THE PEOPLE, Plaintiff and Respondent,
v.
SCOTT EDGAR DYLESKI, Defendant and Appellant.

A115725.
Court of Appeals of California, First Appellate District, Division One
April 27, 2009
Not to be Published in Official Reports

Appeal from the Contra Costa County, Super. Ct. No. 5-060254-0.

MARGULIES, J.

A jury convicted defendant Scott Edgar Dyleski of first degree murder in the bludgeoning death of Pamela Vitale, and found true the special allegation that defendant committed the murder while engaged in the commission or attempted commission of residential burglary. The trial court sentenced defendant, who was 16 years old at the time of the crime, to life in prison without the possibility of parole.

Defendant challenges his conviction on multiple grounds: (1) trial court error in denying his pretrial motions to change venue, suppress evidence, and challenge the scientific validity of certain DNA evidence; (2) insufficiency of the evidence to support the burglary, first degree murder, and special-circumstance allegations; and (3) instructional error concerning the use of prior crimes evidence. He also raises a series of constitutional challenges to his sentence. Finding no merit in defendant's contentions, we affirm the judgment.

I. BACKGROUND

Defendant was charged by information with murder (Pen. Code,[1] § 187) and first degree residential burglary (§§ 459, 460, subd. (a)). The information further alleged that during the commission of the murder, defendant personally used a bludgeon (§ 12022, subd. (b)(1)) and was engaged in the commission or attempted commission of residential burglary (§ 190.2, subd. (a)(17)). The information also alleged that defendant was at least 16 years old when the offenses were committed (Welf. & Inst. Code, § 707, subds. (b), (d)(1)).

A. Prosecution Case

1. The Murder

On the morning of Saturday, October 15, 2005, Daniel Horowitz left his home at 1901 Hunsaker Canyon Road in Lafayette shortly before 8:00 a.m. to attend a meeting. Horowitz was an attorney who was at that time defending Susan Polk in a criminal case that was being widely covered in the local media. Horowitz's wife, Pamela Vitale, was still asleep when he left.

Horowitz attempted to call Vitale periodically during the day, but she did not answer the telephone. He left his office late in the afternoon that day, ran some errands, worked out at the gym, and stopped at a grocery store on the way home. When he pulled into the driveway, Horowitz was surprised that Vitale's car, a white Mercedes sedan, was still there. He knew she had plans to attend a ballet that evening and had assumed she would have left the house by that time. Horowitz retrieved the groceries and his computer bag from the trunk of his car and walked to the front door. The door was closed and Horowitz noticed smears on it. He opened the front door and saw Vitale lying there. It was obvious to him from her appearance and the amount of blood he could see that she was dead. He dropped his computer and groceries, and fell to the floor, screaming. He called 911 from inside the house and then returned to Vitale's body and cried and screamed. Neighbors later recounted hearing Horowitz's screams about 6:00 p.m.

2. Vitale's Injuries

Dr. Brian Peterson, who conducted the autopsy of Vitale, opined that she died as a result of blunt force trauma to her head. The vast majority of Vitale's external injuries were abrasions (scrape-type injuries) and lacerations (crushing or tearing-type injuries) caused by blunt force, many on the victim's head. While it was difficult to estimate how many blows Vitale suffered because of possible overlap, Peterson was able to identify eight distinct injuries on the right side of Vitale's head, 11 on the back of her head, and seven on the left side of her head. Vitale's head lacerations, while in many cases separating her scalp and exposing bone, did not cause any skull fractures. Vitale's internal injuries as a result of the blows to her head consisted of bleeding inside her scalp and over virtually every surface of the brain.

Vitale suffered other injuries to her head and neck. There was bleeding in one of her neck muscles, consistent with impact on the skin. She sustained a bone fracture to her nose, and two of her teeth had broken loose from her upper jaw. Peterson opined that most of Vitale's head and neck injuries were sustained as her face was forced hard against the carpet while blows were inflicted to the back of her head. She had abrasion-type injuries to her left knee that could have been caused by an abrupt fall from a standing to a kneeling position. There were also contusions, abrasions, and scratches to Vitale's shoulders, breasts, and upper torso, fractures to her left hand that caused the bone to be exposed, and bruising on her right foot, which Peterson concluded were probably defensive injuries. The injuries to the right foot were most likely sustained while the victim was on the floor "trying to get anything between her and the force being inflicted."

Peterson opined that the weapon used to inflict the observed blunt force injuries was most likely a smaller, irregularly shaped, hard object such as a rock, which was applied to the victim's body with a moderate amount of force. A longer or heavier object such as a golf club or baseball bat would most likely have caused skull fractures. Peterson opined that the perpetrator, even if wearing gloves, might have also sustained injuries such as bruising and swelling of the hand in applying the force necessary to cause Vitale's injuries.

Vitale suffered two further injuries not caused by blunt force trauma. Peterson observed what he described as "three intersecting superficial incisions" on the victim's back consisting of two horizontal incisions, each approximately four inches in length, both intersected by a four and one-half inch vertical incision, forming an H-shape. The incisions were made while blood was still circulating in Vitale's body. Vitale also suffered a deep abdominal stab wound that penetrated her stomach and small bowel. Peterson believed the stab wound was inflicted shortly after or just before Vitale died.

Dr. Peterson opined that Vitale would have died within minutes as opposed to hours after the first blows were struck to her head.

3. Crime Scene Evidence

Alex Taflya, a criminalist with the Contra Costa County Sheriff's Department Crime Lab, arrived at 1901 Hunsaker Canyon Road at about 9:15 p.m. to process the crime scene and collect evidence.

Taflya observed blood on the floor and the walls near Vitale's body. An overturned plastic storage bin lid lay by the front door. There was a shoe print in blood on top of the lid. There was also a fabric print on the bin consistent with having been made by a glove. Taflya also observed blood smears on the interior portion of the door that he opined were consistent with someone who was wearing a long-sleeved garment. Vitale was found in a short-sleeved T-shirt. Blood spatter on the interior of the front door led Taflya to conclude that the door was closed during the attack. Based on the location of the great majority of blood evidence, Taflya opined that most of the victim's injuries were sustained while she was low to the ground in the entry way. The sock on Vitale's right foot had separated, leaving the foot exposed. Contact transfers below the front door knob were left by Vitale's bare foot.

On the walls and on objects in the room there were numerous finger marks in blood; some of these contained fine linear striations, indicating they were fabric patterns rather than fingerprints, consistent with the attacker wearing gloves throughout the incident. Taflya later looked at photographs of a glove which, based on its finely knit construction, could not be ruled out as the source of the fabric prints found at the scene.

Taflya observed a "fairly heavy" flashlight near the entryway, which was covered in blood, as well as a smaller flashlight with blood contact transfers. He believed the flashlights could have been used to inflict some but not all of Vitale's injuries. Taflya also identified various pieces of molding found at the scene that contained blood stains. Taflya opined that these pieces might have been used to strike the victim, but they could not have been used to strike more than one or two blows and were not the murder weapon.

In the kitchen, Taflya found an opened water bottle and bowl on the counter that had blood on them. There was also blood found on a mug in the sink. In the hallway bathroom, Taflya observed a hand swipe in blood on the far wall and contact transfers on the shower curtain and hot water knob of the shower. He opined that nobody operated the shower after the blood smears were left because the smears would have been diluted or washed off.

4. Defendant's Background

Defendant was two weeks short of his 17th birthday at the time of Vitale's murder. He and his mother, Esther Fielding, had lived a short distance from Horowitz and Vitale's residence, at 1050 Hunsaker Canyon Road, since approximately 1999. They had come to live there at the invitation of Fred and Kim Curiel, who had been living in a small trailer on the property with their three children since 1998. The Curiels began construction of a home on the property in August 2002. Until the house was completed, defendant and his mother lived in a plywood lean-to the Curiels built for them to provide shelter from the weather. Defendant, Fielding, and the Curiels moved into the completed house in April 2003.

In August 2002, defendant's half-sister died in a car accident. He never lived with his half-sister, but he would see her on visits to his father. After his sister's funeral, defendant began wearing black consistently, and would go to school in costumes, using different styles of black hats and stockings, and wearing make-up and black nails and black lipstick.[2] Defendant's grades fell to D's and F's. His mother described him as being very sad, and Kim Curiel testified that he was "quite sullen."

Defendant left high school after his sophomore year and was getting his general education development (GED) certificate during the summer of 2005, so that he could attend Diablo Valley College in the fall. During that summer, he "almost always" dressed in black and wore black nail polish. About three weeks before Vitale was murdered, defendant started taking walks in the woods, which was something he had not done before. He told Kim that he would walk out to the barn, up to the hills, or down to the mailboxes.

The jury was shown a collection of writings and artwork produced by defendant that assertedly reflected his interest in violent subject matters and feelings of separateness. One writing was entitled "Live for the Kill." The words "Style Gothic, hate" were written under the title. Other writings used words such as "Separation," "lonely," and "set apart." His drawings included a rendering of a man holding a severed head and a knife with red coloring, a depiction of a face with the mouth apparently stitched up with X's, and a drawing containing a razor blade, swastika, and a knife. The latter drawing contained the words, "Just like Jesus Christ, just like fun with knives, just like roses red, just like roses dead." Another drawing depicted a male subject in a long coat with a knife, containing the words, "Guns don't kill people. I kill people." Another depicted dark figures lying down among flowers with the words, "Before Manson, before Bundy, there was Gein." Some drawings and writings included symbols containing intersecting horizontal and vertical lines.

Defendant's mother testified that a week or two before the Vitale murder she had found a drawing defendant had made that included body parts. She was concerned enough about the drawing when she found it that she thought he should see a therapist.

Defendant's girlfriend, Jena Reddy, testified that she and defendant experimented with pain in their sexual relationship to the point that she believed, at the time, that they were both sadomasochists. She also testified that they had discussed torturing children and that defendant was interested in Jack the Ripper and discussed with her that Jack the Ripper had removed body organs from his victims.

5. Credit Card Fraud

Defendant and 16-year-old Robin C. had been close friends since the eighth grade. Toward the end of the summer in 2005, defendant and Robin[3] began discussing a plan to grow marijuana. Defendant came up with the idea of using stolen credit card information to pay for the growing equipment they needed. At some point they discussed making a specific purchase of an item from a Web site called "VaporWarez" that sold marijuana smoking devices. Robin and defendant selected a vaporizer device costing $267 that defendant ordered from the VaporWarez Web site on September 17, using credit card information he had stolen from John Halpin, a neighbor of defendant's who lived at 1701 Hunsaker Canyon Road. About two weeks later, defendant brought the vaporizer over to Robin's house where it remained until it was turned in to police by Robin's father after Vitale's murder. A VaporWarez invoice showed that the September 17 vaporizer purchase had been billed to Halpin at 1701 Hunsaker Canyon Road, but the ship-to name and address for the order were listed as Esther Fielding at 1050 Hunsaker Canyon Road. Halpin testified that he was out of state between September 16 and October 23.

A couple of weeks before Vitale's murder, defendant and Robin exchanged e-mails in which Robin identified the lighting and hydroponic equipment they would need to grow marijuana in defendant's closet, and the online sites from which to order them. Robin warned defendant to keep the amount ordered on each credit card small to avoid detection, and defendant responded that "stealthiness is the number one priority." However, part of the plan was to use defendant's address as the delivery address for the equipment. A few days before Vitale's murder, defendant placed orders for the equipment as discussed.

Karen Schneider lived next door to Horowitz and Vitale at 2001 Hunsaker Canyon Road. She did not know defendant but was on friendly terms with the Curiels. On Thursday, October 13, Schneider reviewed her bank and credit card accounts online and noticed that there were three charges she had not approved from a company named Specialty Lighting. Schneider sent an e-mail to Specialty Lighting shortly after 10:00 p.m. Eastern Standard Time on the 13th, after finding its Web site on the Internet. Specialty Lighting's owner, Jackie Jahosky, responded to Schneider by e-mail at 10:20 a.m. Eastern Standard Time the next morning and faxed copies of the orders to her. The first order was placed on October 13 at 12:15 a.m. Eastern Standard Time. The order was for a grow light system and was to be shipped to Esther Fielding at 1050 Hunsaker Canyon Road with an associated telephone number of (925) 962-0829, which was Fielding's telephone number. The order listed Karen Schneider as the party to be billed, with her address shown as 1901 Hunsaker Canyon Road, and an associated telephone number of (925) 283-8970. These were the address and unlisted telephone number for the Horowitz-Vitale residence.[4] The second order, for lighting equipment, was placed four minutes later using the same e-mail address and shipping and billing information as the first order. The third order, for cooling accessories, was placed eight minutes later, using the same information as the other two orders. A fourth order was placed on the 13th using Esther Fielding's e-mail address and shipping address, but listing John Halpin as the party to be billed.[5] Halpin later discovered another order charged to his credit card without authorization on October 13 by a company named Future Gardens for a liquid earth starter kit, hydro buckets, and pumps. This order was to be shipped to Esther Fielding at 1050 Hunsaker Canyon Road and was billed to Halpin at his address using his credit card information.

