER. I THINK –

THE COURT: I DIDN'T SUGGEST THAT YOU WERE.

MR. WERKSMAN: SORRY, YOUR HONOR?

THE COURT: I DIDN'T SUGGEST THAT YOU WERE.

MR. WERKSMAN: I UNDERSTAND. BUT I WOULDN'T WANT THE COURT TO THINK FOR A MOMENT THAT I WAS A WITNESS TO ANY OF THIS OR THAT I WAS THE LAWYER. BECAUSE, THEN, I THINK THAT SHOULD BE DISCLOSED ON THE RECORD, YOUR HONOR. IT WAS NOT ME.

AND I CAN CLARIFY THAT THERE WERE NO DISCUSSIONS WITH ME BACK ON AUGUST 1ST ABOUT THE FEDERAL CASE BECAUSE I WAS NOT MR. FAYED'S COUNSEL UNTIL JULY 31ST OR AUGUST 1ST. SO, I JUST WANTED TO MAKE SURE THE COURT IS CLEAR –

[46] THE COURT: DID HE HAVE COUNSEL PRIOR TO THAT TIME?

MR. WERKSMAN: HE DID, YOUR HONOR. IT WAS DIFFERENT COUNSEL. AND I WANT THE COURT TO UNDERSTAND THAT IF THAT'S RELEVANT.

THE COURT: WELL, MY QUESTION THEN TO YOU, AND YOU DON'T HAVE TO ANSWER IT, BUT IF YOU FEEL COMFORTABLE ANSWERING IT, WERE THERE ANY DISCUSSIONS WITH PRIOR COUNSEL ABOUT THIS IMPENDING INDICTMENT – OR THIS INDICTMENT WHICH HAD BEEN FILED BUT NOT SERVED?

MR. WERKSMAN: YOUR HONOR, I CAN – I CAN STATE WITH CONFIDENCE THAT PRIOR COUNSEL DID NOT KNOW THAT AN INDICTMENT HAD BEEN FILED.

THE COURT: OKAY.

MR. WERKSMAN: IT WAS SEALED. AND I KNOW THAT BECAUSE AFTER MR. FAYED'S ARREST LATE FRIDAY THERE WAS A LOT OF DISCUSSION BETWEEN COUNSEL OVER WHAT IS THIS INDICTMENT. WE DID NOT KNOW WHAT THE CHARGES CONTAINED UNTIL THIS MORNING WHEN I DISCUSSED IT DIRECTLY WITH MR. AVEIS.

AND I KNOW FOR A FACT THAT PRIOR COUNSEL WAS CERTAIN THAT THIS INDICTMENT HAD BEEN ISSUED IN THE PAST WEEK IN RESPONSE TO THE MURDER OF PAM FAYED. SO, I DON'T THINK THERE WAS ANY KNOWLEDGE. I'M FAIRLY CERTAIN THERE WAS NO KNOWLEDGE BY MR. FAYED THAT THEY WERE GOING TO – THEY WERE GOING TO FILE AN INDICTMENT. NOBODY KNEW ABOUT THE FILING OF THE INDICTMENT.

[47] THE COURT: ALL RIGHT.

MR. WERKSMAN: AND, IN FACT, THE EVIDENCE THAT WAS PROFFERED DURING HIS BAIL HEARING SUGGESTS THAT IF YOU BELIEVE THE ALLEGATIONS MADE – AND I SUBMIT TO THE COURT THAT THEY'RE NOT CORROBORATED ENOUGH. THEY'RE NOT SUBSTANTIAL ENOUGH TO BE CONSIDERED IN THESE PROCEEDINGS. I'LL ADDRESS THAT IN JUST A SECOND. BUT EVEN IF YOU BELIEVE THEM, I THINK THE CASE OF A MURDER THAT

WAS CONDUCTED TO END THE DIVORCE AND TO DEPRIVE A VENGEFUL, ESTRANGED WIFE OF COMMUNITY PROPERTY ASSETS – THERE'S NO SUGGESTION IN THE EVIDENCE I HEARD THAT MR. FAYED KNEW OF A FEDERAL INVESTIGATION OR WAS SEEKING TO BLOCK THE FEDERAL INVESTIGATION, OR KNEW THERE WAS AN INDICTMENT – TO ELIMINATE HIS WIFE AS A WITNESS.

SO, YOUR HONOR, THEY ARE DISCONNECTED. AND I HOPE WE DON'T EVEN HAVE TO GET TO THE POINT WHERE YOUR HONOR BELIEVES THAT, IN FACT, THERE'S EVIDENCE HE COMMITTED A MURDER.

THE ONLY QUESTION IS WAS IT A MURDER TO OBSTRUCT THE FEDERAL CASE, WHICH MIGHT BE RELEVANT TO BAIL IN THIS CASE, OR WAS IT A TOTALLY UNRELATED MURDER THAT BELONGS IN A DIFFERENT FORUM, IN A DIFFERENT JURISDICTION IF AND WHEN THE DETECTIVES CHOOSE TO BRING IT IN THAT STATE COURT.

THE COURT: I WOULD SAY THAT THE EVIDENCE AS TO OBSTRUCTION IS PRETTY THIN.

[48] MR. WERKSMAN: I WOULD AGREE WITH YOUR HONOR.

AND EARLIER, YOUR HONOR, WHEN I WAS BEGINNING WHAT I THOUGHT WOULD THEN BE

MY STEM-WINDER ABOUT WHY BAIL SHOULD BE GRANTED, I WAS PERPLEXED AT WHY THE GOVERNMENT –

THE COURT: WHEN DID YOU BEGIN YOUR STEM-WINDER?

MR. WERKSMAN: AT THE VERY BEGINNING WHEN THE COURT SAID I JUST WANT TO KNOW WHETHER OR NOT YOU'RE OBJECTING TO THE EVIDENCE.

THE COURT: I WAS JUST TRYING TO FIX THE TIME.

MR. WERKSMAN: I THINK YOUR HONOR IS SUGGESTING – CALL IT AN ONGOING STEM-WINDER.

BUT, YOUR HONOR, LOOK, AS WE STAND HERE TODAY, MY CLIENT IS CHARGED IN A ONE-COUNT INDICTMENT THAT'S ALL OF A PAGE AND A HALF, THAT SAYS THIS MAN ALLEGEDLY RAN AND KNOWINGLY CONDUCTED, CONTROLLED A MONEY TRANSMITTING BUSINESS THAT WAS UNLICENSED.

IT'S A FIVE YEAR COUNT. IT CARRIES A MAXIMUM OF FIVE YEARS IN FEDERAL PRISON. IT'S AN INDICTMENT THAT WAS ISSUED FIVE AND A HALF MONTHS AGO. IF THEY THOUGHT HE WAS A FLIGHT RISK OR A DANGER TO THE COMMUNITY BECAUSE OF HIS OPERATION OF GOLD-FINGER, THEY COULD HAVE AND SHOULD HAVE

HAD A DUTY TO ARREST HIM IN FEBRUARY WHEN THEY INDICTED HIM.

BUT THEY KNEW HE WASN'T GOING TO FLEE. AND THEY KNEW HE WASN'T A DANGER TO ANYBODY. AND THAT'S WHY THEY SAT ON THIS APPARENTLY AND SAW FIT TO CONDUCT ADDITIONAL [49] INVESTIGATION.

AND WHO KNOWS WHAT THEY WERE DOING FOR THE PAST FIVE MONTHS. IT WILL BE INTERESTING FOR US TO EVENTUALLY LEARN WHEN WE GET DISCOVERY WHAT TOOK THEM FIVE AND A HALF MONTHS AND WHY THEY CHOSE TO BRING THIS INDICTMENT NOW.

BUT THE BOTTOM LINE IS, YOUR HONOR, THEY DIDN'T THINK HE WAS A FLIGHT RISK OR A DANGER WHEN THEY INDICTED HIM. WHY IS HE NOW. NOW HE IS BECAUSE THERE'S SOME DETECTIVES HERE FROM LAPD WHO HAVE PROFFERED TO AN FBI AGENT THAT THEY'VE GOT THIS ACTIVE HOMICIDE INVESTIGATION THAT THEY BELIEVE POINTS TO MR. FAYED.

NOW, YOUR HONOR, I'M AT A BIT OF A DISADVANTAGE TO TRY TO BATTLE AGAINST THE TIDE OF THESE ALLEGATIONS WHEN THEY COME IN IN THE FORMAT THAT THEY'VE BEEN PRESENTED.

I CAST NO ASPERSIONS AGAINST MR. SWEC BECAUSE HE'S DOING HIS JOB. HE'S A GOOD PROFESSIONAL. HE'S A BRAND NEW FBI AGENT

WHO'S DOING AS HE SHOULD. HE'S TRYING TO HELP THE PROSECUTION AND –

THE COURT: BY THE WAY, MR. WERKSMAN, THE FACT THAT HE'S A ROOKIE ONLY MEANS THAT HE'S NEW.

MR. WERKSMAN: THAT'S RIGHT.

THE COURT: IT DOESN'T MEAN HE'S NOT GOOD.

MR. WERKSMAN: AND THAT'S WHY I'M NOT CASTING ASPERSIONS ON THE QUALITY OF HIS WORK OR HIS GOOD INTENTIONS.

BUT LET'S FACE IT, YOUR HONOR, THE GOVERNMENT [50] RUSHED IN HERE WITH UNCORROBORATED, UNSUBSTANTIATED ALLEGATIONS OF A MURDER THAT ARE BASED UPON A BRAND NEW AGENT'S RECOLLECTION OF CONVERSATIONS HE HAD TODAY –

THE COURT: ALL RIGHT.

