SO53228

IN THE

Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

ANDRE STEPHEN ALEXANDER

Defendant and Appellant.

APPEAL FROM A JUDGMENT OF DEATH
SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE CHARLES E. HORAN, JUDGE PRESIDING

LOS ANGELES SUPERIOR COURT NO. BA065313

APPELLANT'S OPENING BRIEF

[Volume 4 of 5; Pages 182-281]

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ARGUMENT

I

APPELLANT'S IDENTIFICATION BY MEANS OF A SINGLE SHOW-UP PHOTO VIOLATED THE DUE PROCESS CLAUSES OF THE UNITED STATES AND THE CALIFORNIA CONSTITUTIONS

A. The Basic Principles

Bulman was handed five photos in a meeting with the prosecutors, Mr. Kuriyama and Ms. Petersen, on the night before he testified. (RT 4851, 4928; *supra*, pp. 98-99.) One photo, Ex. 22, was of Charles Brock. Two photos, Ex.'s 18 and 21, were of Terry Brock and two, Ex.'s 19 and 20, showed appellant (*supra*, pp. 98-99.)

In court, Bulman identified the person shown in Ex. 19 as the person with the shotgun on the passenger side of the Secret Service car and the person in Ex. 20 as the same man, except without a goatee or a moustache. (RT 4861.) Yet, practically in the same breath, Bulman testified that he was unable to identify appellant, as he sat in court, as one of the persons involved in the murder of Julie Cross. (RT 4850.)

In effect, this was a single photo showup. Bulman had identified Terry Brock's photos in an interview with Detective Henry in 1991 (RT 5915-5918; *supra*, pp. 96-97) and had also identified Terry Brock in a lineup in 1980. (RT 4840-4841; *supra*, p. 95.) The prosecutors knew, of course, that Bulman had previously identified Terry Brock in the same or similar picture as Ex. 18 (RT 4849) and that Bulman had failed to identify Charles Brock in a lineup. (RT 7085.) This left Ex.'s 19 and 20, photos of appellant, as the only pictures that Bulman had not previously identified or failed to identify. In other words, as in a single photo showup, the witness

was handed one previously unidentified photo that happened to be a photo of the defendant, i.e., appellant.

This identification procedure was so unfairly suggestive as to violate the due process clauses of the United States (Fourteenth Amendment) and California constitutions (Art. I, sections 7(a) and 15).[86]

The due process clause of the Fourteenth Amendment requires the exclusion of photographic identification that is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (*Simmons v. United States* (1968) 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967.) The same rule obtains in California. (2 Witkin, *California Evidence* (4th ed.), *Witnesses*, section 408.)[87] In this case, the photographic identification procedures employed were so suggestive as to guaranty the result the People sought, i.e., agent Bulman's "identification" of Ex.'s 19 and 20, photos of appellant, as the man with the shotgun on the passenger side of the Secret Service car.

This is not a case where suggestive pre-trial photographic identification led to a misidentification in a later lineup or in court. That was the issue in *Simmons v. United States, supra,* 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967. Nonetheless, the same principles apply. As the

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[86] While the contours of the due process clauses of the California Constitution are not necessarily those of the Fourteenth Amendment (*People v. Ramirez* (1979) 25 Cal.2d 260, 267-268), California courts, in addressing the constitutionality of the identification of suspects by means of photographs, have followed the jurisprudence of the United States Supreme Court on this subject. (E.g., *People v. Contreras* (1993) 17 Cal.App.4th 813, 819-821.)

[87] "Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside only if the photographic identification was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." (2 Witkin, *California Evidence* (4th ed.), section 408, pp. 708-709 [citing, in addition to *Simmons v. United States, supra*, 390 U.S. 377, *inter alia People v. Lawrence* (1971) 4 Cal.3d 273, 275 and *People v. Rist* (1976) 16 Cal.3d 633, 640.)

Supreme Court explained in *Neil v. Biggers* (1972) 409 U.S. 188, 34 L.Ed.2d 401, 93 S.Ct. 375, with the exception of the word "irreparable," this test also applies to an out-of-court-identification. "It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S. at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable,' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." (*Neil v. Biggers, supra,* 409 U.S. 188, 198, 34 L.Ed.2d 401, 93 S.Ct. 375.)

In this case, eyewitness Bulman steadfastly refused to identify appellant in court *even after he had stated that Ex.'s 19 and 20 showed the man with the shotgun.* Thus, this case is analogous to an unfair lineup that was "...so arranged as to make the resulting identification virtually inevitable." (*Foster v. California* (1969) 394 U.S. 440, 443, 22 L.Ed.2d 402, 406, 89 S.Ct. 1127, 1128.)

Identification by means of photographs per se is, of course, not proscribed under either federal or California law. Yet it is undeniable that procedures can be employed in photographic identification that are impermissibly suggestive. As the United States Supreme Court has held, that standard for the admission of identification by means of photographs "...is that of fairness as required by the due process clause of the Fourteenth Amendment." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 113, 53 L.Ed. 2d 140, 97 S. Ct. 2243.) To this end, the United States Supreme Court has established criteria for determining whether the identification procedures employed meet the standards of fairness required by the due process clause:

> "We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* [*v. Denno* (1967) 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967] confrontations. The factors to be considered are set out in [*Neil v.*] *Biggers* [(1972) 409 U.S. 188, 34 L.Ed. 2d 401, 93 S. Ct. 375] 409 U.S. at 199-200. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." (*Manson v. Brathwaite, supra,* 432 U.S. 114, 53 L.Ed. 2d 140, 97 S.Ct. 2243.)

These criteria have been adopted as part of California law. (*People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219.)[88]

The fundamental issue is whether the procedures used were so suggestive as to lead to appellant's misidentification.

> "It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster* [*v. California* (1969) 394 U.S. 440]. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process." (*Neil v. Biggers, supra,* 409 U.S. 188, 198, 34 L.Ed.2d 401, 93 S.Ct. 375.)

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[88] "The factors to be considered include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." (*People v. Martinez, supra,* 207 Cal.App.3d 1219 [citing *Manson v. Brathwaite, supra.*])

In this case, the identification of Ex.'s 19 and 20 as the man with the shotgun on the passenger side of the Secret Service vehicle violated due process for the five reasons set forth below.

First, however, appellant points out that the defense vigorously objected to the identification by means of Ex.'s 19 and 20. (Subsection B.) In overruling that objection, the trial court erred in stating that no law governs the use of photographs in identifying suspects. (Subsection B.) As shown in this subsection, there is a substantial body of due process jurisprudence, spearheaded by decisions of the United States Supreme Court, that prohibits identification by means of photographs if the procedures used are so suggestive as to create a substantial likelihood of misidentification.

There are five reasons why the photographic identification in this case violated the due process clause.

First, the likelihood of misidentification was very high because Bulman had very little, if any, opportunity to observe the man on the other side of the Secret Service vehicle. This made the police-sponsored identification so unreliable as to violate the due process clause. (Subsection C.)

Second, this was effectively a single photo showup but there was no exigency that justified this impermissibly suggestive procedure. (Subsection D.)

Third, Bulman's "identification" of Ex.'s 19 and 20 is inherently unreliable since he adamantly refused to identity appellant in person. (Subsection E.)

Fourth, the unnecessary use of a mugshot, Ex. 19, was impermissibly suggestive. (Subsection F.)

Fifth, the totality of the circumstances show that the procedure used was so suggestive as to create a high probability of misidentification. (Subsection G.)

B. The Defense Vigorously Objected To The Identification Procedures And Photographs Used To Identify Appellant By Means Of Exhibits 19 and 20

The People's presentation of evidence that agent Bulman had actually identified appellant as the person with the shotgun on the passenger side of the car caught the defense completely by surprise.

The presentation of evidence commenced on Monday, January 29, 1996. (CT 3674.) *During the evening of the preceding day*, the prosecutors, Mr. Kuriyama and Ms. Petersen, met with agent Bulman and showed him Ex.'s 18, 19, 20, 21, and 22. (RT 4851.) It was then that Bulman identified Ex.'s 19 and 20, which, according to Bulman, showed appellant, the man with the shotgun on the other side of the Secret Service car. (See text, *supra*, pp. 98-99.)

On January 28, 1996, fifteen and a half years had passed since the murder of Julie Cross. Bulman had been through five hypnosis sessions (see *supra,* pp. 18-34), and a considerable number of re-enactments, lineups and interviews. (Text, *supra*, pp. 95-97.) None of these intensive efforts, driven by the understandable desire of the Secret Service of the United States to find the murderer, had even remotely borne fruit. Appellant was first questioned about this murder in 1987 (RT 8233), his parents' house had been searched in connection with the Cross murder in 1990 (RT 5903) and he had been under arrest for this crime since October 1, 1992. (CT 604.) In a lineup conducted on April 19, 1990, Bulman had failed to identify appellant. (RT 4845-4846; *supra*, p. 95.) Now, on *January 28, 1996*, with the trial just about to get under way, agent Bulman was handed

five photos, two of which he had identified five years before as showing Terry Brock (*supra*, p. 95) and two of which showed appellant.

Mr. Klein was obviously aware of the efforts that had been made to identify appellant – or anyone, for that matter – as the man who shot Julie Cross and he knew that all of those efforts had failed. When, on January 29, 1996, Ms. Petersen brought up that she had shown some photographs to agent Bulman the night before (RT 4851), Mr. Klein was completely taken aback. Given what he knew about the failed efforts to get Bulman to identify appellant (or anyone else), Mr. Klein can hardly be blamed for being surprised. He immediately asked for a sidebar, and this request was granted. (RT 4851:25-26.)

After Mr. Klein expressed his surprise, if not confusion (RT 4852:5-9), and Ms. Petersen identified the photographs and after the trial court asked pointedly 'where this was going' (RT 4852-4853), Mr. Klein's confusion quickly jelled into a focused, if understandably angry, objection. "I'm just shocked. I'm shocked. *There has been no identification and now he is going to identify after seeing a picture and I didn't know about it*? It's appalling. [Para.] They asked me to stipulate that these are pictures of the people that are in it without telling me this. [Para.] How can this be a fair trial if this is what happens?" (Italics supplied) (RT 4853.)

After some back-and-forth about whether the defense had copies of these photos (RT 4853-4854), Mr. Klein again objected that he had not been told about the identification, that this was a surprise and that sanctions were warranted. (RT 4855.) He asked for a hearing, again objected and asked the trial court to rule on whether this was "constitutionally fair." (RT 4856.) Since the principle prohibiting suggestive showups is constitutionally grounded, the reference to 'constitutional fairness' was particularly apt.

The trial court stated: "Well, *I don't know of any authority that suggests that at any point defense or prosecution, for that matter, cannot show a photograph to a witness* when they are on the witness stand or if they are in court for the first time." (Italics added) (RT 4856:19-23.) Mr. Klein inquired whether there was a duty on the part of the People to turn over evidence once the evidence became known. The trial court said there was such a duty. (RT 4856-4857.) The court went on to state:

> "If there is an objection to the fact that the witness was shown these photos, *I don't know of any legal authority for such an objection.* I think that anybody is entitled to do that. [Para.] *So if your motion is to preclude them from that, the motion will be denied.* [Para.] If your motion is also to have – give you some period of time to prepare, if you feel it necessary to ask questions, I will consider that once we are done with the direct and let's see what he says about it...If you need time, you will get more time." (Italics added) (RT 4857.)

After the foregoing exchange, the trial court faulted the People for not advising the defense about the identification and that Ms. Petersen ended up by apologizing to Mr. Klein for not "mentioning it" to Mr. Klein. (RT 4858-4859.) "To be honest about it, I [Ms. Petersen] didn't think about it and I should have and I didn't." (RT 4858-4859.) Given that the People had tried and failed for over fifteen years to identify anyone and for eight years had tried to link appellant to the murder and had suddenly "succeeded" just as Bulman was to take the stand, Ms. Petersen's forgetfulness is too studied to be credible.

The People's apologies aside, the realities were that the People had sprung a devastating surprise on the defense *and* that the trial court had brushed aside any attempt by the defense to challenge the identification of Ex.'s 19 and 20. As shown in subsection A of this argument, the trial court was wrong when it stated that there was no "legal authority" that prevented the People from showing photo Exhibits 19 and 20 to Bulman.

C. Bulman's Independent Recollection Of Appellant Is Minimal To Nil. Thus, The Likelihood Of Misidentification Is Very High

The tests for the reliability of identification testimony focus on whether the eyewitness had an opportunity, apart from the police-sponsored identification, to observe the suspect.[89] The facts in this case are that Bulman's opportunities to observe the man with the shotgun on the other side of the Secret Service car were very minimal to nonexistent. For nearly sixteen years, Bulman consistently failed to identify appellant as that man. The lack of opportunity is not a matter of argument: it is demonstrated by Bulman's inability to identify anyone, *including appellant in person*, as the man with the shotgun.

1. Bulman's Opportunities To View The Suspect At The Time Of The Crime Were Minimal To Nonexistent

The People's theory of the case was that the two men who drove by the parked Secret Service vehicle were the two men who assaulted Bulman and Cross. This assumption is not necessarily supported by the facts. If the assumption is incorrect, Bulman's opportunity to observe the men who carried out the assault and murder was limited to the moments of the confrontation between him and the assailants.

The agents arrived at the scene of the stakeout at 7:30 p.m. (RT 4759.) Witnesses were unanimous that the shooting occurred on or shortly after 9:00 p.m. (RT 4969 [Borges]; RT 5015 [Zisko]; RT 5033 [Kerr].) Thus, if the People's theory of the case is correct, the agents were in their car for well over an hour before the car with the two men drove by. Yet,

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[89] "The factors to be considered [in determining whether a single-photo showup is suggestive and unnecessary] include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the

there is nothing in Bulman's testimony to suggest that the agents were in the car for well over an hour before the car with the two men drove by.

However, even assuming that the People's theory is correct and the two men in the car were the assailants, Bulman's opportunity to observe the man who shot Julie Cross was very limited.

Bulman saw the two men in the car for the first time when they drove by the Secret Service car. (Text, *supra,* p. 66.) Aside from them being Blacks, having moustaches, and their headgear (*ibid.*), Bulman appears to have noticed little else about them, which is no wonder since the car drove past the Secret Service car and therefore left very little time for observation.

The next time Bulman saw the man who was on the passenger side of the Secret Service car was when the altercation was already under way and when the man came over to Bulman's side. Bulman testified that he saw this man, but not very clearly because it was pretty dark. (RT 4797.)

The final opportunity that Bulman had to see the man who had been on the passenger side of the car was when Bulman was engaged in a life and death struggle with the man who had come to his side of the car. Bulman tried to keep the man on his side of the car between himself and the man with the shotgun. (Text, *supra*, pp. 72-73.) Thus, quite apart from the fact that during this desperate struggle he hardly had the time or opportunity to observe the man with the shotgun, Bulman's every effort was bent on keeping the man (who had come to his side of the car) between himself and the man with the shotgun. Again, he had no opportunity to observe this man or to note his physical characteristics.

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corrupting effect of the suggestive identification itself." (*People v. Martinez, supra,* 207 Cal.App.3d 1204, 1219.)

2. Bulman's Degree Of Attention To The Man With The Shotgun On The Other Side Of The Car Was Minimal

Bulman's lack of opportunity to observe the man with the shotgun also meant that Bulman's degree of attention to the man with the shotgun on the other side of the car, at least in terms of his observation of the man's physical appearance and characteristics, was minimal.

It could hardly be otherwise. From the first, Bulman was engaged in a desperate struggle with the man on his side of the car. The struggle began while Bulman was still seated in the car and soon continued in a hair-raising wrestling match outside and away from the car. Bulman testified that he actually saw the man with the shotgun when that man had come over to the driver's side and then, according to Bulman, he did not see the man very clearly since it was already dark. (RT 4797.)

3. As Far As Bulman Was Concerned, His Description Of The Man With The Shotgun Did Not Fit Appellant

Given the minimal amount of attention that Bulman could give to the man with the shotgun, it is not surprising that his description of this man was very cursory. He described this man as a Black male, about 5'10", thinner in build than the other man, with a moustache, and wearing a dark knit hat and a dark jacket. (RT 4830.) The only congruence is that appellant is also 5'10" (RT 6941) but this, of course, would be true of many of Black men. It is apparent that the description is cursory and general enough to fit a very large segment of the population.

However, whatever description Bulman gave and/or had in his mind, it did not fit appellant. If the description had fit appellant, Bulman would have identified him in court. But he pointedly refrained from doing so.

4. While The Record Is Silent About How Certain Bulman Was In His Identification Of Ex.'s 19 And 20 Before He Testified, He Was Certain When He Testified That He Could Not Identity Appellant As The Man With The Shotgun

The record appears to be silent on how certain Bulman was the night before his testimony when he identified Ex.'s 19 and 20 as the man with the shotgun. However, the record is very clear that Bulman flatly refused to identify appellant in court as the man with the shotgun. (RT 4850, 4932-4933.)

One would think that, as a matter of law, this would establish that Bulman was never certain about his identification of Ex.'s 19 and 20. It could not be otherwise. If a witness cannot identify a suspect in person, even though the suspect is singled out as the sole defendant sitting in a courtroom, an "identification" of a photograph of that suspect must necessarily be uncertain and very tentative.

5. An Inordinate 15.5 Years Passed Between The Crime And Bulman's "Identification" Of Exhibits 19 And 20

It has been noted that the prompt identification of a suspect close to the time and place of the offense in order to exonerate the innocent and aid in discovering the guilty is a valid reason for a one-person showup. (*People v. Irvin* (1968) 264 Cal.App.2d 747, 759.)

Here, over *fifteen years* passed between the crime and the evening in the prosecutor's office when Bulman "identified" Ex.'s 19 and 20. Not only is that not prompt, but the passage of over fifteen years nullifies any claim that exigent circumstance justified this single-photo showup.

The fact was that the People had failed in their fifteen-year effort to identify the man with the shotgun, and that since 1990 had steadily failed in their effort to have Bulman identify appellant as that man. The "exigency," if it can be called that, was that the People were commencing trial in January 1996 with the knowledge that Bulman would refuse to identify

appellant in court. Thus, the only path open to the People, inappropriate and constitutionally flawed as it was, was to simply hand Bulman photos of appellant and effectively tell him that this was the man with the shotgun.

D. Since There Was No Exigency, The Identification By Means Of A Single Photo Showup Was Impermissibly Suggestive

The "showup" in this case consisted of photos of three men, i.e., Charles Brock, Terry Brock, and appellant. (Text, *supra*, p. 98.) But, as pointed out above at p. 182, this was really a single-photo lineup since the prosecutors knew that Bulman had identified Terry Brock and had failed to identify Charles Brock.

It is also true that the prosecutors took care to include in the "package" of five photos two pictures of Terry Brock, whom Bulman had already linked to the murder. The message was clear: the prosecutors were handing Bulman photos of the second of the two men involved in the Cross murder.

The United States Supreme Court has noted that the practice of showing suspects singly to persons for purposes of identification has been "widely condemned" (*Stovall v. Denno* (1967) 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 87 S. Ct. 1967) because presenting a single photograph increases the danger of misidentification. (*Simmons v. United States, supra,* 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967.)

This Court has followed suit. It declared in *In re Hill* (1969) 71 Cal.2d 997:

> "One of the most condemned pretrial identification procedures is that of showing a suspect alone to witnesses to a crime as was done in Stovall [v. Denno, supra 388 U.S. 293]. 'It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police.' (United States v. Wade, supra, 388 U.S. at p. 234 [18 L.Ed.2d at p. 1161].) We must thus initially determine whether the method used by the police to present petitioners to Spero was unduly suggestive within the rule of

> Stovall keeping in mind the caveat that 'a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, ...' (Stovall v. Denno, supra, 388 U.S. at p. 302 [18 L.Ed.2d at p. 1206]." (*In re Hill, supra,* 71 Cal.2d 997, 1005.)