Jahosky was suspicious of the Specialty Lighting orders because of their high dollar amounts and the fact that next-day air shipment was requested for the equipment, which added considerably to their cost. She decided that she would not ship the merchandise and told Schneider that on the morning of Friday, October 14. Jahosky also sent an e-mail on October 14 to the e-mail address listed on the orders—Esther Fielding's e-mail address—stating that the orders could not be processed. At 2:21 p.m. Eastern Standard Time, Jahosky received a call from a male caller inquiring about the problem with the orders. Jahosky was surprised by the call because in her experience persons who submitted fraudulent orders did not normally call, but would just try to place the order with another company. The caller sounded young and seemed to Jahosky to be trying to disguise his voice. Jahosky did not say anything to the caller about her suspicion the orders were fraudulent or her contact with Schneider. Rather than telling him her real reason for not filling the orders, she told the caller she could not ship to an alternate address that was not the same as the billing address for the credit card. The caller said, "Okay, that's fine," in a very polite fashion that Jahosky found to be "weird."

The caller called back at 3:54 p.m. Eastern Standard Time on the 14th. This time, he asked if the merchandise could be shipped to the billing address on the orders. In the second call, Jahosky told him the credit card company had declined the charges and he would need to contact the credit card company. He accepted that information and did not make further contact with Jahosky. According to telephone records, both calls originated from the Curiels' telephone number.

On October 14, defendant called Robin after school and told him that "some of it hadn't gone through and he was going to try to find a way to make it work."

6. The Day of the Murder

A forensic examination of Vitale's computer showed that it was used beginning at 8:07 a.m. on October 15 to visit several genealogical and news Web sites that were consistent with Vitale's interests. The computer was used very extensively in the first part of the morning. The last use was at 10:12 a.m. and there was no further activity on the computer that day up until Vitale's body was discovered.

On the morning of October 15, Kim Curiel woke up around 8:30 a.m., did some chores, ate breakfast, and then sat on the couch and started grading papers. While she was grading papers, defendant walked through the front door. That was the first time Kim saw defendant that morning. Another resident of the house, Michael Sikkema, was in the kitchen making breakfast. Defendant walked with an exaggerated step, smiled broadly, and said in rather loud voice, "I had the most beautiful walk this morning."

Kim noticed that defendant's hands were shaking slightly. Defendant also had scratches on his nose that were actively bleeding and three or four small scratches on his cheek. He explained that he fell down on his walk as he was coming down the hill and got "whacked" by a bush. He told Kim he had been "looking for the waterfall that you guys had talked about." When Kim told defendant there was no water in October, he replied, "Yeah, I found that out."

After talking to defendant, putting some ointment on his nose, and grading one more paper, Kim left the house with Fred and two of their children, and drove to the Spirit Store to look at Halloween costumes. Based on transaction receipts from the Spirit Store and travel time, Kim estimated that defendant walked though the door around 10:45 a.m. on Saturday morning. A sheriff's detective determined that it would have taken approximately 10 minutes to walk from the Vitale-Horowitz residence to the location of an abandoned van on the 1050 Hunsaker Canyon Road property where articles of clothing linked by blood evidence to the attack on Vitale were later found.[6]

Sikkema, who was renting rooms in the Curiels' house with his wife and two children, went downstairs to make breakfast for his children about 10:20 a.m. on October 15. As he was making oatmeal, Sikkema noticed defendant walk in the front door at a time he estimated was close to but no later than 11:00 a.m. Sikkema saw gouge marks on defendant's cheek and nose that looked fresh and were not there the night before. Defendant told Sikkema he walked into a bush while walking on the trail toward the barn or waterfall. Esther Fielding came home from work around noon and noticed that defendant had a scratch on his nose and his palm was red. He told her he had slipped while climbing up some rocks, grabbed for a branch, and hit his hand on a rock. Fielding had not noticed any injuries on defendant the previous night.

Fred Curiel initially told the police that he had seen defendant just before 9:30 a.m. on the morning of October 15, and that he saw no bleeding wound on his face or other injuries to his body. He also told police that he and his family left the house to go shopping about 10:20 a.m. At trial, Fred testified that he did not have a clear recollection of seeing defendant that morning and whether there was blood on his face. He also stated that he revised his time estimates after learning from the defense investigator that the prosecutor had made representations about a different time line during his opening statement to the jury. At trial, his best estimate was that he left the house at 10:20 a.m. to get in the car, and that the rest of his family got into the car six or seven minutes later and they all left together.

Sometime before 2:00 p.m., Kim Curiel's brother, Marcus Miller-Hogg called the house looking for defendant's mother. Defendant answered the telephone. Miller-Hogg had known defendant since he was 10 years old. During the conversation, defendant told Miller-Hogg that his hand and wrist were swollen and asked Miller-Hogg what he should do. Defendant told him that he was walking behind the barn to look at a waterfall and fell in the ravine.

Jena picked defendant up at his house about 2:00 p.m. on the afternoon of the 15th, and they spent the afternoon together. Defendant called Robin that evening and told him he wanted to come over and pick up

some marijuana. Robin had never furnished marijuana to defendant before. Defendant and Jena arrived at Robin's house about 8:00 p.m. and defendant gave Robin $40 for the marijuana and in repayment of other debts. That night, Jena noticed that defendant had scratches on his face, that his right wrist and hand were swollen, and that his arm was tender. He told her he went for a walk in the morning and that a tree or bush scratched his face and his palm was swollen because he fell and slid during the walk.

Shortly after defendant arrived at Robin's house, defendant's mother called Jena's cell phone wanting to talk to defendant. Jena told defendant and he called his mother back using Robin's phone. Fielding told defendant that there was a rumor someone in the canyon had been killed, the police were denying access to the area, and he should not try to go home. Defendant told Jena that if she took him home, he would "have to be questioned by the police" and it would be "too much of a hassle." When defendant, Jena, and Robin were speculating about who may have been killed, defendant stated that it was most likely at Horowitz's house because of his stature as an attorney. He also mentioned that he had seen someone on his walk that morning and wondered if it could have been the killer. At one point, he recited a rhyme about Lizzie Borden and 40 whacks. He offered that if you wanted to kill someone, the most painless way would be to shoot them but, if you wanted to cause pain, you would bludgeon the person 36 or 39 times.[7] After leaving Robin's house, defendant and Jena went to Jena's home where they watched a show and drank absinthe.

7. Defendant Confronted With Credit Card Fraud

Schneider reported what she had learned about the credit card fraud to the Lafayette police on the afternoon of October 14. She was concerned that the fraudulent charges might be related to an incident that had occurred on October 1, in which she had struck defendant's family dog, Jazz, as she was driving down the canyon road to work.[8] Schneider thought the fraudulent charges for goods to be delivered to Fielding's residence might be a way to make her pay for Jazz's veterinarian bills. The discovery of the credit card fraud frightened Schneider and caused her to ask a relative to stay with her on Friday night because her husband was working out of town.

On Saturday, Schneider drove to King City in the morning and spent the day with her husband. She and her husband had planned the visit a few weeks earlier. At 11:30 p.m., Schneider's daughter called her in King City and told her about Vitale's murder. Schneider came home from King City the next morning. She arranged for a road association meeting to take place on Sunday afternoon, October 16, so that she could inform the neighbors about the credit card fraud. In addition to Schneider and other residents of the canyon community, Kim and Fred Curiel and defendant's mother attended the meeting. The neighbors discussed the murder and speculated about who killed Vitale. Near the end of the meeting, Fielding expressed anger at Schneider for not taking responsibility for injuring the dog. In response, Schneider told Fielding that "you guys are trying to kill me." Fielding said, "What are you talking about? What do you mean?" Schneider pulled out the credit card orders that Jahosky had faxed to her and pointed out that the orders used the Horowitz address and seem to have been placed by Fielding. Fielding and Fred Curiel looked over the orders in Schneider's presence and could not figure out how Fielding's name could be on them. Schneider gave Fielding and Fred the papers to take with them.

Following the road association meeting, Fred—a computer consultant by trade—demanded to look at all of the computers in the house, including defendant's. Although the browser history on defendant's computer had been erased, certain files remained, showing that the computer had been used to access the Specialty Lighting Web site where the fraudulent orders had been placed. After looking at defendant's computer, the Curiels and Fielding confronted defendant in the early morning hours of Monday, October 17, about the credit card fraud. Defendant initially denied involvement and claimed that someone must have broken into the house and accessed his computer. Still suspecting that defendant was involved in the fraud, Fielding confronted him again later and defendant repeated his denial of wrongdoing. She expected that Fred would next want to search defendant's room. Because Fielding was afraid that she and defendant would be asked to leave the residence over the fraud, she told him he would have one chance to get rid of anything relating to the credit card fraud. At trial, Fielding denied that she had made any connection between the credit card fraud and Vitale's murder when she suggested that defendant remove evidence from his room.

Defendant and Jena had spent Sunday at the Renaissance Faire in Gilroy. After the fair, the couple went to defendant's residence where Jena took a nap in defendant's room. When Jena awoke, defendant was

looking through things in his room. He told her that other residents were accusing him of credit card fraud. Defendant told Jena that his mother told him to pack his things because his room might be searched by police. Defendant placed a number of items into a red-and-black backpack, including a pair of shoes without laces that he had worn to the fair, and five books.[9] Defendant gave Jena the backpack and some bags and asked her to keep them for him.

On Monday afternoon, Kim talked to defendant about Vitale and how sad she was about Vitale's death, to which he responded, "Well, these things will happen." Kim testified that she was angered by "the way he said it so callously."

8. Defendant's Story About DNA Evidence

Just before noon on Tuesday, October 18, the Curiels again raised the credit card fraud issue with defendant, and defendant again denied having placed the fraudulent orders. Fred told defendant that it did not look as if anyone had broken into his computer and asked him whether he understood that his use of Vitale's home telephone number and address could tie him to the murder. Defendant said he understood and began pacing nervously. At some point, Fred told defendant he had nothing to worry about. When defendant asked him what he meant, Fred responded that if Vitale struggled with her attacker as Horowitz had told the press, "then it's virtually guaranteed that there will be DNA . . . under her fingernails, there will be footprints and there probably will be hair." Defendant did not respond to that.

Kim then asked defendant where he was on Saturday morning and defendant replied that he went out for a walk. Kim asked him whether he had seen or talked to anyone on his walk. Defendant thought for a while and then said he remembered talking to someone on his way to the barn. He said there was a woman driving a white, four-door sedan. He said she had long straight brown hair and large glasses, and she had rolled down her window and stopped the car. He told Kim he spoke with the woman and that she reached across and grabbed his arm and said, "You've got to believe." Kim told defendant that the description sounded "a whole lot like Pamela Vitale," and asked defendant whether he knew her. Defendant said he did not. He continued, "Well, she grabbed me, she grabbed my arm, so she might have my DNA under her fingernails." Defendant showed the Curiels "fingernail marks" on his right arm and said, "She even left marks." At first, defendant said that the woman was driving out of the canyon when he encountered her. When Kim pointed out that if he was walking toward the barn the woman would have had to reach across the passenger seat to grab his arm if she was driving downhill out of the canyon, defendant changed his story and claimed he encountered her coming home when he was heading up the hill.

Recognizing that defendant's description of the woman sounded exactly like Vitale, Fred told defendant that Vitale was found in her panties and a T-shirt and could not have been out that morning. After a pause, defendant said, "What if my DNA is there?" This question "stunned" Fred and he did not respond. After Kim asked defendant a few more questions, defendant again asked about the possible presence of his DNA. Fred responded, "Don't worry. If you weren't there, then your DNA won't be there." Defendant said, "But what if it is there?" and Fred responded, "Well, that would mean you were there and that would mean you are going to do time." Defendant was "visibly nervous" and "physically shaking" during this discussion with the Curiels.

On Tuesday afternoon, Jena drove defendant to see Robin at Robin's high school. Defendant told Robin that he was going to admit the credit card fraud to Fred and would say that he used Robin's computer to do the research, in order to clear Robin's name. Defendant also told Robin that he was going to admit the fraud because he was afraid of being linked to the murder and believed admitting the fraud "would separate him from that." When Robin asked defendant about the connection between the fraud and the murder, he "didn't really get a coherent answer."