MR. WERKSMAN: – THE LAST THREE HOURS WITH TWO AGENTS –

THE COURT: MR. WERKSMAN, AND I SHOULD HAVE FOCUSED MR. AVEIS ON THIS TOO, I WOULD LIKE YOU FOLKS TO TALK ABOUT THE BAIL REFORM ACT BECAUSE THAT'S MY TASK, TO FIND OUT WHETHER MR. FAYED REPRESENTS A FLIGHT RISK AND/OR A DANGER.

AND CORRECT ME IF I'M WRONG, AND I'LL ASK MR. AVEIS TO AS WELL, THE NINTH CIRCUIT DOESN'T PERMIT ME TO DETAIN SOMEBODY IF THEY'RE SIMPLY A DANGER UNLESS IT'S A PRESUMPTION CASE.

IS THAT CORRECT?

MR. WERKSMAN: THAT'S CORRECT, YOUR HONOR.

THE COURT: JUST A MOMENT.

MR. AVEIS, DO YOU AGREE WITH THAT?

MR. AVEIS: YES.

THE COURT: SO, THE QUESTION IS IS HE A FLIGHT RISK.

MR. WERKSMAN: AND I WOULD SUBMIT, YOUR HONOR, HE IS ABSOLUTELY NOT A FLIGHT RISK FOR THE FOLLOWING REASONS.

NUMBER ONE, HE IS A 45-YEAR-OLD UNITED STATES CITIZEN WHO HAS BEEN BORN AND RAISED IN THIS COUNTRY. AND [51] HE'S LIVED IN THIS COMMUNITY FOR 19 YEARS.

NOW, THE PRETRIAL SERVICES REPORT I THINK USED SOME UNFORTUNATE LANGUAGE ON PAGE 2 AT THE BOTTOM OF THE FIRST PARAGRAPH. IT SAID, QUOTE:

"THE DEFENDANT HAS LIMITED TIES TO THE CENTRAL DISTRICT OF CALIFORNIA AREA."

THE COURT: YES. I UNDERSTOOD THAT TO MEAN THAT HE DOESN'T HAVE MANY RELATIVES AND THINGS OF THAT SORT. IT GOES ON TO SAY HOW LONG HE HAS BEEN IN THE CENTRAL DISTRICT.

MR. WERKSMAN: RIGHT.

THE COURT: SO, YOU DON'T NEED TO ADDRESS THAT.

MR. WERKSMAN: BUT HIS TIES, THOUGH, YOUR HONOR, ARE QUITE EXTENSIVE BECAUSE HE'S OWNED PROPERTY HERE. HE'S LIVED HERE. HE'S WORKED HERE. HE'S BUILT HIS BUSINESSES HERE. HIS ENTIRE CIRCLE OF FRIENDS AND BUSINESS ASSOCIATES AND COLLEAGUES AND COUNSEL AND EVERYTHING THAT HE'S DONE IN HIS LIFE IN THE LAST 20 YEARS IS CENTERED HERE IN LOS ANGELES IN THE MOORPARK AREA.

HE HAS TWO PROPERTIES, YOUR HONOR, THAT ARE EXTREMELY VALUABLE AND WOULD BE EXCELLENT ASSETS TO BE POSTED TO SECURE HIS APPEARANCE. THEY ARE THE HOME IN CAMARILLO THAT HE USED TO SHARE WITH HIS DECEASED WIFE THAT I UNDERSTAND TO HAVE APPROXIMATELY A HUNDRED AND – \$700,000 IN EQUITY IN IT. IT'S A HOME HE'S OWNED SINCE 2002. BECAUSE OF HIS WIFE'S DEMISE LAST WEEK IT IS NOW HIS HOME EXCLUSIVELY. [52] AND IT'S HIS TO POST. AND IT'S HIS RESIDENCE WHERE HE'S LIVED FOR THE

PAST SIX YEARS WITH THE EXCEPTION OF MOVING INTO THE MOORPARK RANCH APPROXIMATELY A YEAR OR SO AGO IN RESPONSE TO THE DIVORCE AND THE ESTRANGEMENT.

THE MOORPARK PROPERTY HAS PROBABLY GOT EQUITY TOTALLY \$2.5 MILLION, YOUR HONOR. BECAUSE IT'S 286 ACRES. IT'S GOT TWO WELLS ON IT.

AND I'M GOING TO MENTION THIS, YOUR HONOR. THIS IS NOT IRRELEVANT. THIS IS A UNIQUE SPECIAL PROPERTY THAT – THERE'S NO PROPERTY LIKE IT IN SOUTHERN CALIFORNIA. SO, IT'S EXTREMELY VALUABLE NOT ONLY FINANCIALLY BUT EMOTIONALLY TO HIM. HE'S WORKED A LOT. HE'S SPENT A LOT OF TIME AND MONEY FIXING UP THIS – IT'S A RANCH. IT'S A WORKING RANCH WITH 286 ACRES, AND IT BACKS UP AGAINST A 4,000-ACRE STATE RESERVE. SO, IT'S A VERY SPECIAL PROPERTY THAT HE WOULD NEVER ABANDON IN ORDER TO FLEE THIS JURISDICTION. AND IT'S GOT A VALUE OF AT LEAST \$2.5 MILLION.

YOUR HONOR, THIS MAN HAS A DAUGHTER. SHE HASN'T BEEN RAISED IN THESE PROCEEDINGS, BUT HE'S GOT A NINE-YEAR-OLD DAUGHTER WHO HE HAS NOT BEEN ABLE TO SEE SINCE THE DEATH OF HIS WIFE ON MONDAY.

THEY HAD A JOINT CUSTODY ARRANGEMENT WHICH ALLOWED HIM – IT WAS A COMPLETE JOINT CUSTODY AGREEMENT THAT

ALLOWED HIM 50 PERCENT TIME WITH THE CHILD.

SHE WOULD STAY WITH HIM WEEKENDS AND ALTERNATE WEEK [53] DAYS. THERE WAS A WHOLE FORMULA. VERY CLOSE TO THE GIRL. SHE'S NINE YEARS OLD. A BIOLOGICAL DAUGHTER OF HIMSELF AND HIS EX-WIFE.

SINCE THE WIFE'S DEATH, HE HASN'T BEEN ABLE TO SEE HER. SHE'S BEEN SPIRITED AWAY BY AN 18-YEAR-OLD HALF-SISTER WHO IS THE BIOLOGICAL DAUGHTER OF THE DECEDENT PAMELA FAYED AND SOME OTHER PREVIOUS HUSBAND.

WE MADE A MISSING PERSON'S REPORT THROUGH THE VENTURA POLICE DEPARTMENT ON THURSDAY, YOUR HONOR. I SAY WE BECAUSE I ACCOMPANIED MY CLIENT TO THE VENTURA POLICE –

THE COURT: I WANT YOU TO FOCUS ON THE QUESTION OF BAIL.

MR. WERKSMAN: I'M FOCUSING, YOUR HONOR, BECAUSE IT'S EVIDENCE OF HIS TIES HERE. HE WANTS HIS DAUGHTER. HE'S FILED A MISSING PERSON'S REPORT. HE'D LIKE TO BE HOME SO HE CAN CARE FOR HER. HE'S THE ONLY LIVING PARENT THIS CHILD HAS. AND THAT IS A RELEVANT FACTOR IN BAIL, YOUR HONOR. HE HAS A FAMILY OBLIGATION, AND

HE'S EXERCISING IT. HE FILED A MISSING PERSON'S REPORT.

AND THE POLICE HAVE BEEN UNCOOPERATIVE PROBABLY BECAUSE THEY EXPECTED US TO BE HERE TODAY AND HIM NOT HOME TOMORROW. BUT NEVERTHELESS, YOUR HONOR –

THE COURT: LET'S NOT CAST ASPERSIONS ON THE POLICE. ALL RIGHT. LET'S JUST TRY AND FIGURE OUT IF THIS GENTLEMAN PRESENTS A FLIGHT RISK.

[54] MR. WERKSMAN: IN ADDITION, YOUR HONOR, HE HAS SEVERE MEDICAL –

THE COURT: I DON'T NEED ANY MORE STEM-WINDERS. REALLY NEED FOCUSING ON FACTS.

MR. WERKSMAN: I'M TRYING TO DO THAT, YOUR HONOR. HE'S GOT SEVERE MEDICAL ISSUES. HE'S GOT AN AUTOIMMUNE DISEASE AND A SEVERE ADVANCED RHEUMATOID ARTHRITIS –

THE COURT: THAT'S ALL IN THE PRETRIAL REPORT.

MR. WERKSMAN: AND I SUBMIT THAT THAT'S SIGNIFICANT, YOUR HONOR. BECAUSE HE HAS TWO DOCTORS HERE, DR. PAULEY AND A DR. WOOD, WHO HE IS TREATED BY REGULARLY. THEY SPECIALIZE IN THE ORTHOPEDICS AND THE CHRONIC PAIN MANAGEMENT.

THE COURT: NOW, YOU DIDN'T PROFFER ANY OF THAT, MR. WERKSMAN.

MR. WERKSMAN: I'M SORRY, YOUR HONOR?

THE COURT: YOU DIDN'T PROFFER ANY OF THAT.

MR. WERKSMAN: I WAS UNABLE IN THE TIME PERMITTED TO GET LETTERS OR DOCUMENTATION OF THAT, YOUR HONOR. BUT I AM PROFFERING THAT IN MY ARGUMENT BECAUSE THE PRETRIAL SERVICES REPORT DOCUMENTS WE DID PRESENT TO PRETRIAL EVIDENCE OF HIS INFIRMITIES –

THE COURT: WHERE ARE THE DOCTORS? WHERE ARE THEY LOCATED?

MR. WERKSMAN: DR. JOE PAULEY IS LOCATED IN, I [55] BELIEVE, CAMARILLO. AND SO IS DR. WOOD.

THE DEFENDANT: PARDON ME. YOUR HONOR –

THE COURT: JUST TALK TO YOUR COUNSEL.

(MR. WERKSMAN CONFERRING WITH CLIENT.)