Over time, the federal courts have arrived at the view that, absent exigent circumstances, such as that the suspect is still at large or the witness is in serious medical condition, identification by means of a single photograph is unnecessarily suggestive. (*United States v. Casscles* (2d Cir. 1973) 489 F.2d 20, 24; *Mysholowsky v. People* (2d Cir. 1976) 535 F.2d 194, 197; *United States v. Bubar* (2d Cir. 1977) 567 F.2d 192, 197; *U.S. v. Concepcion* (2d Cir. 1992) 983 F.2d 369, 377; *United States v. Williams* (U.S.D.C. W.D. N.Y. 1998) 999 F.Supp. 412, 414.) The United States Supreme Court is of the same view; in *Simmons, supra,* it "...emphasized the fact that the perpetrators of a serious felony were still at large and that it was essential for the FBI to determine if the investigation was proceeding on the right track." (*United States v. Washington* (U.S.D.C. D.C. 1968) 292 F.Supp. 284, 288.)

The same is true in California. Although the courts have recognized that "...there is nothing inherently unfair in a single showup," (2 Witkin, *California Evidence* (4th ed.), *Witnesses*, section 405, p. 704 [citing, *inter alia*, *Stovall v. Denno, supra,* 388 U.S. 293], this does not mean that California courts have not recognized that single showups are suggestive. "Undoubtedly, the showing of a single photograph is a suggestive procedure (see *Manson v. Brathwaite* (1977) 432 U.S. 98, 110)," even though in a given case there may not be a substantial likelihood of misidentification. (*In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 [holding that in that single-photo showup case there was no likelihood of misidentification].) (*Accord, In re Hill, supra,* 71 Cal.2d 997, 1004, *People*

v. Hernandez (1988) 204 Cal.App.3d 639, 653; *People v. Pervoe* (1984) 161 Cal.App.3d 342, 358-359.) The law in California, as in the federal courts, is that "[t]he likelihood of prejudice in the one-to-one confrontation is so great that the police should not use it without compelling reason." (2 Witkin, *California Evidence* (4th ed.), *Witnesses,* section 406, p. 705 [citing *In re Hill* (1969) 71 Cal.2d 997, 1005; *People v. Bisogni* (1971) 4 Cal.3d 582, 586; *People v. Martin* (1970) 2 Cal.3d 822, 829].)

There was no exigency or 'compelling reason' in this case. In January 1996, appellant had been in custody for this offense since 1992, and in custody since 1987. The People had years to show Bulman photographs. And if they absolutely had to show him photographs the night before he testified, the People certainly had time to gather other photos so as to avoid a single photo showup. As this Court stated in *People v. Bisogni, supra,* 4 Cal.3d 582, 586, there was "no emergency present" to require a single showup. And, as the Court stated in *In re Hill, supra,* 71 Cal.2d 997, 1005, it "would not have been a hardship" for the People to assemble some additional photographs that did not show Terry Brock or appellant.

In truth, the only "exigency," if one can call it that, is that the People were commencing trial and were not able to link appellant to the murder through Bulman's testimony – or by anyone else's testimony,[90] or by physical evidence. The way the People dealt with this "exigency" was to show Bulman photos of appellant under circumstances that made it crystal clear what the two prosecutors wanted Bulman to do. He did as he was expected to do but drew the line at identifying appellant in person in court.

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[90] Wayne Dahler drove by the scene and saw figures outside the Secret Service car but could not identify anyone. (RT 4954, 4958.) Neighbors Zisko and Kerr, who came upon the scene right after the shooting, could not identify the two men who were running away. (Text, pp. 82-85.)

While agent Bulman may have been satisfied with this uneasy compromise, this Court cannot be.

E. Bulman's "Identification" Of Exhibits 19 and 20 Was Inherently Unreliable In Light Of His Failure To Identify Appellant In Person

This case is unusual in that the *only* identification of appellant by the eye-witness, agent Bulman, was when Bulman testified that Ex.'s 19 and 20 showed the person with the shotgun on the passenger's side of the car. (RT 4861; text, *supra*, p. 98.) Ex. 19 is a booking photo of appellant and Ex. 20 is his driver's license photo. (RT 4852.) Unlike other typical cases, such as *Simmons v. United States, supra*,[91] the identification by means of the photograph was *not* followed up by an identification in a lineup or in the courtroom. The contrary was true. Agent Bulman was unable to identify appellant either in a lineup or in the courtroom. Given the pressure put on Bulman by the Secret Service to bring this case to a close by identifying the man or men who murdered Julie Cross (RT 2283, 2285), this is remarkable.

In the lineup on April 19, 1990, appellant was No. 3. Yet Bulman picked No. 6 as looking like the man who was on the driver's side of the car. (RT 4845-4846.) At trial, Bulman squarely admitted that he could not identify appellant, sitting in court, as one of the people involved in the murder of Julie Cross. (RT 4850.) However, practically in the same breath, Bulman testified that Ex. 19, appellant's booking photo, showed the man with the shotgun on the passenger side of the vehicle. (RT 4861.)

The startling nature of this "identification" was underlined on cross-examination. Under questioning by defense counsel, Bulman stated that the first time he saw appellant in person was when he saw appellant sitting in court in 1993 [at the preliminary hearing] (RT 4932:25-28); that he came

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[91] In *Simmons v. United States, supra,* 390 U.S. 377, 380-381, 19 L.Ed.2d 1247, 88 S.Ct. 967, the suspect was first identified from snapshots by five employees of the victimized bank and then at trial by the same five employees.

to court a number of times in November 1995; that he saw appellant seated at counsel table and had a number of opportunities to look at appellant. Defense counsel asked: "And today [January 30, 1996] sitting here today, you can't say Mr. Alexander was one of the two perpetrators of that crime, can you?" And Bulman answered, "No, I cannot." (RT 4933.)

Bulman was not a lay witness. Bulman was a Secret Service agent, as well as a veteran police officer with ten years of police experience before he joined the Secret Service. (RT 7906.) He was trained, experienced and seasoned in observing people and noting their physical characteristics. Yet he flatly refused to identify appellant as one of the two people involved in the murder of Julie Cross.

If, as the United States Supreme Court has held, "reliability is the linchpin in determining the admissibility of identification testimony" (*Manson v. Brathwaite, supra,* 432 U.S. 98, 114, 53 L.Ed. 2d 140, 97 S. Ct. 2243), the linchpin in this case is in a truly harrowing condition. A photo identification cannot be said to be reliable when, as here, a trained and expert police officer declines to identify the suspect for a period of nearly sixteen years, including during the trial, and yet "identifies" that suspect's picture that has been thrust upon him (alongside photos of Terry Brock, whom Bulman had identified as one of the two men) on the eve of his trial testimony in the privacy of the prosecutor's office.

It has been held that an extrajudicial identification that cannot be confirmed by an identification at trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime. (*People v. Carter* (1975) 46 Cal.App.3d 260, 266.)

Bulman's flat refusal to identify appellant in person at the very moment when he "identified" his photo is a paradigm of unreliable identification. After all, it was appellant who was on trial, and it was appellant's person whom Bulman refused to identify.

Handing Bulman appellant's photo, along with Terry Brock's, whom Bulman had already identified as the man on his side of the Secret Service car, literally on the eve of Bulman's testimony, could certainly leave no doubt in Bulman's mind what he was expected to say. After all the pressure that had been put on Bulman over the years (RT 2259-2260), and given his own feelings of guilt over Julie Cross's death (RT 7908), there was every reason for Bulman to finally give the prosecution what they wanted and needed – he "identified" Ex.'s 19 and 20 as the man with the shotgun. The fact that he refused to identify appellant in court shows that his "identification" on the night before his testimony was a compromise with his own conscience. It was a compromise, but it was not the truth.

F. It Was Suggestive And Improper To Use A Mugshot In This Single Photo Showup

Ex. 19 was a booking photo of appellant. (RT 4852.)

Although in California there is nothing wrong with showing a witness mugshots (2 Witkin, *California Evidence* (4th ed.), *Witnesses*, section 411), nationally the courts are divided on the question whether it is proper to identify a suspect with a "mugshot" that clearly identifies him or her as a criminal or at least a suspected criminal. (39 ALR3d 1000, *Photographic Identification – Suggestiveness*, *supra*, section 4, pp. 1015-1016 [noting one California case to the contrary, *People v. Blackburn* (1968) 260 Cal.App.2d 35] and see same at 2002 Supp., pp. 214-220.) This annotation notes that there is authority for the view that, under some circumstances, the use of mugshots may make the photographic identification procedure suggestive and thereby justify exclusion of evidence of the identification. (39 ALR3d 1016.)

The split in the authorities is very likely caused by the circumstance that each case must be considered in terms of its own facts. (*People v. Contreras, supra,* 17 Cal.App.4th 813, 821, citing *Simmons v. United States,*

supra, 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967.) What may be suggestive in one setting may not be suggestive in another.

In this case, use of the mugshots was very suggestive. Exhibits 19 and 20 were bracketed for Bulman by the circumstance that he had already identified Exhibits 18 and 21 as showing Terry Brock. Exhibit 19 showed appellant as at least under arrest, thus suspected of a crime. Since there were, according to Bulman, two assailants, and one of them was Terry Brock, it was but a small and easy step to "identify" this "criminal" as the second assailant.

It is also true that Ex. 19 was unnecessary since Ex. 20 was a driver's license photo that was roughly contemporaneous (1978 [RT 4852]) with the murder of Julie Cross. Thus, Ex. 19 was used to underline the circumstance that appellant was a "criminal" with a record, which eased Bulman's pains in "identifying" appellant.

It was highly inappropriate to use a mugshot. However, what is most important is the point next discussed: that the photographic identification fails to meet the criteria established by the courts that determine whether the identification give rise to a substantial likelihood of irreparable misidentification.

G. The Totality Of The Circumstances Show That The Procedure Used Was So Suggestive As To Give Rise To A Substantial Likelihood Of Misidentification

On appeal, the Court will consider the "...totality of the circumstances to determine whether the identification procedure was unconstitutionally suggestive." (*People v. Contreras, supra,* 17 Cal.App.4th 813, 819.) The circumstances under which Bulman "identified" Ex.'s 19 and 20 rendered the identification impermissibly suggestive and created a very substantial likelihood of misidentification. These were the circumstances:

1. It was a single-photo showup. (Subsection D, *supra.*)

2. One of the two photos of appellant was a mugshot. (Subsection F, *supra.*)

3. Bulman had already identified Ex.'s 18 and 21, *contemporaneously shown to him with Ex.'s 19 and 20*, as the man on his side of the Secret Service car. This was unnecessarily suggestive. (Subsection E, *supra.*)

4. Bulman had had a very poor opportunity to observe the man with the shotgun. (Subsection C, *supra.*)

5. Over fifteen years had passed. (Subsection G, *supra.*)

6. There was no emergency. (Subsection D, *supra.*)

7. Bulman had steadfastly declined to identify appellant as the man with the shotgun. (Subsection E, *supra.*)

8. The prosecutors certainly could have added other photos to the five they showed Bulman. (Subsection D, *supra.*)

A comparison of this case with other cases shows that circumstances of the identification in the instant case were very suggestive and highly likely to lead to misidentification.

In *In re Hill, supra,* 71 Cal.2d 997, 1002-1003, petitioners had robbed a liquor store. The eyewitness and victim of the robbery, store employee Spero, saw petitioners as they came into the store and asked for merchandise. Spero attempted to service their request but was confronted by one of the petitioners with a drawn gun and told that it was a holdup. Spero was successively struck on the head and shot in the leg; he crawled away to a corner of the store, where he observed one of the petitioners take money out of the cash register. When asked how much time he had to observe before he was struck on the head, Spero said that it was long enough to recognize one of the petitioners. Thereafter, Spero observed the petitioners for about five minutes before they left the store.

On cross-examination by defense counsel it was brought out that on October 2, 1964, the day of petitioners' preliminary hearing, Spero was requested by a police officer to come to the courthouse to identify someone. When Spero reached the courthouse the police informed him that they wanted him to see if he could identify the parties who robbed the liquor store and assaulted him. He was then taken to a holding cell behind the courtroom, of which petitioners were the sole occupants. When asked by the police if he could identify them Spero indicated that they were the men who robbed and assaulted him. (71 Cal.2d at 1003.)

This Court held:

> "The pretrial identification of petitioners by Spero was 'at variance with the time honored method universally recognized by law enforcement persons, which permits a complainant to select, from among several persons one about whom he is certain.' (United States v. Gilmore (7th Cir. 1968) 398 F.2d 679, 682-683.) Under the totality of the circumstances we think that the identification procedure was so unnecessarily suggestive to Spero that it deprived petitioners of due process of law. Spero was a witness who was robbed, battered and shot by his assailants. Two and one-half weeks later the police requested him to come to the courthouse to see if he could identify the men who robbed and assaulted him. He was taken to a holding cell behind the courtroom which contained only [the two] petitioners and he was there asked by the police if he could identify his assailants. This isolation method of identification is the type which was criticized by the above-cited authorities and does not differ in any material respect from bringing petitioners to Spero while handcuffed to police. The element of suggestion inherent in this procedure is not even subtle. The police, by showing petitioners to Spero while alone in a jail cell, '[i]n effect ... said to the witness, "This is the man." ' [] (Foster v. California (1969) 394 U.S. 440, 443.)." (72 Cal.2d at 1004-1005.)

The very same can be said of this case. Bulman was about to take the stand in a trial for which he had been waiting for nearly sixteen years. He

had been unable to identify appellant as one of the perpetrators. However, he had identified Terry Brock, and photos of Terry Brock, as the man on his side of the car. He was now handed two photos of appellant by the prosecutors who were about to take the case to trial. No one, much less Bulman after all these years, could have missed this cue. This was "not even subtle." The prosecutors could not have been more direct in telling Bulman "this is the man."

It is also true that eyewitness Spero in *Hill* had a genuine opportunity to observe the petitioners and actually availed himself of that opportunity. He observed the petitioners as they came into the store, asked for merchandise and assaulted him, and for an additional five minutes as they cleaned out the cash register. In this case, Bulman did not even have the opportunity to observe the man with the shotgun – in fact, he testified that he could not see him clearly in the dark for the few moments that the man was on his side of the car. (RT 4797.) Yet, despite Spero's independent observation of the petitioners, this Court in *Hill* found the one-on-one confrontation to be impermissibly suggestive. If this Court remains true to its decision in *In re Hill*, it cannot do anything other than hold that the "identification" of Ex.'s 19 and 20 was impermissibly suggestive and a violation of due process.

In *In re Cindy E.* (1978) 83 Cal.App.3d 393, 399-400, the minor, appellant, approached four girls while the girls were leaving a grocery store. Appellant spoke to the girls, one of whom had a sweatshirt tied around her waist with her mother's wallet in it. Appellant said that the girls owed her brother some money, and a conversation ensued that ended when the minor ripped the sweatshirt away from one of the girls and rode off on her bicycle.

One of the girls identified the minor from "among the many in the Rancho School Year Book." The victims were able to view appellant

during the altercation outside the grocery store while they were engaged in a tense conversation with her. It was broad daylight, the conversation lasted three to five minutes; it ended in a struggle at close quarters over the sweatshirt. (83 Cal.App.3d 402.)

Several hours prior to the jurisdictional hearing, the deputy district attorney interviewed the girls and showed them a single photograph of the minor, whom the girls identified. (83 Cal.App.3d 401.)

The Court of Appeal held that "[u]ndoubtedly the showing of a single photograph is a suggestive procedure" but concluded that under the totality of the circumstances, including the reliability of the identification, there was no substantial likelihood of misidentification. (83 Cal.App.3d at 402.)

The differences between *In re Cindy E.* and this case are palpable. Unlike *Cindy E.*, in this case Bulman never identified appellant prior to the suggestive single-photo showup. In fact, when presented with appellant in a lineup in 1990, he failed to identify him. Moreover, he failed to identify appellant in court during the trial. Furthermore, unlike in *Cindy E.*, Bulman never had an adequate opportunity to observe the man on the passenger side of the car. In fact, Bulman testified that he saw this man when the man came over to his side of the car but not very clearly and that it was pretty dark. (RT 4797.) In *Cindy E.*, it was broad daylight and the girls were engaged in a "tense conversation" with the minor for three to five minutes.

Nor were there highly suggestive features to the single photo showup in Cindy E., as there were in this case. Appellant's photos, one of which was unnecessarily and suggestively a mugshot, were handed to Bulman along with Terry Brock's, whom Bulman had already identified as the man on his side of the car. Bulman could hardly fail to get the message.

People v. Contreras (1993) 17 Cal.App.4th 813, 817 is another case that illustrates, by comparison, the suggestive nature of the single photo

showup in this case. In *Contreras*, the victim-eyewitness, Lopez, at first refused, in two photographic lineups, to identify appellant as one of two assailants. In a further lineup, and after he was told that two suspects were in custody, he identified the appellant's cohort, Casares, but not appellant. The police suspected that Lopez was not being truthful when he refused to identify appellant. Lopez was shown a single photo of appellant two days before the preliminary hearing, but he again refused to identify appellant. Lopez finally identified appellant in the courtroom while appellant was seated at counsel table next to Casares.

The Court of Appeal held:

> "Although the trial court did not make an express finding on whether the pretrial photographic procedures were suggestive, it is clear from the record that they were. After Lopez had failed to identify appellant from the photo lineup, the deputy district attorney showed him a single photo of Contreras two days before the preliminary hearing and asked if Lopez could identify him as his assailant. Lopez had been told there were two individuals in custody and knew Casares was one of them-he knew the police wanted Lopez to identify the other. The picture was a clear photo of appellant. The procedure could only suggest to Lopez that the police believed Contreras to be the other assailant." (*People v. Contreras, supra,* 17 Cal.App.4th at 820.)

The procedure employed in the case at bar was the same. As in *Casares*, the prosecutors here left no doubt in the witness's mind what they expected Bulman to do. Just as in *Casares*, they handed the eyewitness a photo under circumstances that made it clear they expected him to identify appellant's photo as the man on the other side of the Secret Service car.

In *Casares*, the ultimate result was that the trial court concluded that the in-court identification did not result from the photographic procedures and that Lopez was lying when he identified appellant in court. (17 Cal.App.4th at 822-823.) The Court of Appeal held that it was not error to

submit the issue of appellant's identification to the jury, which became a question of the credibility of the witness. (17 Cal.App.4th 823-824.)

Notwithstanding the ultimate outcome in *Casares*, the appellate court's opinion supports the conclusion that the two prosecutors in this case used highly suggestive procedures to obtain the desired "identification" by Bulman.

United States v. Washington (U.S.D.C.D.C. 1968) 292 F. Supp. 284, a case where the court suppressed identification evidence as a violation of due process, has several features that are very like those found in the case at bar. Four men conducted a daylight robbery of a jewelry story in the District of Columbia on October 4, 1966. In addition to the store manager, O'Connell, two employees, Potter and Stein, were at work in the store. There was a series of short confrontations in the store when one defendant, Walter McCollough, held the manager at gun point. Another defendant, Washington, did the same with Stein and the third defendant, David McCollough, stood as a lookout. When shown photographs of suspects shortly after the robbery, the victims were unable to identify anyone. (292 F.Supp. at 285.)

