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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY PAUL CHITWOOD,

Defendant and Appellant.

F060630

(Super. Ct. No. BF125307A)

**OPINION**

APPEAL from judgments of the Superior Court of Kern County. Michael G. Bush and Gary T. Friedman, Judges.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Doris A. Calandra, Deputy Attorneys General, for Plaintiff and Respondent.

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**INTRODUCTION**

Around 3:00 a.m. on October 13, 2008, Chantha Meas, a gas station clerk, was forcibly taken from her residence. About three hours later, her body was found on a

desolate dirt road. She had been shot twice in the head. During the investigation into the homicide, the detectives determined that appellant/defendant Jeffrey Paul Chitwood had sent flowers to Meas at work, that he had walked around her house and the adjacent store where she worked, one of the victim's earrings was found in his bedroom, and the victim's DNA was found on his shirt and underwear.

After a lengthy jury trial, defendant was convicted of first degree premeditated murder (Pen. Code,<sup>1</sup> §§ 187, subd. (a), 189). The jury found true the special circumstance that defendant was engaged in the commission or attempted commission of a kidnapping at the time of the offense (§ 190.2, subd. (a)(17)(B)); and the special allegation that defendant personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)). Defendant was sentenced to life without the possibility of parole for first degree murder with a special circumstance, plus 25 years to life for the firearm finding.<sup>2</sup>

On appeal, defendant contends the court improperly denied his motion for disclosure of law enforcement personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). Defendant also contends the court should have granted his motion to suppress evidence recovered when a search warrant was executed at his house. Defendant separately contends the court should have granted his motion to traverse and quash the search warrant because it purportedly contained material misstatements and omitted relevant facts. We affirm.

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<sup>1</sup> All further statutory citations are to the Penal Code unless otherwise indicated.

<sup>2</sup> The prosecution initially sought the death penalty but subsequently notified the parties that it would not treat the matter as a capital case. Defendant rejected a plea offer of 50 years to life.

## **FACTS**

Chantha Meas worked as a clerk at the Shell gas station and food mart located at 1508 Airport Drive near Norris Road in Bakersfield. The store was just a quarter mile from the Kern County Sheriff's Department, and it was the only convenience store in the immediate area. Many of the deputies who investigated her homicide had regularly patronized the gas station and store because it was so closely located to their office, and they were familiar with Meas as one of the clerks who worked there.

Meas and her husband, Odom Chap, lived in a rental house which was immediately adjacent to the Shell store. The house was owned by the same person who owned the gas station. Chap worked at another convenience store located in a different part of town.

The Shell store was not open 24 hours a day. Meas had the morning shift and she was responsible for opening the store in the morning. She usually arrived around 3:00 a.m. to prepare the store to open at 4:00 a.m. on weekdays. Meas's usual custom was to call the store's owner once she had opened the store.

The Shell station and store were equipped with video surveillance cameras and recording equipment. The cameras covered the gas pumps, the store's exterior, the alley which was between the store and Meas's adjacent house, and part of the house itself.

### **Defendant's activities before the homicide**

Defendant lived on Airport Drive directly north of the Shell store.

The records from Log Cabin Florist showed that defendant ordered flowers from his home address for delivery to the Shell store on August 26, 2008. He placed another order on a different date. The flowers were delivered to Meas at the store.

Jennifer Isbell lived near Meas's house on Airport Drive and described an incident which had occurred one evening a couple of weeks before Meas was killed. On that particular evening, Isbell was sitting on the front porch of her own house and saw a man walk up and down the street. The man was not wearing a shirt. Isbell thought the man

was “creepy” and looked like a drug addict. At trial, Isbell identified defendant as the man.

Isbell and her sister got into a car and followed defendant as he continued to walk up and down the street. Defendant stared at Meas’s house and opened Meas’s mailbox. Defendant walked through the adjacent alley. Isbell drove around the Shell station and met defendant as he emerged from the alley. Isbell flashed the car’s bright lights to illuminate defendant, and he hid behind a pole.

The Shell station’s surveillance videotapes showed that on October 12, 2008, the day before Meas was killed, defendant visited the Shell store at 4:37 a.m., and he repeatedly returned.<sup>3</sup>

On October 12, 2008, defendant purchased an expensive police scanner from an electronics store.

### **Last contact with Meas**

Around 9:00 p.m. on October 12, 2008, Chap (Meas’s husband) left their residence to head to his night shift at the store where he worked. Meas was still asleep when he left. She was scheduled to open the Shell store early the next morning.

At 2:30 a.m. on Monday, October 13, 2008, Chap called the house to wake up Meas so she would be ready for her morning shift at the Shell store. Meas answered the telephone and said she was getting dressed.

### **Neighborhood witness**

Bridget Bachman lived directly north of Meas’s house. Around 3:30 a.m. on October 13, 2008, Bachman heard a woman screaming, “ ‘Get the f\*\*\* out of my yard.’ ” Bachman did not recognize the woman’s voice, but the sound seemed to come from the

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<sup>3</sup> Kern County Sheriff’s Detective Lackey testified that after the homicide, he met with the owner of the Shell station, who played the surveillance videotapes for him and explained the time-stamps were two hours later than they should have been. Lackey extensively reviewed the entirety of the videotapes for any suspicious activity.

direction of Meas's house. Bachman went outside but did not hear anything. After about five minutes, Bachman went into her house but then heard somebody hitting something that sounded like metal. Bachman again went outside, but she could not distinguish the sound because of the noise from passing vehicles.

### **Meas is taken from her house**

The Shell station's security videotapes revealed the following activities on October 13, 2008. Shortly before 3:00 a.m., a man walked near Meas's garage and through the alley that was adjacent to the store and Meas's house. At 3:12 a.m., the videotape showed Meas struggling with a man. The man took Meas away from the house on foot, while she continued to struggle and resist. They went out of the video frame, and the other security cameras did not pick up their further movements.

### **Meas's disappearance**

In the early morning hours of October 13, 2008, the Shell store's owner never received the expected call from Meas to report that she had opened the store. At 5:00 a.m., Melissa Chao, the owner's wife, went to the store to check on the situation, and discovered that Meas was not there, and the store was still closed. Chao went to Meas's house, but she was not there. Chao called Chap and told him that Meas was not at work.

Around 6:00 a.m., Chap contacted the sheriff's department and reported that his wife was missing.

### **Discovery of Meas's body**

Around 6:15 a.m. on October 13, 2008, Larry Clouser, a general contractor, was driving to his workplace in the rural oil fields located north of the Shell store. Clouser drove north on Airport Drive, which turned into Granite Road, and he continued through the intersection of Round Mountain Road. He pulled onto an access road and found a woman's body lying in the dirt. Her head was surrounded by a dark liquid which appeared to be blood.

The deputies and detectives who responded to the desolate area recognized the victim as Meas, the missing clerk, based on their prior transactions at the Shell store. Meas was wearing her Shell uniform shirt. The zipper on Meas's blue jeans was partially down.

### **Defendant's activities**

At 5:00 a.m. on October 13, 2008, Lloyd Hatfield reported for work as a crane operator at a construction company's main yard on Airport Drive off Highway 33. Hatfield met defendant there for the first time that morning. It was defendant's first day of work, and defendant was assigned to Hatfield's crew.

On October 14, 2008, defendant failed to show up for his job, and he was never seen again at the construction yard.

### **Forensic evidence**

There was one live nine-millimeter round and one spent shell casing found in the dirt near Meas's body. Both items had been loaded into and extracted from the same firearm. The impression from the firing pin was consistent with the impression left by a nine-millimeter Glock.

There were fresh tire prints in the only "turnaround" area of the dirt access road. There were also drag marks in the dirt that led to the Meas's body, which indicated the victim had been dragged to the location where her body was found. The drag marks were inconsistent with a struggle. A nylon rope or cord was found in close proximity to the tire prints.