MR. WERKSMAN: DR. PAULEY IS IN CAMARILLO, AND DR. WOOD – NO. DR. WOOD IS

IN CAMARILLO, AND DR. PAULEY IS IN VENTURA.

THE COURT: ALL RIGHT. NOW, JUST A MOMENT. MR. AVEIS, DO YOU ACCEPT THAT?

MR. AVEIS: I DO.

THE COURT: ALL RIGHT.

GO AHEAD, MR. WERKSMAN.

MR. WERKSMAN: HE HAS REGULAR APPOINTMENTS WITH THESE DOCTORS WHO GIVE HIM A COCKTAIL OF MEDICATIONS THAT PERMIT HIM TO GET THROUGH THE DAY, YOUR HONOR. THESE ARE SERIOUS MEDICATIONS WITHOUT WHICH HE'S IN CHRONIC PAIN.

SO, THAT IS A TIE, YOUR HONOR. AND HIS SICKNESS WOULD DISABLE HIM FROM FLEEING THIS JURISDICTION.

I WOULD ALSO SUBMIT, YOUR HONOR, THAT AS THE COURT KNOWS, HE HAS NO PRIOR CRIMINAL RECORD. AND I KNOW THE COURT, I THINK, HAS RECEIVED ENOUGH ARGUMENT AND EVIDENCE ON THE DANGER ISSUE.

THE ONLY DANGER THAT'S BEEN ALLEGED WITH ANY SPECIFICITY BY THE GOVERNMENT IS THE DANGER THAT HE WOULD RUN AN UNLICENSED MONEY TRANSMITTING BUSINESS.

[56] BUT AS YOUR HONOR KNOWS, THAT IS NOT A DANGER WHILE THE GOVERNMENT HAS

ACCESS TO HIS PREMISES. HE COULD BE ORDERED AS A CONDITION OF PRETRIAL RELEASE TO NOT HAVE ANY FURTHER AFFILIATION WITH OR DIRECT INVOLVEMENT IN THE BUSINESS. THERE ARE MEASURES THAT THE COURT CAN TAKE TO INSURE THAT ANYTHING HE DID UPON HIS RELEASE WOULD BE LAWFUL AND SUBJECT TO SCRUTINY BY THE COURT, THE PRETRIAL SERVICES OFFICER, OR THE GOVERNMENT.

AND, YOUR HONOR, I WOULD POINT OUT ONE OTHER PIECE OF INFORMATION, WHICH IS THE PUBLIC RECORD THAT I PRESENTED TO PRETRIAL SERVICES THERE WAS A SIMILAR CASE BROUGHT IN THE DISTRICT OF COLUMBIA IN 2006 AGAINST A COMPANY CALLED EGOLD. IN THE EGOLD CASE THE GOVERNMENT INDICTED EGOLD AND ITS CO-FOUNDER AND OWNER DOUGLAS JACKSON WITH NOT ONLY RUNNING AN UNLICENSED MONEY TRANSMITTING BUSINESS BUT CONSPIRACY AND CONSPIRACY TO LAUNDER MONEY AND LAUNDERING MONEY FOR CHILD PORNOGRAPHERS AND CREDIT CARD SCAMMERS.

DOUGLAS JACKSON, YOUR HONOR, WAS RELEASED IN HIS RECOGNIZANCE BY THE U.S. DISTRICT COURT IN THE DISTRICT OF COLUMBIA.

THE COURT: WAS THIS DEFENDANT IN THAT CASE?

MR. WERKSMAN: NO, YOUR HONOR.

THE COURT: I DON'T NEED TO HEAR ABOUT THAT.

MR. WERKSMAN: I OFFER IT ANECDOTALLY AS EVIDENCE, YOUR HONOR, THAT A –

[57] THE COURT: AND WOULD YOU LIKE MR. AVEIS TO GIVE YOU AN ANECDOTAL RECITATION OF SOMEBODY WHO WAS DETAINED?

MR. WERKSMAN: YOUR HONOR, I DON'T THINK MR. AVEIS CAN GIVE ME ANECDOTAL EVIDENCE OF ANYBODY EVER DETAINED ON ONE FIVE-YEAR COUNT OF RUNNING AN UNLICENSED –

THE COURT: WELL, I SUSPECT THERE IS SOME JUDGE IN THE COUNTRY WHO'S DONE THAT.

MR. WERKSMAN: WELL, YOUR HONOR, I DON'T KNOW THAT ANYBODY WOULD UNDER THESE CIRCUMSTANCES.

THE COURT: WELL, MY POINT, MR. WERKSMAN, IS THAT IT DOESN'T HELP ME TO KNOW THAT A DISTRICT COURT IN THE DISTRICT OF COLUMBIA WITH A DIFFERENT DEFENDANT AND DIFFERENT FACTS AND A DIFFERENT COMPANY RELEASED SOMEBODY ON HIS PERSONAL RECOGNIZANCE.

LET'S TALK ABOUT THIS CASE.

MR. WERKSMAN: OKAY. I WILL, YOUR HONOR. AND I'LL CONCLUDE BY SUBMITTING ON THE PRETRIAL SERVICES REPORT AND THE OTHER FACTS AND EVIDENCE THAT'S BEEN BROUGHT IN.

AND, YOUR HONOR, I WOULD ALSO PROFER IN SUPPORT OF A BOND THE TWO PROPERTIES. HE HAS LAWFUL AUTHORITY TO POST THOSE. WE HAVE A BONDSMAN PRESENT TO ASSIST IN THAT.

AND I SUBMIT, YOUR HONOR, THAT THERE MAY BE A TIME AND A PLACE FOR THE GOVERNMENT TO ADD MORE SERIOUS CHARGES IN THE FEDERAL CASE. THERE MAY BE A TIME AND A PLACE FOR THESE LOS ANGELES POLICE DETECTIVES TO BRING A MURDER CASE. BUT [58] THEY CAN'T DO IT IN A BACKDOOR FASHION, YOUR HONOR. YOU MAY BE ABLE TO BUILD A PROSECUTION AGAINST SOMEBODY INCREMENTALLY, BUT YOU CAN'T DETAIN HIM TODAY ON A ONE FIVE-YEAR COUNT BECAUSE TOMORROW HE MAY BE PROSECUTED FOR MURDER.

IT'S JUST SIMPLY NOT APPROPRIATE, YOUR HONOR. IT'S UNFOUNDED. IT'S UNSUBSTANTIATED. AND THIS MAN DESERVES TO BE TREATED BY THIS COURT FOR WHAT HE'S CHARGED WITH.

AND I SUBMIT ON THAT, YOUR HONOR.

THE COURT: THANK YOU, MR. WERKSMAN.

MR. AVEIS.

MR. AVEIS: YOUR HONOR –

THE COURT: BY THE WAY, AM I CORRECTLY PRONOUNCING YOUR NAME?

MR. AVEIS: YES. AVEIS IS CORRECT.

YOUR HONOR, WE WOULD BE HAVING A DIFFERENT DISCUSSION IF IT WERE PRIOR TO 6:35 P.M. ON JULY 28TH, WHICH IS THE TIME THAT PAMELA FAYED WAS BRUTALLY STABBED BY AN ASSAILANT, WHO POPPED OUT OF A CAR THAT HAD BEEN RENTED WITH THIS DEFENDANT'S CREDIT CARD, THE CARD BEING FOUND IN HIS WALLET DURING A SEARCH.

IF I WERE SEEKING DETENTION SOLELY UPON A FIVE-YEAR COUNT, I'M SURE MR. WERKSMAN WOULD PREVAIL. I'M NOT.

THE COURT: AND YOUR ASSUMPTION IS THAT HE IS MORE THAN A SUSPECT IN THAT CASE?

[59] MR. AVEIS: I THINK THE EVIDENCE IS ABUNDANTLY CLEAR HE'S THE PRIME SUSPECT IN THAT CASE, YOUR HONOR.

THE FLIGHT RISK ANALYSIS THE COURT MUST UNDERTAKE IS NOT LIMITED TO THE

CHARGE AT HAND. IT'S WHETHER THIS DEFENDANT WILL APPEAR FOR THIS CHARGE.

THE COURT: SO, YOU BELIEVE THAT HE IS A FLIGHT RISK IN THIS CASE BECAUSE HE IS A PRIME SUSPECT IN THAT CASE?

MR. AVEIS: ABSOLUTELY. THAT'S WHY I SAY WE WOULD BE HAVING A DIFFERENT DISCUSSION IF IT WERE PRIOR TO THE MURDER OR THAT THE MURDER HAD NOT OCCURRED.

THE COURT: BUT HE'S A PRIME SUSPECT BUT NOT YET AT LEAST WITH ENOUGH EVIDENCE FOR THE STATE AUTHORITIES TO ARREST HIM ON THAT –

MR. AVEIS: CANNOT PRESUME WHAT THE STATE AUTHORITIES –

THE COURT: WELL –

MR. AVEIS: – IN THAT RESPECT.

THE COURT: I'M NOT ASKING TO. I'M JUST ASKING –

MR. AVEIS: THE ONLY STATED FACT AS WE STAND HERE HE HASN'T BEEN ARRESTED ON THAT CASE.

THE COURT: AND SO FAR AS YOU KNOW A CHARGE HAS NOT BEEN FILED.

MR. AVEIS: THAT'S CORRECT. AS FAR AS I PERSONALLY KNOW A CHARGE HAS NOT BEEN FILED.

YOUR HONOR, THE EVIDENCE FOR PURPOSES OF THIS [60] HEARING SHOWS HE'S LOOKING AT THE BUSINESS END OF A MURDER PROSECUTION WITH A LYING-IN-WAIT SPECIAL CIRCUMSTANCE DEATH PENALTY ALLEGATION. I DON'T THINK THE EQUATION TIPS IN HIS FAVOR IN LIGHT OF THE FACT THAT SHE WAS MURDERED AND THIS EVIDENCE HAS BEEN PRODUCED.