Three of the defendants were taken into custody in November 1966.. O'Connell was shown only photographs of the four suspects (292 F.Supp 288 at fn. 26) on December 1, 1966. (292 F.Supp. at 285-286.) On December 3, 1966, O'Connell identified James McCollough in a cell with some other men. There was some evidence that McCollough had been told to stand up. On December 8, 1966, Mr. O'Connell identified Washington in the hallway and also in the courtroom. Mrs. Potter identified Walter McCollough and Washington in the courtroom while the defendants were seated at counsel table. Finally, at a conference before the hearing on the suppression motion, Mrs. Potter and Mr. O'Connell had leafed through

photographs of the defendants that had been mounted on white paper with the defendants' name printed on the paper. (292 F.Supp. at 286.)

As in the case at bar, the suspects in *Washington* were in custody when these suggestive procedures were employed. The District Court, noting that exigent circumstances sometimes justified identification procedures, held that the "necessity factor was therefore nil," in light of the fact that the suspects were in custody. (292 F.Supp. at 288.) The same can be said of the case at bar.

Next, the District Court noted that the photos were shown approximately two months after the robbery, "when memories would obviously have faded." (292 F.Supp. at 288.) Not only had over *fifteen years* elapsed in this case, it was a demonstrated fact that Bulman's memory of the man with the shotgun was practically nil *and* that he refused to identify appellant in person. Whatever memory Bulman had of the perpetrators, it simply did not include appellant for he never identified appellant in person, beginning with the first occasion when he saw appellant in a lineup in 1990. (RT 4845-4846.) It remained for the prosecutors to create a setting in which the "identification" was a virtual certainty – as impermissibly suggestive as those circumstances were in creating an extremely high probability of misidentification.

The District Court also referred to the circumstance that the four photos that had been shown were mug shots as one more factor that made the identification impermissibly suggestive. (292 F.Supp. at 288.) The same is true of this case, where the prosecutors showed a mug shot, even though they had a driver's license photo of appellant.

The District Court concluded, "In sharp contrast to *Simmons* [*v. United States, supra,* 390 U.S. 377], therefore, which represented a case involving a high degree of necessity for the photographic identification, and

a low level of suggestivity, the present case involves no necessity whatsoever and quite a high level of suggestivity."

Precisely the same is true of the case at bar. The night before Bulman took the stand, appellant had been custody for approximately nine years, he had been a suspect in this case for nearly that long, if not longer, and had been in custody for this crime since October 1, 1992. (CT 604.) The police and the Secret Service had investigated the murder for nearly sixteen years. Yet, the prosecutors handed appellant's photos to Bulman under circumstances that made it inevitable that Bulman would say what was expected, i.e., that these photos showed the other man, not yet identified, on the passenger side of the Secret Service car with the shotgun. This was truly a case that involved "no necessity whatsoever and quite a high level of suggestivity." It was also utterly unfair and therefore a violation of the due process clause. (*Manson v. Brathwaite, supra,* 432 U.S. 98, 113, 53 L.Ed. 2d 140, 97 S. Ct. 2243 [The test for identification by means of photographs "...is that of fairness as required by the due process clause of the Fourteenth Amendment"].)

The District Court in *Washington* concluded that a "serious violation of due process" had taken place and that the procedures employed and the attendant circumstances cast serious doubt on the ability of the witnesses to independently recollect the identification of the suspects. (292 F.Supp. 289.) The District Court suppressed the identification testimony. (292 F.Supp. 288)

Both federal and California precedents show that the totality of the circumstances that led to the "identification" of Ex.'s 19 and 20 were impermissibly suggestive, highly likely to lead to a misidentification and therefore a violation of the due process clauses of the United States and California Constitutions.

H. Bulman's "Identification" Of Ex.'s 19 And 20 Was Highly Prejudicial To Appellant

Bulman's "identification" of Ex.'s 19 and 20 was a seriously prejudicial blow to the defense. Absent the "identification" of Ex.'s 19 and 20, no one, *including Bulman*, had identified appellant as one of the two perpetrators.

Other than Ex.'s 19 and 20, the evidence that links appellant to the murder was very weak. This is shown in detail in Argument XXII, and that argument is incorporated here by reference.

The error in the admission of this evidence was prejudicial under both California and federal law.

Given the weakness of the People's evidence linking appellant to the Cross murder, Bulman's "identification" of Ex.'s 19 and 20 was the basis upon which appellant's conviction rests. These two Exhibits lend substance to the otherwise implausible stories spun by Jessica Brock, and they lend some substance, however ephemeral, to the vague hints of culpability supplied by the jacket and the eyeglasses. Absent Bulman's testimony about Ex.'s 19 and 20, it is reasonably probable that the jury would have exonerated appellant. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)

For the same reason, the violation of the due process clause brought about by the admission of Bulman's testimony about Ex.'s 19 and 20 was not harmless. Surely, no court could declare that it was harmless beyond a reasonable doubt. (*Chapman v. Connecticut* (1963) 386 U.S. 18, 17 L.Ed. 2d 705, 710, 87 S.Ct. 824, 828.) It was prejudicial because without it, appellant would not have been convicted of the murder of Julie Cross.

II

APPELLANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL GUARANTEED BY THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

A. Introduction

Although an accused, even in a capital case, has no constitutional right to the appointment of an attorney of his or her choice (*People v. Chessman* (1959) 52 Cal.2d 467, 491; 5 Witkin and Epstein, *California Criminal Law* (4th ed.), *Criminal Trial*, section 159, p. 250), objective considerations may justify the appointment of the requested attorney. If the appointment of the requested attorney is justified, it is an abuse of discretion not to appoint the attorney. (*Harris v. Superior Court* (1977) 19 Cal.3d 786, 799.)

As the record amply confirms (see subsection B below), appellant repeatedly sought the appointment of attorney Kopple to represent him after his arraignment. Appellant's efforts to have Ms. Kopple appointed to represent him were unsuccessful but they were determined. Appellant took his case for the appointment of attorney Kopple as high as this Court, which granted review and remanded the matter to the Court of Appeal. (CT 1045.) Unfortunately, that court concluded that Judge Ito did not abuse his discretion when he refused to appoint attorney Kopple to represent appellant after his arraignment. (*Alexander v. Superior Court* (1994) Cal. App.4th 901, 918-919.)

Generally, a prior appellate decision is "law of the case" in a renewed appeal before the Court of Appeal and the Supreme Court. (9 Witkin, *California Procedure* (4th ed.), *Appeal*, section 896, p. 931.)

However, the doctrine of the law of case is not absolute. The modern view is that it should not be adhered to "...when the application of it results in a manifestly unjust decision...[A] court is not absolutely precluded by

the law of the case from reconsidering questions decided upon a former appeal. Procedure and not jurisdiction is involved. Where there are *exceptional circumstances*, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice may and should decide the case without regard to what has gone before." (Italics added) (*England v. Hospital of God Samaritan* (1939) 14 Cal.2d 791, 795; *accord, In re Saldana* (1997) 57 Cal.App.4th 620, 625.)

The doctrine of the law of the case should not be applied in this case. There are exceptional circumstances here that call for a suspension of this rule of practice. *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901 did not take into account important facts and considerations that called for the appointment of attorney Kopple to represent appellant. The Court of Appeal's failure to address these facts and considerations render the resulting decision in *Alexander* "a manifestly unjust decision," to use the phrase employed in *England v. Hospital of God Samaritan, supra,* 14 Cal.2d at 795.

After reviewing the history of Ms. Kopple's involvement in appellant's case in subsection B below, appellant points out the exceptional facts and circumstances that the Court of Appeal failed to consider, and establishes that it was an abuse of discretion not to appoint Ms. Kopple to represent appellant after his arraignment. (Subsection C, *infra.*) In subsections D and E below appellant shows that he was prejudiced by the court's failure to appoint attorney Kopple after his arraignment and that this failure constitutes reversible error.

B. The Procedural History of Appellant's Attempts to Secure the Services of Attorney Kopple and his Efforts to Have Attorney Watson Relieved

1. Ms. Kopple as Advisory Counsel (October 1, 1992-July 13, 1993) and as Appellant's Counsel (July-August 1993)

Appellant was given leave to represent himself on the day he was remanded into custody on the charge of the murder of Julie Cross. (CT 604-606.) The same day, October 1, 1992, attorney Kopple was appointed to serve as his advisory counsel. (CT 636.)

On March 10, 1993,[92] Ms. Kopple presented to the court a substitution of attorney form naming Ms. Kopple as his attorney. (CT 2-3.)[93] Commissioner Ladner stated that it would make sense to appoint Ms. Kopple because she knew the case, but that the public defender and Alternate Defense Counsel would first have to turn down the case and then it would go either to a bar panel or to an attorney on the Central District Death Penalty Panel. (CT 3.) Ms. Kopple withdrew her request to be appointed as appellant's counsel and stated that she would stay on as advisory counsel. (CT 3; CT 660.)

On July 7, 1993, Ms. Kopple appeared in Division 33, Judge Waters presiding, appellant not being present, and indicated that appellant would be making a motion to have Ms. Kopple appointed as his lead counsel. (CT 18.) Ms. Kopple stated that the Public Defender and Alternate Defense Counsel both had declared a conflict. (CT 19.) She stated that she had been

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[92] The preliminary hearing took place in July 1993. (CT 584.)

[93] Between October 1, 1992 and March 10, 1993, Ms. Kopple had expended considerable time and effort on the case. Ms. Kopple's efforts in the case prior to the preliminary hearing are reflected in her invoices for services rendered. (CT 639-642 [55 hours 10/9/92-11/10/92]; CT 647- 649 [61.4 hours 11/11/92-12/09/92]; CT 600-601 [85 hours 12/01/92-12/30/92]; CT 730-732 [73 hours 2/08/93-2/27/93].

for many years a "grade four" and was on the death penalty list of qualified lawyers. (CT 20.)

Judge Waters remarked that there had been a "hullabaloo" recently about Ms. Kopple being appointed as counsel (CT 20) but that the court recognized her as a "great competent defense attorney." (CT 21.) Ms. Kopple stated that it was appellant's "plan and request" that she be appointed as his lead counsel. (CT 21.)

On July 13, 1993, appellant withdrew his request to represent himself and requested that the court appoint Ms. Kopple as his counsel. (CT 40-41.)[94] Judge Waters granted the request and appointed Ms. Kopple to act as appellant's counsel. (CT 41.)

The preliminary hearing commenced on July 13, 1993 (CT 36) and concluded on July 19, 1993. (CT 584.) One of the important results of the preliminary hearing attributable to Ms. Kopple was police artist Ponce's testimony that the originals of Exhibits 26 and 27, the composite drawings, were altered under hypnosis (CT 432), and that there were modifications made to the original composites *during* the hypnosis session. (CT 439.) Unfortunately, Ms. Kopple's successors as appellant's counsel, attorneys Watson and Klein, were never able (or willing) to pursue this important lead that should have led to the barring of agent Bulman's testimony as impermissibly tainted by hypnosis.

Judge Waters concluded that Ms. Kopple's performance as appellant's counsel during the preliminary hearing was very impressive. At the conclusion of the preliminary hearing, Judge Waters stated that she was "very, very impressed" by the performance of both counsel during the preliminary hearing. (CT 589.) On July 26, 1993, Judge Waters wrote

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[94] The motion appears at CT 751-764 and relies, among other authorities, on *People v. Harris, supra,* 19 Cal.3d 786, 799 [under the facts of the case,

Judge Cecil Mills, then presiding in Department 100, that Judge Waters had been "...thoroughly impressed with the professional manner in which this matter was handled by her [Ms. Kopple]." (CT 868.) Judge Waters went on to detail her praise of Ms. Kopple.[95]

2. Appellant's Efforts To Have Attorney Kopple Appointed and To Have Attorney Watson Relieved (August 2, 1993 – March 30, 1994)

Appellant entered a plea of not guilty on August 2, 1993 before Judge Ito in Department 100. Ms. Kopple represented appellant during the entry of the plea. (RT 2-3; CT 879.) The case was then transferred to Department 108, Judge Horan, presiding. However, Judge Horan sent the case back to Department 100 after noting that Ms. Kopple had been appointed by the Municipal Court, and not the Superior Court, that he was "not in a position to appoint counsel to cases," and that Ms. Kopple was "not on the list." (RT 5-6; CT 880.)

Back in Department 100, Ms. Kopple stated that the court did not have the legal right to remove her from the case. (RT 107-108.)[96] Ms. Kopple filed a motion in which she objected to her removal. (Clerk's Transcript Supplemental Three 38-52.) Judge Ito trailed the matter to the next day. (RT 108.)

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it was an abuse of discretion not to appoint counsel who had previously represented defendants].

[95] "Ms. Kopple, it was apparent based on her knowledgeable and effective cross-examination of the witnesses, had thoroughly investigated the matter, read all the discovery, and researched the points of law that pertained to this case. Her courtroom decorum was excellent, her cross-examination of the witnesses was thorough and to the point. She knew exactly where she was headed in her examination. [Para.]...She is a true professional, an excellent criminal defense attorney, and it was my pleasure to have had Ms. Kopple as well as Mr. Conn [deputy district attorney] in my court." (CT 868.)

[96] Judge Ito stated that when the case was before him earlier that day, he did not realize that Ms. Kopple was appointed counsel. (RT 106.)

Judge Ito held a hearing on August 3, 1993. (RT A-2 – A-31; CT 882.) Present were appellant and attorneys Kopple and Watson. Judge Ito heard argument from Ms. Kopple why she should not be removed from the case, and from appellant to the same effect. (RT 116-139.)

During this hearing, appellant made it clear that his reasons for asking for the appointment of attorney Kopple were specific and based on his experiences with counsel appointed to represent him in the triple murder case. Appellant related that he had been continuously assured by his appointed counsel in the triple murder case that he had a constitutional right to take the stand. (RT 117-118.) However, when he told counsel that he wanted to take the stand, counsel refused to do so and threatened to abandon him in the middle of the trial if he continued to insist on testifying. (RT 118.) Appellant had a constitutional right to testify and that right had been violated. Appellant pointed out that when the court was under the impression, on the previous day, that attorney Kopple had been retained to represent appellant, the court had no problem with Ms. Kopple. Yet, now that it was learned that attorney Kopple had represented appellant as appointed counsel, the court declined to continue the appointment. (RT 118-119.) This was not fair. Appellant had trust and confidence in attorney Kopple and he wanted her as his attorney. (RT 118.)

At the conclusion of the hearing, Judge Ito appointed Ms. Watson to evaluate the case, with the notation that she would be appointed as appellant's counsel if Ms. Kopple's motion was denied. (CT 882.) Judge Ito took Ms. Kopple's motion not to be removed under submission. (RT A-31.)

By a minute order dated August 13, 1993, Judge Ito confirmed Ms. Watson's appointment and denied Ms. Kopple's motion not to be removed from the case. (CT 886-889.) Ms. Kopple was relieved as counsel of record on August 16, 1993. (CT 889.)

A petition for a writ of mandate seeking the appointment of Ms. Kopple as appellant's counsel was filed in the Court of Appeal on August 17, 1993. (CT 917.) The petition was denied on September 7, 1993. (CT 917-918.)

On August 18, 1993, the court continued the matter in order to give Ms. Watson time to evaluate the case. (RT 251.) Appellant personally objected to Ms. Watson representing him and requested that Ms. Kopple be reinstated. (RT 247-250.)

The matter was continued on September 10, 1993 to give Ms. Watson more time to evaluate the case. (RT 253-254.) Appellant also presented a motion prepared in pro per in which he stated that Ms. Watson should not represent him because of a conflict of interest. The conflict asserted was that Ms. Watson's own interest in being appointed to a capital case required that she evaluate this case at a lower level than it merited. (CT 895-896.) This would result in inadequate representation. (*Id.*)

The court appointed attorney Robert Gerstein to represent appellant in the petition for review filed following the Court of Appeal's denial of the petition for a writ of mandate regarding Ms. Kopple's appointment. (CT 896.)[97] The petition for review was filed on September 17, 1993. (CT 943.)

On September 17, 1993, appellant filed a motion to vacate the order relieving Ms. Kopple as his counsel. (CT 944-949.)

The record reflects appellant's concern over the Penal Code section 995 motion well before it was filed by attorney Watson.[98] On September 17, 1993, appellant filed a motion to appoint Ms. Kopple for the limited purpose of preparing and filing a motion to dismiss pursuant to Penal Code section 995. (CT 950-952.)

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[97] The petition for review appears at CT 898-920.

[98] Watson filed the motion on October 4, 1993. (CT 990.)

Judge Horan denied appellant's motion to appoint Ms. Kopple. (RT 261-262.) Appellant stated that Ms. Kopple was the only one who knew the facts of the case, and that he wanted to file a Penal Code section 995 motion. (RT 262.) As shown in appellant's *Marsden* motion filed on September 24, 1993 (see text immediately below), attorney Watson refused to raise a number of issues in the Penal Code section 995 motion that appellant believed were important.

Appellant filed another motion to vacate Judge Ito's order removing Ms. Kopple as his lawyer. (RT 263.) Judge Horan lodged this motion and stated he would not hear it at that time. (RT 263-264.)

The Supreme Court requested from the Los Angeles County Counsel an informal response to the petition for review regarding the appointment of Ms. Kopple as appellant's counsel. (CT 962.) The County Counsel furnished that response by a letter served on September 23, 1993. (CT 963-969.)

On September 24, 1993, appellant objected orally to being represented by Ms. Watson and to the removal of Ms. Kopple. (RT 271.) On the same day, appellant filed a *Marsden* motion to relieve attorney Watson. (CT 972-975.) The reasons given were that appellant and his parents had smelled liquor on Ms. Watson's breath during the hearing held on September 20, 1993 (CT 972; RT 283); that Ms. Watson told appellant's mother that there would be two trials, which meant that Ms. Watson believed appellant to be guilty (RT 283-284); and that Ms. Watson had a conflict of interest because appellant's case was a "category IV" case for which the fee was $200,000, but she had been offered a fee of $125,000 which was the fee for a category 3 case. (CT 974-975.) The conflict was that if Ms. Watson refused the $125,000 fee, she would lose her spot on the list of lawyers handling capital cases. This was an inherent financial conflict of interest. (CT 975.)

On September 28, 1993, Mr. Watson stated that she had reached an agreement about the case with Judge Mills. Judge Horan stated that she would be appointed to the case. (RT 278.) Appellant objected, stating that a Marsden motion was pending. (RT 279.)

On September 30, 1993, the court heard appellant's *Marsden* motion that had been filed on September 24, 1993. Judge Horan rejected each of appellant's contentions. Judge Horan noted that he had not smelled liquor on Ms. Watson's breath, that saying there would be two trials might or might not be an accurate prediction, and that there was no conflict of interest. (RT 284-285.)

Attorney Watson filed a Penal Code section 995 motion on October 4, 1993. (CT 990-999.) Appellant objected to the 995 motion filed by Ms. Watson. (RT 288.)[99]

Appellant filed two inter-related motions on October 18, 1993 and October 19, 1993. In the motion filed on October 19, 1993, appellant again sought the removal of attorney Watson under the authority of the *Marsden* decision. (CT 1016-1026.) In the motion filed on October 18, 1993, appellant sought a dismissal of the case because his right to a speedy trial had been violated. (CT 1001-1012.) In the latter motion, appellant contended that attorney Kopple was relieved as appellant's counsel because the court knew that prosecutor Kuriyama was engaged in trial in the *Menendez* brothers' case and that he therefore would not be ready to try appellant's case. (CT 1003-1004.) Appellant contended that relieving attorney Kopple and appointing attorney Watson was a subterfuge to enable

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[99] Appellant also pointed out during this hearing that "technically" he had been without counsel between August 2, 1993 and September 28, 1993. (RT 291.) The former date was when Ms. Kopple was relieved and the latter was the day Ms. Watson was appointed. (Actually, Ms. Kopple was relieved by the minute order of August 13, 1993 and by a formal order to that effect entered on August 16, 1993.)

prosecutor Kuriyama to try both appellant's and the *Menendez* cases. (CT 1008-1010.) Moreover, as set forth in appellant's *Marsden* motion of October 19, 1993, attorney Watson had divulged confidential communications to the prosecution and had engaged in ex parte communications regarding her appointment with Judge Mills. (CT 1023-1025.) Thus, appellant had no confidence in attorney Watson. (CT 1025.)