Defendant also told Robin that he was afraid of being linked to the murder by DNA evidence because the person he had seen on his walk Saturday morning (who he had originally told Robin and Jena on Saturday night might have been the killer) was in fact the woman who was murdered, and that she had grabbed his wrist. On the drive back to his house after seeing Robin, defendant told Jena that on his way home from his walk Saturday morning he encountered a man and woman in a car, and the woman reached over the man from the passenger seat, grabbed his arm, and left scratches. Defendant also spoke to his mother, and to Michael Sikkema and Sikkema's wife that day about his encounter with the woman on his walk. He told his mother that

the woman said, "I can't believe this is happening," before grabbing him. He told Sikkema that the story about the woman on the road was "a hallucination." He told Sikkema's wife, "My DNA is on Pamela Vitale."

Later on Tuesday, defendant admitted to the Curiels that he was responsible for the credit card fraud and that he had lied to them about it. Defendant started crying and said that he wanted to "admit this and get this fixed and go to school."

9. Defendant's Arrest

Fred Curiel called Robin's father, Thomas, on Tuesday afternoon and told him about the fraud. With Thomas's consent, the Curiels drove to his house and confirmed that Robin had been involved in the fraud by examining his computer. Fred also expressed his concern that there might be a connection between the fraud and Vitale's murder. Thomas confronted Robin late that afternoon and made his son tell him everything he knew. The C.s immediately retained counsel and contacted police on Wednesday. Robin was granted immunity that day in exchange for his information. Defendant was arrested on Wednesday evening.

10. Defendant's Backpack

On Thursday, October 20, Fielding went to her sister's house in Bolinas. The next day, Jena and her mother drove defendant's backpack and other possessions to Fielding in Bolinas. After Jena and her mother left, Fielding went through defendant's property. She saw scraps of paper with credit card account numbers and names—including those of Schneider and Halpin—as well as a date book or journal, a box of gloves, two pairs of pants, three shirts, a pair of defendant's shoes, movies, an external hard drive, a book on mass murder and cult leaders, a knife, and empty bottles of absinthe. Fielding threw the papers, gloves, and a journal or date book of defendant's into the fire of a wood-burning stove.[10]

The remaining items that were not burned were eventually turned over to police. The backpack contained, among other items, a T-shirt containing possible blood evidence and a pair of Land's End slip-on shoes. The general pattern of the Land's End shoe was the same as the general pattern of the shoe print found on the plastic storage bin lid found at the murder scene. A criminalist for the Contra Costa County Sheriff's Department Crime Lab opined that defendant's shoes, or another shoe with the same pattern, made the print on the lid. The shoes were identified as defendant's and were the same shoes defendant wore to the Renaissance Faire with Jena on the day after the murder.

11. The Duffle Bag

On October 20, sheriff's officers searched Fielding's abandoned Toyota van, which was on the property at 1050 Hunsaker Canyon Road. The van had been there for several years and was surrounded by vegetation. The interior of the van contained papers, files, and other debris, as well as dead rodents, animal feces, and dead vegetation. Portions of the interior of the van tested presumptively positive for the presence of blood. Behind the driver's seat, officers found a duffle bag that "stood out" because it was "newer looking" and did not have the "weather-beaten look" of the other materials in the van.

The bag contained a lightweight, dark sweater or pullover, a blue balaclava or head mask,[11] and a black, costume-style evening glove that extended up the forearm. Each item was turned inside out and appeared to contain blood stains. The fabric pattern of the glove was similar to the fabric prints left at the scene of the murder. The duffle bag also contained an overcoat, identified as defendant's, with the left sleeve turned inside out and safety pins affixed to the right cuff and bottom. Defendant often wore safety pins in his clothing. The black pullover shirt found in the duffle bag was similar to shirts defendant owned. The glove was similar to gloves Fielding bought and kept in a costume box for the kids in the house to play with, and that defendant sometimes wore.

The duffle bag had an airline tag from December 2003 with defendant's name on it. Various areas of the bag appeared to contain blood stains. The duffle bag was similar to luggage that defendant and the Curiels used when they flew to Hawaii in 2003. On the Monday after the murder, Fielding saw the duffle bag in the van

and believed it was defendant's. She spoke to defendant about it and he said something about old clothes and words to the effect that he had left the bag there.

12. Discovery of Bullet-point List and Other Papers

In late November or early December 2005, Fred Curiel's brother, David, moved into defendant's room at 1050 Hunsaker Canyon Road. At the end of January 2006, as he was cleaning up the house in preparation for a party, David stuffed some of his gloves into a dresser drawer in his room. The drawer also contained a pad of scratch paper. The morning after the party, David opened the drawer looking for his pad of scratch paper. He noticed five loose pieces of paper with handwriting on them. The papers were similar in size to those on the scratch paper pad he had put into the drawer, and to other pads of recycled scratch paper of varying sizes that the Curiels kept at the house.

Four of the papers had account names, numbers, and access codes for multiple accounts—including credit card and brokerage accounts—as well as addresses, phone numbers, and birth dates. These papers contained John Halpin's name, birth date, credit card security code number, and user names and passwords for several of his online accounts, written in defendant's handwriting. Halpin testified that he was not aware of any way a person could get access to all of this information about him without sitting at his computer.

David turned the papers over to police. He told a sheriff's detective that the papers had been "wedged between the framework and the top of a dresser." Forensic analysis revealed that two of the five papers contained defendant's fingerprints.

A fifth piece of paper, in defendant's handwriting, had a vertical, unnumbered list of five bullet points, followed by text. The five bullet points read in order as follows: "Knockout/Kidnap," "question," "Keep captive to confirm PINS," "dirty work," and "dispose of evidense [sic]." The words "cut up, bury" followed the last bullet point, enclosed in parentheses.

13. DNA Evidence

David Stockwell, senior criminalist at the Contra Costa County Sheriff's Department Crime Lab, conducted a DNA analysis of the evidence recovered from the duffle bag and backpack and determined that Vitale's blood was on the duffle bag, glove, mask, and shoes.

Analysis of DNA found on the glove established that if there were more than two contributors, defendant could not be excluded as one of the contributors. However, if there were only two contributors, defendant could not have been one of them. Stockwell opined that it would not be unexpected to find multiple contributors if the glove was kept in a box containing various articles of dress-up clothing that were sometimes handled or worn by others, including children. The inside of the glove contained not more than two DNA contributors and defendant was excluded.

Six areas of the mask were analyzed, with four of the sites matching Vitale. The area of the mask corresponding to the wearer's mouth contained no blood, but did contain a single source of DNA matching defendant's. The statistical probability of finding an individual with the same DNA profile as that on the mouth portion of the mask was one in 1.8 quadrillion African-Americans, one in 780 trillion Caucasians, and one in 1.6 quadrillion Hispanics. An area above the left eye opening contained a mixture of DNA consistent with Vitale's and defendant's. However, the sample collected from that site was degraded and a larger number of persons—one in 150 African-Americans, one in 59 Caucasians, and one in 79 Hispanics—have DNA profiles that would include them as potential contributors to the mixture.

DNA found on the duffle bag contained a major component matching Vitale's DNA profile and a minor component that could only be profiled at seven loci. The minor component's profile was consistent with defendant's. That profile would be found in one of 4,500 African Americans, one in 560 Caucasians, and one in 650 Hispanics.

The shirt found in the duffle bag contained DNA matching defendant's. The shoes contained two areas of blood evidence allowing for a full DNA profile for a single contributor, both of which matched Vitale's DNA. A degraded area on the sole of the shoe showed three separate contributors, including Vitale and defendant. The presence of DNA from a third donor on the sole of the shoe could be explained, for example, if the wearer had been walking around at a fair.

Stockwell analyzed a swab taken from the bottom of Vitale's right foot, which revealed a mix of contributors, with the primary contributor being Vitale and the minor contributor being male. As to the male component, Stockwell identified a partial profile that matched defendant. As to that partial profile, Stockwell calculated that one in 81,000 African-Americans, one in 43,000 Caucasians, and one in 23,000 Hispanics would have the same profile.

To verify that the male component of the sample came from a single male donor, Stockwell sent the sample to Gary Harmor at Serological Research Institute for Y-STR profiling.[12] Harmor used a test kit that displays 17 different markers on the Y chromosome. He found that the male component of the sample was indistinguishable from defendant's DNA for all 17 markers. In the case of Y-STR's, the statistical significance of such a match can only be determined by comparing the profile found to a database. The company that makes the test kit, Applied Biosystems, Inc., has an online database consisting of the Y-STR profiles of 3,561 different people chosen at random. Harmor determined that the database did not contain any profile matching the Y-STR profile shared by the evidence sample and defendant's Y-chromosome DNA. Due to the relatively small size of the database and the nature of the Y chromosome, however, it is not possible to directly extrapolate from the absence of a match the frequency with which that profile may occur in the general population. However, Stockwell performed a further statistical analysis to derive a conservative estimate that no more than one person in 1,189 would share the same Y-STR profile as defendant's.

DNA testing of Vitale's fingernails found no DNA present other than her own.

B. Defense Case

Joanna Tams, a geology teacher at Acalanes High School, coached the Ultimate Frisbee team. As a team member, defendant was dedicated, caring toward others, and well loved by everyone on the team. He was extremely responsible and worked hard to improve his performance. Tams made him one of the team captains. She considered him a "peaceful" person, very calm and respectful of his teammates and opponents. He was happy and outgoing.

Susan Lane teaches graphic design at Acalanes High School. Lane was defendant's teacher in the 2004-2005 school year. He attended regularly and was always on time. He was quiet and focused. Defendant was respectful, polite, and engaged in his relationships with other students. She frequently posted his artwork in her classroom because she regarded it as "exceptional art." Shown examples of defendant's artwork in class, Lane considered it to be very much mainstream relative to the student work she had seen over the 10 years she had taught at Acalanes. She did not find the drawings of dismembered body parts and blood dripping from a person holding a severed head exceptionally different from other student artwork. Probably 20 percent of her students produce artwork with violent or gruesome aspects. Defendant had also done artwork for her that is beautiful and bright. Lane did not consider defendant a violent person.

Rebecca Gray, a junior at Acalanes High School, was a friend of defendant's. She testified that she had never seen defendant frustrated or angry, that he always had a smile, was kind, and acted like an older brother to a lot of her friends. She had never seen him act in a violent manner. Rebecca's mother found defendant to be an "impressive young man." He was always polite and kind. She never saw him get violent or lose his temper or lose control.

Kameryn Summers testified that she had just graduated from Acalanes High School and was attending Diablo Valley College. She was a teammate of defendant's on the Frisbee team. She testified that defendant was a "really caring guy, . . . really fun," who was always available to his friends when they needed someone to talk to. He was one of the calmest people she knew. He was respectful to her parents and interacted well with them. She had never seen him be violent in any way, shape, or form.

Deputy sheriff criminalist Eric Collins processed defendant on October 20, and estimated that he was approximately five feet six inches tall and weighed 110 pounds.

C. Verdict, Sentencing, and Appeal

On August 28, 2006, a jury found defendant guilty of first degree murder and residential burglary, and found true the weapon use and burglary special-circumstance allegations. The trial court sentenced defendant to life in prison without the possibility of parole for the murder violation and an additional year for the weapon use. As to the residential burglary conviction, the court imposed the mid-term of four years and stayed execution of that term. This timely appeal followed.

II. DISCUSSION

A. Change of Venue

Defendant contends that the trial court erred in denying his motion for change of venue because the evidence before the court—including evidence concerning pretrial publicity as well as the jury questionnaires and oral voir dire of the jurors summoned for the case—raised a reasonable likelihood that he could not receive a fair and impartial trial in Contra Costa County.

1. Factual Summary

a. Defendant's Initial Motion

Defendant initially moved for a change of venue before jury selection. The motion was supported by evidence of the media coverage of the case and the results of a public opinion survey he had commissioned.

Evidence was presented that the media coverage of Vitale's murder and its aftermath was both extensive and inflammatory in nature. Defendant provided a compilation of media coverage showing that between the date of the murder and the date the motion was filed the story was covered in 225 newspaper articles, 664 television news broadcasts, and 67 articles posted on local media Web sites. The initial media coverage focused on the status of the victim as the wife of Daniel Horowitz, a prominent criminal defense attorney and television legal pundit, and on Horowitz's representation of Susan Polk in a widely covered murder trial under way at the time of Vitale's murder. This was followed by inflammatory and detailed accounts of the murder describing it, for example, as a "`brutal slaying,'" "`beating death,'" "`fatal bludgeoning,'" and "`vicious slaying,'" and recounting aspects of the crime scene and of the extensive injuries inflicted on Vitale. The media featured statements by Vitale's friends and family describing her as a kind, warm, and selfless person, and her relationship with Horowitz as extremely close and loving. This was juxtaposed with accounts that she endured a ferocious fight for her life against her attacker.