THIS DEFENDANT HAS EVERY REASON NOT TO WANT TO BE HERE AND TO ABANDON WHATEVER HOUSE HE MAY HAVE BUILT, WHATEVER BUSINESS HE MAY HAVE, OR WHATEVER OTHER ASSETS HE MAY HAVE. HIS FREEDOM AND POTENTIALLY HIS LIFE IS NOW AT STAKE. IT'S A WHOLLY DIFFERENT MATTER THAN PRIOR TO THE TIME SHE WAS MURDERED OR IF SHE WERE NOT MURDERED AT ALL.

THE FLIGHT RISK ANALYSIS, YOUR HONOR, IS NOT LIMITED TO THE FACT THAT HE ONLY FACES A FIVE-YEAR COUNT IN THIS CASE. IT'S NOT LIMITED TO THE POSSIBILITY THAT HE MAY BE FURTHER INDICTED IN THIS CASE AND MAY BE LOOKING AT A 30-YEAR COUNT; FOR EXAMPLE, FOR BANK FRAUD. OR A 20-YEAR COUNT FOR MONEY LAUNDERING.

WHAT REALLY DRIVES THE BUS HERE, YOUR HONOR, IS THE FACT THAT THIS DEFENDANT IS A PRIME SUSPECT IN A MURDER-FOR-HIRE SCHEME. AND THAT BASED UPON THIS EVIDENCE CLEARLY SHOWS HE HAS EVERY REASON TO FLEE. AND THE EVIDENCE SHOWS HE HAS THE MEANS TO DO THAT.

AND THAT'S WHY I BELIEVE HE'S A FLIGHT RISK, WHY WE WOULD BE ENTITLED TO THE HEARING WHICH ALLOWS US NEXT TO MOVE TO THE ADDITIONAL ANALYSIS OF DANGER. THE FACT THAT HE HAS [61] GUNS THAT WERE NOT SEIZED, THAT IF HE WERE RELEASED HE LIKELY WOULD HAVE ACCESS TO DESPITE WHATEVER CONDITION OR COMBINATION OF CONDITIONS MIGHT BE IMPOSED WITH RESPECT TO A FIREARMS PROHIBITION. WE KNOW WHERE HE LIVES IN THIS REMOTE AREA AS MR. WERKSMAN DESCRIBED. WE KNOW HIS MOTIVE AND OPPORTUNITY FOR THE KILLING.

AND THE OTHER INDIVIDUAL WHO WAS INVOLVED – AS I MENTIONED, THERE WERE THREE PEOPLE – IN THE CAR CONVENIENTLY IN A PLACE WHERE SHE WAS GOING TO BE ATTENDING THIS HEARING WHICH PROVIDED THE DEFENDANT WITH A PERFECT ALIBI.

HE HAS THE MEANS, THE MOTIVE, THE OPPORTUNITY TO DO MORE. IF HE WAS WILLING TO KILL OVER A DIVORCE CASE OR A WHITE COLLAR CASE, HE'S WILLING TO KILL EVEN

MORE OVER THE FACT THAT HE'S A PRIME SUSPECT IN A MURDER.

ACCORDINGLY, I THINK, YOUR HONOR, WE'VE ESTABLISHED BOTH THE GROUNDS FOR A DETENTION HEARING. WE'VE ESTABLISHED HE'S A FLIGHT RISK. AND WE'VE ESTABLISHED HE'S A DANGER TO THE COMMUNITY. AND NO CONDITION OR COMBINATION OF CONDITIONS CAN ASSURE THAT THIS DEFENDANT WILL NOT GO OUT LOOKING FOR MORE PEOPLE THAT CAUSED THAT SAME KIND OF HORRIBLE EVENT THAT WE'VE ALREADY EXPERIENCED LAST WEEK.

AND I BELIEVE THAT ON THIS RECORD THIS DEFENDANT OUGHT TO BE DETAINED.

THE COURT: ALL RIGHT. IN THE COURT'S VIEW THE GOVERNMENT HAS NOT SUSTAINED ITS BURDEN OF ESTABLISHING THAT [62] THE DEFENDANT IS NOT ENTITLED TO BAIL UNDER THE BAIL REFORM ACT.

IT'S NOT TO GAIN SAY THAT THERE IS SOME RISK. THE FACT THAT THE DEFENDANT APPEARS TO BE A PRIME SUSPECT MAY, IN FACT, BE A FACTOR. BUT IT'S NOT SUFFICIENT IN THE COURT'S VIEW TO ESTABLISH THAT THE COURT CANNOT FASHION CONDITIONS THAT WILL INDICATE THE DEFENDANT IS LIKELY TO APPEAR AND RESTRICT HIS ABILITY TO PRESENT A DANGER TO THE COMMUNITY.

NOR IS IT TO SAY THAT IF CIRCUMSTANCES CHANGE, EITHER IN THE STATE SYSTEM OR IN THE FEDERAL SYSTEM, THAT THE MATTER CANNOT BE REVISITED. BUT ON THE RECORD MADE BEFORE THIS COURT THE COURT WOULD HAVE TO BUILD INFERENCES UPON VERY, VERY LIMITED EVIDENCE IN ORDER TO ESTABLISH THAT THE DEFENDANT IS SUCH A FLIGHT RISK THAT BAIL CANNOT BE SET.

SO, I'M GOING TO SET BAIL.

DOES EITHER PARTY WISH TO BE HEARD AS TO THE AMOUNT OF BAIL?

MR. WERKSMAN: YOUR HONOR, IF I MAY. I THINK THE COURT IS ALREADY INTENDING TO HAVE HIM POST HIS PROPERTY. THAT'S WHAT I WOULD PROFFER, YOUR HONOR, BECAUSE THERE'S A SUBSTANTIAL AMOUNT OF EQUITY IN HIS HOMES. AND THAT WOULD APPEAR TO BE AN APPROPRIATE POSTING.

THE COURT: THE PROPERTIES CAN BE POSTED, BUT THE PROPERTIES STAND AS COLLATERAL FOR AN AMOUNT OF BAIL. SO, MY QUESTION WAS WHAT AMOUNT?

[63] AND YOU STOOD FIRST, MR. WERKSMAN, SO I'LL HEAR YOU FIRST.

MR. WERKSMAN: YOUR HONOR, I WOULD ASK THAT THE COURT SET BOND IN THE AMOUNT OF \$250,000, WHICH IS COMMENSURATE WITH THE NATURE OF THE CHARGE.

AND IT'S AN AMOUNT THAT COULD BE FULLY JUSTIFIED BY THE DEEDING OF ONE OR BOTH OF THE PROPERTIES THAT MR. FAYED OWNS. AND I THINK THAT WOULD BE SUBSTANTIAL BAIL THAT WOULD INDICATE THE COURT'S AND THE GOVERNMENT'S INTEREST IN INSURING HIS APPEARANCE IN THESE PROCEEDINGS.

AND I THINK IT WOULD ALSO BE A HARD-SHIP FOR HIM TO ABANDON PROPERTIES FOR THAT AMOUNT OF MONEY.

THE COURT: MR. AVEIS.

MR. AVEIS: THANK YOU, YOUR HONOR.

I WOULD NOT WANT MY INPUT ON ANY AMOUNT OF BAIL TO BE DEEMED – MY BELIEF THAT –

THE COURT: IT'S NOT.

MR. AVEIS: IT WOULD BE SOLID AS A CONDITION –

THE COURT: IT'S NOT. YOU DON'T WAIVE ANYTHING. I'M SIMPLY ASKING IF YOU HAVE INPUT. IF YOU DON'T HAVE INPUT, THAT'S FINE TOO.

MR. AVEIS: ONLY FOR THE PURPOSES OF THIS HEARING, YOUR HONOR, BASED UPON WHAT APPEAR TO BE THE DEFENDANT'S OWN STATEMENTS, BUT SUBJECT TO A REVIEW OF AN APPRAISAL, IT WOULD SEEM TO ME THAT AT THE VERY LEAST – WE HAVE \$1.7 MILLION IN

[64] EQUITY IN HIS PERSONAL RESIDENCE AND ANOTHER APPROXIMATELY \$500,000 IN THE PROPERTY IN CAMARILLO. THE GOVERNMENT WOULD ASK THAT BAIL BE SET IN NOT LESS THAN \$2 MILLION WITH AN AGGREGATE OF COLLATERAL BASED UPON THOSE PIECES OF REAL ESTATE.

AND I DON'T WANT TO FORGET TO ASK THAT THE COURT – REQUEST THAT THE COURT STAY ITS DECISION HERE TODAY FOR A REASONABLE TIME TO ALLOW ME TO RESPECTFULLY APPEAL THE COURT'S DECISION.

THE COURT: LET'S DEAL WITH BAIL FIRST AND THEN WE'LL DEAL WITH THE STAY QUESTION.

MR. AVEIS: VERY WELL.

(PAUSE IN PROCEEDINGS.)

THE COURT: THE COURT WILL SET BAIL AS FOLLOWS:

THE DEFENDANT IS TO BE RELEASED UPON THE POSTING OF AN APPEARANCE BOND IN THE AMOUNT OF \$500,000 BACKED BY A JUSTIFIED AFFIDAVIT OF SURETY WITH FULL DEEDING OF PROPERTY, WHICH CAN BE EITHER THE PERSONAL RESIDENCE OR THE HOME IN MOORPARK, OR BOTH.

THE DEFENDANT IS TO SUBMIT TO INTENSIVE PRETRIAL SUPERVISION.

THE DEFENDANT IS TO SURRENDER ALL PASSPORTS TO PRETRIAL SERVICES.

THE DEFENDANT'S TRAVEL IS RESTRICTED TO THE CENTRAL – AND IS NOT TO APPLY FOR THE ISSUANCE OF A PASSPORT DURING [65] THE PENDENCY OF THIS CASE.