On October 19, 1993, the court first took up the Penal Code section 995 motion prepared and filed by attorney Watson. (RT 299 et seq.) Appellant objected to the motion being made by attorney Watson and requested that the *Marsden* motion that he had prepared be heard before the 995 motion. (RT 302-303.) (For the October 19, 1993 *Marsden* motion, see the immediately preceding paragraph.) The court declined to do so and proceeded to hear and deny the Penal Code section 995 motion filed by attorney Watson. (RT 312-314.)

The court turned to appellant's *Marsden* motion (RT 315-322.) Appellant pointed out that, even though no one had identified him during the preliminary hearing as one of the perpetrators, attorney Watson had failed to raise this important issue in the section 995 motion. (RT 317.) The court denied the motion. (RT 322.)

On October 27, 1993, the Supreme Court granted appellant's petition for review and transferred the case to Division Five of the Second Appellate District with directions to vacate its order denying the writ of mandate and to issue an alternative writ. (CT 1045.) The Court of Appeal issued an alternative writ in conformance with the Supreme Court's order. (CT 1109-1110.) The Court of Appeal denied the petition in its opinion filed on February 17, 1994. (CT 1350-1378.) The opinion is reported in *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901

On March 25, 1994, appellant filed a further *Marsden* motion to relieve attorney Watson. (CT 1480-1489.) The motion contended that

appellant was being deprived of his right to counsel. The motion was based on three grounds. First, the motion contended that Ms Watson failed to raise in the Penal Code section 995 motion that the victim of the charged offense was not a peace officer and that the special circumstance of Penal Code section 190.2(a)(7) therefore did not apply. (CT 1484-1485.) Second, the motion contended that Ms. Watson had failed to challenge the application of Penal Code section 12022.5 [personal use of firearm], even though it was enacted after the commission of the offense. (CT 1486.) Third, the motion contended that Ms. Watson had a financial conflict of interest in that she was being paid only $93,000. (CT 1488.)

Judge Horan heard the motion on March 25, 1994. (CT 1490; RT 766-778.) Judge Horan rejected appellant's contentions as premature and as tactical decisions by Ms. Watson. (RT 768-776.)

After the court denied the *Marsden* motion, appellant requested that the court grant appellant's *Faretta* motion that had been filed in October 1993. (RT 775.) This request was renewed and granted on March 30, 1994 when Ms. Watson was relieved and appellant was permitted to proceed in pro per. (RT 783-795.) The court, on its own motion, sent the case to Department 100 (Judge Ito) to determine whether advisory counsel should be appointed. (RT 790-791, 796.)

3. Following the Court of Appeal's Opinion, Appellant Makes a New Effort, Based on Additional Facts, To Secure Attorney Kopple's Appointment as His Counsel

On May 20, 1994, attorney Robert Gerstein, who had been appointed for this purpose by Judge Ito, filed a comprehensive motion on behalf of appellant in which he sought the appointment of attorney Kopple as his counsel. (CT 1611.)[100]

[100] Attorney Gerstein's application for leave to file this motion sought reconsideration of Ms. Kopple's appointment or, in the alternative, for her appointment as advisory counsel. (CT 1536.) The motion that was filed on

This motion was supported by the following declarations: Appellant's (CT 1629-1633), Ms. Kopple's (1608-1610), appellant's sister and father (CT 1620-1623), and two attorneys experienced in capital litigation who stated that it would take them between a year and a half and two years to prepare the case for trial. (CT1624-1627.) The motion was also supported by a six and a half page report of Samuel I. Miles, M.D., Ph.D., a Diplomate of the American Board of Psychiatry and Neurology, who had examined appellant under the trial court's appointment on May 19, 1994 and who had reviewed a number of documents. (CT 1694-1700.)

Appellant's declaration explained in great detail the relationship that existed between him and attorney Kopple. He described how that relationship developed as he observed Ms. Kopple representing another defendant. (CT 1629-1630.) Appellant explained that he was able to communicate effectively with Ms. Kopple and that she was able to work effectively with him in reconstructing events that were fourteen years in the past. (CT 1630-1632.) Appellant stated that he felt great trust and confidence in Ms. Kopple. (CT 1632.) Appellant recounted bad experiences with attorneys who had represented him, some of whom had gone so far as to betray him. (CT1632-1633.) Appellant's sister and father expressed their confidence in Ms. Kopple, based on the way that she had dealt with appellant and his family in the past. (CT 1620-1623.)

Dr. Miles concluded that appellant's desire to have Ms. Kopple represent him had been consistent and did not to reflect any psychopathology or inappropriate manipulation. Rather, his request to have Ms. Kopple represent him was based on his assessment of the quality of her work with him and on a comparison of Ms. Kopple with other attorneys.

May 20, 1994 (CT 1611-1618) sought only reconsideration of Ms. Kopple's appointment as counsel for appellant and did not seek her appointment as advisory counsel.

One of those attorneys had been charged with fraud and had offered to produce for the People evidence that purportedly would incriminate appellant, in return for a plea bargain for the attorney. (CT 1699.) Dr. Miles concluded that appellant's working relationship with Ms. Kopple was excellent and productive, and that appellant would have great difficulty in developing any sense of trust and confidence with other attorneys. (CT 1700.)

The motion was heard on June 9, 1994. (RT 894-706.) In addition to matters covered in the moving papers, Mr. Gerstein stressed the savings that would be effected if Ms. Kopple were appointed, since she had agreed to credit fees already paid ($53,986 [CT 1679]) against the flat fee of $125,000. (RT 899.) Dr. Miles stated briefly that it would be very difficult for a lawyer other than Ms. Kopple to establish a sound working relationship with appellant. (RT 903.)

Judge Ito denied the motion for reconsideration. He noted that, after the Court of Appeal's opinion in *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901, Ms. Kopple had made unprofessional comments about the trial court and the Court of Appeal, that Ms. Kopple had been denied inclusion in the capital panel for Orange County, and that Dr. Miles' conclusions were an embellishment on comments already made. (CT 1702.)

Judge Ito himself provided the rebuttal to the alleged significance of Ms. Kopple denial of inclusion in the Orange County capital panel. Judge Ito noted that "...it is not an easy thing to decline to reappoint an attorney with the experience and the reputation Miss Kopple has and I cannot frankly recall any other situation where I have done that in any other case." (RT 904.)

C. The Court of Appeal Failed to Take Into Consideration Several Exceptional Facts and Circumstances That Showed That It Was An Abuse of Discretion Not to Appoint Attorney Kopple

There are objective and subjective factors in the decision whether to grant a defendant's request for the appointment of a particular attorney. (*Harris v. Superior Court* (1977) 19 Cal.3d 786, 798.) Prior representation, with its obvious benefits to the defendant as well as to the trial court, is the former factor, while trust and confidence between the defendant and the lawyer of his choice is the latter factor. (*Harris v. Superior Court, supra,* 19 Cal.3d at 798.)

Although the court in *Alexander v. Superior Court, supra,* 22 Cal.App.4th at 918 noted as a factor favoring her appointment that attorney Kopple had represented appellant in the preliminary hearing, the Court wholly failed to take into account the exceptional quality of her performance.

It is unusual for a judge to go out of his or her way to praise counsel, and it is even more unusual to do so in a detailed, fact-specific letter to the presiding judge in Department 100. Judge Waters did exactly that. She praised Ms. Kopple's grasp of the facts of the case, her thorough preparation, and her skill in cross-examination. (Text, *supra*, p. 214, fn. 95 and accompanying text.) Judge Waters concluded that Ms. Kopple was a "true professional, an excellent criminal defense attorney." (*Id.*)

In *Harris v. Superior Court, supra,* the defendants had been represented in proceedings in Los Angeles by the attorneys they wished to have appointed in Alameda County proceedings. This 'prior representation' qualified the attorneys in *Harris* for appointment in the Alameda case. In the case at bar, attorney Kopple's good work in thoroughly preparing for, and in providing representation at, the extensive preliminary hearing (CT 40-584) certainly also qualifies as "prior representation."

Regrettably, the Court of Appeal in *Alexander v. Superior Court, supra,* did not know, or chose to ignore, that Ms. Kopple demonstrated the very qualities that one looks for in "prior representation." According to Judge Waters, Ms. Kopple had "...*thoroughly investigated* the matter, *read all the discovery*, and *researched* the points of law that pertained to this case." (Italics added) (See text, *supra*, p. 214, fn. 95.) In other words, she knew the case very well. That is precisely the value of "prior representation," as the Court noted in *Harris v. Superior Court, supra,* 19 Cal.3d at 798 [the attorney's prior representation of defendants provided them with an "extensive background in various factual and legal matters" that might be relevant in the Alameda proceedings]. Here, attorney Kopple's prior representation of appellant at the preliminary hearing was directly and immediately relevant to the impending trial.

The Court in *Harris v. Superior Court, supra,* 19 Cal.3d at 799, concluded that the prior representation of the defendants in the Los Angeles proceedings heavily outweighed the fact that the appointing judge was well aware of the professional qualifications of the new lawyers whom he wanted to appoint to the case. In the case at bar, Ms. Kopple had not only represented appellant prior to and during the preliminary hearing, she had done so in an exemplary manner. Judge Waters was not the only judicial officer to think so. Judge Ito also recognized that attorney Kopple was highly qualified. (RT 904 [per Judge Ito, it was not an "easy thing" to decline to appoint someone with Kopple's "experience" and "reputation"].) Thus, it is not necessary to *infer* in this case that attorney Kopple would have been more effective than others in representing appellant because she had represented him before. Here, it was a *demonstrated fact, attested to by Judge Watson,* that attorney Kopple not only thoroughly knew the facts and the law of the case, but that she could, and did, handle the case very well.

The Court in *Harris v. Superior Court, supra,* concluded that the objective consideration of prior representation called for the appointment of counsel who had previously represented the petitioners. The Court went on to hold that after considering the factor of appellant's "...personal preference based upon trust and confidence developed over a substantial period of time, only one conclusion is possible," i.e., that counsel who had previously represented petitioners should be appointed. (19 Cal.3d at 799.)

The same is true of the case at bar. Ms. Kopple's prior representation of appellant was of high quality, and there was no doubt that appellant had personal trust and confidence in her. Evidence of this was overwhelming, highly persuasive, and absolutely uncontradicted. Thus, as in *Harris v. Superior Court,* only one conclusion is possible: Ms. Kopple should have been appointed to be appellant's counsel after his arraignment.

Apart from the petition that was ultimately decided in *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901, after his plea in August 1993 and prior to the motion for reconsideration in May 1994, appellant repeatedly requested, orally and in writing, that the court appoint Ms. Kopple (RT 247-250, CT 944-949, 950-952, RT 262, RT 271), each time expressing his trust and confidence in her.

In the motion for reconsideration, appellant presented a cogent, detailed and persuasive explanation *why* he had trust and confidence in attorney Kopple. As he stated in his declaration, he had observed Ms. Kopple representing another defendant and from this he learned that she was skillful in drawing people out and reliable in her dealings with clients. (CT 1629-1630.) Appellant explained that he was able to communicate effectively with Ms. Kopple, and that she was able to work effectively with him in reconstructing events that were fourteen years in the past. (CT 1630-1632.) Surely, no more convincing and even eloquent description of a relationship of trust and confidence can be found than appellant's

declaration filed in support of the motion for reconsideration. And Dr. Miles provided third-party, expert corroboration of the reasons for, and the degree of, trust and confidence, that appellant had in Ms. Kopple.

There is no doubt that the record demonstrates that the factors of prior representation and trust and confidence were both fully present in this case. With *both* the objective and subjective factors indicating that appellant's request for attorney Kopple should have been granted, it was surely an abuse of discretion not to appoint her. (*Harris v. Superior Court, supra,* 19 Cal.3d 786 at 796 [the matter of appointing counsel requested by a defendant is within the sound discretion of the trial court].) The exercise of discretion involves 'balanced judgment.' (*Harris v. Superior Court, supra,* 19 Cal.3d at 796.) There is no balance in the judgment if each and every indication calls for the very opposite conclusion that the court reached, i.e., if every factor called for attorney Kopple's appointment.

It may well be that the real reason for not appointing Ms. Kopple had nothing to do with either the objective or subjective factors but with the trial court's, and the Court of Appeal's, unhappiness with Ms. Kopple's expenditure of time and effort in representing appellant. Thus, while it is true that she spent a great deal of time in getting ready for the preliminary hearing and billed over $53,000 for that work,[101] it turned out, according to Judge Waters, that she spent her time to a very good effect. She"...*thoroughly investigated* the matter, *read all the discovery*, and *researched* the points of law that pertained to this case." (Italics added) (See text, *supra*, p. 214, fn. 95.) In other words, the time that Ms. Kopple invested in the case paid off handsomely.

The fact that Ms. Kopple made critical comments about the trial and appellate courts, as noted by Judge Ito (CT 1702), is not the first or the last

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[101] The Court of Appeal in *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901, 918, criticized her billing.

time that a lawyer will criticize trial and appellate courts. If this was a reason to disqualify a lawyer from serving on a case, the shortage of lawyers would be acute.

Finally, that attorney Kopple was not on the Los Angeles and Orange County capital panels elevates form over substance. Attorney Kopple was a lawyer who was not only dedicated to appellant, but one who had also proven herself to be a hardworking, effective lawyer. That satisfies the substance of why there are lists of lawyers to handle capital cases – inclusion in the list is an indication that the lawyer is hardworking and effective in the handling of capital cases. Ms. Kopple was such a lawyer.

Attorney Kopple may not have been a 'team player,' when viewed from the bench, but she was on *appellant's* team, as Judge Waters noted very clearly. That is the team on which attorney Kopple was supposed to be.

The failure of the Court of Appeal in *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901 to consider the exceptional circumstances herein reviewed renders that decision manifestly unjust. Because it was an unjust and incorrect decision, this Court is not precluded from reconsidering the decision not to appoint Ms. Kopple. (*England v. Hospital of God Samaritan, supra,* 14 Cal.2d at 795; *In re Saldana, supra,* 57 Cal.App.4th at 625.) The circumstances reviewed in this subsection show that it was an abuse of discretion not to appoint Ms. Kopple after appellant's arraignment, and it is respectfully submitted that this Court should so conclude.

D. The Courts' Refusal to Appoint Attorney Kopple And to Relieve Attorney Watson Prejudiced Appellant

Attorney Watson based the Penal Code section 995 motion on the arguments that there was *no* evidence that: (1) Appellant knew or reasonably should have known that Cross was a peace officer; and (2) the murder was committed in the course of a robbery. (CT 993-996.) The

motion was denied (RT 312-314) and the effort to obtain appellate review of the denial was rebuffed with a summary denial. (CT 1212.)

Appellant made it very clear, beginning almost a month before attorney Watson filed the 995 motion (RT 262), that he was objecting to the motion Ms. Watson proposed to file. He objected again when she filed the motion (RT 288) and he objected on the day the court heard the motion. (RT 302-303.)

Appellant had good reasons for objecting to the 995 motion prepared by attorney Watson. There were three grounds for a Penal Code section 995 motion that attorney Watson was aware of and could have, but chose not to, assert in the section 995 motion.

First, the special circumstance allegation that Julie Cross was a California peace officer engaged in the performance of her duties within the meaning of Penal Code section 190.2(a)(7) was patently incorrect. She was not such an officer. The People ultimately conceded this when they moved to delete this allegation from the information. (RT 7643-7644.)

Second, there was literally no evidence that identified appellant as one of the two men who had assaulted the Secret Service agents. As shown in Argument I, *supra*, Bulman had simply failed to identify appellant prior to the trial as either one of the two assailants.

Third, Ms. Kopple had brought out in the preliminary hearing that the composite sketch had been altered *during* the hypnosis session. (CT 432, 439.) This was evidence that the hypnosis session had affected Bulman's recollection. It would have been the basis for striking Bulman's testimony under *People v. Shirley* (1982) 31 Cal.3d 18, 67, 68 [witness may not testify to events that were the subject of a hypnosis session].

Attorney Kopple would have asserted each of these grounds in a Penal Code section 995 motion.

As to the first ground, appellant himself pointed out in a *Marsden* motion directed at Ms Watson that she failed to raise in the Penal Code section 995 motion that the victim of the charged offense was not a peace officer and that the special circumstance of Penal Code section 190.2(a)(7) therefore did not apply. (CT 1484-1485.) Attorney Kopple would have done no less than appellant did himself, i.e., raise the issue, ultimately conceded by the People, that Cross was not a California peace officer.

The second and third grounds that should have been raised in the section 995 motion required a knowledge of the details of the case that went beyond the obvious superficialities that were the bases of the motion prepared by Ms. Watson. As attested to by Judge Waters, attorney Kopple's performance during the preliminary hearing was impressive. She knew the facts of the case and the law that applied. (CT 868.) It was Ms. Kopple who brought out on Ponce's cross-examination that the composite drawing had been altered *during* the hypnosis session (CT 432, 439) and it was, of course, also Ms. Kopple whose examination demonstrated that no one had identified appellant as either of the two assailants. Attorney Kopple was intimately familiar with these important facts and she would have raised the grounds based on these facts in a Penal Code section 995 motion.

The prejudice that resulted from not raising these grounds in the Penal Code section 995 motion is obvious. If the 'California peace officer' special circumstance allegation had been struck, the jury panel would not have been endlessly regaled with questions about this during voir dire. The prejudicial effect of this is set forth in Argument III. That discussion is incorporated here by reference. And if either of the second and third grounds had been successful, as they might well have been, this trial would not have taken place.

The trial court's failure to appoint attorney Kopple, i.e., the court's refusal to continue her appointment, also caused delays in bringing the case

to trial. The trial court acknowledged that its failure to continue attorney Kopple's appointment necessarily resulted in delaying the case since attorney Watson could not be expected to proceed with pre-trial motions without a continuance. (RT 290-291.) One of the effects of the delay caused by the court's failure to continue with Ms. Kopple was the loss of witness Ellis, who died in August 1995. (RT 2779.) As noted below, Ellis would have given a detailed description of the suspects' car and would have described one of the suspects as having a large scar on his left cheek. (See text, p. 247, *infra*.) Ellis would also have testified that the shooter wore a black leather jacket ripped at the shoulder (*ibid.*), which would have proven that appellant's jacket could not have been the one worn by the shooter.

Finally, as a general matter, appellant was also prejudiced because he was deprived of the services of an effective and hardworking lawyer in whom he had great trust and confidence. "Effective" and "hardworking" are words with real meaning in this case. Attorney Kopple already knew the case very well, both from a factual and legal standpoint, in July 1993. She would certainly have known it even better if and when it had gone to trial with her at the helm.

The extent of the prejudice that was caused can be appreciated if one assumes, for the sake of argument, that attorney Kopple had been retained by appellant and that she had been relieved without cause as his counsel after his arraignment.

Attorney Kopple had shown herself to be extremely well prepared and very effective during the preliminary hearing. Thus, not only had appellant developed trust and confidence in her, but she had shown herself to be, in Judge Waters' words, "an excellent criminal defense attorney." (*Supra*, p. 214, fn. 95.) Added to this was that, for reasons well explained by appellant, he was able to communicate effectively with attorney Kopple, and she with him, and he found her to be reliable and trustworthy.