### **The pathology evidence**

The pathologist determined Meas had been shot twice in the head. The first gunshot caused an entrance contact wound to the left cheek, which indicated the weapon's barrel had been placed against the skin. The bullet went through her mouth, broke multiple facial bones, and exited through the right side of her cheek, just in front of the right ear. This gunshot wound was potentially fatal based on the massive blood loss.

However, the pathologist determined that Meas survived after being shot the first time, based on the blood aspiration pattern in her lungs.

The pathologist testified Meas suffered a second gunshot wound, which was fatal and the cause of death. This gunshot entered just above the right eyebrow. There was stippling on Meas's forehead and cheek, which indicated the second shot was fired two to four feet away from her body. The bullet traveled from front to back, right to left, and upward. It went through Meas's brain and lodged in the left upper portion of her skull. There was no evidence the gunshot wounds were self-inflicted or that Meas had fired a weapon.

There was a small abrasion on Meas's chin and a facial contusion. There were multiple broad contusions, bruising, and trauma on Meas's wrists and fingers, consistent with some kind of ligature or binding being wrapped around her wrists while she was still alive. The marks were not consistent with the nylon cord found near her body.

### **The investigation**

Kern County Sheriff's Detectives Lackey and Olmos were on call on the morning that Meas was reported missing, and they responded to the desolate area where the body was found.<sup>4</sup> They next went to Meas's house and interviewed her husband. Lackey noticed flower vases that were next to the back door. When Lackey saw them, he

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<sup>4</sup> Detectives Lackey and Olmos were among the officers who regularly patronized the Shell store and recognized Meas's body. At trial, Lackey testified that he was a diabetic, he frequently purchased snacks to get him through the day, and Meas was usually the clerk who was on duty. He did not know where Meas lived. Lackey and Olmos testified they were just one hour away from going off duty when they received the dispatch about the missing clerk and a body being found on the dirt road. Lackey continued to patronize the Shell store after Meas's death. As we will discuss in section III, *post*, defendant's motion to traverse claimed Lackey and Olmos should have disclosed their prior "relationship" with Meas in the affidavit filed in support of the search warrant, and their failure to do so resulted in a material omission of fact. The court rejected this argument and declined to consider this issue when it reviewed defendant's motion to traverse.

remembered a conversation he overheard during one of his visits to the Shell store, when Meas and another employee talked about Meas receiving flowers at the store, and the coworker said that Meas had a secret admirer. Based on that memory, Lackey asked Meas's husband if she received those flower while she was at work.

Chap knew that his wife had received a big flower arrangement, which she had placed on their dining room table. Meas told her husband that a friend sent the flowers to her, but she did not reveal that person's identity to him.

Melissa Chao, the Shell store owner's wife, frequently worked at the store with Meas. At trial, Chao testified that Meas said someone was bothering her at work, and Meas asked Chao if she knew who that person was. Chao said no. Chao testified that Meas then told her "the name Jeff," but Chao knew a lot of people named "Jeff." Meas told Chao that "Jeff" sent her flowers.

Detective Lackey testified that when he met with Melissa Chao, he asked if she knew that Meas received flowers from someone named "Jeff." Chao said she didn't know Jeff. Chao told him that on October 12, 2008, the day before the homicide, Meas said that she was concerned about two people who came into the store.

The phone records for both defendant and Meas did not reveal any calls between them.

### **Search of defendant's house**

On October 15, 2008, defendant's house was searched pursuant to a warrant.<sup>5</sup> Detective Fennell supervised the search, and he was assisted by several other officers, including Detectives Lackey and Olmos.

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<sup>5</sup> As we will discuss in sections II and III, *post*, Detective Olmos prepared the affidavit in support of the search warrant, and he partially relied on information supplied to him by Detective Lackey.

The master bedroom's closet contained the police scanner that defendant had purchased the day before the homicide. There was an empty blue gun box in the closet that belonged to a nine-millimeter Glock Model 17. The Glock was not found, but there were several weapons in the house, including a Colt semi-automatic assault rifle, a .270-caliber bolt rifle, a .22-caliber revolver, a .12-gauge shotgun, and ammunition for .45-caliber and nine-millimeter weapons.

### **Additional forensic evidence**

The detectives seized several items of clothing from the master bedroom's laundry hamper. The right sleeve of a man's shirt tested positive for human blood. The blood contained a mixture of DNA from defendant and Meas.

Defendant's underpants, which were removed from him on October 15, 2008, contained semen and other biological material, including a small amount of Meas's DNA on the outside front portion. There was biological material on the victim's panties, but defendant was excluded as the source.

### **Meas's earrings**

During the autopsy, the pathologist found an earring in Meas's pierced left ear. The pathologist did not find an earring on Meas's right ear, but only a pierced-ear backing which was still attached to the back of Meas's right ear lobe. The backing was not sticky or gooey, and it was not embedded in her hair.

During the search of defendant's house, Detective Olmos found an off-white colored pearl-type earring on the carpeted floor of the master bedroom, in front of a dresser. The earring blended into the beige carpet. There was no backing on the studded earring.

Detective Lackey testified that the back part of the earring which the pathologist found on Meas's right ear, matched the earring Detective Olmos found on the floor of defendant's bedroom. A criminalist determined Meas's DNA was on the earring found in defendant's bedroom.

### **The computer searches**

A search of the computer found in defendant's house revealed that searches had been conducted on it prior to October 13, 2008, for the names "Chantha," "Meas," and "Mease." There were also searches for various cultural aspects of Cambodia, a short list of English/Cambodian translations, and questions about sending flowers to Asian or Cambodian women while they worked.

In addition, there were specific search inquiries made on the computer in 2008 which had been deleted and recovered by investigators. These recovered inquiries included: " 'How to date Cambodian women,' " " 'Do Cambodian women like to get flowers?' " " 'Is it good when a Cambodian woman tells you that she loves you?' " " 'Do Asian women get jealous of white men?' " and " 'Why do Asian women love blue-eyed men?' "

### **Defendant's statements to Glenn Osbourne**

Glenn Osbourne testified for the prosecution under a grant of immunity for any pending state or federal firearm offenses. Osbourne and defendant had been good friends for 35 years. Osbourne sold a nine-millimeter Glock 17 to defendant in 2000.

Osbourne testified that he was with defendant on the evening of October 13, 2008. Defendant said his mother called to let him know that he was wanted for two homicides and a robbery. Osbourne let defendant sleep at his house that night.

On the morning of October 14, 2008, Osbourne and defendant drove to defendant's house on Airport Drive, and they saw detectives there. As they passed his house, defendant told Osbourne, " 'I did it. I did it. I did it.' "

Later on October 14, 2008, Osbourne asked defendant what was going on. Defendant said he had killed " 'that girl.' " Osbourne asked if she was " '[t]he

waitress,' ” and defendant said yes.<sup>6</sup> Osbourne asked defendant if he shot her in the head, and defendant said yes, and that he used the Glock. Defendant said the body was somewhere off Round Mountain Road. Osbourne asked defendant if he had any remorse, and defendant said yes. Later that night, defendant called Osbourne and said he got rid of the Glock, and he was going to turn himself in.

Detective Royce Haslip testified that when investigators interviewed Osbourne, he revealed details about the homicide which had not been made public yet, including the fact that a nine-millimeter weapon was used, and it had not been found.

### **DEFENSE EVIDENCE**

An evidence technician testified that Meas's fingerprints were not found on the interior or exterior of defendant's truck, and defendant's fingerprints were not found in or around Meas's house.

Michael Nelson testified he was with defendant at the construction job, and they drove out to work around 5:00 a.m. The drive took about an hour. Nelson did not know defendant, and they just engaged in chit-chat during the drive. Nelson thought he saw defendant on October 13, 2008, but admitted he was not sure about the date. However, he never saw defendant again at the construction site.