THE DEFENDANT'S TRAVEL IS RESTRICTED TO THE CENTRAL DISTRICT OF CALIFORNIA. THE DEFENDANT IS NOT TO ENTER THE PREMISES OF ANY AIRPORT, SEAPORT, RAILROAD OR BUS TERMINAL WHICH ALLOWS EXIT FROM THE CENTRAL DISTRICT OF CALIFORNIA.

THE DEFENDANT IS TO RESIDE IN A LOCATION APPROVED IN ADVANCE BY PRETRIAL SERVICES AND NOT TO RELOCATE WITHOUT PRIOR PERMISSION FROM PRETRIAL SERVICES.

THE DEFENDANT IS NOT TO POSSESS ANY FIREARMS, AMMUNITION, DESTRUCTIVE DEVICES OR OTHER DANGEROUS WEAPONS AND, IN ORDER TO DETERMINE COMPLIANCE WITH THIS CONDITION, IS TO AGREE TO SUBMIT TO A SEARCH OF HIS PERSON AND/OR HIS PROPERTY BY PRETRIAL SERVICES ACTING IN CONJUNCTION WITH THE UNITED STATES MARSHAL.

THE DEFENDANT IS TO PARTICIPATE IN A HOME DETENTION PROGRAM AND IS RESTRICTED TO HIS RESIDENCE – EXCUSE ME – IS RESTRICTED TO THE RESIDENCE WHICH PRETRIAL SERVICES APPROVES AT ALL TIMES

EXCEPT FOR EMPLOYMENT, RELIGIOUS SERVICES, MEDICAL APPOINTMENTS, ATTORNEY-CLIENT VISITS, COURT OBLIGATIONS AND ANY OTHER ACTIVITIES APPROVED BY PRETRIAL SERVICES.

IN ORDER TO DETERMINE COMPLIANCE WITH THIS, THE DEFENDANT IS TO BE SUBJECTED TO ELECTRONIC MONITORING AND SHALL PAY FOR ALL OR PART OF THE COSTS OF THE PROGRAM BASED UPON HIS ABILITY TO PAY AS DETERMINED BY PRETRIAL SERVICES.

[66] THOSE ARE THE CONDITIONS THE COURT WOULD SUGGEST.

BEFORE I PROCEED FURTHER, DOES EITHER SIDE WISH TO SUGGEST ANY OTHER CONDITIONS?

THE DEFENDANT: YOUR HONOR –

THE COURT: JUST A MOMENT.

LET ME HEAR FROM THE ATTORNEYS. THEN, I'LL HEAR FROM PRETRIAL ALSO.

MR. WERKSMAN.

MR. WERKSMAN: YOUR HONOR, I'D LIKE TO REQUEST THAT THE COURT ALSO ORDER THAT HE BE RELEASED FORTHWITH AND BE GIVEN APPROXIMATELY EIGHT TO TEN COURT DAYS TO POST THE PROPERTY. IT TAKES SOME TIME TO SET UP ALL THESE MECHANISMS THE COURT IS CONSIDERING IMPOSING.

THE COURT: MR. AVEIS.

MR. AVEIS: – WOULD OBJECT. IT PROVIDES THE GOVERNMENT WITH ABSOLUTELY NO ASSURANCE OF HIS APPEARANCE – OR FUTURE APPEARANCES OR OTHERWISE THAT HE WOULD FLEE.

AND, AGAIN, THIS WOULD NOT BE INCONSISTENT WITH MY REQUEST THAT THE COURT STAY THE DECISION OF ITS RULING UNTIL I'M ABLE TO RESPECTFULLY APPEAL THIS.

THE COURT: ALL RIGHT. ARE THERE OTHER CONDITIONS WHICH IF THE COURT DOES SET BAIL THAT THE GOVERNMENT WOULD SUGGEST?

MR. AVEIS: NO, THANK YOU.

THE COURT: ALL RIGHT. AND I'LL HEAR FROM PRETRIAL [67] NOW.

THE PRETRIAL SERVICES OFFICER: YOUR HONOR, WE WOULD JUST REQUEST THAT WITH REGARD TO THE ELECTRONIC MONITORING, THAT HE BE RELEASED TO PSA ONLY –

THE COURT: YES.

THE PRETRIAL SERVICES OFFICER: – TO FACILITATE THE INSTALLATION OF THE EQUIPMENT.

THE COURT: YES. YES, THAT'S IN MY MIND AUTOMATIC, BUT YES.

ALL RIGHT. I WILL DENY THE REQUEST FOR A FORTHWITH RELEASE.

MR. FAYED, THE CONDITIONS I'VE ANNOUNCED HERE IN OPEN COURT FOR YOUR RELEASE FROM CUSTODY ARE IN SOME CIRCUMSTANCES IN ADDITION TO CONDITIONS WHICH ARE PRINTED ON THE FORM OF THE BOND.

IF YOU FAIL TO COMPLY WITH ANY OF THE CONDITIONS FOR YOUR RELEASE, THEN, THE BOND WILL BE FORFEITED TO THE GOVERNMENT. THE ORDER FOR YOUR RELEASE WILL BE CANCELLED, AND YOU'LL BE REARRESTED IMMEDIATELY.

IN ADDITION, YOU CAN BE PROSECUTED FOR CONTEMPT OF COURT, AND THAT CAN BRING A FINE OR JAIL TIME OR BOTH.

AND IF YOU COMMIT AN OFFENSE WHILE YOU'RE ON PRETRIAL RELEASE, THEN, YOU MAY BE SUBJECT TO IMPRISONMENT AFTER A PROSECUTION FOR AS MUCH AS FIVE YEARS BEYOND WHAT YOU FACE ON THE CHARGES IN THIS CASE.

[68] NOW, DO YOU UNDERSTAND, SIR, THERE CAN BE VERY SERIOUS CONSEQUENCES IF YOU DO NOT COMPLY WITH THE CONDITIONS I'VE SET FOR YOUR RELEASE?

THE DEFENDANT: YES, YOUR HONOR, I DO.

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THE COURT: YOU AGREE TO COMPLY WITH THOSE CONDITIONS?

THE DEFENDANT: YES, SIR.

THE COURT: WHEN DID WE SET PIA? REMIND ME.

MR. AVEIS: AUGUST 18TH.

THE COURT: ALL RIGHT. ONE OF YOUR CONDITIONS, MR. FAYED, IS THAT YOU MAKE ALL YOUR COURT APPEARANCES. SO, I'VE SET ANOTHER COURT APPEARANCE IN THIS COURTROOM, COURTROOM 341, OF THE ROYBAL FEDERAL BUILDING FOR AUGUST 18TH AT 8:30 A.M.

DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, YOUR HONOR, I DO.

THE COURT: YOU'RE REQUIRED TO BE HERE.

THE DEFENDANT: YES, SIR.

THE COURT: DO YOU AGREE TO DO THAT?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT. MR. AVEIS, I'LL HEAR FROM YOU ON YOUR REQUEST FOR A STAY.

MR. AVEIS: YES. I WOULD REQUEST –

THE COURT: I DID DENY THE FORTH-WITH RELEASE.

MR. AVEIS: YES. I WOULD REQUEST A STAY TO ENABLE [69] THE GOVERNMENT JUST SOME TIME TO RESPECTFULLY APPEAL THE COURT'S RULING.

AND IN LIGHT OF MR. WERKSMAN'S STATEMENT THAT IT WILL TAKE EIGHT TO TEN DAYS FOR HIM TO PREPARE THE PAPERWORK, AND BASED UPON MY OWN EXPERIENCE, THAT WOULD NOT BE UNREASONABLE GIVEN THE PAPERWORK THAT DOES NEED TO GET DONE FOR THIS PARTICULAR BOND.

I WOULD REQUEST THAT THE COURT JUST STAY ITS RULING UNTIL THIS FRIDAY AT CLOSE OF BUSINESS 5:00 P.M.

THE COURT: THAT'S FRIDAY, THE 8TH – FRIDAY THE 8TH.

MR. AVEIS: YES, SIR.

THE COURT: MR. WERKSMAN.

MR. WERKSMAN: YOUR HONOR, I WOULD OBJECT TO A STAY OF THAT LENGTH. IN ORDER TO RELEASE MY CLIENT SO THAT HE COULD GET THE MEDICAL CARE THAT HE NEEDS AND BE REUNITED WITH HIS FAMILY, WHICH IS A NINE-YEAR-OLD DAUGHTER WHOSE MOTHER HAS BEEN MURDERED, AND HE'S THE

ONLY PARENT SHE HAS, WE NEED TO GET MOVING ON THIS AND GET HIM OUT.

I WOULD SUBMIT, YOUR HONOR, THAT THE GOVERNMENT IS LIKELY TO BRING ANY KIND OF ACTION IN THE NEXT 48 HOURS. BUT AFTER THAT, YOUR HONOR, WE'RE JUST PERPETUATING AND ALLOWING HIM TO LINGER IN CUSTODY WHEN THIS COURT HAS ISSUED A RELEASE ORDER.

SO, I WOULD RESPECTFULLY REQUEST THAT HE BE ALLOWED [70] TO BE RELEASED – THAT HE BEGIN – THAT THE GOVERNMENT'S STAY BE NO LONGER THAN – THEY SHOULDN'T HAVE A STAY, YOUR HONOR. HE SHOULD BE ALLOWED TO POST THE BOND.

THE COURT: WELL, IT'S ALL ACADEMIC IF HE CAN'T POST THE PROPERTY ANY QUICKER THAN WHAT YOU DESCRIBED ANYWAY.

BUT I WILL GRANT THE GOVERNMENT'S REQUEST FOR A STAY BUT NOT TILL FRIDAY. I'LL GIVE YOU TILL WEDNESDAY AT 4:30, MR. AVEIS, TO SEEK REVIEW BEFORE THE CRIMINAL DUTY JUDGE OR OTHER DISTRICT COURT JUDGE.