If Ms. Kopple had been retained counsel and if she had been relieved by the court over appellant's objections, the damage done to appellant, and the outrageous nature of that damage, would have been obvious. No one would question that, under such circumstances, appellant had been severely prejudiced by losing an effective, knowledgeable and well-prepared lawyer in whom he had great trust and confidence.

Appellant's case was materially prejudiced by the loss of attorney Kopple's services, whether Ms. Kopple was appointed or retained. The quality of her performance, and her dedication to appellant's case, did not depend on whether she was retained or appointed.

Being stripped of one's lawyer who is effective and well prepared surely makes it reasonably probable that a result more favorable would have been reached in the absence of the error of relieving that lawyer. (*People v. Watson* (1956) 46 Cal.2d 818, 837.) No court would declare that losing such a lawyer in the midst of a capital case – a lawyer in whom the defendant, i.e., appellant, had great confidence – was harmless error beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710.) On the contrary, professional opinion, i.e., the opinions of lawyers and judges alike, would be that the very opposite was true – that the error was harmful beyond a reasonable doubt.

E. The Courts' Refusal to Appoint Attorney Kopple is Reversible Error Per Se

The error of refusing to appoint Ms. Kopple was reversible per se, without a showing of prejudice.

"That an accused has the right to *representation* by counsel of his or her choice, in any prosecution or forum, is universally conceded." (Italics in original) (5 Witkin and Epstein, *California Criminal Law* (3d ed.), *Criminal Trial*, section 145, p. 229, citing *Powell v. Alabama* (1932) 287

U.S. 45, 53 S.Ct. 55, 61, 77 L.Ed. 158, 162 and *Chandler v. Freitag* (1954) 348 U.S. 3, 75 S.Ct. 1,5, 99 L.Ed. 4, 10.)

While a defendant is, as a general matter, not entitled to the appointment of a lawyer of his or her choice, once it shown that the court should have appointed the lawyer the defendant requested, the defendant is in no different position than if he had been denied the right to be represented by counsel personally chosen by the defendant. It is a denial of the equal protection of the laws to treat defendants differently: (1) who have retained counsel or (2) who are defendants who have shown that the court should have appointed counsel of their choice.

The equality guaranteed by the equal protection clauses of the state (Cal. Const., Article I, section 7(a) and federal constitutions (Fourteenth Amendment) is equality under the same conditions, and among persons similarly situated. The classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be established.[102] (*Morey v. Doud* (1957) 354 U.S. 457, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1485,1490; *Reed v. Reed* (1971) 404 U.S. 71, 92 S.Ct. 251, 253, 30 L.Ed.2d 225, 229; *Brown v. Merlo* (1973) 8 Cal.3d 855, 861.)

However, more is required of the classification at bar than a "substantial relation to a legitimate object." The right to counsel is a fundamental right. (*Gideon v. Wainwright* 1963) 372 U.S. 335, 344-345, 83 S.Ct. 792, 9 L.Ed/2d 799.)

> "When a law impinges on certain fundamental rights...it will ordinarily be subject to strict judicial scrutiny. Under this very severe standard, a discriminatory law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification is

[102] The tests for determining a claim of denial of equal protection are substantially the same under the state and federal constitutions. (*Los Angeles v. Southern Calif. Tel. Co.* (1948) 32 Cal.2d 378, 389.)

> necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible. (Plyler v. Doe (1982) 457 U.S. 202, 217 [72 L.Ed.2d 786, 799, 102 S.Ct. 2382]; In re Griffiths (1973) 413 U.S. 717, 721-722 [37 L.Ed.2d 910, 915-916, 93 S.Ct. 2851]; Bernal v. Fainter (1984) 467 U.S. 216, 219, 227 [81 L.Ed.2d 175, 179, 184-185, 104 S.Ct. 2312]..." (*Board of Supervisor v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913.)

Thus, the classification in this case must promote a compelling state interest and it must be narrowly drawn to achieve that interest by the last restrictive means possible.

Depriving a defendant of the services of a *retained* lawyer is reversible error per se. If the denial of a continuance to obtain counsel is reversible error per se (*People v. Crovedi* (1966) 65 Cal.2d 199, 206, 208), denial of the right to retained counsel – which Mr. Witkin writes almost never happens (5 Witkin and Epstein, *California Criminal Law* (3d ed.), *Criminal Trial*, section 157, p. 249) – is surely also reversible error per se. (See *Powell v. Alabama, supra,* 287 U.S. 45, 53 S.Ct. 55, 61, 77 L.Ed. 158, 162.)

Defendants who have retained lawyers and defendants who have shown that they are entitled to the appointment of the lawyer of their choice are persons who are similarly situated. Both types of defendants are entitled to the services of the lawyer of their choice. If the law is followed, both types of defendants will in fact have the services of lawyers they have chosen.

There is simply no legitimate objective, much less a compelling state interest, to be accomplished by treating defendants with retained counsel differently from defendants who have shown that they are entitled to appointed counsel of their choice. The critical point is that *both "classes" of defendants are entitled to counsel of their choice.*

Distinguishing between these two "classes" of defendants is an arbitrary classification that serves no legitimate objective. In fact, it serves no objective at all, *save the objective of illegitimately discriminating against certain defendants.* It goes without saying that, under these circumstances, the classification does not even meet the test that the classification must have a rational relationship to the purpose of the classification. It certainly falls far short of the "strict scrutiny" test that is applicable to fundamental rights. (*Board of Supervisor v. Local Agency Formation Com., supra,* 3 Cal.4th 903, 913.)

It is a denial of the equal protection of the laws to treat defendants differently who have retained counsel from defendants who have shown that the court should have appointed counsel of their choice. Thus, the conclusion follows that if a defendant, as in this case, has shown that he or she is entitled to the appointment of a certain lawyer, it is reversible error per se to deny that defendant the appointed lawyer of his or her choice.

III

FREQUENT REFERENCES DURING VOIR DIRE TO THE MURDER OF A PEACE OFFICER IMPLANTED THIS ENTIRELY INVALID SPECIAL CIRCUMSTANCE ALLEGATION INTO THE CONSCIOUSNESS OF THE JURY

The information filed on August 2, 1993 alleged as a special circumstance that Julie Cross was a peace officer engaged in the performance of her duties within the meaning of Penal Code section 190.2(a)(7), i.e., a California peace officer in the sense of Penal Code section 830.1 et seq. (CT 587.)

This allegation was patently erroneous and unfounded. Cross was a United States Secret Service agent. Federal law enforcement officers are not California peace officers. (4 Witkin and Epstein, *California Criminal Law* (4th ed.), *Pretrial Proceedings*, section 8, p. 207.)

The People conceded this point, albeit only after the verdict was returned, when they moved to strike this allegation and substitute in its stead the allegation that Cross was a federal law enforcement officer engaged in the performance of her duties within the meaning of Penal Code section 190.2(a)(8). (RT 7643-7644.) Shortly after this amendment was allowed, this special circumstance allegation was struck on the defense's motion because there was insufficient evidence that appellant knew or should have known that Cross was a federal law enforcement officer. (RT 7660.)

Throughout the voir dire of the jury panel, the information was firmly implanted in the jury's consciousness that this case involved the murder of a peace officer and that this was a special circumstance that warranted the death penalty. Question 50 of the jury questionnaire was: "Do you think a person convicted of murdering a law enforcement officer should receive the death penalty? Please explain your answer." (CT 3013.)[103]

The court instructed the panel that "... [t]he special circumstance alleged in this case is a murder during an attempt robbery or murder of an on-duty peace officer." (RT 3959:14-16.) Thereafter, the court vigorously pursued this question on voir dire. (RT 3988-3990, 3992-3993, 4038, 4177, 4208, 4325, 4337, 4368, 4399, 4469 and 4526.)

After the grilling by the court that the jury was subjected to on this topic (RT 3959, 3988-3990, 3992-3993, 4038, 4177, 4208, 4325, 4337, 4368, 4399, 4469, 4526), no one on the panel could fail to know that this case involved the murder of a peace officer and that this was a special circumstance which, if found to be true, justified a death verdict. In other

[103] This was the jury questionnaire for the panel impaneled on January 17, 1996, which was selected commencing on January 8, 1996. The same

words, overshadowing the trial was a special circumstance allegation that the People were not entitled to bring. The allegation of this special circumstance was wholly unfounded and erroneous, as the striking of this allegation after the verdict confirmed.

The prejudicial nature of this allegation is obvious. The jury was aware throughout the trial that appellant faced the additional charge of having murdered a peace officer and that this charge, if true, was so serious as to justify the death penalty. The understandably negative reaction to the charge that appellant had killed a peace officer was re-enforced and magnified by the court's repeated instruction that this, standing alone, warranted the death penalty.

This entirely unjustified suggestion tainted the entire jury panel. Throughout the trial, the jury was encouraged by this unfounded allegation to view appellant as having committed a form of murder that the law considers especially heinous. Yet, appellant could not lawfully be charged with this special circumstance.

This unfounded charge also underlines the prejudice appellant suffered by the court's insistence on the services, as defense counsel, of attorney Watson and the court's concomitant unwillingness to appoint attorney Kopple to represent appellant. Appellant personally brought to the trial court's attention that the matter of this special circumstance allegation needed to be raised and resolved (CT 1484-1485), yet the court brushed this aside as a tactical decision by Ms. Watson. (RT 768-776.) Had this issue been raised prior to trial, as appellant requested, the allegation would never have been before the jury panel.

Simply put, this special circumstance allegation was a charge that the People were not entitled to bring, as they admitted after the verdict. The

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question was No. 65 on the panel excused on December 13, 1995. (CT 2961.)

prejudicial effect of this unfounded charge cannot be disentangled from the verdict. It must have influenced the jury – in fact, it was *designed* to influence the jury. The only remedy to right this serious, prejudicial error is to reverse the conviction that it helped to bring about.

IV

PREJUDICIAL ERROR WAS COMMITTED IN THE SELECTION OF THE JURY

A. The Governing Principles

During the voir dire of the jury, the defense moved to dismiss under *People v. Wheeler* (1978) 22 Cal.3d 258, on the ground that the prosecution had challenged five Black females. (RT 4321.) The motion was taken under submission. (RT 4322.) A little later, the defense broadened the motion in view of the fact that the prosecution had challenged four Black males. (RT 4371.) After ruling that the defense had not made a prima facie case (RT 4385), the trial court denied the motion. (RT 4501.)

> "'It is well settled that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates the state and federal Constitutions.' (*People v. Turner, supra*, 8 Cal.4th at p. 164; *People v. Wheeler* [1978], *supra*, 22 Cal. 3d [258] at pp. 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 1719, 90 L.Ed.2d 69].) Under *Wheeler* and *Batson*, " '[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, ... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association ....' " (*People v. Howard* (1992) 1 Cal. 4th 1132, 1153-1154 [];

italics omitted; *People v. Turner* [1986], *supra*, 8 Cal.4th at p. 164; *People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.)" (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188.)

Appellant met each of the requirements set forth. Appellant showed that the People challenged all five Black females, and then challenged for Black males. Blacks are a cognizable group for the purposes of a *Wheeler* motion. (*People v. Wheeler, supra*, 22 Cal.3d 258, 276.) Appellant also made a prima facie case that there was a reasonable inference that the challenges were made because the potential jurors were Black. (In California, a 'strong likelihood' means a 'reasonable inference.' (*People v. Box, supra*, 23 Cal.4th at 1188, fn. 7.)

The constitutional prohibition against peremptory challenges based on the assumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds – group bias – was supplemented in the year 2000 by the enactment of California Code of Civil Procedure section 231.5 [peremptory challenges may not be used on the assumption that the prospective juror is biased because of race, religion etc.].

Although the court ruled that the defense had not made a prima facie case (RT 4385), the court stated that it would give the People an opportunity to "make a statement for the record." (RT 4385.)[104] The prosecutor proceeded to do so. However, the justifications given for the challenges were not supported by the record and they were implausible.

The Supreme Court has recently drawn attention to the fact that the prosecutor's explanations for the challenges must be consistent with the

[104] When, as here, the trial court expressly rules that a prima facie case has not been made and then asks the prosecutor to state justification for the challenge in order to provide complete record on appeal, the ruling is that a prima facie case has not been established. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200.)

record and that the prosecutor is definitely not free to misrepresent the record of the voir dire or to give implausible justifications for the challenge. (*People v. Silva* (2001) 25 Cal.4th 345, 385 [prosecutor improperly gave reasons that misrepresented the record; prosecutor's statements must be inherently plausible *and* supported by the record].)

> "During the ex parte hearings, when the prosecutor gave reasons that misrepresented the record of voir dire, the trial court erred in failing to point out inconsistencies and to ask probing questions. 'The trial court has a duty to determine the credibility of the prosecutor's proffered explanations' (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220), and it should be suspicious when presented with reasons that are unsupported or otherwise implausible (see *Purkett v. Elem, supra*, 514 U.S. 765, 768 [115 S.Ct. 1769, 1771] [stating that at step three 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination']; *McClain v. Prunty, supra*, at p. 1221 ['Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised.']).'' (*People v. Silva, supra,* 25 Cal.4th at 385.)

> "Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent (*People v. Williams* (1997) 16 Cal.4th 153, 189 []), it is another matter altogether when, as here, the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court has failed to probe the issue (*McClain v. Prunty, supra,* 217 F.3d 1209, 1220-1224; *Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327, 1331)."(*People v. Silva, supra*, 25 Cal.4th at 385.)

When the trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the reviewing court will consider the entire record of voir dire. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154.) The

record of voir dire in this case shows that the prosecutor's justifications were either not supported by the record or were implausible or both.

There were three Blacks on the jury that was selected. (RT 4384.) However, a prima facie case may be made even though members of the cognizable group remain on the jury. (*People v. Granillo* (1987) 197 Cal.App. 3d 110, 121.)

B. The Justifications for the People's Peremptory Challenges Were Not Supported by the Record, and Were Implausible and Pretextual

1. Juror No. 89

The prosecutor gave as justifications for challenging juror No. 89 that she stated on questionnaire that O.J. Simpson was not proven guilty beyond a reasonable doubt,[105] that L.A.P.D. officers treats African Americans as "lesser human beings" and that this juror had a step sister employed by a prominent defense lawyer. (RT 4489-4490.)

None of these reasons are plausible. The first reason, that O.J. Simpson was not proven guilty beyond a reasonable doubt, states nothing but the objective fact, i.e., the outcome of that case. Correctly stating the outcome of a criminal trial is hardly a reason to challenge that person. The second reason has no bearing on this juror's ability to fairly judge the facts of this case which does not involve the L.A.P.D. Moreover, like the first reason for the challenge, there are, unfortunately, grounds to think that this answer was also correct. The third reason, that this juror's *sister* was employed by a "prominent defense lawyer" means nothing since it relates to the sister, not the juror, and a "defense lawyer" can mean any number of lawyers, e.g. insurance defense lawyers.

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[105] This response was given to question number 34 on the questionnaire: "What are your thoughts, feelings, and opinions about the following cases and their results," the O.J. Simpson case being one. (CT 3010.).

It is entirely implausible that the People challenged No. 89 because she gave correct answers to questions she was asked. The real reason she was challenged was that she was Black, and a female. Thus, she represented two cognizable groups (*People v. Macioce* (1987) 197 Cal.App.3d 262, 280 [women are a cognizable group]) that the People wanted to remove from the jury panel.

Juror No. 42

The prosecutor gave as justifications for challenging juror No. 42 was that, in answer to number 34 on the questionnaire (see juror No. 89, *supra*), this juror also replied that there was reasonable doubt in the Simpson case, that the prosecution had not proven its case against O.J. Simpson, that the L.A.P.D. needed to clean up the crime lab and African Americans were sitting on the curb for the police, but not Caucasians. (RT 4489.) The prosecutor added that No. 42 stated on questionnaire that, if there was no doubt, she could impose the death penalty. (RT 4489.)

As in the instance of juror No. 89, No. 42 had not expressed any views that were factually in error or that betrayed any bias. Obviously, the prosecution had not proven its case against O.J. Simpson since he was exonerated and this meant that there was reasonable doubt about his guilt. It was patent that there were problems with the L.A.P.D. crime lab in that case. And since juror No. 42 was black, it was likely that she lived in a black neighborhood where she would not see any Caucasians sitting on a curb. As with No. 89, the prosecutor's reasons to challenge No. 42 were implausible and pretextual.

3. Juror No. 11

The prosecutor gave as justifications for challenging juror No. 11 that this juror had visited her boyfriend who was in jail for joy-riding, that she had an ex-sister-in-law who was doing three years in prison, that she had a sister with a theft offense, that she thought the Menendez defense

lawyers had done a better job than the prosecution and that she thought that the L.A.P.D. treated African Americans differently. (RT 4488-4489.)

The matter of a criminal record, or friends and relatives with criminal records, did not bother the prosecutor when it came to other jurors. No. 84 was arrested for a shooting (RT 4231), No. 68 had an uncle who served time for drunk driving (RT 4255), No. 24 pleaded guilty to a violation of Penal Code section 417 [drawing a dangerous weapon, i.e., a handgun] (RT 4115), the brother of No. 23 served time for two manslaughter convictions (RT 4160-4161), and the brother in law of No. 147 had a 30-year criminal history. (RT 4279) The opinion held by No. 11 that the Menendez brothers were well-represented is shared by many and is perfectly legitimate, as is her opinion that the L.A.P.D. treats African-Americans differently.

Thus, in the instance of No. 11, the People's challenge purported to be based on responses that were demonstrably correct. That is, the answers could not reflect bias because anyone who is well-informed would have given the same answers. Thus, it was entirely implausible that the challenge was based on the reasons given by the prosecution.

4. Juror No. 76

The prosecutor gave as justifications for challenging juror No. 76 that she visited friends in prison, that her brother was convicted of kidnapping and robbery, that her nephews were in prison for drugs, that she had filed for bankruptcy and didn't want to be a juror. The prosecutor noted that appellant had also filed for bankruptcy. (RT 4388.)

As noted in the instance of No. 11, *supra*, friends and relatives with criminal backgrounds did not bother the prosecution when it came to jurors who were not Black females. The fact that No. 76 had filed for bankruptcy is a matter of her economic status which is not a legitimate criterion to

determine the qualification of a person to serve as a juror. (California Code of Civil Procedure section 204.)

The record demonstrates that the People challenged several jurors because they belonged to two cognizable groups, i.e., they were Black women. The justifications given by the prosecutor for these challenges were implausible and pretextual. For the most part, these jurors were purportedly challenged because they answered questions correctly. This is entirely implausible. The real reason these jurors were challenged was because they were Black women.

The discriminatory use of peremptory challenges to exclude members of cognizable groups is reversible error per se. (*People v. Wheeler, supra*, 22 Cal.3d at 283.) This violates the California Constitution and also the defendant's right to the equal protection of the laws under the Fourteenth Amendment of the United States Constitution. (*Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69, 82.)

V

APPELLANT'S RIGHT TO THE DUE PROCESS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS WAS VIOLATED BECAUSE OF THE LOSS AND DESTRUCTION OF IMPORTANT EVIDENCE DURING THE DELAY OF TWELVE YEARS BETWEEN THE MURDER OF JULIE CROSS AND APPELLANT'S ARREST FOR THAT CRIME

A. The Issue is Whether Appellant Was Prejudiced by the Prearrest Delay of Twelve Years

Appellant's motion to dismiss for the loss of evidence due to the delay between the murder of Julie Cross and his arrest was based on the due process clauses of the state and federal and state constitutions. (CT 1932, 1942-1946, 1948-1958.) The evidence that appellant contended was lost due to the delay were lost and erased videotapes, lost medical records

relating to eyeglass prescriptions, and lost swabs and photographs relating to tests for blood performed on a jacket. (CT 1942-1946.) The court denied this motion. (RT 2814.) The instant argument addresses the denial of this motion, which is referred to hereafter as the Due Process Motion.