Defendant, in contrast, was portrayed in a mostly negative and sensationalistic light. Following his arrest, significant media coverage was given to the "`T-shaped symbol'" that was "`carved'" on the victim's back, referring to it as a "`gothic symbol'" and linking it to descriptions of the defendant wearing "`dark, goth clothing'" and to high school photographs showing him with stringy, black hair and dark eyeliner. Some articles and stories emphasized defendant's supposed rapid transformation from a Boy Scout to a brooding "goth" who wore silver jewelry, black nail polish, and a trench coat. Others speculated that Vitale had been killed to conceal a "credit card scam" that defendant had set up to finance his marijuana growing.

On October 28, 2005, media attention turned to the arrest of defendant's mother as an accessory after the fact, allegations that she destroyed evidence, and the subsequent dismissal of the accessory charges in exchange for her agreement to testify "for the prosecution." There was also extensive coverage in February 2006 of the testimony given by various witnesses at the preliminary hearing linking defendant to the murder, including the testimony of Robin C. and David Curiel. Newspapers published repeated reports that defendant's mother and his friends were testifying against him, necessarily implying that those closest to him believed he was guilty.

The defense public opinion survey of Contra Costa County residents found that the vast majority of the public (89.9 percent) recognized the case. Of those who recognized the case, 60.6 percent admitted that they had already decided that defendant was either definitely guilty or probably guilty, according to the survey. Other results showed a high recognition of certain purported "facts" about the case: (1) 67.9 percent had read, seen, or heard that defendant "`had purchased marijuana-growing equipment with stolen credit cards'"; (2) 51.5 percent had read, seen, or heard that "`the victim was struck more than 39 times with a piece of molding'"; and (3) 47.1 percent had read, seen, or heard that "`the victim had a satanic symbol carved on her back.'" According to the defense, the survey showed "extraordinarily high recognition and prejudgment rates for [defendant] and the facts surrounding this case," suggesting that the venire from which the jury would be impaneled was likely to be irreparably biased.

The trial court found that a large number of the defense print media exhibits were actually duplicates of the same article published in multiple newspapers. Twelve of the exhibits were repeated at least four times in the collection, and another 40 were duplicated at least once. The court found that approximately 92 of the print articles reported factual information concerning court appearances and filings involving defendant or his mother. Fifty of the 92 articles referenced the Susan Polk case. A number of the articles reported criticism of the police investigation. While some of the articles portrayed defendant in a negative light, the court found that others contained balanced or positive comments. The court also pointed to articles on the following themes that were not supportive of the defense arguments: (1) speculation that someone other than defendant was responsible for the crime; (2) the relationship between Horowitz and Vitale and the effect of the killing on the couple's friends and neighbors; (3) the court's gag order; and (4) criticisms of the media's coverage of the case.

Regarding a summary of coverage appearing on Web sites maintained by the local television news stations, the court noted that a majority of the video clips and articles focused on something going on in court, and did not contain material that could be considered inflammatory. The court also reviewed video clips of televised news broadcasts. It found that many of the clips merely reported in a factual way about court appearances and proceedings. While some stories focused on emotionally charged aspects of the case, such as Horowitz's grief over Vitale's death, others ran counter to defendant's change of venue theory including, for example, video clips showing the prosecutor criticizing the press and others for disseminating misinformation about the case.

The trial court found that most of the articles were "clumped" in the second half of October 2005, at the time of the crime, defendant's arrest, and his initial appearances in court. The coverage abated somewhat until the preliminary hearing in February 2006, which triggered a series of articles recounting factual information emerging at the hearing. At that point, the coverage tapered off until pretrial motions were filed at the end of June 2006.

The court did not find the defense's public opinion survey, or the testimony given by its author, to be very credible or persuasive. The court found the author's testimony to be "nonsensical" on certain issues, criticized the survey for failing to control for possible confusion between this case and the Susan Polk case, and placed "very little weight" on the survey.

The court reviewed the factors that are relevant to deciding the venue issue before jury selection, discussed post, and found that defendant failed to demonstrate that he could not receive a fair trial in Contra Costa County. Given that prospective jurors were to be questioned about pretrial publicity, the court denied the motion without prejudice and suggested revisiting the issue after jury selection.

b. Renewed Motion

Defendant renewed his motion for change of venue after the jurors in this case were seated, but before any alternate jurors were chosen.

Among all 156 prospective jurors who completed jury questionnaires, 127 reported having heard or read about the case, and one more admitted in voir dire that he remembered information about the case from press accounts. All but two of the 12 jurors and four alternate jurors ultimately chosen had been exposed to some publicity about the case, according to their questionnaires. Of the 14 jurors and alternates who reported having seen or heard something about the case, 12 checked "No" on the jury questionnaire when asked if they had

formed any opinion about it as a result of the publicity, one juror checked "Yes," and one juror—according to the People—wrote in "I don't know."[13]

Juror No. 1 was the sole juror who responded affirmatively to the question of whether he had formed any opinions about the case. When questioned about his response in camera by the court and counsel, Juror No. 1 explained that he believed that the evidence at trial might trigger his memory of something he had read or heard—possibly about a personal item found in the house or some other "major thing"—that made it sound to him like the defendant was guilty. He had not thought about the case since hearing about it the night of the murder and again a few days or weeks later when a neighbor was arrested, and he could not remember what it was he had heard on the news that caused him to have this reaction. Whatever it was, Juror No. 1 thought he could set it aside, presume defendant innocent, and base his decision solely on the evidence at trial.

Juror No. 2 stated that he had knowledge of the case through the radio, television, and newspapers. There were "numerous, numerous times [he] heard it on the radio or read it in the newspaper." He recalled that a prominent attorney's wife was killed and that a 17-year-old was being charged for the act. He recalled an image of a couple who were living in a trailer and building a dream home that was up on a hill somewhere. That was all he could remember about it. He thought at the time that the coverage was being overly sensationalized because a prominent lawyer was involved and due to the age of the person charged. Juror No. 2 stated that he believed he could be objective in all cases, was the kind of person who liked to see and analyze the evidence before making up his mind about anything, and had not jumped to any conclusion about the guilt or innocence of the person charged.

Juror No. 3 stated that he had heard about the case from watching the news on TV while he was living in New York. He remembered hearing Daniel Horowitz's name mentioned. Juror No. 4 stated in her questionnaire that she had only read newspaper headlines about the case. She was not questioned orally regarding publicity.

Juror No. 5 remembered reading about the murder in the Contra Costa Times and the San Francisco Chronicle at the time it happened, and that an "elderly lady" had been murdered in Lafayette. He remembered there had possibly been a burglary, the defendant may have gone to collect something he had had sent to the house, and there had been "some signs or something left behind but [he could not] remember . . . what." Juror No. 5 stated that he takes all news coverage "with a grain of salt."

Juror No. 6 had heard and read about the case from television new coverage and the Internet, and had talked about it with coworkers. He followed the story "because it seemed kind of sensational," and he recalled that the victim had suffered repeated blows to the head and there was lots of blood. He remembered something about the defendant taking a shower and getting a drink of water after the murder. He remembered a high school picture of the defendant "in his Goth getup." He had discussed with his friends the brutality of the crime and speculation that it had something to do with the victim's husband's work. Juror No. 6 stated that the person who committed the crime was a sick person and he felt for the victim, but he understood he had to set that aside and base his decision on the evidence presented. He believed he could presume defendant not guilty. He was also struck by the defendant's young age and understood there was a difference between what had been in the news and what evidence had been collected. Juror No. 6 stated that the case had disappeared from his mind once the coverage ended, and he had forgotten most of the specifics.

Juror No. 7 had not heard about the case "since last October or September," and it was not "on [his] radar." He remembered that a "[h]igh school kid . . . murdered a wife or friend of some big-time lawyer. That was pretty much it." He affirmed that his job as a juror would be to presume that the defendant was innocent. Juror No. 7 knew there was a youth involved, but he had no idea why the defendant was on trial and whether he was "walking down the street and happened to be in the wrong place at the wrong time."

Juror No. 8 stated in her questionnaire that she recalled reading and hearing about the case in newspapers and on television news. She had mostly paid attention to it the previous fall. She recognized the name of attorney Horowitz, but did not recognize the names of any of the other persons involved in the case. She remembered that the victim was brutally murdered in her home by "repeated stab wounds," that her husband is a prominent attorney, and that clothes somehow led police to the defendant. She vaguely remembered a picture of the defendant with longer hair. She was surprised at the time that a teenager was arrested for the crime.

Juror No. 9 recalled "little bits and pieces" of the case from radio and television. She recalled that a lady was found murdered in her home, and then a week or so later she heard the names of the people involved, including defendant's name. She recalled seeing a picture of the house and a few seconds of a picture of the defendant, but could not remember any further detail about the pictures. The story made her sad because the defendant was so young, and she felt bad for him and for the victim's family. She stated, "[D]eep in me I want to believe that he's innocent."

Juror No. 10, who stated that she had not seen, heard, or read about the case, was not questioned about publicity. Juror No. 11 remembered media reports that the perpetrator had stolen credit cards and bought things with them, but she was not certain about that. She also thought the case involved a plea of insanity. She did not recall seeing any pictures concerning the case. Juror No. 11 thought she could block everything out and listen to what is presented in court.

Juror No. 12 stated that he had seen some newspaper and TV coverage of the case intermittently after it happened. The last time he seen anything about it was "months" earlier.

The trial court denied the renewed motion. The court found that although some of the seated jurors who were exposed to publicity had retained vague or inaccurate information about the case, all indicated they could set aside such information and base their verdict solely on the evidence, and all understood their responsibility to presume the defendant innocent. The court also observed that defense counsel had used her peremptory challenges to eliminate those prospective jurors who had more than passing knowledge of the case, and still had six unused peremptory challenges when she passed on the jury as then constituted. The court stated that it was satisfied defendant could receive a fair trial from the venire in Contra Costa County.

2. Analysis

A trial court must order a change of venue to another county on motion of the defendant when it appears there is a reasonable likelihood that a fair and impartial trial cannot be had in the county that originally has venue. (§ 1033.) The right to an impartial jury is of constitutional dimension under the Sixth Amendment. (Duncan v. Louisiana (1968),391 U.S. 145.)

When a change of venue motion is brought before jury selection, case law requires the trial court to consider the following factors in determining whether there is a reasonable likelihood that the defendant will not receive a fair trial in the county where the crime occurred: (1) the nature and extent of the publicity, (2) the size of the population in the county, (3) the nature and gravity of the offense, (4) the status of the victim and of the accused, and (5) whether any political overtones are present. (See Williams v. Superior Court (1983),34 Cal.3d 584.)

On appeal from the denial of a motion for change of venue, the defendant must show both that (1) it was in fact reasonably likely at the time the motion was brought that a fair trial could not have been had; and (2) viewed in retrospect, it is reasonably likely that a fair trial was not in fact had. (People v. Jenkins (2000),22 Cal.4th 900.) To resolve the first issue, we undertake a de novo review of the five controlling factors enumerated in Williams v. Superior Court, supra, 34 Cal.3d 584. (People v. Jenkins, at p. 943.) To determine the second issue—whether pretrial publicity had an actual prejudicial effect on the jury—we examine the voir dire of the jurors. (Ibid.)

As an initial matter, the People contend that defendant's position is undercut by the fact that he had six unused peremptory challenges left when the full jury was seated. According to the People, this fact implies that the defense must have accepted the fairness and impartiality of the jury as constituted. In People v. Panah (2005),35 Cal.4th 395 (Panah), our Supreme Court found that the failure to exercise peremptory challenges can be a significant or even controlling factor in the review of the denial of a motion for change of venue: "`In the absence of some explanation for counsel's failure to utilize his remaining peremptory challenges, or any objection to the jury as finally composed, we conclude that counsel's inaction signifies his recognition that the jury as selected was fair and impartial.'" (Id. at p. 449, quoting People v. Daniels (1991),52 Cal.3d 815; see also People v. Zambrano (2007),41 Cal.4th 1082 (Zambrano), disapproved on other grounds in People v. Doolin (2009),45 Cal.4th 390, fn. 22 [exhaustion of only 16 of 20 peremptory challenges is a "strong indication that the jurors were fair, and that the defense so concluded"].)