Karrissa Morris, Osbourne's niece, testified she was very close to him and loved him. However, he was not an honest person and liked to fabricate stories that put the spotlight on him.

### **DISCUSSION**

#### **I. The court properly denied defendant's *Pitchess* motion for disclosure**

Defendant contends the court improperly denied his *Pitchess* motion for disclosure of the confidential personnel records for Detectives Lackey and Olmos. As we will

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<sup>6</sup> Osbourne testified that on prior occasions, defendant talked about an "oriental" woman, and he assumed defendant meant a waitress because defendant always ate at restaurants.

explain, defendant's *Pitchess* motion was based on defense counsel's assertions that Lackey and/or Olmos "planted" the earring found during the search of defendant's master bedroom, and that their personnel records should be disclosed in order to further this theory. The superior court reviewed the detectives' personnel files at a confidential hearing and held there was nothing to disclose. Defendant requests this court to conduct an in camera review of their personnel records and determine whether the court abused its discretion when it denied disclosure.

**A. *Pitchess* motions**

We begin with the well-settled principles concerning the *Pitchess* discovery procedure, which has two steps. First, the party must file a written motion describing the type of records sought, supported by "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." (Evid.Code, § 1043, subd. (b)(3); *People v. Mooc* (2001) 26 Cal.4th 1216, 1226 (*Mooc*).)

Second, if the superior court finds good cause for discovery of personnel records, the court conducts an in camera review of the pertinent documents to determine which, if any, are relevant to the case, typically disclosing only identifying information concerning those who filed complaints against the officers. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) "The trial court may not disclose complaints more than five years old, the 'conclusions of any officer' who investigates a citizen complaint of police misconduct, or facts 'so remote as to make [their] disclosure of little or no practical benefit.' [Citations.]" (*Ibid.*, brackets in original.) Even upon a showing of good cause, the defendant is only entitled to information that the court, after the in camera review, concludes is relevant to the case. (*People v. Johnson* (2004) 118 Cal.App.4th 292, 300.)

When the superior court conducts the in camera review, it must make a record that will permit future appellate review. (*Mooc, supra*, 26 Cal.4th at pp. 1229-1230; *People v.*

*Guevara* (2007) 148 Cal.App.4th 62, 69.) The court may do so by either copying the documents and placing them in a confidential file, preparing a sealed list of the documents it reviewed, or “simply state for the record what documents it examined” and seal that transcript. (*Mooc, supra*, 26 Cal.4th at pp. 1229-1230.)

The trial court’s determination of whether confidential personnel records are discoverable is subject to review for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) If there is any uncertainty in the record as to which documents were reviewed by the trial court, this court may remand the matter to the trial court with directions to conduct a hearing and clarify the materials it reviewed in camera before it denied the *Pitchess* motion. (*Mooc, supra*, 26 Cal.4th at p. 1231.) If the appellate court determines the superior court erroneously denied disclosure under *Pitchess*, defendant must demonstrate a reasonable probability of a different outcome had the evidence been disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 182-183.)

#### **B. Defendant’s motion**

Defendant filed a pretrial *Pitchess* motion for disclosure of the personnel records for Detectives Lackey, Olmos, and Chandler, all of whom investigated the homicide. The motion asserted the court should review the detectives’ personnel records and order disclosure of any information and/or complaints related to their veracity and character.

Defense counsel’s affidavit, submitted in support of the motion, asserted that defendant denied killing Meas, and his defense was going to be that the detectives planted the earring that was found in the master bedroom during the search of his house. Defense counsel declared that Lackey, Olmos, and Chandler regularly visited the Shell station; the victim was “flirtatious by nature,” and her conduct may have “tended to lead men on”; Lackey may have had a personal relationship with the victim based on his numerous visits to the store; Olmos prepared the search warrant affidavit for defendant’s house; the affidavit allegedly contained material misstatements and omissions, including the nature of the victim’s relationships with the three detectives; Lackey obtained a key to

defendant's house; either Lackey or Olmos may have planted the earring found in the master bedroom during their initial protective sweep of the house or by entering the house at an earlier time; and the earring was not found by forensic examiners even though they searched the bedroom before the detectives did.

The prosecution filed opposition and asserted defendant's motion, and defense counsel's supporting declaration, failed to state any basis for review and/or disclosure of Detective Chandler's personnel records. The prosecution requested the court conduct a confidential hearing if it decided to review the records of Lackey and Olmos.

### **C. The *Pitchess* hearing**

On November 2, 2009, the court conducted an open hearing as to defendant's *Pitchess* motion. The court found defendant failed to make a sufficient showing to review Detective Chandler's records, because defendant alleged that either Lackey or Olmos purportedly planted evidence. However, the court found sufficient grounds to review the personnel records for Lackey and Olmos.

Thereafter, the court conducted a confidential in camera hearing. After the hearing, the court advised the parties that it had denied defendant's *Pitchess* motion for disclosure.

### **D. Analysis**

This court has received the confidential files which were reviewed by the superior court at the in camera *Pitchess* hearing. We have reviewed the entirety of these materials, and find there was nothing subject to disclosure and the court did not abuse its discretion when it denied defendant's *Pitchess* motion as to the personnel records of Detectives Lackey and Olmos. (*Mooc, supra*, 26 Cal.4th at p. 1232; *People v. Prince* (2007) 40 Cal.4th 1179, 1286.)

## **II. Denial of motion to suppress**

As explained *ante*, defendant's house was searched pursuant to a warrant. The search warrant was based on an affidavit signed by Detective Olmos.

Prior to trial, defendant filed a motion to suppress pursuant to section 1538.5. Defendant argued that the search warrant affidavit was based on statements obtained from defendant as a result of an illegal detention, after which he was extensively questioned by the detectives. The superior court conducted a hearing on defendant's motion to suppress and held that, while defendant was subject to an illegal detention, there was sufficient attenuation from that illegality and his subsequent statements such that his statements were properly considered as part of the search warrant affidavit.

Defendant also filed a pretrial motion to traverse and quash the search warrant affidavit, based on the separate argument that there were material misstatements and omissions which undermined the veracity of the affidavit.

On appeal, defendant challenges the court's rulings on both motions. We will review the procedural history of both motions, and then address the validity of the court's denial of defendant's motion to suppress and its findings of attenuation. In section III, *post*, we will address the court's rulings on defendant's motion to traverse and quash the search warrant.

#### **A. Procedural history**

On October 13, 2008, Meas's body was found. As we will discuss, *post*, on October 15, 2008, deputies saw defendant driving his truck and performed a traffic stop, during which their guns were drawn and defendant was placed in handcuffs. After defendant's handcuffs were removed, a deputy advised defendant that detectives wanted to speak to him, and defendant agreed to answer questions. Defendant answered questions that day, denied any involvement in Meas's homicide, and admitted he knew Meas from the store and that he sent her flowers. Defendant was not arrested that day.

Later on October 15, 2008, Detective Olmos prepared an affidavit in support of a search warrant for defendant's house. The affidavit summarized the investigative history of the case and defendant's prior interactions with Meas. The affidavit also cited to the statements defendant made to the detectives during the interview. Defendant's house was

searched pursuant to the warrant, and the detectives found the blood-stained shirt and the pearl earring.

On October 16, 2008, defendant was arrested for the murder of Meas.

Prior to trial, defendant filed a motion to suppress evidence seized during the search of his house. Defendant argued the traffic stop and detention performed on October 15, 2008, was illegal, his subsequent statements to the detectives should be suppressed as the fruits of that illegal detention, and the search warrant affidavit was invalid because it was partially based on those statements.

Defendant also filed a motion to traverse and quash the search warrant, based on separate grounds from the illegal detention issue. Defendant argued the search warrant affidavit was based on material misstatements and omitted relevant facts, those misstatements and omissions negated the existence of probable cause to search defendant's house, and all the evidence seized from defendant's house, including the blood-stained shirt and the pearl earring, should be suppressed.