Appellant also moved to dismiss because of the loss and destruction of evidence. (CT 2020-2029.) This motion addressed the erasure of the tape of the June 6, 1980 hypnosis session, the loss of the original composite drawings, and the loss of the swabs, test photos and lining of appellant's jacket. (CT 2020-2029.)[106] This motion was based on *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 and *Arizona v. Youngblood* (1988) 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281. (CT 2025-2027.) This motion was also denied by the trial court. (RT 2796-2797.) The denial of this motion is addressed separately in Argument VI, *infra*. This motion is referred to hereafter as the Trombetta Motion.

Under the due process clauses of the state and federal constitutions,[107] a defendant's right to a fair trial may be violated by a delay between the commission of the crime and his or her arrest or indictment. (*People v. Archerd* (1970) 3 Cal.3d 615, 640; *United States v. Marion* (1971) 404 U.S. 307, 92 S.Ct. 455.465, 30 L.Ed.2d 468, 481.) It is hornbook law that the defendant must first show that he or she has been prejudiced by the delay. (*People v. Archerd, supra,* 3 Cal.3d 615, 640; 5 Witkin and Epstein, *California Criminal Law* 3d ed.), *Criminal Trial*, section 280 [a defendant is not entitled to relief for preindictment delay unless there is a showing of prejudice].) Only upon a showing of prejudice

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[106] In terms of the items of evidence addressed, there was some overlap between the Due Process and the Trombetta Motions. Both motions address the loss of the tape of the June 6, 1980 hypnosis session and the loss of the swabs and photographs generated in the tests for blood on the jacket.

will the court balance the justification, if any, against the prejudice caused the defendant by the delay. (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 506-507.) It makes no difference whether the delay was deliberately designed to disadvantage the defendant, or whether it was caused by the negligence of law enforcement agencies or the prosecution. (*Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 953; 5 Witkin and Epstein, *California Criminal Law* (3d ed.). *Criminal Trial*, section 282(2), p. 432.)

B. The Trial Court Ruled that Appellant Was Not Prejudiced by the Loss and Destruction of Evidence

The trial court ruled that there was "absolutely no credible showing of prejudice" due to the loss or destruction of evidence. (RT 2814:18-21.)

The trial court exempted from this ruling the loss of appellant's employment records. (RT 2814:22-26.) The court found that, as to the employment records, "...a colorable claim has been made of some non-trivial prejudice to the defendant" that would "require the People to put on some evidence of the investigation." (RT 2814:23-26.) These records would have shown that appellant was working on Wednesday, June 4, 1980 at 9 p.m., when the Cross murder occurred. (RT 2802.)

The trial court thereupon took notice of Exhibit W to the People's opposition to the motion to dismiss that provides a chronology of the investigation of the Cross murder. (CT 2783-2831.) The parties stipulated that there were 13,036 pages of materials relative to the investigation, 62 audio tapes and twelve videotapes that had been received by the defense. (RT 2818.) Based on the chronology of the investigation, the court concluded that there was no possibility that appellant could have been "found" any earlier than he was "found." (RT 2816:15-18.)

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[107] The constitutional provisions involved are Cal.Const., Art. I, section 15 [due process] and the due process clauses of the Fifth and Fourteenth

C. The Trial Court's Ruling That Appellant Was Not Prejudiced by the Prearrest Delay of Twelve Years Is Not Supported by Substantial Evidence

> "The question of whether a defendant has established prejudice occasioned by the [preindictment] delay is a factual matter to be resolved by the trial court, and its decision on that point will not be overturned by an appellate court if supported by substantial evidence. (People v. Hill (1984) 37 Cal.3d 491, 499 []." (*People v. Martinez* (1995) 37 Cal.App.4th 1589, 1593; *accord, People v. Mitchell* (1972) 8 Cal.3d 164, 167.)

As shown in subsections 1, 2 and 3 below, there is substantial evidence that shows appellant was prejudiced by the loss of evidence. On the other hand, there is *no* substantial evidence that supports the trial court's ruling. Thus, appellant is not asking this Court to weigh the evidence. Appellant contends that the trial court's ruling is not supported by substantial evidence.

1. Appellant was Prejudiced by the Loss/Erasure of the Tapes

The Due Process Motion listed the following tapes that had been erased (CT 1942-1944):

Tapes of agent Bulman's hypnosis sessions on June 6, 1980 (tape No. 83153), June 19, 1980 (tape No. 81810),[108] and July 10, 1980 (tape No. 81292);

Tape of agent Torrey's hypnosis session on July 11, 1980 (tape No. 81350);

Tape of Nina Miller's hypnosis session on June 20, 1980 (tape No. 82189);

Amendments of the United States Constitutions.

[108] The People contended this tape was not erased but was listed as "no audio." (CT 2738.)

Tape of William Ellis' hypnosis session on June 13, 1980 (tape No. 81813; and

Tape of Mary L. Bush hypnosis session on July 25, 1980 (tape No. 82578).[109]

The tapes were erased on Captain Nielsen's authority on October 26, 1984. (CT 2738-2739.)[110]

The Bulman Tapes. The Due Process Motion contended that appellant was prejudiced by the erasure of these tapes because they reflected Bulman's recollection when events were still very fresh in his mind. The tapes, particularly the tape of the June 6, 1980 session, would have enabled the defense to make a comparison between his statement made on June 4, 1980 to the police and Bulman's statements under hypnosis. This would have revealed what was Bulman's own memory and what was suggested to him under hypnosis. It would have materially strengthened appellant's case that Bulman's memory was impermissibly affected by the hypnosis session of June 6, 1980. (CT 1942-1943.)

The Torrey Tape. The defense was prejudiced by the erasure of this tape because it contained a description from an eyewitness of the car driven by the assailants. (CT 1942.)

The Ellis Tape. The defense was prejudiced by the erasure of this tape because it contained a detailed description of the suspects' car. Ellis also described one of the suspects as having a large scar on his left cheek and that the shooter wore a black leather jacket ripped at the shoulder. This would have conclusively proved that appellant's jacket could not have been the one worn by the shooter. (CT 1943.)

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[109] The People contended this tape was not erased. (CT 2739.)

[110] See text, *supra*, p. 27, for Captain Nielsen's testimony on the erasures.

The Bush Tape. The defense was prejudiced by the erasure of this tape because Bush saw a male Black get out of the suspect's car who did not match the description given by Bulman. It is unknown what description she gave under hypnosis; it may have exonerated appellant. (CT 1944.)

The People's response was that the defense had failed to show that: (a) the evidence was exculpatory; (b) that its exculpatory value was apparent before the evidence was destroyed; and (c) the defendant did not have comparable means to obtain the same information from other evidence. (CT 2588-2592.)

The People's argument relied on standards that are not applicable to the due process motion. The standards the People relied on are those articulated in *California v. Trombetta, supra,* 467 U.S. 479 and *Arizona v. Youngblood* (1988) 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281, 289. (See generally 3 Witkin and Epstein, *California Criminal Law* (4th ed.), *Presentation at Trial,* section 126.) These are the standards that were applicable to the Trombetta, and not the Due Process Motion.

The Due Process Motion, which contended that the erasure of these tapes prejudiced appellant, was not based on *California v. Trombetta, supra,* and *Arizona v. Youngblood, supra.* It was based on the due process clause and on the prejudice that that the loss of these tapes posed for the defense. Thus, the standards and requirements of *California v. Trombetta, supra,* and *Arizona v. Youngblood, supra,* do not apply to the Due Process Motion.

However, even assuming that the People's argument is that appellant had failed to show prejudice, the evidence shows the contrary to be true.

The People contended that, according to Detective Thies and Agent Renzi, no new evidence came to light as a result of the June 6, 1980 hypnosis session and that Bulman testified that the composites were not changed or altered after the hypnosis session. (RT 2791-2793.)

This is no answer to appellant's contention that, as Ponce testified, the composites were changed during the hypnosis session. (CT 432, 439.) The tape was the *only* reliable evidence of the hypnosis session. Bulman, the subject of the session, could not testify reliably on what happened during the session. And Thies' and Renzi's testimony about events (or non-events) *after* the session was not evidence about what happened *during* the session.

The defense was substantially prejudiced by the loss/erasure of the tape. The defense could not compare Bulman's pre-hypnosis and hypnosis-generated statements nor could the defense cross-examine Bulman with the help of the hypnosis tapes. Had the defense been able to show that the hypnosis session directly affected Bulman's recollection, Bulman's testimony would have been excluded.

Loss of the other tapes also prejudiced appellant. Ellis' description of the ripped jacket did have exculpatory value in that it showed that appellant's jacket had not been worn at the crime scene. Bush's descriptions did not fit those given by Bulman, which indirectly had an exculpatory value since, at one point, Bulman identified appellant by two photographs. (Argument I, *supra.*)

The reason or reasons the tapes were erased are extraordinarily suspect. It was obvious that Bulman would be a critical witness in any prosecution for the murder of Julie Cross. Yet, Captain Nielson who was in charge of deciding whether tapes of hypnosis sessions would be erased or not (RT 2533), testified that the tapes of the hypnosis session were erased in 1984 because he did not think that they had any evidentiary value. (RT 2533-2534.) According to Nielsen, the tapes had no evidentiary value because four years had passed, the suspects were not known, the police got nothing from the tapes and there had been no hypnosis. (RT 2534.) Nielsen stated that, given these circumstances, "...I just routinely automatically

sign them off." (RT 2534:27-28.) He did not even listen to the tapes. (RT 2534.)

Captain Nielsen made the decision to erase the tapes in October 1984. (CT 2738-2739.) This was two years after *People v. Shirley* (1982) 31 Cal.3d 18. One is reminded of the observation of Justice Kaus in *People v. Guerra* (1984) 37 Cal.3d 385, 430 (conc. opn. of Kaus, J.), that "... the police and prosecution have been on notice since Shirley was filed of the consequences that flow under that decision if a potential witness is hypnotized." No matter how much time had passed, if there ever was a prosecution, it was clear that Bulman would be a witness. Once suspects were identified, Bulman was going to play a key role. And Nielson's opinion that there was no hypnosis was a self-fulfilling prophecy. The tape was critical to the question *whether or not* there had been hypnosis. It was not for Nielsen to pre-empt a later trial of this issue.

There is substantial evidence that appellant was prejudiced by the loss/erasure of the tapes. Moreover, the circumstances under which the tapes were erased are highly suspect.

2. Appellant was Prejudiced by the Loss of Medical Records

One of the issues in the case was whether appellant wore glasses in 1980 since the prosecution introduced into evidence a glass frame, a broken lens and a case for eyeglasses recovered 57 feet from the Secret Service car. (RT 5078.)

In the Due Process Motion, appellant contended that appellant did not begin to wear glasses until 1982, and that medical records would substantiate this. (CT 1944-1945.)

The People contended that it was highly speculative that medical records existed that showed that appellant did not wear glasses in 1980. (CT 2592.) The People argued in the hearing on the due process motion that

medical records dating to 1981 or 1982 would not show whether appellant wore glasses in 1980. (RT 2809.)

Defense investigators Ingwersen and Lonsford made an extensive effort to locate the optometrist(s) who treated appellant in the early 80's. (See text, *supra*, pp. 50-51.) They were unable to locate either the treating optometrists or records pertaining to appellant. One optometrist, Dr. Jacobi, stated that records from the early 80's were no longer in existence (RT 2436-2437); another optometrist, Dr. Weiss, said he no longer had records but that the name Alexander sounded vaguely familiar to him. (RT 2437.)

It stands to reason, as defense counsel argued, that appellant's first prescription would state that it was a first prescription. (RT 2800-2801.) The testimony of Ingwersen and Lonsford confirms that they tried very hard to find the supporting records. Yet, understandably, due to the passage of time, the optometrists' records dating back to the early 80's were no longer in existence in 1995/1996.

The record of appellant's first prescription glasses, whether dated 1981 or 1982, would have put to rest any claim that he wore glasses in 1980. It would have been objective evidence of this fact. As it was, the issue was consigned to the conflicting testimony of witnesses, i.e., Yvette Curtis, who testified that appellant wore glasses in 1980, and Beverly Perry, Louis Jimenez and Eileen Smith, who testified that he did not wear glasses in 1980. (RT 6389, 6395-6396, 6518.)

Appellant was prejudiced by the loss of objective evidence that would have shown that he did not wear glasses in 1980.

3. Appellant was Prejudiced When the Swabs that Showed the Presence of Blood on Appellant's Jacket were Discarded

Appellant contended in the Due Process Motion that he was prejudiced when the swab used by Matheson to test for blood on the jacket was discarded. (CT 1945-1946.)[111]

The swabs, according to the Matheson, showed the presence of blood on the jacket. (RT 2755.) Matheson testified that the swabs were discarded because the reaction had been observed and the swabs do not hold any value after that. (RT 2759.)

They may not have had any value for Matheson and the People after he formed his conclusion, but they certainly had value for appellant. As defense counsel pointed out in the hearing on the motion, the People contended that there was blood on the jacket. (RT 2785.) As it turned out, it could not even be confirmed that it was human blood. (RT 5676.) However, the People wanted the jury to draw the inference that not only was it human blood, but that it was Julie Cross' blood. The most effective way to refute this was to show that Matheson was wrong and that the residue on the jacket was not blood. (RT 2785-2786.) If the swabs could have been tested by the defense, it could have been shown that Matheson was wrong and that the substance or residue on the jacket was not blood. But the swabs had been discarded.

Given the emphasis the People placed on the alleged evidence of blood on the jacket, it was crucial for the defense to be able to disprove that the substance on the jacket was blood. Not only did Matheson testify at length in front of the jury about blood on the jacket (text, *supra,* pp. 111-114), an 'expert' on blood spattering, Rod Englert, testified at great length about the spattering of blood in the car in which Julie Cross was shot. (See

text, *supra*, pp. 107-110.) Thus, it was very important for the defense to be able to attack and defeat the People's claim that there was blood on the jacket.

However, the defense was unable to effectively challenge Matheson's finding that the swabs disclosed blood. The reason for this was that the swabs had been discarded. (RT 2759.)

Appellant's due process challenge should have been sustained. The evidence that was lost due to the lengthy delay between the commission of the offense and appellant's arrest was very important, if not critical, to appellant's defense.

D. Conclusion

The due process clauses of the California and the United States Constitutions are violated when a defendant is prejudiced by the delay between the commission of the crime and his or her arrest or indictment. (*People v. Archerd, supra*, 3 Cal.3d 615, 640; *United States v. Marion, supra*, 404 U.S. 307, 92 S.Ct. 455.465, 30 L.Ed.2d 468, 481.) Appellant has shown that the loss/erasure of tapes, lost medical records and lost swabs and photographs of the test for blood on the jacket prejudiced his defense. Appellant has *affirmatively* shown that he was prejudiced, and there is *no* evidence that appellant was not prejudiced. Thus, the violation of the due process clauses of the state and federal constitutions requires that the conviction be reversed, and that the case against appellant be dismissed.

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[111] Appellant also contended in the Due Process Motion that photographs taken of the luminol reaction were no longer available. (CT 1946.) It was later shown that the photographs did not turn out. (RT 5671.)

VI

THE TRIAL COURT ERRED IN CONCLUDING THAT THE STATE DID NOT HAVE A DUTY TO PRESERVE CERTAIN EVIDENCE

Appellant moved to dismiss because of the erasure of the tape of the June 6, 1980 hypnosis session, the loss of the original composite drawings, and the loss of the swabs, test photos and lining of appellant's jacket. (CT 2020-2029.) This motion was based on *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 and *Arizona v. Youngblood* (1988) 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281. (CT 2025-2027.)

The trial court denied the motion on the ground that the evidence lost had no exculpatory value and that, if it did have such value, it was not apparent to the police in 1980 that it would have exculpatory value for appellant. (RT 2796-2797.)

"The State's duty to preserve exculpatory evidence is limited to evidence that (a) possesses an exculpatory value that was apparent before the evidence was destroyed, and (b) is of such nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (3 Witkin and Epstein, *California Criminal Law* (4th ed.), *Presentation at Trial,* section 126(3), p. 180.)

The record demonstrates that the trial court erred in concluding that the lost evidence had no exculpatory value and that it was not apparent to the police in 1980 that it had such a value. It is also true that the evidence that was lost and/or destroyed was unique, and that there was no comparable evidence that the lost and destroyed evidence would have served.

A. The Tape of the June 6, 1980 Hypnosis Session

As set forth in subsection C.1 of Argument V, *supra*, the tape of the June 6, 1980 hypnosis session would have been very important to the

defense. Given that changes were made to the original composites during hypnosis, as Ponce testified (CT 432, 439), the tape would have shown Bulman's actual state during the hypnosis session. Without the tape, the evidence on Bulman's mental state was limited to the testimony of witnesses who had an interest in claiming that Bulman was at no time hypnotized during the June 6, 1980 session. The tape would have exposed this testimony as being erroneous.

Had the defense been able to show that the hypnosis session directly affected Bulman's recollection, Bulman's testimony would have been excluded. This surely would have had an exculpatory effect for without Bulman's "identification" of Exhibits 19 and 20 (Argument I), no direct evidence linked appellant to the Cross murder.

Thus, the trial court's ruling that the tape had no exculpatory value was simply wrong. Also mistaken was the court's ruling that it was not apparent to the police that the tape had exculpatory value. As noted in subsection C.1 of Argument V, *supra*, it was absolutely obvious that Bulman would be a critically important witness in any prosecution for the commission of the Cross murder. This was simply never open to doubt. Thus, it is disingenuous in the extreme to pretend that Bulman, and statements made by Bulman, were of no interest to the State.

This is doubly true of Bulman's statements made under hypnosis. Such statements are taken for the very purpose of eliciting information that the subject has not previously provided. Thus, statements made by Bulman under hypnosis were at all times of special interest to the State and the defense.

The tape of the June 6, 1980 session was irreplaceable, unique and of great importance to the defense. Nothing could have served as a substitute. It was the only objective record of Bulman's state during the hypnosis session. Its erasure seriously prejudiced appellant's defense.

B. The Original Composite Drawings

The original composites drawn by artist Ponce were crucial because without them the defense could not establish the extent of the hypnosis-induced modifications that were made in the original pre-hypnosis composite.

The report prepared by Detective Thies about his interview of Bulman on June 5, 1980 did not state that the suspect had facial hair, i.e., a moustache, and the all-points bulletin prepared by Thies also made no mention of a moustache. (RT 6854, 6858.) Thies testified very candidly that the moustache was an important point and he would normally note this information in his report. (RT 6859.) Bulman himself testified that the pre-hypnosis composite did not show a moustache while the second copy of this composite does show a moustache. (RT 4882 [referring to Exhibits C and E showing the man with the shotgun].) As Ponce testified, changes were made to the original composite during hypnosis. (CT 432, 439.)

The original composite was irreplaceable evidence because it would have shown that there was no moustache on the man with the shotgun. If the moustache was added during hypnosis, as appellant contends, it would be evidence that Bulman's memory was affected by the hypnosis session. This would, in turn, lead to the exclusion of Bulman's testimony under *People v. Shirley* (1982) 31 Cal.3d 18, 67, 68 [witness may not testify to events that were the subject of a hypnosis session].)

The trial court erred with it concluded that the original composite had no exculpatory value. The court also erred in holding that it was not apparent to the police that the original composite had an exculpatory value. (RT 2782-2783.)

The murderer of a U.S. Secret Service agent was at large and the composite drawn under the direction of that agent's partner, who was an eyewitness, was the single most important link to the murderer. Obviously,

the composite was intended to inculpate somebody but it would also necessarily exculpate others. The police were, of course, intensely aware of this because this was the whole and single purpose of drawing the composite. Thus, the police well knew that the composite would serve both an inculpatory and an exculpatory purpose. This meets the requirements of *California v. Trombetta, supra,* and *Arizona v. Youngblood, supra.*

Thus, the trial court should have considered sanctions, including a dismissal of the case, for the loss of this item of evidence.