Defendant seeks to distinguish Panah and Zambrano on the ground that, here, he did object to the jury as finally composed and he does have an explanation for his failure to use all peremptory challenges. Defendant explains that he did not use all of his peremptory challenges because only six of the 31 prospective jurors who did not reach the jury box for questioning had stated in their questionnaires that they had not heard or read anything about the case. Had he tried to use his remaining challenges to obtain a jury with more persons who had not heard about the case, the prosecution would have simply used its remaining challenges to excuse any of those jurors who made it into the box, and would have been in a position to "hand-pick" the last five jurors impaneled once the defense had exhausted its challenges. Defendant claims that by electing not to exercise further challenges he was simply "making the best of a bad situation."

We are not convinced. First, the fact that the defense renewed its venue motion does not negate the inference, based on its failure to use all of its challenges, that it was satisfied with the jury. Defendant was compelled to renew the venue motion simply in order to preserve the issue for appellate review. (People v. Williams (1997),16 Cal.4th 635 (Williams) [when a trial court initially denies a change of venue motion without prejudice, a defendant must renew the motion after voir dire of the jury to preserve the issue for appeal].) Competent trial counsel would have felt compelled to preserve the issue whether the defense was unhappy with the jury or not. Second, defendant's explanation for his failure to use six remaining challenges is not entirely satisfying. While it might not have been feasible to obtain six more jurors who had seen no publicity about the case, the defense's remaining challenges would surely have been useful in finding jurors with the least exposure to or memory of the pretrial publicity. If defendant was seriously troubled about the degree to which any members of the jury as finally composed had been influenced by pretrial publicity, it stands to reason that he would have used his remaining challenges to remove those persons before they were sworn. While we do not regard defendant's failure to use more challenges as dispositive of the venue issue, it certainly casts doubt on his claim that the jury as constituted was so tainted by pretrial publicity that he could not get a fair trial.

Our de novo review of the Williams factors also shows that the trial court did not err in denying defendant's venue motion. Two of the five factors—the population of Contra Costa County and whether any political overtones are present—weigh clearly against a change of venue. Contra Costa County is the ninth largest of California's 58 counties and has a population of over one million people. The California Supreme Court has consistently upheld the denial of venue changes from counties much smaller than Contra Costa County. (See Zambrano, supra, 41 Cal.4th at p. 1125; People v. Pride (1992),3 Cal.4th 195 [size and metropolitan nature of Sacramento County with an estimated population above 875,000 weighed heavily against a change of venue]; People v. Fauber (1992),2 Cal.4th 792 [venue changes are seldom granted from counties as large as Ventura County, the 13th largest county in the state with 619,000 residents].) In People v. Mendonsa (1982),137 Cal.App.3d 888, this court observed that Contra Costa County must be considered for venue purposes to be part of a large metropolitan area. (Id. at pp. 895-896.) With regard to possible political overtones, defendant concedes that none were present in this case.

The nature and gravity of the offense also does not weigh in favor of a change of venue. Although murder is a serious crime, the murder charges in this case "lacked `the sensational overtones of other killings that have been held to require a change of venue, such as an ongoing crime spree, multiple victims often related or acquainted, or sexual motivation.'" (People v. Fauber, supra, 2 Cal.4th at pp. 817-818.) The killing in this case was brutal, but the facts pertaining to the crime were not so egregious or sensational that this factor weighs in favor of a change in venue. The trial judge observed that she had tried homicide cases in the county that were "much worse" than the present case "in terms of what occurred and what the crime scene looked like."

Aside from the fact that Vitale was the wife of a prominent attorney, neither the victim nor the defendant had any special status in the community that would counsel in favor of a change of venue. Vitale was not herself a prominent person in the community. She was not well known in the county before her death, either as Horowitz's spouse or through her own activities or involvement in community affairs. Horowitz himself was no more well known or well regarded in Contra Costa County than he was in most other areas of the state. It is difficult to see why his status would support a change of venue even if we attributed it to Vitale.

According to defendant, the crucial inquiry regarding his status is whether he was "viewed by the press as an outsider, unknown in the community or associated with a group to which the community is likely to be hostile." (Odle v. Superior Court (1982),32 Cal.3d 932.) He maintains that the media portrayed him as a youth who had "`spiraled downhill' "after the death of his sister to become a brooding and sullen teenager who wore

dark "Goth" clothing. But, in our view, defendant's portrayal of the media coverage is too one-sided. Defendant was not consistently portrayed as an outsider who had come into the community to inflict harm on one of its members. Many articles and stories placed him in a positive light, quoting or interviewing friends and neighbors who came forward to support him and to express shock and incredulity at his arrest. In fact, as the trial court found, Vitale and defendant were treated as having much the same status in the community—they were neighbors in Lafayette and each had a support system. As we view the evidence, the relative status of the victim and defendant did not weigh in favor of a change of venue.

The final relevant factor is the nature and extent of the news coverage. There is no question that the case did attract substantial coverage. However, the fact that a case receives extensive or even massive publicity does not automatically translate into prejudice or compel the granting of a motion for change of venue. (People v. Manson (1976),61 Cal.App.3d 102.) For a number of reasons, we do not believe that the pretrial publicity in this case was so extensive or of such an inflammatory nature that it created a reasonable likelihood that defendant would not receive a fair trial in Contra Costa County.

First, the majority of the pretrial coverage was clustered around the time of the murder and defendant's arrest and initial court appearances in October 2005. Coverage spiked again in February 2006, at the time of the preliminary hearing. Jury selection began nearly nine months after the crime and five months after defendant's preliminary hearing. The passage of time attenuates the effect of media coverage. (People v. Alfaro (2007),41 Cal.4th 1277; see, e.g., People v. Proctor (1992),4 Cal.4th 499 [publicity three months before jury selection did not weigh in favor of venue motion]; People v. Anderson (1987),43 Cal.3d 1104 [five-month lapse significantly reduces danger of prejudice].) The voir dire of the sworn jurors illustrates this fact. Of the nine jurors who had been exposed to any substantial amount of local media coverage of the crime,[14] six (Jurors Nos. 1, 5, 6, 7, 8, and 12) stated in substance that they had not heard about the case in months and the few facts they remembered stemmed mostly from news reports at the time of the crime. The remaining three jurors— Jurors Nos. 2, 9, and 11— did not specify when they heard about the case, but their recollections about it were fragmentary and not entirely accurate.

Second, the trial court was correct in characterizing the coverage as generally "factual" rather than "inflammatory." A major portion of it reported on court appearances or proceedings pertaining to defendant or his mother. Although there was also more problematic coverage—describing the brutal nature of the crime, portraying defendant in a negative light, showing the grief of the victim's family—such coverage was not so pervasive, predominant, or inflammatory that it necessarily tainted the jury pool. Coverage describing the circumstances of a crime or the grief of the victim's family is not biased or inflammatory per se. (Panah, supra, 35 Cal.4th at p. 448 [coverage is not biased or inflammatory simply because it recounted the inherently disturbing circumstances of a child's rape and murder and her family's grief].)

Finally, the media survey evidence defendant offered does not change the analysis. The survey suffered from a number of methodological defects that undermine its conclusions. Only 305 out of 748 Contra Costa residents reached by telephone for this survey were willing to continue answering questions after being told that the survey was about this case. It is quite possible that the 40 percent of those reached who completed the survey were a self-selecting group of people whose interest in or knowledge of this case was not representative of the population sampled. Further, the survey's questions concerning knowledge of particular facts about the case were poorly designed and unreliable. The questions were all leading and suggestive, some were compound, and some incorporated false information about the case.[15] It is difficult to attribute much significance to results elicited by questions framed in this way. In addition, the survey asked respondents whether they had read, seen, or heard anything about either this case or the Susan Polk case, but it did not account for respondents who may have confused the two cases. When he was cross-examined about these methodological issues, the survey's author was unable to provide coherent answers. He also admitted that the data supporting one of the survey's core results—that respondents exposed to more media coverage were more likely to have prejudged defendant's guilt—could not be relied upon because it did not show a statistically significant correlation. We must therefore agree with the trial court's conclusion that the survey evidence was entitled to little weight.

Based on our review of the Williams factors, defendant failed to establish that it was reasonably likely at the time his initial motion was brought that he could not obtain a fair trial in Contra Costa County. Equally, our review of voir dire of the sworn jurors fails to show any reasonable likelihood that defendant faced a jury that

had prejudged the case against him. Exposure to publicity does not automatically translate into prejudice. (People v. Proctor, supra, 4 Cal.4th at pp. 526-527.) There is no prejudice if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. (People v. Daniels (1991),52 Cal.3d 815.) Here, all of the jurors questioned in voir dire about their exposure to publicity assured the court that they could sit as impartial jurors in this case. Based on the jurors' limited exposure to and memory of the pretrial publicity, the nature and timing of the publicity, and the number of unused peremptory challenges defendant had left when the jury was seated, we have no reason to question the sincerity of these responses.

Defendant's motion for change of venue was properly denied.

B. Burglary Verdict and Special Circumstance Allegation

The prosecution's allegations that (1) defendant committed burglary, (2) Vitale's killing was a first degree murder under the felony-murder rule, and (3) the killing was a burglary special-circumstance murder, were all based on the supposition that defendant entered Vitale's residence with either the intent to commit theft or the intent to acquire credit card information in violation of section 484e.[16] Defendant contends the evidence was insufficient to prove the burglary charge or the special-circumstance allegation. He further contends that because the jury was instructed that it could find defendant guilty of first degree murder on alternative theories, either premeditation and deliberation or burglary felony murder—one of which was invalid—the murder conviction must also be reversed.

We do not share defendant's view of the burglary evidence. He begins his analysis of the evidence with a faulty premise. According to defendant, the prosecution's burglary theory must be wrong because it assumes irrational behavior on his part. He posits that acquiring someone's credit card information by physically overpowering or killing them "would have [been] . . . completely pointless, because . . . . [a]s soon as the theft is discovered, the credit card will be cancelled and no orders made with the card will be processed." He claims that he would have been acutely aware of this problem if he were the assailant because he had just experienced that very problem with Karen Schneider's credit card information, which became useless as soon as she realized someone was making unauthorized charges with her card.

The prosecution was under no burden to prove that defendant acted rationally or intelligently. To the contrary, the evidence showed that defendant's crimes were not at all carefully or rationally thought through. To begin with, defendant had very little knowledge of how to get away with credit card fraud. If he had thought about it rationally, he would have understood the very great risk that his first victims, Schneider and Halpin, would eventually uncover the fraudulent charges on their credit cards and immediately trace the fraud back to him. Had he been acting rationally, he would not have used his own address as the delivery address or his mother's e-mail address for contact purposes when attempting to carry off a credit card scam. As for Karen Schneider's credit card information becoming useless once she discovered the fraud, there is no evidence that defendant learned of Schneider's discovery of the fraud until after Vitale was killed. At the time of the killing, all he knew based on his telephone calls with Specialty Lighting was that the credit card company would not approve the charges due to a problem with the delivery address. Ms. Jahosky of Specialty Lighting deliberately avoided mentioning her contacts with Schneider and never told defendant that she suspected him of fraud. Defendant had no way of knowing that Schneider had checked her account online the afternoon after he placed the fraudulent orders. His apparent success in getting away with using Halpin's credit card in September may have convinced him, however foolishly, that the problem he was having could be solved simply by obtaining a different credit card number and security code.

In our view, substantial evidence supports the theory that defendant entered Vitale's residence to steal her credit card information. First, there is no dispute that defendant and Robin C. entered into a scheme to commit credit card fraud to purchase marijuana growing equipment. Second, in furtherance of the scheme, defendant had obtained and attempted to use the numbers and security codes for credit cards belonging to two of his neighbors.[17] Third, Vitale's address and unlisted telephone number appeared on three of the four orders defendant placed with Specialty Lighting on October 13, 2005. Fourth, defendant learned the day before the murder that Specialty Lighting would not put the orders through and ship the items. Fifth, after learning this, defendant unsuccessfully attempted to have the merchandise shipped to Vitale's address using Schneider's credit card information, only to be told that the credit card company had refused the charges. Sixth, within 24

hours before the murder, defendant left a message for Robin advising him that the transactions had not gone through but "he was going to find a way to make it work." Seventh, it is reasonable to infer that defendant intended to obtain Vitale's credit card information since he had been led to believe by Jahosky that Schneider's and Halpin's credit card companies had refused the charges. Finally, the bullet-point list found in defendant's drawer by David Curiel shows that defendant had drawn up a plan to obtain account information and PIN's from someone by knocking them out, holding them captive, and killing them after the information was confirmed.