MR. AVEIS: ALL RIGHT.

THE COURT: ALL RIGHT. ANYTHING FURTHER TO DO ON THIS CASE?

MR. AVEIS: NO, THANK YOU.

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MR. WERKSMAN: YOUR HONOR, JUST A HOUSEKEEPING MATTER.

THE COURT: YES.

MR. WERKSMAN: BECAUSE OF HIS MEDICAL CONDITION WOULD THE COURT ORDER THAT THE MARSHALS SUBJECT HIM TO A MEDICAL EVALUATION UPON HIS BEING TAKEN INTO CUSTODY AT MDC. HE NEEDS TO BE SEEN.

THE COURT: WELL, THE MARSHALS WON'T DO IT, BUT THE PHYSICIANS AT THE DETENTION CENTER I'M SURE WILL SEE HIM. AND IT WILL BE THE COURT'S RECOMMENDATION. I'M SURE MR. AVEIS JOINS IN THAT AS WELL.

MR. WERKSMAN: THANK YOU, YOUR HONOR.

[71] THE COURT: ALL RIGHT. ANYTHING FURTHER?

MR. AVEIS: NO, THANK YOU.

THE COURT: ALL RIGHT. THE DEFENDANT'S REMANDED TO THE CUSTODY OF THE MARSHAL.

(PROCEEDINGS CONCLUDED 5:24 P.M.)

[Certificate Omitted]

App. 198

EXHIBIT C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE OTIS D. WRIGHT, II,
JUDGE PRESIDING

UNITED STATES	)	
OF AMERICA,	)	
Plaintiff;	)	
VS	)	No. 08-224-UA
JAMES MICHAEL FAYED,	)	
Defendant.	)	

Reporter's Transcript of Proceedings
Motion Hearing
Los Angeles, California
Wednesday, August 6, 2008

[2] APPEARANCES

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[4] WEDNESDAY, AUGUST 6, 2008; 3:30 P.M.

PROCEEDINGS

COURT CLERK: Calling Criminal Case 08-
24. United States of America versus James Michael M
Fayed.

Counsel, please state your appearances for the record.

MR. AVEIS: Good afternoon, Your Honor. Mark Aveis for the United States.

THE COURT: Good afternoon, Counsel.

MR. WERKSMAN: Good afternoon, Your Honor. Mark Werksman appearing on behalf of James Fayed, who's present and in custody.

THE COURT: Mr. Werksman, Mr. Fayed, good afternoon.

I've read the government's memorandum of points and authorities in support of the application for a review of the magistrate judge's bail order in which bail had been set at \$500,000 secured by a real property, and the government had requested a stay of that Order until today to permit briefing as to why Mr. Fayed should not be released on bond but detained pending trial.

And, Mr. Werksman, I have your Reply Memorandum, and I have read it. And I also understand, and I [5] guess there is an FBI agent en route. I'm not certain that's necessary.

I'm inclined to accept the government's position, therefore, Mr. Werksman, I would imagine you wish to be heard.

MR. WERKSMAN: I do, Your Honor. And first I would like to take issue with one set of facts that's raised in the government's papers which

appears to be new and different from anything that was raised before the magistrate because, Your Honor, the government's allegations in the memorandum in support of review of the magistrate judge's bail order, basically contains – I'm sorry.

THE COURT: One second. Pardon me, but I meant to raise this earlier, but it's important I get it out of the way now.

I know the indictment initially was issued under seal. I guess it was unsealed. What is the status of this case now? Does it remain under seal?

MR. AVEIS: No, it was unsealed by Judge Rosenberg at about 11:30 Friday night August 1st.

THE COURT: Okay.

MR. AVEIS: And the order for that has been lodged with the clerk's office and ought to be filed; but the order of it, in and of itself, at that moment, the indictment was unsealed.

[6] THE COURT: Okay, good. Thank you.

MR. AVEIS: You're welcome.

THE COURT: I apologize, Mr. Werksman. Go ahead.

MR. WERKSMAN: Your Honoring, the government presents nothing new and different to this Court that was presented to the magistrate during a rather lengthy proceeding. It included the cross-examination

of the affiant, the declaring FBI agent, who presented facts to the Court which were pure hearsay.

A four-month rookie FBI agent testified about his discussion with two LAPD detectives who were present but neither was called as a witness. One of the LAPD detectives, the special agent was testifying, his name was Swedd, I believe that's Swedd, S-W-E-D-D [SIC], knew the name. The other one, he didn't even bother to learn the name of.

Special Agent Swedd testified about various facts which are now contained and resubmitted in the government's papers; but there is one new and additional fact which I think the government put forward to tip the scale in favor of the Court finding that Mr. Fayed was a danger to the community to such an extent that it would warrant his detention in this otherwise unrelated one-count indictment, for which, I believe, there is – traditionally, in a one-count indictment, alleging a failure to be licensed for a money exchange house, which carries a five-year maximum for a [7] 45-year-old United States citizen with no prior criminal record, who's been living in this community for 20 years, he probably would have been summoned then. But it's clear, Your Honor, that the government is seeking to bootstrap into these proceedings and use as a reason to detain him this separate murder investigation.

And today in the pleadings filed by the government – and I received them today, Your Honor, and that's why my Reply was just filed an hour ago, 20

minutes ago, and I apologize for that, but that was as much time as I had – the government makes an allegation that on June 24th of 2008, Pamela's then defense counsel advised the government that Pamela wanted to cooperate in its investigation.

Now, Your Honor, I'm not putting myself in the position of trying to read the Court's mind, but I think the addition of this fact is a serious and inflammatory and prejudicial allegation that my client may have arranged the murder of Pamela Fayed to silence the witness against him or to punish her for cooperation against him in a federal investigation. I must take issue with that if that is at all being considered by Your Honor.

And I understand that if that were true that it would be a fact that would support the government's motion for detention; although I don't think it would put it over the top, it would certainly be an incriminating fact.

[8] THE COURT: In order to give you a bit more of the Court's thinking to help you, I suppose, focus your argument, it wasn't just that simple a statement. It was, so much of what was going on on the date before the family law hearing. But I have to tell you – and reasonable bench officers can differ – but I come to a different conclusion that there is a thin connection between Pamela's murder and anything that your client may have orchestrated.

When the murder is captured on videotape and the murderer's vehicle license plate is recorded and that

vehicle is traced to a particular car rental agency and it is learned that that vehicle was rented using a credit card found in your client's wallet, given the acrimonious nature of the divorce and how much money your client was standing to be ordered to pay, plus, plus the assertion, and whether it's true or not, that she might have been willing to provide evidence against her husband in connection with this case, you put all that together, and that is not "thin" in my book.

MR. WERKSMAN: Your Honor, I think that Judge Zarefsky, in concluding that it was thin was concluding that the basis for believing those facts was thin. The government presented uncorroborated hearsay, a declaration –

THE COURT: Stop. Tell me which of the facts that I recited is just made up of whole cloth, is completely unsupported.

[9] MR. WERKSMAN: For one thing, Your Honor, the murder wasn't captured on videotape. I don't think that was ever asserted. I think what the governmental is asserting through this hearsay declarant, this FBI agent talked to two LAPD detectives, and they told him, and he told Judge Zarefsky that the vehicle that was suspected of use, of being used in a murder that carried the suspects who allegedly committed the murder was captured on videotape. A license plate was recorded, and that license plate came back to the Avis office, and near – in Camarrillo, and it had been rented by my client's company.

But the murder wasn't captured on videotape. There isn't that quantum of evidence linking my client to the murder, Your Honor.

And, furthermore, this allegation that my client may have had a motive to murder Pamela Fayed because she was going to cooperate with the government is also unsubstantiated.

And I can stand here today, Your Honor, and tell the Court that having interviewed the defense attorney for Pamela who had a conversation with government counsel, this government counsel, on June 24, 2000, and I interviewed that attorney an hour and a half ago, and he told me that he made no such request or had no such discussion with Mr. Aveis in which he offered Pamela's cooperation. In fact, he did [10] not offer her cooperation. He simply had a discussion with Mr. Aveis about his client being, quote, "cooperative," closed quote, in dealing with issues regarding an attorney-client privilege that was extended by the accountants to a subpoena received by the government in the course of an investigation.

In other words, there is absolutely no evidence, and I can represent to the Court, having interviewed that attorney, and that there was no cooperation agreement, she was not cooperating, she never told my client that she was cooperating, and my client had no idea or expectation that she was cooperating.

So, it would be simply false for the government to assert, and it's unsubstantiated, that my client may have been motivated to commit this murder because

he thought Pam Fayed was going to become an informant against him or a witness against him. It simply – that nexus is missing, Your Honor.

Now, I understand Your Honor's concern, Your Honor has expressed some concern over facts which, on their face, may appear to be incriminating. They tell a story, they paint a picture but not the whole picture, Your Honor. And when we talk about thinness, we're not necessarily talking about what those facts would prove if they all turned out to be true. What we're talking about is the quantum of [11] evidence presented by the government, the persuasiveness, the voracity, the authenticity, the credibility of these representations which is wholly lacking.

The record today, Your Honor, contains of a declaration that wasn't even made by the declarant, himself. It was proffered by the assistant U.S. Attorney who basically recited to Judge Zarefsky here is what Special Agent Swedd would say; and then I cross-examined Special Agent Swedd who revealed that he had a wafer thin set of conversations that, over the previous two or three hours, that very day, Monday, with two LAPD detectives, one of whose name he didn't even know and a couple of other FBI agents, and he parsed together this verbal declaration that was proffered on his behalf by Mr. Aveis. That's thin, Your Honor.

On that basis, for this Court to find that there is a preponderance of the evidence that my client is a danger to the community; and rather, I think, the standard would be for clear and convincing evidence that he's a

danger to the community such that he should be detained on an unrelated indictment that was filed five and a half months before the murder alleging a single-count, which carries five years in prison for not having a license to run a money exchange, I think that would be heavy-handy, Your Honor.