C. The Swabs and Photographs of the Blood Tests

The trial court concluded that evidence that there was no blood on the jacket was not exculpatory. (RT 2787.)

Evidence of the absence of blood on the jacket was exculpatory. If there was no blood on the jacket, all the testimony that the People presented about blood spattering (see text, *supra*, pp. 107-110) actually tended to prove that appellant was not there because there was no blood on his jacket, even though, according to Englert, there should have been blood on the jacket.

The value of this evidence, and its significance to appellant's defense, is set forth in subsection C.3 of Argument V. That discussion is incorporated here by reference. As set forth in subsection C.3 of Argument V, if appellant was able to show that there was no blood on the jacket that was retrieved by Detective Henry from his closet, a major aspect of the People's case would fail. The People brought in an "expert" on blood spattering, Rod Englert, for the sole purpose of persuading the jury that Julie Cross' blood spattered back on appellant. If in fact there was no blood on appellant's jacket, this testimony that purportedly linked appellant to the murder could be discounted in its entirety. Moreover, if there was no blood on the jacket, the jacket itself would tend to exonerate appellant because of

the People's evidence that blood must have spattered on the shooter. Thus, this evidence was clearly exculpatory.

Appellant showed that the items of evidence herein reviewed were exculpatory and that it was apparent to the police that the evidence was exculpatory. Appellant also showed that the evidence that was lost or destroyed was unique. For these reasons, the court should have assessed sanctions against the People by dismissing the case against appellant. (*California v. Trombetta, supra,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 and *Arizona v. Youngblood, supra,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281.

VII

THE FAILURE TO APPLY EVIDENCE CODE SECTION 795 TO THIS CASE DEPRIVED APPELLANT OF THE EQUAL PROTECTION OF THE LAWS UNDER THE STATE AND FEDERAL CONSTITUTIONS

People v. Shirley (1982) 31 Cal.3d 18, 40 precludes the admission of the testimony of a witness who has undergone hypnosis for the purpose of restoring his or her memory of the events in issue. *People v. Guerra* (1984) 37 Cal.3d 385, 413 held the rule of *Shirley* to be retroactive, i.e., applicable to cases that are not yet final.

Evidence Code section 795 ("section 795") was enacted in 1984. Section 795 provides that the testimony of a witness who has been previously hypnotized for the purpose of recalling events that are the subject of the witness' testimony may be admitted in a criminal proceeding under specified conditions. *People v. Hayes* (1989) 49 Cal.3d 1260, 1274 held that section 795 would have prospective operation only, i.e., section 795 applies only to hypnosis sessions held after January 1, 1985. (*People v. Alcala* (1992) 4 Cal.4th 742, 771, 772, 773.)

The state of the law is that in cases where the witness was subject to hypnosis prior to January 1, 1985, the witness is not barred from testifying to events that the court finds were recalled by the witness and related to others prior to the hypnosis session. (*People v. Hayes, supra,* 49 Cal.3d 1260, 1270, 1272, 1273.) The opposing party may introduce evidence of the fact and method of hypnosis, and its potential effects on the witness' recollection. (*People v. Hayes, supra,* 49 Cal.3d 1260, 1273.)

The equality guaranteed by the equal protection clauses of the state (Cal. Const., Article I, section 7(a) and federal constitutions (Fourteenth Amendment) is equality under the same conditions, and among persons similarly situated. The classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be established.[112] (*Morey v. Doud* (1957) 354 U.S. 457, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1485, 1490; *Reed v. Reed* (1971) 404 U.S. 71, 92 S.Ct. 251, 253, 30 L.Ed.2d 225, 229; *Brown v. Merlo* (1973) 8 Cal.3d 855, 861.)

In holding that section 795 applies only to hypnosis sessions held after January 1, 1985, *People v. Hayes, supra,* 49 Cal.3d 1260, 1274, violates the equal protection clauses of the state and federal constitutions.

Defendants whose cases are not yet final are entitled to the protections of *People v. Shirley, supra,* 31 Cal.3d 18. Under *People v. Hayes, supra,* if the hypnosis session occurred after January 1, 1985, the defendants are entitled to the protection of section 795. However, under *People v. Hayes, supra*, defendants whose cases are not yet final and where the hypnosis session occurred prior to January 1, 1985 are not entitled to the protections of section 795.

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[112] The tests for determining a claim of denial of equal protection are substantially the same under the state and federal constitutions. (*Los Angeles v. Southern Calif. Tel. Co.* (1948) 32 Cal.2d 378, 389.)

Thus, there are two classes of appellants. One class is entitled to rely on section 795 (the "section 795 class"). Members of the other class are not entitled to the procedural protections (see text immediately below) of section 795. This second class is referred to here as the "Hayes class."

The difference in the treatment of the section 795 class and the Hayes class is formidable.

In the instance of a member of the section 795 class, testimony must be limited to matters the witness recalled and related prior to the hypnosis and the substance of the prehypnotic memory must be preserved in written or audiotaped form. (Section 795(a).) The procedural safeguards enjoyed by a defendant who is a member of the section 795 class are extensive. There must be a written record made prior to the hypnosis of the event testified to and this must be provided by the hypnotist; there has to be informed consent to the hypnosis; the hypnosis session must be videotaped for subsequent review; and the hypnosis must be conducted by a licensed medical doctor, psychologist, licensed clinical worker or licensed marriage and family therapist and *not* in the presence of law enforcement, the prosecution or the defense. (Section 795(3.)

The only safeguard a member of the Hayes class has is that the court must find that the events covered in the hypnosis sessions were recalled and related to others prior to the hypnosis session. There is some check on the hypnosis session for members of the Hayes class, in that the opposing party may introduce evidence of the fact and method of hypnosis, and its potential effects on the witness's recollection. (*People v. Hayes, supra,* 49 Cal.3d 1260, 1970, 1972, 1273.) Yet, it cannot be denied that the procedural protection the section 795 class enjoys far exceed those given to the Hayes class.

The classification established by the section 795 class and the Hayes class must not be arbitrary, but must be based upon some difference in the

classes having a substantial relation to a legitimate object to be established. (*Morey v. Doud, supra,* 354 U.S. 457, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1485,1490.)

The purpose of section 795 is to safeguard against abuses of hypnosis. Specifically, the safeguards of section 795 ensure that the hypnosis session does not create a false memory of events that never happened. As long as the principles of *People v. Shirley, supra,* 31 Cal.3d 18, 40 apply, and they do apply to all pending cases, there is *no legitimate objective* in denying the Hayes class the protections of section 795. The evils of suggestive hypnosis are every bit as real and dangerous for members of the Hayes class as they are for the members of the section 795 class. A miscarriage of justice resulting from false testimony because of hypnosis is just as much a miscarriage of justice for members of the Hayes class as it is a miscarriage of justice for members of the section 795 class.

Not only is the distinction between the Hayes and section 795 classes arbitrary and without any legitimate objective, the classification itself offends settled principles. Under those principles, procedural changes brought about by new statutes generally govern pending as well as future changes.

While the general rule is that new statutes operate prospectively (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206-1209), the corollary to that principle is that procedural changes generally govern pending as well as future cases (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 843, fn. 7), as long as vested rights are not adversely affected. (*Aetna Cas. & Surety Co. v. Inc. Acc. Com.* (1947) 30 Cal.2d 388, 394-395.)

In numerous cases California courts have applied new procedural changes to proceedings that occurred before the statute in question took effect. (See *Vinson v. Superior Court, supra,* 43 Cal.3d 833, 843 [statute increasing showing of good cause required for discovery of plaintiff's

sexual conduct in a sexual harassment suit]; *Woodland Hills Residents Assn. v. City Council* (1979) 23 Cal.3d 917, 930-932 [statute authorizing award of attorney fees on "private attorney general" theory]; *Hogan v. Ingold* (1952) 38 Cal.2d 802, 812 [statute regulating stockholders' derivative suits]; *Lazelle v. Lovelady* (1985) 171 Cal.App.3d 34, 43-44 [statute tolling five-year period for bringing case to trial when plaintiff voluntarily submits to arbitration]; *Pacific Coast Medical Enterprises v. Department of Benefit Payments* (1983) 149 Cal.App.3d 197, 204-205 [statute creating remedy for enforcement of reimbursement rights of health care provider]; *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 48-49 [statute allowing malpractice plaintiff to file certificate of merit at time complaint is served].)

The same rule was followed in *People v. Seldomridge* (1984) 154 Cal.App.3d 362 where, at time of trial, the rule obtained that a polygraph test was admissible in a criminal trial. (*Witherspoon v. Superior Court* (1982) 133 Cal.App.3d 24.) While *Seldomridge* was pending on appeal, the Legislature enacted Evidence Code section 351.1, making evidence of a polygraph test inadmissible. Assuming that the admission of the polygraph would have been error under the law in effect when the case was tried, the *Seldomridge* Court concluded that the new statute would be applicable to the pending case. (*People v. Seldomridge, supra,* 154 Cal.App.3d 362, 365.)

This is in accord with the section 12 of the Evidence Code, which states that its provisions apply to all cases pending when it became effective in January 1967, even as to causes of action arising before that date. Thus, both the cases and the Evidence Code itself show that procedural changes generally govern pending and future cases.

There is no question that this violation of the equal protection clauses of the federal and state constitutions was prejudicial. Each of the

hypnosis sessions conducted prior to 1985 violated section 795.[113] Therefore, Bulman's testimony would not have been admissible.

The hypnosis session of June 6, 1980. Although an audiotape was made of this session, it was erased. Thus, contrary to subsection (a)(3)(C) of section 795, the tape was not available for subsequent review. (RT 2457, 2480.) Captain King, who conducted the session, was not a licensed medical doctor, psychologist, licensed clinical worker or licensed marriage and family therapist, as required by subsection (a)(3)(D) of section 795. Also in violation of the latter subsection, which precludes the presence of law enforcement personnel, no less than four law enforcement personnel, including Secret Service agents, were present during the session. (RT 2460.)

The hypnosis session of June 19, 1980. This session, also conducted by Captain King (RT 2453-2453), violated each of the provisions of section 795 that was violated by the session conducted in June 6, 1980. (The tape of this session was also erased. (RT 2480).)

The hypnosis session of July 9, 1980. This session was conducted by Captain Nielsen, who was also not licensed, as required by subsection(a)(3)(D) of section 795. Law enforcement personnel were present (RT 2537), and the tape of this session was erased. (RT 2551.)

The admission of Bulman's testimony was highly prejudicial to appellant. The reasons for this are discussed in subsection H of Argument I. That discussion is incorporated here as though fully set forth.

If Bulman's testimony had been excluded, as it should have been, his "identification" of appellant by the means of Exhibits 19 and 20 would also have been excluded. As set forth in subsection H of Argument I, Bulman's

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[113] As it turns out, at least one of the two sessions in May 1987 also violated section 795 because Secret Service Agent Banner was present. (RT 2283-6.) This is the subject of Argument VI, *infra*.

"identification" of Exhibits 19 and 20 lent substance to the otherwise implausible stories spun by Jessica Brock, as well as to the vague hints of culpability supplied by the jacket and the eyeglasses. (See Argument XX for the proposition that the case was closely balanced.) Absent Bulman's testimony about Exhibits 19 and 20, it is reasonably probable that the jury would have exonerated appellant. (*People v. Watson, supra,* 46 Cal.2d 818, 837.)

For the same reason, the admission of Bulman's testimony about Exhibits 19 and 20 was not harmless under the federal constitutional standard. Surely, no court could declare that it was harmless beyond a reasonable doubt under *Chapman v. Connecticut, supra,* 386 U.S. 18, 17 L.Ed.2d 705, 710, 87 S.Ct. 824, 828) because without the "identification" of Exhibits 19 and 20 by Bulman, appellant would not have been convicted of the murder of Julie Cross.

The unequal, discriminatory application of section 795, i.e., the court's failure to apply it to appellant's case, fatally prejudiced appellant's defense. Failure to apply section 795 was prejudicial error under both state and federal standards.

VIII

BULMAN'S TESTIMONY SHOULD HAVE BEEN EXCLUDED BECAUSE EVIDENCE CODE SECTION 795 WAS VIOLATED IN THE MAY 1987 HYPNOSIS SESSION

Subsection (a)(3)(D) of Evidence Code section 795 ("section 795") provides in relevant part that the hypnosis must be performed by a licensed psychologist "... and not in the presence of law enforcement, the prosecution, or the defense."

While the first requirement of subsection (a)(3)(D) appears to have been met,[114] it is undisputed that agent Banner was present during at least one of the two hypnosis sessions. Bulman testified to that effect. (RT 2283-6.) Dr. Stock not only confirmed agent Banner's presence, but testified that agent Banner did some of the questioning. (RT 2608.) According to Dr. Stock, Banner was not comfortable with it since he had not questioned witnesses under hypnosis before. Therefore, Dr. Stock did most of the questioning. (RT 2608.) Dr. Stock was unaware that California law barred law enforcement personnel from being present during the hypnosis session. (RT 2660.)

Thus, it is clear that section 795 was violated. Prior to the commencement of the hearing on the hypnosis motion, the trial court noted that a law enforcement officer was present during the hypnosis and took part in the interrogation and that this violated section 795. (RT 2241-2242.)

However, the trial court concluded that section 795 applies only if the subject has actually been hypnotized. (RT 2965-2976.) According to the trial court, the "mere attempt" to hypnotize a witness does not invoke the provisions of section 795. (RT 2976:16-18.) Since the trial court concluded that Bulman was not hypnotized in 1987 (RT 2980), the court declined to apply section 795.

There are two flaws in the trial court's ruling. First, as a factual matter, the trial court's finding that Bulman was not hypnotized in 1987 is contradicted by the record. Second, there is nothing in section 795 that predicates its operation on whether the subject was actually, and "successfully," hypnotized.

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[114] Dr. Stock, who performed the hypnosis in May 1987 (RT 2616), was a board certified forensic psychologist with a Ph.D. in psychology from the University of Kansas. (RT 2598-2599.)

First. The trial court's conclusion that Bulman was not hypnotized in 1987 is flatly contradicted by the record. Dr. Stock, the People's own witness, testified that there was no question in his mind that Bulman was hypnotized during both sessions in May 1987. (RT 2632.) Dr. Stock explained that Bulman's arm levitation on both occasions indicated that he was in an altered state of consciousness. (RT 2615.) There was a change in Bulman's breathing pattern, as well as in the tone and rate of his speech. (RT 2615.) On a scale of one to ten, Bulman's response was a five when the arm levitated, which was an average response. (RT 2659.) While Bulman's own testimony was equivocal – he denied having been hypnotized (RT 2660) yet admitted that he may have been hypnotized when he had a flashback (RT 2270) – the opinion of the People's own medical expert who administered the hypnosis opinion cannot be disregarded by the lay opinion of the person he hypnotized.

Second. The applicability of section 795 does not hinge on divergent opinions whether the subject of the hypnosis session was "successfully" hypnotized. Section 795 applies to the testimony of a witness "...who has previously undergone hypnosis for the purpose of recalling events which are the subject of the witness' testimony." Bulman had very clearly "undergone hypnosis" in May 1987. After all, that was the sole purpose of what Dr. Stock referred to as the "forensic hypnosis interview." (RT 2606-2607.) According to the trial court, there is "no question" but that the purpose of the May 1987 sessions was to hypnotize Bulman. (RT 2957:9-12.)

Section 795 is a straight-forward procedural statute that provides for clear and unambiguous requirements when a witness is to "undergo" hypnosis. If the applicability of section 795 were to depend on a battle of the experts on whether the witness was "successfully" hypnotized – a requirement that nowhere appears on the face of section 795 – the

effectiveness of the statute's procedural safeguards would be gutted. When the People, or anyone else, set about to hypnotize a witness, they must meet the procedural requirements of section 795. It is as simple as that.

The defense raised this matter in its motion to exclude Bulman's testimony on the grounds that he had been hypnotized. In its written motion, the defense also noted out that police had been present at each hypnosis session (CT 1969:3-4 ["Most significantly, the police were present at each session."].) In the oral argument on the motion, defense counsel misspoke when he twice referred to that involvement and participation of agent "Bulman," when the context of defense counsel's remarks clearly show that he meant to refer to agent Banner (RT 2959:9-17, 2974:1-8.)[115]

The trial court was aware of the significance of its ruling, which predicated the applicability of the statute on the "success" of the hypnosis session. The court stated that if a "later court" concluded that Bulman was "successfully hypnotized," this would preclude Bulman's testimony "in toto." (RT 2982-2983.) The court conceded that there had been "...a violation and a rather clear one of 795 of the Evidence Code" (RT 2983:2-3)[116] but because Bulman had not been hypnotized in 1987, section 795 did not apply. (RT 2982-2983.)

In sum, not only was the trial court's opinion that the hypnosis was not "successful" flatly contradicted by the People's own evidence, but there

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[115] It is evident, when the defense's written motion (CT 1969) and the context of defense counsel's argument are taken into account, that counsel meant to say Banner when he said Bulman. This is the reasonable and fair construction of the record. Technically, the record could not be corrected to substitute Banner for Bulman since the reporter was required to take down what counsel actually said, no matter how much of a slip of the tongue the reference was.

is nothing on the face, or in the spirit, of section 795 that predicates its applicability on the criterion that the hypnosis must have been "successful."

Not only was one of the clear requirements of section 795 flaunted in that agent Banner was present, but this law enforcement agent was allowed to inject himself into the process by questioning Bulman. (RT 2608.) This is a clear violation of both the letter and the spirit of subsection (a)(3)(D) of section 795. It is precisely what this provisions was designed to prevent – the injection of the influence of law enforcement personnel into the process of hypnosis, which can vitally affect the "memory" of a witness.

People v. Shirley, supra, 31 Cal.2d 18, 40 and section 795 are either going to be enforced or, if the trial court's ruling on this matter is affirmed, both the decision of this Court and the statute are going to be flaunted. The choice is clear. Bulman's testimony should have been excluded "in toto."

As pointed out in Argument I, Bulman's "identification" of appellant by means of the photographs was highly prejudicial to appellant under both state and federal standards. (Argument I, subsection H.) For the reasons set for in Argument I, subsection H, the error of not excluding Bulman's testimony was prejudicial.

IX

EXPERT TESTIMONY THAT THERE WAS BLOOD ON THE JACKET SHOULD HAVE BEEN EXCLUDED BECAUSE IT WAS BASED ON FACTORS THAT WERE SPECULATIVE, REMOTE AND CONJECTURAL

Following a hearing held outside the presence of the jury in which Thomas Wahl described the tests for blood on clothing (see text, *supra*, p. 110), the defense moved to exclude evidence that purportedly showed that

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[116] The "clear" violation of section 795 was the presence of agent Banner during the hypnosis session in May 1987, as the trial court noted at the outset of the hearing on the hypnosis motion. (RT 2241-2242.)

there was blood on the jacket that had been seized in the search of the home of appellant's parents. (RT 5635.)[117]

The defense contended that there was no probative evidence to show that there was blood on the jacket (RT 5635:10-12) and that any 'evidence' that purportedly showed that there was blood was speculative. (RT 5635:26.) Defense counsel stated that only two presumptive tests had been performed (RT 5635:7-9), that these tests could be positive for animal blood and copper substances (RT 5635:18-10), and that there was nothing to show what had happened to the jacket for ten years. (RT 5635:9-10.) The defense contended that the evidence the People intended to introduce would confuse the jury and prejudice appellant because the substance on the jacket "... could be any number of substances." (RT 5635:16-17.) The defense moved to have the evidence excluded under Evidence Code section 352. (RT 5635:13-14.)