Based on the foregoing evidence, it was reasonable for the jury to infer that defendant went to Vitale's residence on October 15, 2005, for the purpose of obtaining her account information. Waiting until Horowitz was gone, defendant put on a mask and gloves, armed himself with a rock, and entered the Vitale residence prepared to attack, subdue, question, and ultimately kill Vitale. When Vitale fought back and tried to escape, defendant realized he had to kill her immediately.[18]

It is true, as defendant points out, there was no evidence of actual theft. Nothing was missing from the Vitale-Horowitz residence after the murder, there had been no activity on Vitale's computer apart from her own use of it, and defendant was not found to be in possession of anything belonging to Horowitz or Vitale.[19] But to support his burglary felony-murder theory or burglary special-circumstance allegation, the prosecutor was not required to prove actual theft. He was only required to prove that defendant entered the residence with the intent to steal credit card information. (See In re Ryan N. (2001),92 Cal.App.4th 1359 [the two elements of entry of a defined space and felonious intent are sufficient to complete the crime of burglary, whether or not the intended felony is actually committed].) In our view, the record contains substantial evidence from which a reasonable jury could have found that both of these elements were satisfied.

Even assuming for the sake of analysis that the evidence was insufficient to prove the essential elements of burglary, defendant's first degree murder conviction would still not be undermined. As noted earlier, the prosecution went forward on the alternative theory that the killing of Vitale was the product of premeditation and deliberation. In People v. Guiton (1993),4 Cal.4th 1116, the California Supreme Court held that when the evidence is held to be insufficient to support a verdict on one of two alternative legal grounds, reversal is generally not required as long as there is sufficient evidence to support the alternative ground. (Id. at pp. 1128-1129.) This general rule applies except when the record demonstrates a reasonable probability that the jury in fact relied solely on the inadequate ground. (Id. at pp. 1129-1130.)

Defendant does not dispute the sufficiency of the evidence of premeditation and deliberation. As the prosecutor pointed out to the jury in closing argument, the note in defendant's handwriting that said "Knock out" and do "dirty work" showed reflection and premeditation, as did the evidence that the attacker wore a mask and gloves and entered the residence with a rock in his hand and a knife on his person. Defendant maintains that two factors in the record—the guilty verdict the jury reached on the burglary charge and the prosecutor's argument to the jury that it could find defendant guilty of first degree murder on a felony-murder theory even if some jurors had doubts about whether the killing was deliberate and premeditated—demonstrate a reasonable probability that one or more jurors did in fact rely solely on the felony-murder theory. We do not agree. The evidence of premeditation and deliberation was clear, overwhelming, and undisputed by the defense. If anything, that evidence was stronger and more direct than the prosecution's burglary evidence, which depended on the assumption that defendant had not fully considered how he could get away with using any credit card information he succeeded in obtaining from Vitale. In its closing argument, the defense strenuously attacked the inference that defendant's involvement in credit card fraud gave him a motive to enter Vitale's residence. On appeal, defendant reiterates that the "most difficult question in the case for the jury" must have been whether he entered Vitale's residence with the intent to steal credit card information. In our view, even assuming for the sake of analysis that the burglary evidence was insufficient to support the prosecution's felony-murder theory, the record as a whole fails to establish a reasonable probability that one or more jurors relied solely on that evidence in finding defendant guilty of first degree murder.

The burglary evidence is sufficient to support the jury's burglary and first degree murder verdicts as well as its special-circumstances finding. However, even assuming that the burglary evidence was not sufficient to support the prosecution's felony-murder theory, there would be no grounds to reverse defendant's first degree murder conviction.

C. Instructional Error

Defendant contends the trial court prejudicially erred in instructing the jury that evidence of other uncharged crimes—the Schneider and Halpin credit card frauds—could be used to establish identity, intent, motive, or common plan or scheme, as related to the murder.[20]

Defendant claims that the trial court erred in giving an instruction based on CALJIC No. 2.50, because the credit card fraud evidence had no probative value in establishing the identity of Vitale's killer, the killer's intent or motive in entering her residence or attacking her, or that the fraud and killing were acts in furtherance of a common plan or scheme. (See People v. Thompson (1980),27 Cal.3d 303, fns. 13 & 14, 316, 319 [to be admissible, other crimes evidence must be logically relevant to proving a material fact such as intent, identity, motive, or plan].) Defendant reasons that because the Schneider and Halpin offenses were so dissimilar to the killing of Vitale and the entry into her residence they could not shed light on the motive or intent behind these latter offenses. He further argues that no logical connection was or could have been shown between the credit card fraud and the crimes against Vitale because (1) Vitale's assailant would have realized that the killing of Vitale was certain to be discovered so quickly that any credit card information obtained from her would be unusable; (2) having already obtained credit card information by surreptitious means from Halpin and Schneider without physically attacking them, defendant could have done the same with Vitale; and (3) there was no evidence that Vitale's credit card information was taken or that defendant had it in his possession.

The trial court cited two cases in support of its decision to give the challenged instruction. In People v. Harris (1981),28 Cal.3d 935 (Harris), a double-murder prosecution, the California Supreme Court upheld the admission of evidence that the defendant robbed a bank later on the day of the murders using the pistol he had used to commit the murders and driving the murder victims' automobile as his getaway car. The court found the robbery evidence was relevant to show that the defendant had the means to commit the murders and to show intent because the evidence indicated the murders were committed in furtherance of the planned bank robbery. (Id. at p. 957.)

The trial court also cited People v. Williams (1988),44 Cal.3d 883, in which the court allowed evidence of a robbery that occurred about a week before three murders. Among other items taken in the robbery was a checkbook. (Id. at p. 898.) The defendant later met the murder victims at a yard sale where he expressed interest in buying a car from one of the victims, Miguel. (Ibid.) The next day, the defendant wrote Miguel a check for the car using a check stolen in the robbery. (Id. at pp. 898-899.) He later went to Miguel's home, which Miguel shared with the other victims, to retrieve the check. (Id. at p. 899.) He and his accomplice killed Miguel and the other victims and removed the check from Miguel's pocket. (Id. at p. 900.) The court found the robbery evidence relevant to prove both intent and identity, reasoning that defendant feared he would be identified as the perpetrator of the camper robbery if the check were to be negotiated. (Id. at p. 911.)

As in Harris, supra, 28 Cal.3d 935 and People v. Williams, supra, 44 Cal.3d 883, the credit card fraud evidence is relevant in this case not because the fraud bore similarities to the murder of Vitale, but because of the unmistakable transactional relationship between the crimes. As discussed earlier, substantial evidence supports the prosecution's thesis that defendant entered Vitale's residence and attacked her in order to obtain her credit card information. A couple of days before the murder, defendant had used Vitale's address to place three fraudulent orders in furtherance of the plan he had concocted with Robin C. to grow marijuana. Less than 24 hours before the murder, defendant learned that the Schneider and Halpin credit card information he had was no longer useable and that he needed to have a new number with a billing address that he could match to the shipping address. He assured Robin that he would find a way to make the transaction go through. The bullet-point "to do" list found after defendant's arrest establishes what he must have had in mind. That list cements the linkage between the credit card fraud and defendant's violent acts. It was not only found alongside account information and passwords belonging to Halpin, but specifically laid out a plan for obtaining someone's account information by violently attacking them. However foolish and brutally irrational that plan was, the evidence linking it to the credit card fraud, and linking the fraud to the murder of Vitale, was sufficiently probative on the issues of intent, motive, identity, and common plan or scheme that the trial court was fully justified in giving the challenged instruction.

D. Failure to Hold Kelley Hearing on Y-STR DNA Profiling

Defendant contends that the trial court erred in failing to hold a Kelley[21] hearing on the issue of whether the results of the Y-STR testing performed on a DNA sample taken from Vitale's foot were admissible at trial.

Defendant maintains that a Kelley hearing was necessary to address (1) whether Y-STR testing is generally accepted within the scientific community; (2) whether the laboratories used by the prosecution followed proper storage, collecting, and testing procedures; and (3) whether the statistical formulations used to explain the significance of the Y-STR "match" found in this case are generally accepted in the scientific community as they were applied here.

In response to the defense's motion for a Kelley hearing on the prosecution's intended use of Y-STR DNA evidence, the trial court did in fact conduct an evidentiary hearing addressing whether Y-STR testing is a new scientific technique for Kelley purposes and whether the prosecution's proposed testimony as to the significance of the test results was also based on a generally accepted statistical methodology. Both the prosecution and defense presented expert testimony on these subjects.

Dr. Megan Shaffer, who had been qualified as an expert witness 10 to 15 times on Y-STR analysis and statistical interpretation issues, testified for the prosecution that Y-STR profiling used the same process and technology to extract, amplify, and identify Y-STR DNA as that generally employed with polymerase chain reaction (PCR) short tandem repeats.[22] The only significant distinction is that a different statistical analysis must be performed with Y-STR results because the Y-chromosome is inherited intact from father to son. Since the frequencies of particular STR patterns at different loci on the Y-chromosome are not independent of one another, the probability of finding two persons with matching results across all such loci tested cannot be determined by multiplying the frequencies together. The only way to assess the significance of a match is to compare the matching profiles to a database of profiles drawn randomly from unrelated males, using the "counting method." The "counting method" consists of simply counting the number of times the same profile is found in the database. Shaffer opined that the Applied Biosystems database did represent a random sampling of Y-STR profiles.

In this case, defendant's profile (and the matching profile found in the evidentiary sample from Vitale's foot) did not appear at all in the Applied Biosystems database of 3,561 individuals. However, as explained by prosecution expert, David Stockwell, that fact does not necessarily mean that fewer than one male in every 3,561 males has the same profile as defendant's. Instead, a more conservative way of interpreting the test results would be to determine the maximum frequency of defendant's profile in the male population using a standard 95 percent confidence interval. Using that method, which Stockwell testified was generally accepted in the scientific community, he determined that defendant's profile would be shared by no more than one person in 1,189. In other words, if one were to draw 20 different random samples of the population, each sample consisting of 3,561 individuals, in 19 of the 20 samples a profile matching defendant's would show up less than once out of every 1,189 persons in the sample.

The defense's expert, Jason Eshleman, is a molecular anthropologist and senior research director of Trace Genetics. He testified that there are significant problems with the Applied Biosystems Y-STR database. According to Eshleman, the broad racial categories in the database, such as "Hispanic," have not been subjected to analysis to see if they represent truly random variations in the category, or if they contain a hidden "structure"—such as an over-representation of persons whose ethnic ancestries trace back to particular countries or regions of the world—that may be unrepresentative of the Hispanic populations living in the local area where the crime sample was taken. In Eshleman's view, the use of a confidence interval would not overcome these concerns about the reliability of the database. Given the potential structure problems in the database, Eshleman believed that any figure based on lumping together all individuals in the database regardless of ethnicity (such as Stockwell's use of one in 1,189) would be "meaningless."

On cross-examination, Eshleman admitted that he was in disagreement with the conclusion of the Scientific Working Group on DNA Analysis Methods that "`the absence of significant broad-scale population structure within U.S. ethnic groups means that forensic DNA databases need not be constructed for separate geographic regions of the U.S.'" He also disagreed with the authors of one of the principal articles he relied on in his testimony, who concluded that, with the exception of Native Americans, the geographic origin of samples within a U.S. ethnic database was not critical. Eshleman also admitted that the computation of a confidence interval can ameliorate structuring issues in a database.

In our view, the defense failed to rebut the prosecution's evidence that Y-STR testing procedures are generally accepted in the scientific community and that the testing done for the prosecution conformed to

proper procedures. The defense expert did not even address these issues, but confined himself to questions concerning the reliability of the Applied Biosystems Y-STR database and the implications of possible structuring issues in that database for assessing Y-STR test results. On those issues, there was a conflict between the prosecution and defense experts. However, Eshleman's credentials on Y-STR issues were not as strong as Dr. Shaffer's. He had no knowledge as to how the Applied Biosystems database had been created, and he had done little to verify the actual extent of the structure issues he was concerned about. He appeared to rely on two or three articles in the literature on Y-STR's, none of which fully supported his conclusions about the overall reliability of the Applied Biosystems database. In any event, general acceptance does not require unanimity, a consensus of opinion, or even majority support by the scientific community. (People v. Leahy (1994),8 Cal.4th 587.)

The trial court correctly held that a Kelley hearing was not required. Y-STR testing, the counting method, and confidence intervals are not new scientific techniques. The fact that Y-STR analysis uses a different test kit and dyes than other PCR/STR tests does not make it a new scientific technique. (People v. Hill (2001),89 Cal.App.4th 48.) The simple empirical counting of the number of matches found in a database is not a scientific technique. (See People v. Venegas (1998),18 Cal.4th 47.) The use of confidence intervals to report a result when no match is found in a DNA database is also not novel. Such a method was described in People v. Soto (1999),21 Cal.4th 512. The defense failed to establish that the representativeness or reliability of the Applied Biosystems database is widely questioned in the relevant scientific community. At most, the defense evidence suggested that the database used was not entirely representative of all relevant population groups. That goes to the weight of the statistical testimony given by Stockwell, but not to its admissibility under Kelley.