In this section, we will focus on defendant's motion to suppress, and his arguments as to whether his statements to the detectives on October 15, 2008, were the fruits of the unlawful traffic stop and detention, whether those statements must be removed from considering whether the affidavit constituted probable cause for issuance of the warrant, and whether the court should have excluded the blood-stained shirt and pearl earring as additional fruits of the initial unlawful traffic stop.

#### **B. The traffic stop**

In light of defendant's motion to suppress, the court conducted a pretrial evidentiary hearing as to the validity of the traffic stop performed on defendant on October 15, 2008. Deputy Bobby Voth was the only prosecution witness at the suppression hearing who testified about the circumstances of the traffic stop of defendant's truck.

Voth testified that around 4:30 a.m. on October 15, 2008, he was on patrol and advised to look for defendant and his truck because defendant was wanted for questioning about a homicide which involved a firearm, and the firearm had not been located. Voth recognized the truck at a gas station on Norris Road. Voth contacted his sergeant and advised him about the truck. Voth's sergeant instructed him to stop and detain defendant.

Voth testified that he advised other deputies in the vicinity to wait for the truck to leave the gas station and then initiate an investigative traffic stop. He arranged for two patrol cars to follow the truck and perform the stop. Voth saw defendant in the truck as it left the gas station. Deputies Skidmore and Klarcyk performed the actual traffic stop; Voth was not present when it occurred.

When Deputy Voth arrived at the scene of the traffic stop, there were two patrol cars there with flashing emergency lights. Deputy Skidmore was taking a cover-type position and his gun was drawn. Defendant was in handcuffs, and Deputy Klarcyk placed defendant in the back of a patrol car. Voth never drew his weapon during the detention.

Deputy Voth spoke to the other officers and then removed defendant from the patrol car, conducted a patdown search, and did not find any weapons. Voth removed the handcuffs from defendant. Voth testified a couple of minutes passed between his initial contact with defendant and the removal of the handcuffs. After he removed the handcuffs, they remained outside the patrol car, and Voth explained to defendant that he was being detained because detectives wanted to talk to him about a homicide, and he was not being arrested. Defendant said he understood. Defendant also said his mother told him that Detective Lackey wanted to talk to him.

Deputy Voth testified he again contacted his sergeant, advised him that defendant was detained, and asked what they should do. The sergeant said the detectives were on their way to the scene of the traffic stop.

Voth testified about the ensuing conversation he had with defendant. Voth's firearm was not drawn. The only other deputies present were the two men who performed the traffic stop, and they had returned their weapons to their holsters. None of the deputies drew their weapons again; they were standing outside the patrol cars, defendant was not in handcuffs, and he was never again placed in restraints. Voth advised defendant that the detectives were on their way and asked defendant whether he would like to speak with them. Defendant said yes. Voth testified that he "explained [to defendant] that it might be easier or I asked him if he wanted to go to our headquarters ... where we had an office. I explained to him that detectives could speak to him here or there, but it would be probably more comfortable if we went to the office. I asked him if he would like to go there, and he said that he would." Voth testified that he told defendant "this was voluntary and that he did not have to go if he didn't want to," and defendant agreed to go with them. Voth said that Deputy Skidmore would provide him a ride to the department, which was less than a mile away from the scene, and defendant agreed.

Voth testified that defendant entered Deputy Skidmore's patrol car for the drive to the sheriff's department, and Voth followed in his own patrol car. Defendant was not in handcuffs immediately before or after the drive.

### **C. Defendant's statements**

Defendant was subsequently questioned at the sheriff's department by Detectives Olmos and Lackey. Defendant's statements were not introduced into evidence at trial, but they were included in Detective Olmos's affidavit in support of the search warrant for defendant's house. As we will discuss in section III, *post*, the references to defendant's statements are just one part of the six-page search warrant affidavit.

The search warrant affidavit includes a brief description of the traffic stop on defendant's truck, and simply states that deputies conducted an investigative stop on the truck because they believed defendant was the driver. The affidavit failed to mention that

defendant was removed from the truck at gunpoint, placed in handcuffs, and put into a patrol car. The affidavit further states that defendant “freely and voluntarily” agreed to go to the sheriff’s department for an interview.

The affidavit states that Detectives Olmos and Lackey interviewed defendant and asked about his whereabouts for the prior 48 hours. Defendant said he was at his mother’s house, that he knew the detectives were trying to contact him about a double homicide and a robbery, and he “ ‘freaked out’ ” and avoided contact with the deputies.<sup>7</sup> Defendant said he was not involved in a double homicide and robbery, and he had heard that Meas had been killed. They told defendant that the video surveillance cameras showed a male walking in front of Meas’s garage; defendant replied, “ ‘Oh was she abducted[?]’ ” Olmos pointed out that he never said Meas was abducted. Defendant “nervously responded” that he assumed she was taken from her house. Olmos again pointed out that he never said Meas was abducted or taken from her residence, and defendant “appeared nervous.” Defendant said he failed to go to work because he intended to voluntarily go to the sheriff’s department to answer questions.

Olmos asked defendant about his relationship with Meas. Defendant said he liked Meas as a friend and bought gifts to “ ‘cheer’ her up when she appeared sad.” Meas said she was single, and she was “very flirtatious towards him.” Defendant said he never asked her for a date and he did not know she was married. Meas told defendant where she lived. Defendant denied killing Meas and denied calling her cell phone.

According to the affidavit, defendant had on a dark colored, hooded sweater during the interview, similar to the one worn by the subject depicted on the videotapes.

Defendant was not arrested at that time and he left the sheriff’s department. However, defendant was arrested the next day, on October 16, 2008.

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<sup>7</sup> The record does not explain why defendant thought he was a suspect in a “ ‘double homicide and robbery.’ ”

#### **D. The parties' arguments**

After the evidentiary hearing on the legality of the traffic stop, the court stated that the prosecution failed to present any direct evidence as to why Deputy Voth believed defendant was wanted for questioning in the homicide investigation, and there was no evidence to support the initial stop. The court granted defendant's motion to suppress only as to any information obtained from the initial stop up to the point where Voth removed defendant's handcuffs.

The court asked the parties whether there was sufficient attenuation between the initial illegal detention, to the point where Deputy Voth removed defendant from the patrol car and removed the handcuffs. Defendant argued that everything that flowed from the illegal detention was the fruit of the poisonous tree and subject to suppression, including defendant's subsequent statements to the detectives. Defendant argued it was not reasonable to believe his consent was voluntary when it occurred after he had been removed from his vehicle at gunpoint, handcuffed, and placed in a patrol car. The prosecutor replied that such facts did not necessarily abrogate the voluntariness of defendant's consent to answer questions. Once it was determined that defendant was not armed, the deputies returned their weapons to their holsters and the handcuffs were removed. It was only at that point that defendant was asked if he would be willing to answer questions.

#### **E. The court's ruling on the traffic stop**

The court held that while the initial traffic stop and detention were illegal, the deputies stopped defendant's truck in good faith, and the initial detention was not done in bad faith. "It wasn't stopped for some nefarious purpose or something along those lines. I think the People just got caught short on who the witness was going to be [at the evidentiary hearing on the suppression motion]."

The court also found that even though the initial detention was illegal, there was attenuation between that detention and defendant's consent to the interview, because

defendant was removed from the patrol car, the handcuffs were removed, the situation was explained to him, and he agreed to answer questions. The court noted that the detention was over, and defendant was specifically told that the detectives could come to the scene or go to the sheriff's department, and he agreed to go there on his own. "He was not handcuffed,... the detention was over, but he still went down there voluntarily."

"Therefore, there was an attenuation. When [defendant] was told 'We want to talk to you, we will talk to you here, we will talk to you there,' he freely chose to go. So the mere fact he was illegally detained ... will not cause this court to suppress whatever happened at the station."