And I think what the government is trying to do is, to overwhelm this Court with hearsay and [12] unsubstantiated allegations of a very prejudicial nature that attempt to portray my client as a murderer without proving he's a murderer, without offering one single fact but rather offering hearsay declarations of FBI agents who talked to detectives and learned those facts that very day.

On that basis, Your Honor, I believe that this Court cannot find that this my client is a danger to the community such that he would be detained on this. Otherwise relatively a minor case based upon a technicality which is a failure to be licensed – for which I don't think detention would be appropriate.

THE COURT: All right, now, you know our focus is not on this case and the licensing; and any concern that the Court may have as to whether or not your client will make his court appearances is not based upon any potential future punishment he may receive from operating this unlicensed business. I think we're all in agreement on that, right?

MR. WERKSMAN: We are, Your Honor.

THE COURT: All right. Now, you talked about all of this hearsay evidence. Tell me, in your view, what quality of evidence is necessary for the Court to make a determination in this kind of a hearing?

MR. WERKSMAN: Well, Your Honor –

THE COURT: Do we have to prove that your client committed murder?

[13] MR. WERKSMAN: Well, Your Honor, in a case involving allegation of running a money exchange house without a license, it would be nice to have something more than just a hearsay allegation that he is a prime suspect in an LAPD murder case.

THE COURT: It may be nice. I'm asking you, what quantum or quality of evidence is necessary?

MR. WERKSMAN: Well, Your Honor, I would think at a minimum they would actually prove up some of these allegations. For example –

THE COURT: You're not going to answer my question. That's fine.

MR. WERKSMAN: No, I'm trying to, Your Honor.

THE COURT: Okay. That's fine. I just want to give you a warning. When I ask a question, it is for a reason. If you don't want to answer the question or you can't answer the question, say so, because, I've got to tell – you, I turn off. I'm not listening to what you're saying.

There are things I need to know, and if you don't want to give me what I need to know, trust me, I'm not interested in what you've got to say. But if you want to speak for another five or ten minutes about whatever it is you want to say, go ahead.

MR. WERKSMAN: Well, Your Honor, I believe that in order for the government to use an unrelated case as a [14] grounds for detention because he's a danger to the community in that other regard, I believe, Your Honor, the evidence should be something more than a hearsay declaration. For example, Your Honor, the government should be required to prove to this Court that in fact the vehicle rented by my client's company was actually involved in the murder to create some concrete link between this murder and my client.

Your Honor, there ought to be some quantum of proof which apparently the LAPD has not found sufficient to file a complaint against my client.

THE COURT: Can the government rely on hearsay testimony at this point?

MR. WERKSMAN: To a certain extent, they can, Your Honor, yes.

THE COURT: Okay. So I'm not sure why that seems to be the focal point of your argument that the government is relying on hearsay, and that clearly is something that the Court can consider at this stage.

MR. WERKSMAN: Well, yes. But, Your Honor, in a case with this gravity –

THE COURT: Yes, yes. And I am focusing on the gravity.

MR. WERKSMAN: Yes, Your Honor.

THE COURT: I'm not focusing on the license. I could care less about the fact that he was operating a [15] business without a license. He'd be home by now, and I think you're aware of that.

MR. WERKSMAN: Yes, Your Honor. And my argument to Your Honor is, I would ask Your Honor to consider whether the vast disparity between the indictment for which he stands here today and this other case for which he's being detained, this vast disparity is a perversion, Your Honor, because if the government had evidence that he committed a murder to silence a witness or for any other purpose, they should bring that case and detain him on that case.

But for government to arrest a man on a five-and-a-half-month old indictment and then detain him because of an ongoing murder investigation I believe creates such a disparity between what he was arrested for, what he was charged with and the basis for the detention that it distorts the fairness and the due process of this consideration.

THE COURT: I'm not sure why you're linking, you know, this indictment, which is, what, February, with the murder that took place a couple of weeks ago.

MR. WERKSMAN: Well, I link it, Your Honor, because they indicted him five and a half

months ago and didn't believe he was a flight risk or a danger then.

THE COURT: The murder had not occurred then.

MR. WERKSMAN: Yes, Your Honor, it hadn't.

[16] THE COURT: I'm not following the logic of your argument. The government wasn't concerned five and a half months ago, and suddenly now the government is now concerned, Well, his wife has been murdered. He is suspected of being complicit in that murder. The stakes have now gone up from the statutory maximum of five years for operating a business without a license to murder for hire.

MR. WERKSMAN: And yet, Your Honor, he's not charged with murder for hire.

THE COURT: Well, not today.

MR. WERKSMAN: Well, is he going to be charged?

THE COURT: Well, I shouldn't even say that. I shouldn't say that. I don't know. I don't know what's going on.

MR. WERKSMAN: That's precisely my point, Your Honor. I feel – and this is the argument that I'm making to Your Honor – that if the government has no realistic or immediate expectation to file certain charges, if they can't presently evidence enough to support those charges, then the defendant shouldn't be

held detained on those charges. Rather, his detention hearing should center on the charge that he's facing at the present, which is this one-count indictment.

THE COURT: Well, he certainly isn't being detained on charges that haven't been brought.

[17] MR. WERKSMAN: Well, Your Honor, and yet the Court has indicated, as we all know, that if the bail issue turned only on what he's charged with, he'd be home by now.

THE COURT: Yes.

MR. WERKSMAN: So, in fact, effectively, he is being detained based upon a separate LAPD homicide investigation in which he's been named as a suspect. That seems to be the basis of his detention, Your Honor. And it's inescapable.

THE COURT: There's only a couple of things that the Court concerns itself with at this particular stage of the proceedings, and that is whether or not there is some assurance that he will make his court appearances and whether or not him remaining in the community may present some danger to the community. That's all we're concerned about here.

And my understanding, and I believe yours as well, is that the quality of evidence that the Court may consider at this particular point is not necessarily that quality of evidence that would be admissible at trial.

MR. WERKSMAN: Yes, Your Honor. But may I ask this?

THE COURT: I've got to tell you, when the threats are grave, then I think it's prudent for the Court to exercise some degree of caution.

MR. WERKSMAN: May I submit, Your Honor –

[18] THE COURT: Certainly.

MR. WERKSMAN: – that there are terms and conditions of pretrial release that could satisfy the Court's problems, and that's what Judge Zarefsky found.

THE COURT: All right, why don't you take a run at it, because I'm aware of all sorts of terms and conditions of release, and I have reviewed those in my mind, and I have no comfort in any of them.

And let me give you some guidance as to my thinking. What was it, I read somewhere where a couple of days ago a search of your client's business disclosed – was it a couple of millions of dollars in gold? I understand that a search of his residence disclosed about \$3 million in gold and \$60,000 in cash and 31 firearms – I'm not sure what that's all about. But he's got \$2.2 million in real estate equity and over \$7 million in assets, and what we're looking at here is a bond of \$500,000 secured by real estate. That gives me no comfort whatsoever.

MR. WERKSMAN: Well, Your Honor, in fact, the government has now seized all the gold in Mr. Fayed's possession at his home and at his business, and he's in the gold business. The codefendant in the

indictment is Goldfinger, Inc. He ran a business that involved the use of precious metals as an asset to back deposits by customers. It's a fairly complicated situation. The government claims [19] it's an unlicensed money exchanged. He has a defense to that based upon the way the business was actually run. He will plead not guilty to this indictment.

But the fact that gold would be in his home and at his office should not be surprising to the Court or the government in a case in which my client is in the gold business.

THE COURT: Well, I'm not surprised. That isn't the point. That isn't the point. The point is, that he has assets at his disposal, which means he can probably, oh, at least make it as far as Glendale.

MR. WERKSMAN: Well, he had assets, Your Honor. Those have all been seized by the government.

THE COURT: No, no, no. And you know that, why? You stand here and make that presentation to the Court based on what?

MR. WERKSMAN: Well, because –

THE COURT: You can make the representation that assets of a certain kind and quantity were seized from certain locations. Now, can you state here unequivocally to the Court that all of his assets had been seized by the government?

MR. WERKSMAN: No, Your Honor.

THE COURT: Then why are we having this conversation?

[20] MR. WERKSMAN: Because the assets that were presented by the government in their argument to the Court as to why he should be detained suggests that he has this massive wealth that liquid, that he could carry with him as a fugitive, that's all been taken by the government. Everything the government is aware of they've taken –

THE COURT: No, no. Tell me how you know that.

MR. WERKSMAN: Because I've been in constant contact with the government agents and the government –

THE COURT: How would the government know that?

MR. WERKSMAN: Well, Your Honor, the government – when we discussed this at the bail hearing on Monday –

THE COURT: We don't know how much this gentleman has got in his wallet. Now, how do you know what this man's assets are and where they are?

MR. WERKSMAN: What I'm speaking of, Your Honor, is that the gold that the government –

THE COURT: Why don't you just simply say: I don't know.

MR. WERKSMAN: Well, I don't know.

THE COURT: Well, that's my point.

MR. WERKSMAN: Okay.

THE COURT: That is my point. That is my point. So let's stop wasting time.

MR. WERKSMAN: The gold that the Court is familiar [21] with is – the Court is familiar with it because the government seized it and told the Court that we found all this gold. That's taken by the government.

THE COURT: Yes.

MR. WERKSMAN: All right. They've taken his passport.

THE COURT: Yes.

MR. WERKSMAN: He has a home that he's lived in for years in Camarrillo and Moorpark, where he's been residing for the past year and a half, mainly since he became estranged from his wife.

He's been in this community for 20 years. He has serious health problems including rheumatoid arthritis and anti-immune disorder that require him to take a cocktail of very potent pain medicine on a daily basis to avoid excruciating pain. He sees doctors regularly for that.