In any event, even assuming the trial court erred in denying defendant's motion for a Kelley hearing, and erred in admitting the Y-STR evidence, it is not reasonably likely that he would have obtained a more favorable result had the evidence been excluded. Apart from the Y-STR testimony, the evidence in the record pointing to defendant's guilt for the murder of Vitale is overwhelming and beyond any reasonable doubt.

The evidence of defendant's guilt included the following:

Vitale was struck numerous times with an irregular blunt object such as a rock, and then stabbed in the abdomen as she lay dying. Based on examination of her computer, it appears that Vitale was killed shortly after 10:12 a.m. on October 15. Defendant, who lived a short distance from the murder scene, went out on the morning of the murder and returned home at 10:45 a.m. No witness could account for his whereabouts during that time frame. When defendant returned to his home, he had scratches and gouge marks on his nose and face that were actively bleeding, his hands were shaking, and his right hand and wrist were red and swollen. Defendant's injuries were consistent with those that would be incurred by a person in the course of inflicting the injuries Vitale sustained. Defendant gave conflicting and implausible accounts of how he sustained his injuries. He told his mother he had slipped and hit his hand on a rock while climbing up rocks, and told other people that he had been scratched by a bush or fell into a ravine while looking for a waterfall that he would have known was dry in October. After his mother told him that evening that the police were in the neighborhood and there was a rumor someone in the canyon had been killed, defendant told his friends that it most likely was at Horowitz's house and he joked about bludgeoning someone 39 times as a way of killing them.

Two days before the murder, defendant had used Vitale's address and unlisted telephone number in ordering marijuana growing supplies using credit card information stolen from two neighbors. Those orders did not go through and defendant was told that the credit card companies had declined the orders because the billing and shipping addresses did not match. The day before the murder, he told his friend, Robin, that he was going to find a way to make it work. At some point, defendant wrote out a to-do list or plan that included knocking someone out, holding them captive to obtain their credit card information, and then killing them. There was evidence of a fascination with violence and killing in defendant's artwork and writings.

Defendant had access to the means used to bludgeon and stab Vitale. Rocks were readily available to defendant in the area around his home. He owned a knife, and information on his computer showed he had purchased a knife a few months before the murder. Defendant's mother had removed and hidden a knife that had been in the backpack he gave to Jena.

Defendant's own statements a few days after the murder are strong evidence of a consciousness of guilt. When an unsuspecting Fred Curiel suggested to defendant that he need not worry about the police connecting the murder to the credit card fraud because the killer's DNA would almost certainly be found under the victim's fingernails, defendant became visibly nervous and told the Curiels a strange story about being scratched on the morning of the killing, for no apparent reason, by a woman matching Vitale's description who was driving a white, four-door sedan. Defendant denied knowing Vitale, but he would have seen her that morning and would have noticed her white sedan parked outside her house, if he was the killer. Defendant continued to insist that his DNA might be present at the murder scene even after Fred Curiel tried to assure him that it would not be. Defendant offered two inconsistent versions of his encounter with the woman to the Curiels, and later told different versions of the story to others. Given the inherent implausibility of defendant's story, the conflicting versions of it offered, and the circumstances in which it first emerged, the only reasonable inferences to be drawn are that (1) he was able to accurately describe Vitale's appearance because he had killed her a few days earlier; and (2) being conscious of his own guilt and convinced based on the protracted physical contact he had with Vitale during their struggle that his DNA would be found on her, he felt compelled to make up a cover story in advance to explain that fact.

Extensive physical evidence also linked defendant to the murder. A duffle bag with his name tag was found adjacent to his house in his mother's abandoned van, and contained a mask, glove, pullover, and overcoat. Forensic analysis established that Vitale's blood was on the bag, glove, and mask. DNA matching defendant's was found on the mouth area of the mask. Evidence was adduced that the murderer wore gloves and the glove found in the duffle bag was consistent with fabric prints left at the murder scene. The backpack defendant gave to Jena Reddy before his arrest contained a pair of his shoes, among other items. Vitale's blood was found on the shoe. The general pattern of the shoe matched the pattern of a shoe print found at the murder scene.

As defendant points out, the prosecutor did tell the jury that it seemed "extremely significant to the [P]eople" that defendant's DNA matched the sample from Vitale's foot at all 17 loci in the Y-STR test and that no other sample in the database matched that profile. But viewed in the context of the evidence as a whole, and considering the prosecutor's entire closing argument to the jury, including his repeated admonitions that this was "not a DNA case," we cannot say that any assumed error in allowing the Y-STR testimony could have affected the jury's verdict.

E. Motion to Suppress Evidence

Defendant asserts that the trial court erred in denying his motion to suppress evidence seized from the Curiel household. He contends that the affidavit used to establish probable cause contained a material misstatement concerning the link between the credit card fraud and Vitale's address and that, absent such misstatement, probable cause was lacking. The assertedly false statement in question was made in an affidavit submitted to the magistrate by Detective Jason Barnes. Barnes asserted in substance that Karen Schneider's husband, Doug, had told him he received a credit card statement which indicated that the Schneiders' credit card information had been used to purchase growing equipment for shipment to Vitale's address. Defendant believes that he had a right to a hearing to challenge the accuracy and veracity of the affidavit because he made a "`substantial preliminary showing'" that this assertedly false account of what Doug Schneider told him was made either intentionally or with reckless disregard for its truth or falsity, and that the statement was necessary to the finding of probable cause. (See Franks v. Delaware (1978),438 U.S. 154; People v. Luttenberger (1990),50 Cal.3d 1.)

As an initial matter, we do not find that defendant made the requisite "substantial preliminary showing" that Barnes's statement about what Schneider told him was made with intentional or reckless disregard for the truth. First, there was no substantial showing that Barnes's statement was false. When Barnes spoke to Schneider by telephone on October 16, 2005, he did not have access to a copy of the Specialty Lighting order forms. Barnes did not obtain the forms until the day after he signed and submitted his affidavit to the magistrate on October 19. Doug Schneider himself did not have the forms, and by the time the defense motion was filed he could no longer remember what he knew about the transactions when he spoke to Barnes or what he told Barnes about them. It was not clear that Schneider had a clear understanding on October 16 of how the different names and addresses on the orders interrelated. He remembered only that his wife had told him Vitale's address was associated with her name on the orders and that he and his wife were extremely concerned when he spoke to

Barnes about a possible connection between the credit card fraud and the murder. Whatever details he may have provided to Barnes, the gist of what Schneider told him was that somebody associated with the credit card fraud may have gone to Vitale's residence for reasons related to the credit card purchases.

Defendant relies on a police report dated October 24, 2005, by Barnes in which Barnes stated that Schneider told him on the 16th that the shipping address on the orders was defendant's address. But that report of Barnes's conversation with Schneider was prepared eight days after the conversation took place. In the meantime, Barnes had reviewed printouts of the fraudulent orders. Barnes averred that his October 24 report wrongly attributed that information about the shipping address on the orders to his conversation with Schneider when, in fact, he gleaned that information from the printouts. In light of the confusing combinations of names and addresses appearing in the transactions, and the very early stage of the investigation at which Schneider and Barnes spoke, it is highly plausible that Schneider either gave Barnes inaccurate information about the shipping address or that Barnes innocently misunderstood the information he was given. Barnes's October 24 report does not constitute a substantial showing to the contrary.

Second, even if the shipping address information is excised from the affidavit, the magistrate still had probable cause to issue the search warrant. At a Skelton[23] hearing conducted before the magistrate, Robin testified that defendant had approached him in an agitated state after the murder, expressed concern about being linked to the murder, and told him that his DNA may have been transferred onto the victim when she grabbed his wrist while he was on his walk on the morning of October 15. Robin also testified that he saw scratches on defendant's nose on the night of the murder. The magistrate found Robin's testimony on these subjects to be credible. When this testimony is added to the facts that defendant lived in close proximity to the victim and that he used her address as part of his credit card fraud, there was a substantial basis for the magistrate's probable cause finding independent of any misinformation the Barnes affidavit may have presented about Vitale's address being used as the delivery address in the fraudulent orders.

The trial court did not err in denying defendant's motion to suppress without an evidentiary hearing.

F. Constitutionality of Section 190.5, Subdivision (b)

Section 190.5, subdivision (b) provides in relevant part: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true . . ., who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole [(LWOP)] or, at the discretion of the court, 25 years to life." Defendant contends that subdivision (b) is unconstitutionally vague under both state and federal law because the statute "does not make clear whether the court has equal discretion to impose the two possible sentences, or whether there is a presumption favoring LWOP."

The issues defendant raises were addressed in People v. Guinn (1994),28 Cal.App.4th 1130 (Guinn). Guinn held that section 190.5 must be construed in a commonsense manner that avoids ascribing an absurd, unjust, capricious, or arbitrary intent to its enactment. (Guinn, at p. 1143.) The Guinn court held that under the plain language of the statute, "16- or 17-year-olds who commit special circumstances murder must be sentenced to LWOP, unless the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." (Id. at p. 1141.) Guinn found that the word "shall" in the context of this statute must be construed as mandatory, and that such construction was consistent with the history of the statute, which was enacted as part of Proposition 115, the "Crime Victims Justice Reform Act," specifically in order to subject youthful offenders who committed otherwise death-eligible crimes to special circumstances and LWOP. (Guinn, at pp. 1141-1142.) That a court might grant more lenient treatment in some circumstances, the appellate court found, does not detract from LWOP as the "presumptive punishment for 16- or 17-year-old special-circumstance murderers." (Id. at p. 1142.) As the court observed, the courts must not infer a legislative intent that is capricious or unconstitutional if there is an alternative interpretation that would render the law reasonable, just, and constitutional. (Ibid.)

We find Guinn's reasoning and interpretation of section 190.5, subdivision (b) to be persuasive in light of the statute's text and history. Although defendant argues that Guinn was wrongly decided, he fails to offer any alternative interpretation of the voters' intent that is equally consistent with the statute's text, takes into account the circumstances in which it was put before the public, and utilizes the principles of statutory interpretation that

we are bound to follow. We believe Guinn was correctly decided, and reject defendant's argument that the statute is constitutionally infirm for failing to make clear whether it establishes a presumption in favor LWOP.

Defendant further submits that section 190.5, subdivision (b) violates his right to due process and transgresses the prohibition against cruel and unusual punishment, because it fails to provide any guidance as to how a judge's sentencing discretion must be channeled. As defendant concedes, these constitutional arguments were also addressed by Guinn.

Guinn found that the factors listed in section 190.3[24] are available to guide the trial court's discretion in deciding whether to grant leniency in a case subject to section 190.5, subdivision (b) because they are part of the same statutory scheme as section 190.5. (Guinn, supra, 28 Cal.App.4th at pp. 1142-1143.) By extension of section 190.3, subdivision (k), the mitigating and aggravating factors listed in former rules 421 and 423 of the California Rules of Court (now rules 4.421 and 4.423),[25] are also available to guide the court's discretion. (Guinn, at pp. 1143, 1149.) The Guinn court held that the availability of these factors satisfied the requirements of the Eighth and Fourteenth Amendments to the United States Constitution, and related provisions of the California Constitution, safeguarding the guarantees against cruel and unusual punishment. (Guinn, at pp. 1141-1143.) On similar grounds, the court held that the defendant's due process rights were protected because he had fair notice of the factors that would be considered by the court in deciding whether to grant leniency. (Id. at pp. 1143-1144.) The latter argument applies with at least equal force here because, as defendant acknowledges, he understood that the trial court was bound by Guinn in his case.

We find Guinn persuasive on these points, and reject defendant's constitutional arguments that the lack of express guidelines in the statute violated the prohibition against cruel and unusual punishment and deprived him of due process.

Defendant argues one additional point not directly addressed by Guinn—that section 190.5, subdivision (b) violates his right to equal protection by allowing identically situated minors to receive unreasonably different sentences—one with a possibility of parole in 25 years and one with no such possibility. However, a careful reading of Guinn shows that this argument also fails. As persuasively construed in Guinn, the statute provides for a presumptive sentence of LWOP. The court's discretion to grant leniency is guided and circumscribed by the factors enumerated in section 190.3, as augmented by rules 4.421 and 4.423 of the California Rules of Court. Such limited, guided discretion does not violate equal protection requirements. (See In re Anderson (1968),69 Cal.2d 613; In re Sean W. (2005),127 Cal.App.4th 1177.)