#### **F. Attenuation**

Defendant contends that since the trial court found the initial traffic stop and detention were unlawful, it should have granted his motion to suppress his subsequent statements to Lackey and Olmos, and the statements were improperly relied upon in the search warrant affidavit because they were the fruits of the illegal detention. Defendant further argues that when his statements are omitted from the affidavit, it fails to state probable cause to support the search warrant issued for defendant's house, and the evidentiary items seized from his house—particularly the bloody shirt and the pearl earring—should have been suppressed.

"The scope of our review of constitutional claims of this nature is well established. We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]" (*People v. Boyer* (1989) 48 Cal.3d 247, 263, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

The exclusionary rule extends to the fruits of an illegal search or seizure. (*Wong Sun v. United States* (1963) 371 U.S. 471, 488 (*Wong Sun*)). "Because of the particular

interests protected by the Fourth Amendment, a statement must be suppressed, even when knowing, voluntary, and intelligent, if it is the direct product of an illegal arrest or detention. [Citations.]” (*People v. Boyer, supra*, 48 Cal.3d 247, 267.)

However, “suppression is not necessarily required *even if* the evidence would not have come to light *but for* an infringement of the defendant’s Fourth Amendment rights. [Citation.]” (*People v. Boyer* (2006) 38 Cal.4th 412, 448, italics in original.) “[N]ot ... all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is ‘whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’ [Citation.]” (*Wong Sun, supra*, 371 U.S. at pp. 487-488; *People v. Sims* (1993) 5 Cal.4th 405, 445.) “ ‘Under *Wong Sun*, evidence is not to be excluded merely because it would not have been obtained but for the illegal police activity. [Citation.] The question is whether the evidence was obtained by the government’s exploitation of the illegality or whether the illegality has become attenuated so as to dissipate the taint. [Citation.]’ [Citation.]” (*People v. Boyer, supra*, 38 Cal.4th 412, 448; see also *United States v. Crews* (1980) 445 U.S. 463, 471.)

“Relevant factors in this ‘attenuation’ analysis include the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct. (*Brown v. Illinois* (1975) 422 U.S. 590, 603-604 ... (*Brown*).)” (*People v. Boyer, supra*, 38 Cal.4th at p. 448; *People v. Brendlin* (2008) 45 Cal.4th 262, 269.) “The degree of attenuation that suffices to dissipate the taint ‘requires at least an intervening independent act by the defendant or a third party’ to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality. [Citations.]” (*People v. Sims, supra*, 5 Cal.4th at p. 445.) The prosecution bears the burden of showing

the evidence is not the fruit of the illegal detention and is therefore admissible. (*People v. Boyer, supra*, 38 Cal.4th at p. 449.)

### **G. Analysis**

We find that the trial court properly denied defendant's motion to suppress his statements because those statements were sufficiently attenuated from the initial illegality of the unlawful detention. In making this determination, we review the three *Brown* factors, i.e., the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct. (*Brown, supra*, 422 U.S. at pp. 603-604; *People v. Brendlin, supra*, 45 Cal.4th at p. 269.)

The first *Brown* factor is the temporal proximity of the unlawful detention to the procurement of the challenged evidence, i.e., defendant's statements. (*Brown, supra*, 422 U.S. at p. 603.) It is undisputed that a few minutes passed between the time that deputies stopped the truck, detained defendant, placed him in handcuffs and in the back of the patrol car, and when Deputy Voth removed him from the patrol car and removed the handcuffs. The record is silent as to how much time elapsed from defendant's conversation with Deputy Voth, when he agreed to the interview, and when he was transported to the sheriff's department for the interview itself. However, it is undisputed that the sheriff's department was less than a mile away from the scene of the traffic stop, and the record thus implies that a short period of time passed between those events.

In any event, a relatively short period of time passed between the initial detention and defendant's interview with the two detectives. While this factor may tend to favor suppression, it is not dispositive of the issue. (*Brown, supra*, 422 U.S. at p. 603; *People v. Brendlin, supra*, 45 Cal.4th at p. 270.)

The second *Brown* factor is the presence of intervening circumstances. (*Brown, supra*, 422 U.S. at pp. 603-604.) There were several intervening circumstances which establish attenuation in this case: the deputies returned their weapons to their holsters;

defendant was removed from the patrol car; the handcuffs were removed from him; he remained outside the patrol and he was never again placed in restraints; Deputy Voth explained to defendant that he was not under arrest, and that detectives wanted to talk to him about a homicide; defendant said he already knew that Detective Lackey wanted to talk to him; Voth asked defendant if he wanted to speak with the detectives; defendant said yes; Voth offered to have the detectives talk to him at the scene or he could go to the sheriff's department; Voth explained defendant did not have to go with them and it was voluntary; defendant said he would go to the sheriff's department; Voth offered him a ride; and defendant accepted the ride.

All of these intervening circumstances attenuated the taint of initial unlawful detention. Defendant was no longer in custody and was advised that he was not under arrest and that he did not have to answer questions. Defendant replied that he knew Detective Lackey wanted to talk to him about a homicide, and he accepted the offer of a ride to the sheriff's department.

As for the third *Brown* factor, the deputies' conduct was not particularly flagrant given the circumstances of this case. As noted by the trial court, the prosecution seemed unprepared at the time of the evidentiary hearing on the suppression motion and failed to call the deputies who actually conducted the initial traffic stop. Nevertheless, Deputy Voth testified that they had been informed that defendant was wanted for questioning in a homicide that involved a firearm, and the firearm had not been found. Such information might explain the reasons the deputies drew their weapons when they conducted the traffic stop. Indeed, Deputy Voth explained that he removed the handcuffs from defendant as soon as he conducted the patdown search and ensured that defendant did not possess a weapon. Defendant was advised within minutes that he was not under arrest, the handcuffs were unlocked, and he was removed from the patrol car.

Based on the *Brown* factors, there is sufficient evidence of attenuation such that defendant's subsequent statements to Detective Lackey and Olmos were not the fruits of

the initial unlawful detention. The trial court properly denied defendant's motion to suppress his statements as reflected in the search warrant affidavit.

### **III. Denial of the motion to traverse**

Defendant next contends that, independent of his motion to suppress his statements to the detectives that were used in the search warrant affidavit, the court should have granted his separate motion to traverse and quash the search warrant. Defendant argues the search warrant affidavit contained material misstatements and omitted relevant facts about the homicide investigation and defendant's purported connection to Meas.

#### **A. Motions to traverse**

We begin with the well-settled rules on motions to traverse a search warrant. "There is ... a presumption of validity with respect to the affidavit supporting the search warrant." (*Franks v. Delaware* (1978) 438 U.S. 154, 171 (*Franks*)).

In *Franks*, however, the United States Supreme Court held that "a defendant may challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. When presented with such a challenge, the lower courts must conduct an evidentiary hearing if a defendant makes a substantial showing that: (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to justify a finding of probable cause." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297 (*Bradford*)).

"To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or

otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.” (*Franks, supra*, 438 U.S. at p. 171.)

“At the evidentiary hearing, if the statements are proved by a preponderance of the evidence to be false or reckless, they must be considered excised. If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to that warrant must be suppressed. [Citation.]” (*Bradford, supra*, 15 Cal.4th at p. 1297.)

“[T]wo types of correction are envisioned in *Franks*: (1) material misstatements are stricken and (2) material omissions are added. The aim in either case is not punitive but remedial -- to make the affidavit read as it should have so that the reviewing court can then retest for probable cause support. [Citations.]” (*People v. Costello* (1988) 204 Cal.App.3d 431, 443.)

Defendant bears the burden of showing the allegedly false statements and/or omissions were material to the determination of probable cause. (*Bradford, supra*, 15 Cal.4th at p. 1297.) Materiality is evaluated by the test of *Illinois v. Gates* (1983) 462 U.S. 213, “ ‘which looks to the totality of the circumstances in determining whether a warrant affidavit establishes good cause for a search. [Citation.]’ [Citation.]” (*Bradford, supra*, 15 Cal.4th at p. 1297.)