If he were released by this Court on a property bond that required him to post his properties, one or the other or both, if he were subject to intensive pre-trial supervision as Judge Zarefsky ordered, if he's

required to wear an ankle bracelet and be subject to electronic monitoring as Judge Zarefsky ordered, and if he was subject to intensive pretrial supervision, Your Honor, then I think that the Court's concerns about being a flight risk and certainly a danger to community would be abated.

[22] He could be cut off from his business; he could be cut off from leaving his property; he could be cut off from moving freely about the community.

The crime that he's charged with, which is the allegation that he's a danger, the murder of Pamela Fayed, is a singular instance of violence that's attributed to him, but he has no prior record of any kind of other criminal acts, and it's not alleged that he is otherwise a dangerous or a violent person, with the exception of this other one case in which he's suspected.

So, I would submit to Your Honor that a certain set of conditions of pretrial release could satisfy the Court's concern that he not be a danger and of course to abate him as a flight risk.

THE COURT: Okay. Thank you.

MR. WERKSMAN: Submitted, Your Honor.

THE COURT: Thank you, sir.

All right, is there anything from the government?

MR. AVEIS: Your Honor, I have the agent. He's here. I have not yet had a chance to talk with him today prior to his taking the stand.

And if the Court rather – I guess it's more a point of whether or not the counsel would accept the government's proffer to satisfy the evidentiary requirements [23] of 3142(f), I would have the agent available for that. It's more – I know where the Court is going. I appreciate that. I don't want to belabor any of those points.

THE COURT: Give me an offer of proof. What is the agent here to testify regarding?

MR. AVEIS: The agent will support the facts that are contained in the government's brief.

THE COURT: Specifically with respect to whatever LAPD is doing?

MR. AVEIS: With respect to what specifically was laid out in the brief and not everything LAPD is doing. If the Court would like to learn what LAPD may be doing, if I could have a moment, I can perhaps answer that.

THE COURT: Let me do it this way. Mr. Werksman, do you wish to have an opportunity to examine the agent?

MR. WERKSMAN: Not at this time, Your Honor.

THE COURT: All right, then we can dispense with it.

Is there anything else you'd like to add?

MR. AVEIS: All right, just to make sure the record would be clear –

MR. WERKSMAN: I'm sorry, you mean the FBI agent?

THE COURT: Yes.

MR. WERKSMAN: I would like to cross-examine the FBI about his representation that on June 24th, 2008 –

[24] THE COURT: No, no. If the answer is yes, then I'll permit you to do that.

MR. WERKSMAN: Yes, Your Honor. That I would. I misheard who he was offering to cross-examine.

THE COURT: Let's put him on the stand.

MR. AVEIS: Very good.

(Witness sworn.)

COURT CLERK: Please state your full name and spell your last name for the record.

WITNESS, TIMOTHY L. SWEC, SWORN

THE WITNESS: Timothy L. Swec, last name is S-W-E-C.

MR. WERKSMAN: May I, Your Honor?

THE COURT: Yes, go ahead, please.

DIRECT EXAMINATION

BY MR. WERKSMAN:

Q. Special Agent Swec, you were the agent who testified at the Monday hearing before Judge Zarefsky, correct?

A. I was.

Q. Okay. And just to establish your background, you're a special agent with the Federal Bureau of Investigation, correct?

A. That's correct.

Q. And you've been an agent for approximately four months, correct?

[25] A. That's correct.

Q. And on Monday you were the agent who transported Mr. Fayed from the Ventura County Jail early Monday morning to the federal courthouse for his initial appearance, correct?

A. That's correct.

Q. And after you arrived to the federal courthouse on Monday, you were – after you arrived at the courthouse on Monday, sometime during that day, you were asked by Assistant United States Attorney Mark Aveis to bear witness to certain facts that would be presented to the Court in support of the government's motion to detain Mr. Fayed, correct?

A. That's correct.

Q. All right. Now, we covered the other areas on Monday, but there is a fact that is contained in a filing that was presented yesterday by the United States Attorney regarding a conversation that Pamela Fayed's defense attorney allegedly had with the government about Pamela's interest in cooperating. Are you the source of that information?

A. I'm sorry, the source in what way?

Q. Did you provide information to Mr. Aveis about an allegation that on June 24th, 2008, Pamela Fayed's then defense counsel had advised the government that Pamela wanted to cooperate in its investigation?

A. I was not the one who provided that information to [26] him, no,

Q. All right. Do you have any knowledge about any conversation between Pamela Fayed's defense counsel and any government lawyer about Pamela cooperating?

A. I have knowledge that was given – that was told to me by agents who worked on the case.

Q. And were you the special agent who reported that information to Mr. Avis, or did someone else report that to Mr. Avis?

A. Someone else reported to Mr. Avis.

Q. All right, who were the FBI agents that you interviewed who advised you about the facts regarding a June 24th conversation?

A. I spoke to Special Agent Eric Jensen, and he provided me with those facts.

Q. All right, and did you ask Special Agent Jensen what his source of information was for the things he told you about the June 24th conversation?

A. I did.

Q. You did?

A. Yes.

Q. And what was his source?

A. His source was Special Agent Mora Kelly.

Q. Mora Kelly, okay. And did you subsequently interview Special Agent Mora Kelly about that subject?

[27] A. No, I did not.

Q. And do you have any independent knowledge as to Special Agent Mora Kelly's basis or foundation for knowing about a conversation on June 24th between Pamela Fayed's defense counsel and a government lawyer?

A. I don't.

Q. Thank you.

MR. WERKSMAN: I have no further questions, Your Honor.

THE COURT: All right. Mr. Aveis, is there –

MR. AVEIS: No, I have nothing further. Thank you.

THE COURT: Thank you, Special Agent. You may step down.

All right, anything further from either counsel?

MR. AVEIS: If I could just make one point, Your Honor.

THE COURT: Please.

MR. AVEIS: As the Court could tell from my filing, my position is that the totality of the circumstances, the whole being greater than some of the parts would indicate that no condition or a combination of conditions can assure the appearance of this defendant or protect the community or others in the event he's released.

[28] Accordingly, if that analysis holds water, if you will, then eliminating this fact that Mr. Werksman has discussed with this witness would not, in my view, change the equation.

I think he could probably back out any number of the factors contained in the government's proffer which has otherwise been accepted by counsel for this hearing, and the Court can reach the same conclusion.

The summary, therefore, would be, that while one fact might be stronger in terms of the quantum of proof than any other, when the entire pattern and all of the factors are considered, starting from years before the indictment in this case and of course leading up to the

present and the searches that occurred and are ongoing as we speak, I believe the Court's analysis is absolutely correct, and it's the government's position that no combination of conditions or condition can satisfy the necessary standard.

I also want to point out for the record, of course, that a 3142(f) clearly holds that the rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of what's called Information at the hearing. So, we're really not dealing with evidence. We're dealing with Information.

I think it's in the best interest of the Court, the parties and certainly the community, if not the [29] defendant, himself, that the Court avail itself of all the available information. And if the Court were to do so, based upon the government's filing and in fact the defendant's own filing, the Court would reach the conclusion provided, if you will, in the Court's tentative.

And I appreciate the Court's time. Thank you.

THE COURT: All right. I appreciate your concise argument.

MR. WERKSMAN: Your Honor, may I?

THE COURT: Yes, absolutely. I was just about to ask if there is any one last comment you wish to make in light of the government's remarks.

MR. WERKSMAN: Your Honor, I simply want to add that I understand the government's argument about the totality of the circumstances.

Unfortunately, the totality of the circumstances warranting detention in the government's view are all unrelated to and separate from the crimes that he's charged with.

And I believe, Your Honor, that pretrial detention should be an extreme measure that should be a measure of last resort, and I think it sets a dangerous precedent to allow the government to detain a man for uncharged crimes, especially when there is such a vast [30] disparity between what he was arrested for and the alleged crimes for which he's being detained.

The government has the means to bring the charges if they believe those charges are warranted. They haven't. The State of California has the means to bring murder charges across the street if they believed that there are facts that warrant it. And now we'll have to sit and wait, Your Honor, to see if they ever plan to charge him with this murder.

But as of now, Your Honor, all he's charged with is one single-count of this money exchange house, and I would submit that it would be unfair and it would be heavy-handed for him to be detained based on a totality of circumstances that stem from a completely uncharged, unrelated crime.

Submitted, Your Honor.

THE COURT: All right, thank you, Counsel. Appreciate it.

My tentative stands based upon the totality of the circumstances, and I excised the reference at page 5 of

the government's motion regarding the government being contacted on June 24 by Pamela's then defense counsel advising the government that Pamela wanted to cooperate in the investigation.

I think had defense counsel made a direct [31] contact with the government, I don't think there would be much difficulty in ascertaining precisely who that individual with the government was.

In any event, charged crime or not, I think the risk is too grave, and I think the possibility of flight is too grave.'

If indeed there has been, and indeed there has been, a murder of Mr. Fayed's wife, it is not going to go away. There is no statute of limitations with respect to murder; and if the facts are as I earlier stated them to be with the exception of the fact that the murder itself was not captured on videotape, only that the perpetrator was seen leaving in a vehicle that was rented with a credit card found in Mr. Fayed's wallet, sooner or later the other shoe is going to drop.

He is going to remain in custody pending trial.

MR. AVEIS: Your Honor, if I may, as required by the statute, I'll submit the proposed findings if that's acceptable to the Court.

THE COURT: Thank you, Mr. Aveis.

MR. AVEIS: You're welcome.

MR. WERKSMAN: Your Honor, would the Court make this ruling without prejudice so that we

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can raise it again before the District Court when the case is assigned to a [32] judge after the post-indictment arraignment?

THE COURT: Absolutely.

MR. WERKSMAN: Thank you, Your Honor.

THE COURT: Absolutely.

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(Proceedings concluded.)

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[Certificate Omitted]