Section 190.5 is not unconstitutionally vague on any of the theories defendant advances.

G. Cruel and Unusual Punishment

Defendant submits that even if section 190.5 provided adequate standards for deciding whether to impose a sentence of LWOP or a sentence of 25 years to life, his sentence of LWOP constitutes cruel and unusual punishment because he was just 16 years old when the crime was committed. He maintains that (1) the United States Supreme Court has recognized that juveniles deserve special treatment and are less culpable than adults who commit similar crimes; (2) evolving standards of decency require juveniles to be sentenced less harshly than adults; and (3) customary international law requires that juvenile offenders be given special protection.

According to defendant, it is beyond the bounds of decency to treat a juvenile as having the same culpability as an adult and to be as irretrievably beyond rehabilitation. Defendant derives this conclusion from Roper v. Simmons (2005),543 U.S. 551 (Simmons), in which the Supreme Court found that imposition of the death penalty on juveniles is unconstitutional, in large part based on the fundamental premises that youth and immaturity diminish blameworthiness and that youthful offenders are more amenable to rehabilitation. (Id. at pp. 568-575.)

But death penalty cases have a markedly different standing in Eighth Amendment jurisprudence than sentencing cases. "[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice." (Gregg v. Georgia (1976),428 U.S. 153 (lead opn. of Stewart, J.).) The Eighth

Amendment proscription against cruel and unusual punishment "contains a `narrow proportionality principle' that `applies to noncapital sentences.'" (Ewing v. California (2003),538 U.S. 11, quoting Harmelin v. Michigan (1991),501 U.S. 957 (conc. opn. of Kennedy, J.) That principle prohibits "`imposition of a sentence that is grossly disproportionate to the severity of the crime.'" (Ewing, at p. 21, quoting Rummel v. Estelle (1980),445 U.S. 263.) Successful proportionality challenges in noncapital case are "`exceedingly rare.'" (Ewing, at p. 21.)

Simmons itself negates defendant's argument that its holding should be extended to LWOP sentences. The Simmons court noted that the death penalty is unconstitutionally disproportionate when applied to juveniles, at least in part, because any deterrent effect it had could be achieved by imposing LWOP instead. The court stated: "To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." (Simmons, supra, 543 U.S. at p. 572.)

In People v. Demirdjian (2006),144 Cal.App.4th 10 (Demirdjian), the Second District Court of Appeal specifically declined to extend Simmons to the imposition of a life sentence on a juvenile: "More fundamentally, we are not persuaded that the decision of the United States Supreme Court holding that execution of a person who was under 18 at the time his or her crime was committed is cruel and unusual punishment bars a term of life imprisonment. We find no categorical prohibition against imposition of a life term on juveniles who commit special circumstance murder." (Demirdjian, at p. 16.) Other states have rejected challenges to LWOP sentences for juveniles based on Simmons. (State v. Allen (2008),289 Conn. 550; State v. Rideout (2007),933 A.2d 706; State v. Craig (2006),944 So.2d 660.)

Guinn, supra, 28 Cal.App.4th 1130, which was decided before Simmons, held, under state constitutional standards, that an LWOP sentence is not cruel and unusual punishment as applied to a 17-year-old offender: "Defendant Guinn argues that imposition of a sentence of LWOP on a 17-year-old is extreme. While we agree that the punishment is very severe, the People of the State of California in enacting the provision have made a legislative choice that some 16- and 17-year-olds, who are tried as adults, and who commit the adult crime of special circumstance murder, are presumptively to be punished with LWOP. We are unwilling to hold that such a legislative choice is necessarily too extreme, given the social reality of the many horrendous crimes, committed by increasingly vicious youthful offenders, which undoubtedly spurred the enactment." (Guinn, at p. 1147; see also Harris v. Wright (1996),93 F.3d 581 [pre-Simmons case holding that imposition of mandatory LWOP sentence on 15-year-old offender under Washington law does not violate Eighth Amendment].)

The defendant in this case committed a truly heinous crime. Putting on a dark mask and gloves, and arming himself with a rock and a knife, he invaded the home of a complete stranger to him. Without any provocation, he viciously set upon Pamela Vitale, raining blow after blow on her as she tried to fight him off. After a fierce struggle, he knocked her to the ground and got her turned on her stomach with her face against the floor. He hit the back of her head again and again with the rock, repeatedly smashing the back of her skull, and pounding her face so hard against the floor that her nose was fractured and two of her teeth were broken loose. Even as Vitale lay motionless and near death, defendant was still not done with her. He put away his rock and pulled out a knife. He pulled Vitale's T-shirt up and used the knife to draw some type of mark or symbol on Vitale's back. He then turned Vitale over and stabbed deep into her midsection, leaving a gaping wound in her abdomen.

Youthful immaturity does not begin to explain a crime of such brutality. There are no significant extenuating circumstances here. Defendant was not goaded into the crime by peer pressure or other external influences. The crime did not result from any provocation by the victim or from any real or perceived wrong done to defendant. Although his family was not affluent, defendant had the advantage of attending good schools and having a network of family and friends who cared about him. Defendant showed no sign of remorse for his crime either in its immediate aftermath or at any time since. When he returned to the house a few minutes after the killing, defendant was smiling and telling his housemates that he had just had "the most beautiful walk this morning." He joked with his friends later that evening about the painful manner in which the killing took place.

Despite defendant's age, we cannot say that a sentence of LWOP is disproportionate under either the United States or California proscriptions against cruel and unusual punishment, given the nature of the crime and the lack of significant mitigating factors.

Finally, defendant claims that the fact that he was tried as an adult and sentenced to LWOP violated customary international law. He relies on the Charter of the Organization of the American States and the American Declaration of the Rights and Duties of Man, but neither the courts of California nor those of the United States are bound by these agreements. (Buell v. Mitchell (2001),274 F.3d 337, citing Garza v. Lappin (2001),253 F.3d 918.) The United Nations Convention on the Rights of the Child has not been ratified by the United States and is also not binding on us. (Simmons, supra, 543 U.S. at p. 576.)

Defendant's sentence is neither unconstitutional nor otherwise contrary to binding law.

III. DISPOSITION

The judgment is affirmed.

We concur:

Marchiano, P.J.

Pollak, J.*

Notes:

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

2. Fielding had once owned a costume shop in Hayward. Defendant had enjoyed wearing costumes of all kinds when he was younger, some of them made by Fielding, who was a skilled seamstress.

3. We use first names for purposes of clarity, not out of disrespect.

4. The residents of Hunsaker Canyon Road had formed a road association. The Curiels kept a list of the names, addresses, and telephone numbers of the road association members, including the unlisted Horowitz-Vitale telephone number, taped to the wall in their house.

5. The Halpin order was apparently placed using his credit card information.

6. The detective also timed the drive from 1050 Hunsaker Canyon Road to the vicinity of the Spirit Store, which took 21½ minutes. Credit card receipts established that the Curiels made a purchase at the Spirit Store at 12:36 p.m.

7. Jena testified that she could not remember whether defendant used the number 36 or 39 when he made this comment.

8. Jazz was severely injured and eventually had to be put down. Schneider had apologized for hitting Jazz, but Fielding was angry with her for not taking full responsibility. Even though Jazz had been in defendant's family since defendant was two years old, defendant had shown no emotion about the dog's condition. Kim Curiel described defendant's demeanor as being similar to his demeanor at his sister's funeral—withdrawn, serious, silent, and sullen.

9. The titles of the books were Silence of the Lambs, Fathers of the Dead, Hannibal, Absinthe, and Black Sunday.

10. Fielding admitted that she initially testified at defendant's preliminary hearing to seeing Vitale's name, along with Schneider's and Halpin's, on the scraps of paper. Upon being further questioned on that at the preliminary hearing, she stated, "On second thought, I think I was wrong about that." At trial, Fielding denied having seen Vitale's name on any of the papers she burned.

11. A balaclava is a knit cap that covers the head and neck. (Merriam-Webster's Collegiate Dict. (10th ed. 2000) p. 86.) The balaclava recovered from the duffle bag in this case was designed to cover the wearer's face except for the eyes.

12. STR stands for "Short Tandem Repeats." (Nat. Research Council, The Evaluation of Forensic DNA Evidence (1996) p. 23.) STR's are a particular type of loci where the same DNA sequence is repeated a variable number of times depending on the person's genotype. (Id. at p. 70.) Y-STR profiling focuses on DNA loci found only on the Y chromosome, which exists only in males.

13. The record indicates that the questionnaire containing the "I don't know" response was filled out by Juror No. 6, but the gender and certain personal facts disclosed by the person who filled out the questionnaire do not match those of Juror No. 6 as revealed in Juror No. 6's in camera voir dire. We were unable to determine from the record whether this questionnaire response is in fact attributable to any of the sworn jurors or alternates.

14. Juror No. 10 had seen no publicity about the case, Juror No. 3 had heard about the case while living in New York, and Juror. No 4 had seen only newspaper headlines.

15. For example, responders who said they recognized the case were asked: "Have you read, seen, or heard if Dyleski had dressed like and been associated with Goths at his high school?"; "Have you read, seen, or heard if the victim had a satanic symbol carved on her back?"; and "Have you read, seen, or heard if the victim was struck more than 39 times with a piece of molding?"

16. Section 484e defines grand theft to include the acquisition or possession of another person's credit card account information without their consent, with the intent to use it fraudulently.

17. There was also evidence from which the jury could have reasonably inferred that defendant obtained this type of information at least once by breaking into a neighbor's residence, and that he had "cased" other neighbors' houses for the same purpose. Defendant had recently begun taking walks in the canyon, something he had never done before. Halpin testified that he would typically leave his house unlocked unless he was leaving town. Four of the slips of paper found by David Curiel in defendant's dresser contained personal and account information about Halpin in defendant's handwriting, including multiple account names, numbers, and passwords, as well as Halpin's credit card number, security code and expiration date, birth date, and middle name. Halpin was not aware of any way a person could have collected all of this information about him without sitting at his computer. Robin C. and Fred Curiel testified that defendant did not have the computer knowledge to be able to hack into other computers. The security codes and passwords defendant possessed could not have been obtained by intercepting Halpin's mail.

18. Vitale was nearly 70 pounds heavier and three inches taller than defendant.

19. The People point to Fielding's testimony at the preliminary hearing, which she quickly recanted, that she remembered seeing Vitale's name on one of the paper scraps she burned. The People argue that this constitutes substantial evidence that defendant did steal credit card information from Vitale's home after killing her. We do not find this persuasive, particularly in the absence of any crime scene evidence that the assailant accessed Vitale's computer or went through her purse or financial papers after killing her.

20. The jury was given a modified version of CALJIC No. 2.50 as follows: "Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial. [¶] Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] The existence of the intent which is a necessary element of the crimes charged; [¶] The identity of the person who committed the crime, if any, of which the defendant is accused; [¶] A motive for the commission of the crime charged; [¶] The crime charged is a part of a larger continuing plan, scheme or conspiracy. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case. You are not permitted to consider such evidence for any other purpose."

21. The term "Kelly hearing" derives from People v. Kelly (1976),17 Cal.3d 24 (Kelly). Kelly held that the admissibility in California of evidence produced by a new scientific technique requires a preliminary showing of the technique's general acceptance in the scientific community. (Id. at p. 30.)

22. People v. Morganti (1996),43 Cal.App.4th 643 affirmed a trial court finding that PCR testing was generally accepted in the scientific community. (Id. at pp. 662-671.) People v. Allen (1999),72 Cal.App.4th 1093 has affirmed that STR testing is generally accepted as reliable in the scientific community. Once a trial court decision finding general acceptance of a scientific procedure has been affirmed in a published appellate decision, other trial courts are bound by that result. (Kelly, supra, 17 Cal.3d at p. 32.)

23. Skelton v. Superior Court (1969),1 Cal.3d 144 (Skelton).

24. Section 190.3 provides that the trier of fact may consider the following factors in determining whether the penalty shall be death or LWOP in the case of an adult convicted of special circumstance, first degree murder: "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1. [¶] (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. [¶] (c) The presence or absence of any prior felony conviction. [¶] (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. [¶] (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [¶] (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct. [¶] (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person. [¶] (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication. [¶] (i) The age of the defendant at the time of the crime. [¶] (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. [¶] (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

25. Rules 4.421 and 4.423 of the California Rules of Court enumerate the circumstances in mitigation and aggravation that are generally applicable to sentencing proceedings under section 1170, subdivision (b).

* Associate Justice of the Court of Appeal, First Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.