We will uphold a trial court’s finding as to the falsity or recklessness of an affidavit statement if supported by substantial evidence. (*People v. Costello, supra*, 204 Cal.App.3d at p. 441.) The materiality of any affirmative misrepresentations and/or omissions is a question of law. (*Wood v. Emmerson* (2007) 155 Cal.App.4th 1506, 1524.)

With these standards in mind, we turn to the facts and circumstances of defendant’s motion to traverse the search warrant.

## **B. The search warrant affidavit**

As set forth *ante*, Meas disappeared and her body was found on the morning of October 13, 2008. On the morning of October 15, 2008, Detectives Lackey and Olmos interviewed defendant after he was detained during the traffic stop. Defendant was not arrested at that time.

Later on October 15, 2008, Detective Olmos prepared a six-page affidavit in support of obtaining a search warrant for defendant's house. The affidavit stated that Meas's body had been found on the dirt access road, that she had two gunshots to the head, that she had worked at the Shell store on Airport Drive, and that her house was adjacent to the store.

The affidavit stated that detectives had reviewed the video surveillance tapes at the Shell store, which also showed part of Meas's house, and they saw "a male subject walking in front of Meas'[s] garage" around 2:58 a.m. on October 13, 2008; he walked in front of her garage; and it appeared he walked into her backyard. About 10 minutes later, the male subject "has his arms wrapped around Meas as she is struggling to get away from him." The man "appeared to be about average height and medium build."

The affidavit stated that Meas was getting ready for work and to open the store at 3:00 a.m. Meas's husband was not home and his employer confirmed he was already at his own job when Meas disappeared.

The affidavit gave the following information about a possible suspect named "Jeff."<sup>8</sup>

"We spoke to several employees [at the Shell store] who told us a male subject by the name of 'Jeff' had been harassing Meas for the past several months. Jeff was sending her flowers to her workplace and calling her on

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<sup>8</sup> We are quoting these paragraphs in their entirety because, as we will explain *post*, defendant claims these paragraphs contain material misstatements as to the detectives' investigation about the existence of "Jeff."

her cell phone. It is unknown at this time how Jeff obtained Meas'[s] cell phone number. Jeff was a regular customer of the store and according to [Meas's] co-workers, Jeff was infatuated with Meas. Jeff frequented the store and would solicit Meas for a date, which Meas would decline. Meas received flowers from Log Cabin Florist at her work place. Detectives received invoices from Log Cabin Florist and confirmed that a 'Jeff' had ordered over three hundred dollars in flowers and vases and had them sent to the Shell Gas Station to Meas. Detectives were able to obtain Jeff's cell phone number through these invoices.... These purchases were made over a three month period. According to co-workers, Meas did not ask Jeff for the gifts nor did she solicit him for a date. Co-workers also believe she was not having an extra marital affair with Jeff.

“The most recent visit from Jeff was on 10-12-08 at about 0437 hours. On that date and time, co-workers of Meas told Detectives that Jeff was harassing Meas at the check out counter. The harassment became so overt and aggressive that customers were telling Jeff to leave her alone. Jeff eventually left the store. Meas was continuing to receive phone call[s] from Jeff. It is unknown how often Jeff called Meas. Through video surveillance of the store on 10-12-08, Detectives reviewed the recordings and saw that Jeff had visited the store six times on that particular day between 0437 hours and 0637 hours on 10-12-08. Each time Jeff went into the store, he purchased drinks and stood near the check out counter speaking to Meas for several minutes. Meas was the only employee in the store at the time.”

The affidavit stated that detectives identified defendant as “Jeff,” they showed his photograph to Meas's coworkers, and “[s]everal employees” identified him as the person who Meas knew as Jeff.

“Detectives have been unable to locate [defendant] as of this time. Detectives are conducting constant surveillance on his residence. Since the time of the homicide, [defendant] has not returned home.”

The affidavit stated that defendant's employer reported that defendant arrived at work at 5:00 a.m. on October 13, 2008, but he called into work on October 14, 2008, because “ ‘something came up.’ ” The detectives spoke to defendant's family, who said he had not made contact with them for about 10 days.

“The male subject on the video recording that abducted and possibly murdered Meas has similar physical qualities as [defendant]. [Defendant]

is about 5'8" and about 150-160 lbs. [Defendant] lives in close proximity to Meas. [Defendant] was obsessed with Meas to the point that he visited her frequently at her place of employment and harassed her. [Defendant] bought Meas unsolicited gifts and harassed [her] through her cell phone by calling her frequently. [Defendant] has not been home since the homicide of Meas.... I also believe [defendant] is deliberately avoiding contact with Sheriff's Detectives."

The affidavit stated that detectives had left business cards at defendant's door with messages to contact them. The detectives went to defendant's house on the afternoon of October 14, 2008, where they saw two females arrive in a vehicle. They later learned one of the women was defendant's adult daughter, and she went into the house. The detectives approached the vehicle, but the driver pulled away "in an evasive manner," and defendant's daughter also left the premises.

"Based on the fact that [defendant] has deliberately avoided contact with Sheriff's Detectives, he has not shown up to work by calling in sick, has not returned home since the day of the homicide, and the fact that family members who were previously notified of our attempt to question him are now being evasive with Sheriff's Detective, has led me to believe that [defendant] is highly suspect in this investigation."

The affidavit further stated that detectives obtained a search warrant on October 14, 2008, to locate a triangulation site for defendant's cell phone, and there was a "[p]ing-hit" at the time the car with the two women were at defendant's house. The detectives went to the house of defendant's mother, there were cars in the driveway and lights on, but no one answered the door.

The affidavit then set forth the circumstances of finding defendant and his truck on the morning of October 15, 2008. At 5:30 a.m., deputies were watching defendant's house and saw a white truck parked in the driveway. The truck matched the description of defendant's vehicle. A man walked out of the house, entered the truck, and drove away. The deputies followed the truck, conducted an investigative stop, and confirmed defendant was the driver. Defendant was asked if he would agree to an interview, and he

agreed and “freely and voluntarily” went to the sheriff’s department for the interview.<sup>9</sup> After defendant left the site of the traffic stop, the detectives examined his truck and “saw what appeared to be blood splatter on the front passenger side portion” of the truck.<sup>10</sup> The affidavit summarized defendant’s interview with the detectives, as set forth in section II, *ante*.

The affidavit concluded as follows:

“Based on the aforementioned facts that [defendant] has deliberately avoided contact with Sheriff’s Detectives, he has not shown up to work by calling in sick, has not returned home since the day of the homicide, and the fact that family members who were previously notified of our attempt to question him are now being evasive with Sheriff’s Detectives, has led me to believe that [defendant] is highly suspect in this investigation. I also believe evidence pertinent to this investigation is inside his residence that is going to further assist Detectives in this investigation, since he was seen at his residence after being missing for the last 48 hours [prior] to being stopped and the fact that he possibly went home after the homicide.”

### **C. Search of defendant’s house**

As explained in the factual statement, *ante*, the warrant was issued and defendant’s house was searched pursuant to the warrant on October 15, 2008. The detectives found a blood-stained shirt which contained Meas’s DNA; the matching pearl earring which contained Meas’s DNA; the police scanner defendant bought the day before the homicide; an empty box for a nine-millimeter Glock; and other weapons and ammunition. Defendant’s computer was also seized and numerous search inquires were found about dating Asian and/or Cambodian women.

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<sup>9</sup> As explained in section II, *ante*, the affidavit omitted the precise details about how the traffic stop was performed and defendant was removed from the truck.

<sup>10</sup> As we will explain *post*, the detectives thought there was blood on the truck at the time the affidavit was prepared; tests later clarified the substance was not human blood.