The trial court denied the defense motion on the ground that the evidence was not "unduly prejudicial." (RT 5640:21.) While the trial court conceded that the tests could have shown animal blood or copper salts, if both tests indicated the presence of blood, this was "... fairly strong evidence that there is blood of some sort on the jacket in a couple of locations." (RT 5641:4-11.)[118] The court concluded that the evidence was relevant, especially in light of the testimony that showed that blood could have spattered on the shooter. (RT 5641-5642 [referring to Englert's testimony, summarized in text, *supra*, pp. 107-109].)

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[117] Detective Henry was directed by appellant's mother to a closet that she stated contained appellant's clothing. The jacket was found in the closet. (RT 5638-5639.)

[118] Wahl testified that since the phenolphthalein and the luminol tests both showed the presence of blood, there was a very high probability that the substance was blood. (RT 5634.)

However, the court was 'troubled' about the passage of time. (RT 5642:21.) The passage of time "of interest," according to the trial court, was between 1980 and 1990. (RT 5637:7-8.) The court noted that during this decade appellant had no access to the jacket and "...one does not know exactly what happened to it during that time other than it was apparently kept for some portion in the parents' home." (RT 5642:23-27.) The court apparently concluded that this went to the weight and not the admissibility of the evidence. (RT 5643.)

When an expert bases his conclusions upon assumptions which in turn are based on factors that are speculative, remote and conjectural, the expert's conclusions have no evidentiary value and do not constitute substantial evidence. (*Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1136; *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) Moreover, an inference may not be based on mere surmise or conjecture, or on mere possibility. (*People v. Mayo* (1961) 194 Cal.App.2d 527, 535; *People v. Berti* (1960) 178 Cal.App.2d 872, 876.)

The People's expert Matheson testified that the phenolphthalein test on the inside of the left sleeve of the lining of the jacket, applied with swabs, showed that the stain was blood or had blood in it. (RT 5662:8-13.) The luminol test, according to Matheson, showed a reaction in the same location where the phenolphthalein had indicated the presence of blood. (RT 5663.)

Matheson's testimony that there was blood on the jacket should have been excluded because it was speculative, remote and conjectural. There are three reasons why Matheson's testimony was speculative. First, it was equally possible that the blood on the jacket, assuming it was blood, was animal blood. Second, Matheson's testimony is contradicted by facts of record to which the People and the defense stipulated. Third, the

circumstances demonstrate that it was entirely speculative to rely on the condition of the jacket.

First. The conclusion that the two presumptive tests showed the presence of *human* blood was sheer speculation. Matheson himself testified that the blood on the jacket could have been animal blood. (RT 5676.) Where inferences are equally balanced, the proponent has not met his burden of proving the truth of the proposition on which he seeks to rely. (*San Joaquin Grocery Co. v. Trewhitt* (1926) 80 Cal.App. 371, 375; *Leslie G. v. Perry & Associates, supra,* 43 Cal.App.4th 472, 483; 3 Witkin, *California Evidence* (4th ed.), *Presentation at Trial,* section 139, p. 198.). It was equally possible in this case that the blood on the jacket, assuming it was blood, was animal blood. Thus, the People did not meet their burden to show that the blood on the jacket, assuming it was blood, was human blood. The evidence to support that proposition was insufficient since the inference that it was human blood was as likely as the inference that it was animal blood. (*San Joaquin Grocery Co. v. Trewhitt, supra,* 80 Cal.App. 371, 375; *Leslie G. v. Perry & Associates, supra,* 43 Cal.App.4th 472, 483; 3 Witkin, *California Evidence* (4th ed.), *Presentation at Trial,* section 139, p. 198.)

Second. The conclusion that there was blood on the jacket or, if there was blood, it was human blood was contradicted by the stipulated facts. The People and the defense stipulated that the jacket was tested by Thomas Wahl of the Analytical Genetic Testing Center in Denver, Colorado and that, according to these tests, the presence of blood on the jacket could not be confirmed. (RT 7131-7132.) With specific reference to the inside of the left sleeve of the lining of the jacket, confirmatory tests for blood were negative and human species origin tests yielded negative results. (RT 7132.) Presumptive tests were also negative, with the exception of one presumptive test that yielded positive results after "vigorous

swabbing." (RT 7132.) However, it is not known whether this was human blood.

The value of an expert's opinion is dependent on the truth of the facts he assumes as the basis of that opinion. (*People v. Cantrell* (1973) 8 Cal.3d 672, 688.) The opinion of an expert cannot rise above the reasons upon which it is founded. (*People v. Houser* (1965) 238 Cal.App.2d 930, 932.) It is simply not known whether the substance on the inside of the left sleeve of the lining of the jacket was human blood. Thus, Matheson's conclusion to the contrary should have been disregarded.

Third. It is totally conjectural what happened to the jacket between 1980 and 1990. As noted by the People, for a significant portion of that time appellant was not even in control of the jacket. He was imprisoned between 1984 and 1986, was arrested for the triple homicide in 1987 and had been in custody since then. (RT 5637.) Thus, anyone may have worn the jacket for half the time that elapsed between the Cross murder and the seizure of the jacket by Detective Henry.

The trial court was "troubled" about the passage of time. (RT 5642:21.) The court noted that during this decade appellant had no access to the jacket and "...one does not know exactly what happened to it during that time other than it was apparently kept for some portion in the parents' home." (RT 5642:23-27.) One cannot put it any better than that. Indeed, no one knows what happened to the jacket for a decade. Thus, it was entirely inappropriate to base any conclusions on the condition of the jacket, i.e., to infer, based on a spot of unknown origin on the jacket, that appellant had worn the jacket at the scene of the Cross murder.

The admission of Matheson's testimony clearly was prejudicial error. The People introduced a substantial body of testimony that showed that blood could have spattered on the shooter. (See text, *supra*, pp. 107-109.) If Matheson's testimony was to be believed, the jacket found in

appellant's clothes closet showed traces of human blood. (RT 5638-5639.) This was physical evidence that purported to connect appellant with the shooting of Julie Cross. In light of the paucity of physical evidence that connected appellant with the crime (Argument XX is incorporated here by reference), this item of evidence assumed great importance in the People's case. It tended to show directly that appellant had been the shooter since the alleged blood spatters were on his jacket. Since this evidence was central to the People's case, it is reasonably probable that, absent this evidence, the outcome would have been favorable to appellant. (*People v. Watson, supra,* 46 Cal.2d 818, 837.)

Matheson's conclusions were conjectural and speculative. In a word, they were unreliable. Yet, under the Eighth and Fourteenth Amendments to the United States Constitution, appellant is entitled to a *reliable* determination of guilt. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 100 S.Ct. 2382, 65 L.Ed.2d 391.) The admission of Matheson's testimony therefore was not only a violation of California law, it also violated the Eighth and Fourteenth Amendments.

X

THE TESTIMONY OF APRIL WATSON WAS IRRELEVANT, AND DETECTIVE HENRY'S RECAPITULATION THEREOF WAS INADMISSIBLE HEARSAY

The defense objected to the testimony of April Watson (Jones) on the ground that it was irrelevant. (RT 5838-5839.) The objection was overruled. (RT 5841-5842.) Shortly after Watson testified, Detective Henry was called by the People. He was asked by the People to relate statements made by Watson. The defense objection that this was inadmissible hearsay was overruled. (RT 5900-5901.)

Watson testified that she received a call from appellant (RT 5850) and that it was possible appellant wanted to know what was going on with Terry Brock. (RT 5851.) It was also possible that she told the police that Terry Brock was seen being taken out of County Jail by Detective Henry and guys with suits, and that appellant was asking what was going on with Terry Brock. (RT 5851-5852.)[119] According to Watson, it was also possible that appellant stated, "Tell Terry to stay strong. Tell him to stay strong. I heard some things that weren't right." (RT 5852.)

The People called Detective Henry to testify to the out-of-court statement made by Watson. Henry testified that he interviewed Watson, then known as April Jones, on September 27, 1990. (RT 5897-5898.) Watson told Henry that she had received telephone calls from appellant, and his wife Eileen (RT 5898), in August 1990. (RT 5900.) Over defense objection that Henry was about to give hearsay testimony (RT 5899), Henry testified that Watson told him that appellant wanted to know what was going on with Terry Brock, and that Terry Brock had been seen taken out of jail by Henry and men in suits. According to Detective Henry, appellant told Watson to tell Terry Brock to stay strong, that he had heard some things that weren't right. (RT 5901.) Jones told Henry that she did not understand what appellant was talking about. (RT 5901.)

A. Watson's Testimony was Irrelevant

In substance, Watson's testimony was introduced to show that appellant was concerned about Terry Brock's statements to the police regarding the Cross murder. As the prosecutor put it: "In my opinion he

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[119] Detective Henry testified that he removed Terry Brock from the Los Angeles County Jail on August 17, September 6, September 13 and September 14, 1990. (RT 5902.) On three occasions Henry was with his partner, Roger Niles, and on one occasion with Special Agent Beeson. He and Beeson were both wearing suits. (RT 5902-5903.)

[appellant] is worried about Terry Brock who is his partner in crime. He [appellant] is worried about Terry Brock telling the police what they did in the Secret Service murder." (RT 5840.)

Terry Brock pleaded guilty in the triple murder case on October 12, 1990. (RT 5838:13-15.) Appellant was convicted of the triple homicide in July 1990. (RT 5840:23-24.) Appellant appealed from that conviction. (RT 5841:9-0.)

There is nothing in the record to show that any of the statements ascribed to appellant related to the Cross murder. It was far more plausible that appellant, if he actually made the cited comments to Watson, was referring to the triple homicide.

It was incumbent on the People to produce at least *some* showing that these comments related to the Cross murder. Yet, no such showing was made. Instead, the People relied simply on the inference that the comments related to the Cross murder.

However, it is just as reasonable to infer that the comments related to the triple homicide. Appellant's appeal from that conviction was pending in August-September 1990. (RT 5841.) In no sense was that case closed in August-September 1990. Appellant, if he made the comments, may well have been concerned about Terry Brock's statements about the triple homicide. Brock had not entered a plea to that offense in August-September 1990 – he was to do so in October 1990 (RT 5838) – and Brock could well have been engaged in plea bargaining in August–September 1990. It stood to reason that, in the course of those negotiations, Brock would be talking about the triple homicide and this may have been appellant's concern. Thus, it was far more reasonable to infer that the comments were about the triple homicide as it was to infer that they were about the Cross murder.

Where inferences are equally balanced, the proponent has not met his burden of proving the truth of the proposition on which he seeks to rely.

(*San Joaquin Grocery Co. v. Trewhitt, supra,* 80 Cal.App. 371, 375; *Leslie G. v. Perry & Associates, supra,* 43 Cal.App.4th 472, 483; 3 Witkin, *California Evidence* (4th ed.), *Presentation at Trial,* section 139, p. 198.) At a minimum, the inferences in this case are equally balanced.

If the comments related to the triple homicide, they were irrelevant in the case at bar. Since the evidence is insufficient to support the inference that the comments related to the Cross murder, it has not been shown that the comments were relevant. Thus, it was error to overrule the defense objection to Watson's testimony on the ground that it was irrelevant.

If Watson's testimony relates to the triple homicide, her testimony on this score was not only irrelevant, it was also prejudicial. For the reasons set forth in Argument XV, testimony by Watson that appellant had committed a criminal offense in 1978 was prejudicial and inadmissible. And as set forth in Argument XVI, Watson's explicit reference to the triple murder (RT 6288), which sparked a mistrial motions that should have been granted, was even more damaging and prejudicial. The same is true of the more attenuated reference to the triple murder that is the subject of the instant argument.

B. Henry's Recapitulation of Watson's Testimony was Inadmissible Hearsay

During Detective Henry's direct examination by the prosecutor, Henry was asked whether Watson told him during the interview on September 27, 1990 that she had received calls from appellant and his wife Eileen [Smith]. (RT 5898:21-22.) The defense objected on the grounds that the prosecutor was eliciting "... hearsay from the statement of Eileen." (RT 5899:5-6.) The trial court overruled the objection. (RT 5900:10-11.)

Detective Henry's entire account of the statement April Watson made on September 27, 1990 was a recitation of what Watson told him on that day.[120]

Watson's statement to Henry was very evidently offered to prove the truth of the matter stated, i.e., that appellant had inquired about Terry Brock, that appellant wanted to know what was going on with Terry Brock, that appellant had said that he wanted Terry Brock "to stay strong" and that appellant had heard some things that weren't right. The prosecutor wanted to prove that appellant was worried about Terry Brock who was "his partner in crime" and that appellant was worried that Terry Brock might tell the police "what they did in the Secret Service murder." (RT 5840.) Watson's statement to Henry was, of course, made out of court. Thus, Watson's statement was a hearsay statement. (Evidence Code section 1200 [hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated"].)

"A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements *each* of which meets the requirements of an exception to the hearsay rule." (Italics added) (Evidence Code section 1201.)

While an *admissible* hearsay statement may be used to prove another *admissible* hearsay statement (1 Witkin, *California Evidence* (4th ed.), *Hearsay*, section 6, p. 684), an inadmissible hearsay statement cannot be

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[120] Henry testified: "She [Watson] told me that Andre Alexander wanted to know what was going on with Terry Brock. And that Andre had stated that Terry Brock was seen being taken out of the County Jail by myself, Buck Henry, and guys wearing suits and Alexander was questioning April Jones [Watson] regarding what was going on with Terry Brock...Alexander told

used to admit an admissible hearsay statement. (Law Revision Commission Comment, Evidence Code section 1201.)

Watson's hearsay statement to Henry does not come within any of the exceptions to the hearsay rule and was inadmissible hearsay.

The grounds for the objection were adequately identified (Evidence Code section 353(a) [objection to evidence must be timely and so stated as to make clear the specific ground for the objection].) The specific ground for the objection was that Watson's testimony was hearsay. While defense counsel stated that the objection was as to hearsay statements from Eileen (RT 5899:5-6), when the objection was made, defense counsel could not anticipate that Henry would be asked to relate Watson's – and not Eileen's – statement.

In any event, it appears that the objection was broadened to encompass statements made by *Watson*. After the objection was lodged, the trial court stated, "It is not hearsay. She was asked – the witness was asked when she was on the stand if she had phone calls from the defendant or a person named Eileen." (RT 5899:9-12.) The trial court was clearly referring to Watson, who had just testified. The trial court repeated the substance of this remark (RT 5900:2-5), and defense counsel responded as follows: "All right. I assume that the People are going to bring out information relating to the telephone calls that she talked about." Following on the heels of the trial court's statement, defense counsel's reference was clearly to Watson. Thus, the objection was discussed in terms of statements made by Watson, and it was overruled on that understanding.

Watson's statement was prejudicial for the very reason that the People sought the admission of this statement into evidence. The inference that the statement showed that appellant was worried that Terry Brock

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her [Watson] to tell Terry 'to stay strong. Tell him to stay strong. I heard some things that weren't right." (RT 5901.)

would tell the police "what they did in the Secret Service murder" (RT 5840 [prosecutor speaking]) lacked any evidentiary support. Yet, even though it lacked any evidentiary support, the statement was introduced to show consciousness of guilt. As shown in Argument XX, the evidence in this case was very closely balanced. (Argument XX is incorporated here by reference.) Given the weakness of other evidence, as it set forth in Argument XX, it is reasonably probable that, absent this error, the jury would have exonerated appellant. (*People v. Watson, supra,* 46 Cal.2d 818, 837.)

California law that prohibits the admission of hearsay is a safeguard against unreliable and untrustworthy testimony. (1 Witkin, *California Evidence* (4th ed.), *Hearsay*. Section 1.) Yet, in this case the safeguard against the admission of such untrustworthy testimony was denied to appellant in clear violation of California law. There is not even a colorable basis for the trial court's rulings on appellant's objections to the admission of this evidence. The arbitrary denial of this crucial state-law-mandated safeguard violated appellant's rights under the Due Process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 227, 100 L.Ed.2d 175 [due process clause is violated when defendant is arbitrarily denied safeguard mandated by state law]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300; *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522.)

XI

IT WAS ERROR TO INTRODUCE EVIDENCE THAT APPELLANT HAD REFUSED TO STAND IN A LINEUP

The defense objected to testimony that appellant refused to stand in a lineup on April 3, 1990. (RT 5711:19-27; 5715:5-15.) The defense contended that since appellant had been advised by his attorney not to stand

in the lineup, testimony that he refused to participate in the lineup could not be used to show consciousness of guilt. (*Ibid.*)

Notwithstanding the objection, the trial court allowed Deputy Sheriff Hartwell to testify that on April 3, 1990 he told appellant that he would have to stand in the lineup, that appellant became agitated, and that he refused to stand in the lineup. (RT 5729.) Hartwell testified that he told appellant that his refusal to stand in the lineup could be used against him in court. However, appellant stated that he refused to stand in the lineup on the advice of his attorney. (RT 5732.) Appellant signed a form to that effect. (RT 5733, 5712.)

Attorney Rosen testified that he met with appellant on April 2, 1990, and that he advised appellant not to stand in the lineup. (RT 5811.) Rosen thought that if appellant refused to stand in the lineup as a result of advice Rosen had given him, appellant's refusal could not be used to show consciousness of guilt. (RT 5820.) Rosen testified that he believed that he must have so informed appellant, i.e., that he informed appellant that if appellant refused to stand in the lineup on his lawyer's advice, the evidence of his refusal would not come in or would not have any meaning. (RT 5815.)

The trial court allowed Hartwell to testify because the court thought that two inferences were possible. First, it could be inferred that appellant refused because his lawyer told him to do so. Second, it could be inferred that appellant refused "... because his lawyer didn't want him identified." (RT 5716:23-28.)

There was absolutely no evidence to support the second inference. It was nothing but rank speculation and should be rejected by this Court. (6 Witkin and Epstein, *California Criminal Law* (3d ed.), *Criminal Appeal*, section 152, p. 400 [speculation and conjecture is not substantial evidence].) Rosen made it clear why he thought that appellant should not

participate in the lineup. Rosen stated that there was no advantage to standing in the lineup, and that asking a witness ten years after the fact to make an identification did not serve any purpose. (RT 5812.) Neither Rosen nor anyone else ever testified that appellant was advised not to stand in the lineup because he would or could be identified.

It was fundamentally unfair to present Hartwell's testimony to the jury that appellant refused to stand in the lineup on April 3, 1990. Appellant was not only acting on the advice of counsel, but his lawyer had told him that if he acted on advice of counsel, his refusal to stand in the lineup could not be used against him. The court's ruling in allowing Hartwell to testify would have required appellant to disregard his lawyer's advice in 1990 – advice which was clear and unequivocal.

Viewed from another perspective, the court's ruling was not only unfair, it was also extraordinarily unrealistic. No one in appellant's shoes on April 3, 1990 could be expected to overrule his court-appointed lawyer and stand in the lineup on the suppositions that: (1) his lawyer was wrong, and (2) six years later a judge would suggest that it could be inferred that his lawyer gave him the advice because the lawyer did not want him identified – when nothing supported such an inference.

Hartwell's testimony was prejudicial to appellant. It suggested that appellant refused to stand in the lineup because he was afraid of being identified, i.e., it showed a consciousness of guilt, even though the uncontradicted reason for the refusal was that appellant was told by his court-appointed lawyer not to stand in the lineup and that, once so instructed, his refusal could not be used against him. Hartwell's testimony created the substantial danger of undue prejudice and should therefore not have been admitted. (Evidence Code section 352 [evidence should be excluded if its probative value was outweighed by the danger of undue prejudice].)