#### **D. Defendant's motion to traverse**

In addition to his motion to suppress, discussed in section II, *ante*, defendant also filed a pretrial motion to traverse and quash the search warrant. Defendant argued that Detective Olmos, the affiant, made “at least twelve material mis-statements of facts [in the affidavit] that are properly characterized as either willfully false or made with reckless disregard for the truth.” Defendant requested the court conduct an evidentiary hearing pursuant to *Franks*, and then strike the alleged misstatements. Defendant argued that once the alleged misstatements were stricken, the affidavit failed to state probable cause to search defendant's house, and the entirety of the evidence seized from defendant's house would have to be suppressed.

Defendant's motion set forth 12 specific areas where the search warrant affidavit allegedly contained material misstatements, and one material omission, to conduct a *Franks* hearing to traverse the affidavit. The court conducted a two-part hearing on the motion, reviewed each of defendant's allegations, and made specific findings as to whether each allegation raised a prima facie case for a *Franks* hearing. The court found some, but not all, of defendant's allegations justified a *Franks* evidentiary hearing.

#### **E. The affidavit's statements about defendant's alleged relationship with Meas**

Defendant's motion to traverse asserted there were four specific areas in the search warrant affidavit which contained material misstatements about the nature of defendant's relationship with Meas:

1. Defendant argued that Detective Olmos, the affiant, falsely claimed the detectives spoke to “ ‘several employees’ ” who said a male named “ ‘Jeff’ ” had harassed Meas for several months, called her cell phone, and asked her for a date. Defendant asserted that Detective Lackey introduced the name “Jeff” into the investigation and no one said that anyone was harassing Meas.

2. The affiant falsely claimed “Jeff” harassed Meas at the store on the day before the homicide, and that customers had to tell him to leave her alone. Defendant argued the statement was a complete lie.
3. The affiant falsely claimed defendant was “obsessed” with Meas, he frequently visited the store and harassed her, and he called her cell phone. Defendant argued there was no evidence that defendant harassed Meas or called her cell phone.
4. The affiant falsely and recklessly claimed “Jeff” solicited Meas for a date and she declined. Defendant argued there was no evidence that happened.

The court held defendant made a prima face case for a *Franks* evidentiary hearing only as to these four alleged material misstatements as to the nature and sources of information about defendant’s relationship with Meas. The court noted the “tenor” of the affidavit was that defendant had or attempted to have some type of relationship with Meas, things did not go as he wanted, and a death resulted.

The court thus conducted a *Franks* evidentiary hearing on the four allegations in defendant’s motion to traverse, as to the affidavit’s description of the nature of defendant’s relationship and conduct with Meas. The court denied defendant’s motion for an evidentiary hearing as to the other allegations of misstatements and omissions.<sup>11</sup>

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<sup>11</sup> Defendant’s motion to traverse also alleged the affidavit contained five additional material misstatements, but the court declined to conduct a hearing on these allegations. These allegations involved the incorrect time stamps on the video surveillance tapes (the court noted that during a previous pretrial hearing, an explanation had been provided about the two-hour differential in the time stamps); the statements that the detectives did not know defendant’s whereabouts even though the affidavit also stated that they had interviewed him the previous day (the court found the entirety of the affidavit clarified that point); whether the detectives prepared a report about their interview with the employer of Meas’s husband, to confirm he was at work when she disappeared (the court found the absence of a report did not mean that the matter was not investigated); the affidavit’s failure to explain the exact nature and circumstances of the traffic stop (the court found it had already ruled on the admissibility of defendant’s statements when it denied his motion to suppress); and why defendant matched the “average” build of the man seen on the videotapes (the court acknowledged that someone may have an “average” build and thus match the suspect depicted on the videotapes).

**F. The *Franks* evidentiary hearing**

Several witnesses testified at the *Franks* evidentiary hearing as to the nature and source of the detectives' information about the existence of "Jeff" and defendant's relationship with Meas, as summarized in the search warrant affidavit.

**Detective Lackey**

Detective Lackey testified that on the morning of the homicide, he was assigned to be the lead detective on the case and did not assign himself to the investigation.<sup>12</sup> Lackey testified about an incident that occurred when he was at the store prior to the homicide: "[A] guy named Jeff" sent flowers to Meas at the store and "they were wondering who it was." Lackey testified the flowers were on the desk, and Meas's

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Defendant's motion also alleged one material omission, based on the affidavit's failure to state that both Detectives Olmos and Lackey allegedly "enjoyed an unusual relationship" with Meas, and they regularly and repeatedly visited her store every day. The court found the nature of the detectives' relationship with Meas was irrelevant to the review of the search warrant affidavit.

The court found defendant failed to provide a sufficient basis for a *Franks* hearing on these other points. Nevertheless, defendant tried to question the detectives on some of these issues. In any event, on appeal, defendant has not challenged the court's decision not to conduct a *Franks* hearing on the other five alleged misstatements and the one omission.

<sup>12</sup> During the *Franks* hearing, Lackey was asked about the nature of his relationship with Meas and other topics, even though the court had limited the subject matter of the *Franks* hearing to the identification of "Jeff." As to his relationship with Meas, Lackey's testimony was consistent with his subsequent trial testimony on the topic: he knew Meas because he regularly went to the Shell store on his morning breaks, it was just three blocks from the sheriff's department, and he used to talk and visit with her. Lackey had diabetes and could not drink sodas, and the Shell store carried iced tea, which he could drink. Lackey also took afternoon breaks at the store, but he usually did not see Meas then. Lackey testified he did not have any romantic interest in Meas.

Lackey also testified the time stamps on the surveillance videotapes were off by two hours. Lackey testified he did not prepare a report about speaking with the employer of Meas's husband to determine his whereabouts.

coworker pointed them out to Lackey and said, “ ‘Oh, look what [she] got.’ ” Lackey testified that Meas “asked me if I knew who Jeff was.”

Lackey testified that after his initial conversation with Meas about the flowers, he “used to tease her about it quite a bit. ‘Have you heard from Jeff lately? Did Jeff send you any more flowers?’ In fact, this Jeff, unidentified Jeff at the time, did, in fact, send her flowers again.”

Lackey testified that after the homicide, he interviewed Melissa Chao about whether Meas was being bothered at the store. Chao said Meas told her that someone at work had bothered her, but Chao did not know that person’s identity. Lackey asked Chao if she knew who Jeff was and reminded Chao that Meas received flowers at work. Chao remembered that Meas received flowers, but she did not have any more information about that person. Chao also said that Meas was concerned about two people who came into the store the day before the homicide.

Lackey testified he did not know Jeff’s full name before the homicide, and developed information about this person during the investigation. On the same day that Lackey spoke to Chao, he determined that defendant sent flowers to Meas on two different occasions. Lackey conceded that Chao never said that Meas was concerned that Jeff sent her flowers.

Lackey testified he provided some of the information which Olmos included in the affidavit, but he did not help Olmos write the affidavit. He assumed Olmos asked him to read it over after he finished it, but he could not specifically remember doing so.

#### **Detective Olmos**

Detective Olmos testified he also knew Meas because he regularly visited the Shell store with Lackey, his partner. Olmos prepared the search warrant affidavit after he reviewed the reports prepared by other investigators and exchanged information with Lackey. Olmos testified that he met with Lackey before he wrote the affidavit, and “we went over what needed to be placed into the affidavit.”

Olmos testified that he spoke to Chao, Meas's coworker.<sup>13</sup> Chao said that Jeff came to the store and talked to Meas. Chao also said that Meas received flowers at the store from Jeff more than once. Chao said that she knew someone as "Jeff," and he would make his purchases and then stare at Meas before leaving. Chao said Jeff frequently came to the store in a red sports car. Chao said that Meas never talked about Jeff or expressed concern about him, and she never said that Jeff frequently called her. Chao believed that Meas was not concerned about Jeff at the time of her death.

Olmos testified that on the day that Meas's body was found, he spoke with Jennifer Ferguson, another Shell store employee. Jennifer said that someone named "Jeff" regularly came into the store, and he drove a red sports car. Jennifer said someone had been calling Meas. Jennifer thought that person was Jeff, but she was not sure. Jennifer also thought Jeff asked Meas for a date at least once, and Meas declined. Olmos explained he did not prepare a report about his conversation with Jennifer because he thought another deputy had already interviewed her. Olmos testified that Jennifer was the only source of his information in the affidavit about Jeff asking Meas for a date.

Olmos was asked if any other employee said that Jeff was "harassing" Meas. Olmos replied: "Well, it depends on what definition of harassing you are looking for. Harass to me was bothering somebody persistently, which was just a synthesized word I used when I had spoken to Lisa and Melissa." Olmos testified that he used the words "harassing" and "obsession" in the affidavit based on Jennifer's information about Jeff. One of the employees, possibly Jennifer, also told Olmos that Jeff harassed Meas the day before the homicide, and the harassment was so severe that other employees intervened.

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<sup>13</sup> Defendant speculates that "Melissa" Chao and "Lisa" Chao are two different people. When Olmos was asked about which employees he interviewed, he testified that he spoke to Jennifer Ferguson and "Melissa and Lisa Chao or Melissa Chao." Olmos also said that he spoke "to Lisa and Melissa." At trial, however, only Melissa Chao testified and there was no evidence about another person.

Olmos thought Jennifer and/or another employee were also the source of his information that defendant harassed her at the store on the day before the homicide, and that customers told him to leave her alone. Olmos had not reviewed the videotapes at the time he spoke with Jennifer. Olmos testified that Lackey reviewed the videotapes and gave him the information which he included in the affidavit, that Jeff repeatedly went to the store on the day before the homicide.

Olmos testified he also spoke to other deputies about their investigation into the homicide, and relied on their information to prepare the affidavit. Deputy Todisco told Olmos that “[h]e found what he believed to be blood or brain matter on the front fender of the white pickup truck that [defendant] was stopped in.” Olmos admitted that after defendant’s house was searched, the substance from his truck was subsequently analyzed, and it was not human.

#### **G. The court’s ruling**

The court denied defendant’s motion to traverse and quash the search warrant. The court found the witnesses were honest and direct, and they were not trying to hide anything. While defendant made a prima facie case to conduct the *Franks* hearing, the court clarified that it did not find the officers engaged in reckless or intentional misconduct in the preparation of the search warrant affidavit.

“I do note, though, that Detective Olmos talked about—I think it was—her name was Jennifer who he did not use her name and he did not write a report on because he thought other deputies had. *And the paragraphs in the affidavit that speak of co-workers talking about this Jeff harassing the victim, that should be stricken. It should be co-worker. I think the evidence is that there was—well, in some instances it’s multiple, but in this one instance when he testified about Jennifer... [¶]...[¶] ... She was the one who made some of these allegations or made some of these statements. But even with those changes in the affidavit, when you read this affidavit as a whole, even with all those complaints that [defense counsel] puts forward, the affidavit—the magistrate still would have signed this affidavit. There is plenty of evidence in this affidavit that the*

magistrate would still—would have signed this search warrant. And I think there is sufficient evidence to uphold that.” (Italics added.)

#### **H. Analysis**

Defendant argues the affidavit contained “fictionalizations and gross exaggerations designed to make [him] look like a dangerous stalker,” particularly as to Olmos’s admission that he characterized defendant’s conduct as “harassment” based on “synthesizing” the evidence he had received. Defendant argues that “such fictionalizations” were not accidental, and the trial court should have stricken the misstatements from the affidavit and retested it for probable cause. We note, however, that the court discounted the affidavit’s description of defendant’s alleged harassment of Meas on the day before the homicide, particularly as to whether other coworkers and/or customers had to intervene. The court instead focused on Jennifer Ferguson’s statements to Olmos about Jeff’s conduct toward Meas, and decided that the affidavit still contained probable cause to search defendant’s house.

In any event, we find the trial court properly denied defendant’s motion to traverse as to the affidavit’s identification of “Jeff,” and the description of the nature of defendant’s relationship and conduct toward Meas. “ ‘[T]he warrant can be upset only if the affidavit fails as a matter of law ... to set forth sufficient competent evidence supportive of the magistrate’s finding of probable cause ...’ ” (*People v. Thuss* (2003) 107 Cal.App.4th 221, 235.) Probable cause to search exists when, based upon the totality of the circumstances described in the affidavit, “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” (*Illinois v. Gates, supra*, 462 U.S. at p. 238; *People v. Farley* (2009) 46 Cal.4th 1053, 1098.) “Probable cause ‘ “means less than evidence which would justify condemnation.... It [describes] circumstances which warrant suspicion.” ’ [Citations.] Probable cause, unlike the fact itself, may be shown by evidence that would not be competent at trial. [Citation.] Accordingly, information and belief alone may support the issuance of search warrants,

which require probable cause. [Citations.]” (*Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 573.)

While the trial court properly found that the affidavit overstated the nature and source of the detectives’ information about Jeff’s conduct toward Meas, the detectives’ testimony at the evidentiary hearing clearly explained the source for their information about Jeff’s activities. Detective Olmos explained that Jennifer Ferguson, Meas’s coworker, was the primary source for the information that Jeff asked Meas for a date. Jennifer thought he regularly called Meas, and he “harassed” her the day before the homicide. The court correctly discounted Olmos’s use of the word “harass,” particularly whether other employees and/or customers had intervened to prevent Jeff’s alleged harassment of Meas on the day before the homicide.

Defendant complains that Detective Lackey introduced Jeff’s name into the investigation, and he reminded Chao that Jeff sent flowers to Meas. Defendant points out that there was no evidence that Meas was concerned or worried about Jeff’s conduct or alleged attention toward her. Nevertheless, defendant never introduced any evidence to undermine the affidavit’s statement that Jeff ordered flowers from Log Cabin Florists for delivery to the Shell station. While Jeff may not have “harassed” Meas on the day before the homicide, defendant also failed to undermine the affidavit’s statement that Jeff walked around and repeatedly entered the store that day. More importantly, defendant failed to undermine the affidavit’s statement that detectives showed defendant’s photograph to Meas’s coworkers and they identified him as Jeff.

Thus, even when the affidavit’s description of defendant’s alleged “harassment” is stricken, it still states probable cause to search defendant’s house: defendant was identified as the “Jeff” who regularly went to the store, he sent expensive flower arrangements to Meas, Jennifer Ferguson said that he asked Meas for a date and she declined, Jennifer knew someone had been calling Meas and thought it was Jeff, and he repeatedly went to the store on the day before the homicide. Moreover, defendant failed

to return to work the day after the homicide, he had not been seen at his house, he failed to respond to the detectives' cards to call them, his adult daughter attempted to evade the deputies when she arrived at defendant's house, defendant's cell phone "pinged" at the time that his daughter was at his house, and defendant appeared to have the same height and build as the man depicted in the videotapes who forcibly removed Meas from her house.<sup>14</sup>

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_  
Poochigian, J.

WE CONCUR:

\_\_\_\_\_  
Dawson, Acting P.J.

\_\_\_\_\_  
Detjen, J.

\_\_\_\_\_  
<sup>14</sup> In section II, we found that defendant's statements to the detectives during the October 15, 2008, interview were sufficiently attenuated from the initial illegal traffic stop and properly relied upon in the search warrant affidavit. We note that defendant's statements during that interview did not add much to the affidavit, since he confirmed that he sent gifts to Meas. However, defendant also said that Meas told him where she lived, said she was single, and she was flirtatious. In any event, we further find that even if defendant's interview with the detectives on October 15, 2008, should have been suppressed as the fruits of the initial unlawful traffic stop, and thus excised from the search warrant affidavit, that the affidavit still contained probable cause to support issuance of the search warrant for defendant's house based on the balance of the factors we have discussed.