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SO53228

SUPREME COURT  
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DEPUTY

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 1 of 5; Pages 1-57]

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Under Appointment by the California Supreme Court*

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## INTRODUCTION

The murder of a United States Secret Service agent will galvanize attention. The first murder of a female U.S. Secret Service agent in the line of duty is, tragically, a cause celebre.

Every aspect of the tragic killing that led to this case contributes to its unfortunate prominence. The victim, agent Julie Cross, a veteran policewoman but new to her job with the Secret Service, was gunned down at close quarters inside a Secret Service vehicle that was on a stake-out near the Los Angeles Airport in the evening hours of June 4, 1980. While the People proceeded on the theory that the two men who approached the Secret Service car from the rear intended to rob Julie Cross and her partner, agent Lloyd Bulman, who was also seated in the Secret Service vehicle, the crime seems random and fortuitous – a mugging or a roust gone bad. Certainly, one would not expect a Secret Service agent to fall victim to low-level street crime, yet this is what happened.

The bitter frustration engendered by the random, senseless nature of this crime was fueled by the inability of law enforcement agencies to identify the two perpetrators for over a decade. It could not be otherwise. No murder should go unpunished and, certainly, the murder of agent Julie Cross called out for punishment that was swift and sure.

Appellant was arrested for this crime in 1992, while serving a prison sentence handed down in 1990 for the murder of three individuals, in 1978.

In 1990, law enforcement received from Terry Brock, who was appellant's co-defendant in the 1978 murder case, information that pointed, even if equivocally, to appellant as one of the two perpetrators of the Cross murder. Ultimately, Brock entered a plea in the 1978 murder case and served his time in that case. In 1990, while awaiting trial in the triple murder, appellant stood in a lineup held in the Cross case, in which Agent



Bulman failed to identify appellant as either of the two perpetrators of the Cross murder.

Prior to and during the trial of this case, appellant claimed he had nothing to do with the murder of Julie Cross and pursued the theory that the culprits were Terry and Charles Brock. However, once suspicion had focused on appellant, law enforcement did not let go. Appellant was brought to trial and convicted of the murder of Julie Cross. Even though the prosecution pursued the theory that appellant and Terry Brock had committed the murder, the latter was never even charged in the Cross case.

The People's case against appellant for the murder of Julie Cross was not an easy one. No physical evidence in the form of fingerprints linked appellant to the crime. Agent Bulman failed to identify appellant, even in court, as one of the perpetrators. The physical evidence on which the People relied was conjectural to the point that the trial judge declared himself, more than once, unimpressed by it.

Among other things, this appeal shows that the People overreached in convicting appellant of this crime. Evidence was propounded that should not have been admitted. Far too much reliance was placed by the People on the circumstance that appellant's past made him vulnerable to this charge. And appellant's efforts to vindicate himself were turned against him.

This appeal is also about rights that any defendant in a criminal case has – or should have. Appellant was stripped of his right to make a motion for new trial and of the opportunity to prepare for the hearing on the modification of the death sentence. Appellant was also deprived by the courts of the one lawyer in whom he had confidence, and who, according to the judge presiding over the preliminary hearing, had done an outstanding job.

This is a tragic case, but it is not a simple case. However, tragic or not, simple or not, it is a case that requires justice to be elevated over the

angry passions that the murder of Julie Cross so understandably engendered.

## **STATEMENT OF THE CASE**

### **I. PROCEEDINGS PRIOR TO THE PRELIMINARY HEARING**

Ms. Julie Cross was murdered on June 4, 1980. (CT 589.) Appellant was remanded into custody for this murder on October 1, 1992. (CT 604.) The same day, he was granted leave to represent himself. (CT 606.) Attorney Kopple was appointed to serve as advisory counsel. (CT 636.)

On March 10, 1993 appellant, through Ms. Kopple, requested an order maintaining his pro per status in a prior case, LASC A959177, so that he would have access to the jail's law library to work on his appeal from this prior conviction.<sup>1</sup> (CT 661-666.) The court granted the request. (CT 2, 657.)

Ms. Kopple continued as advisory counsel in this case, i.e., the Cross murder case, until July 13, 1993 when she was appointed as appellant's counsel at his request. (CT 40-41.)

On May 24, 1993 Ms. Kopple filed on behalf of appellant a motion to strike the prior murder conviction that was alleged as a special circumstance in the complaint filed in this case as a special circumstance. (CT 671-722.)

Ms. Kopple informed the court on July 7, 1993 that the prior conviction had been affirmed. (CT 23.) According to Ms. Kopple, in addition to his (appointed) counsel's brief, appellant had filed a pro per

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<sup>1</sup> The prior conviction (LASC A959177), entered in October 1990, was for three counts of first degree murder. Appellant was sentenced to a life term with the possibility of parole on one count and to life terms on the other two counts that were merged pursuant to former Penal Code section 669. The Court of Appeal affirmed the conviction in an unpublished decision (B054929) filed on June 10, 1993. (CT 816-827.)

brief, much of which appellant wrote himself, and which she helped to prepare. (CT 24.) A petition for review was going to be filed in the California Supreme Court. (CT 24.) Ms. Kopple stated that even though the conviction had been affirmed, the court would have to make a determination about the constitutional validity of the conviction. (CT 25.) The court requested the People to file a memorandum in response to Ms. Kopple's memorandum on this issue. (CT 26.)

Also on July 7, 1993, Ms. Kopple filed a motion to suppress the testimony of three witnesses who were to be called by the People during the preliminary hearing. (CT 737-748.) This motion was based on *People v. Shirley* (1982) 31 Cal.3d 18, 67, 68 [witness may not testify to events that were the subject of a hypnosis session].) This motion was refiled on July 20, 1993 in Superior Court, after appellant had been held to answer. (RT 737.)

On July 12, 1993, Ms. Kopple filed on behalf of appellant a Motion to Dismiss For Denial of Due Process. (CT 765-776.) This motion was based on the substantial pre-indictment delay. It was denied by Judge Waters in the Municipal Court (CT 658), and it was refiled on July 20, 1993 in Superior Court. (RT 765.)

On July 13, 1993, the court denied the defense's motion to strike the prior conviction in LASC A959177 (CT 42.) The court also denied the motion to strike the testimony of three witnesses, ruling that the witnesses could testify to matters that occurred prior to the hypnosis. (CT 42.)<sup>2</sup>

The preliminary hearing terminated on July 19, 1993 (CT 584) and appellant was bound over for trial. (CT 581.)

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## II. THE INFORMATION

In an information filed on August 2, 1993, appellant was charged in one count with the murder of Julie Cross on June 4, 1980, in violation of Penal Code section 187(a). (CT 586.) The count gave notice that this offense was a serious felony within the meaning of Penal Code section 1192.7(c)(1). (CT 586.) The information alleged that appellant had personally used a firearm, i.e., a shotgun, in the commission of the offense within the meaning of Penal Code sections 1203.06(a)(1) and 12022.5(a), causing the charged offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8). (CT 587.) It was further alleged that in the commission of the charged offense a principal had been armed with a firearm within the meaning of Penal Code section 12022(a)(1). (CT 589-590.)

The information also alleged that, within the meaning of Penal Code section 190.2(a)(2), appellant had been previously convicted of three counts of first degree murder in the Superior Court of the State of California in case No. A959177 on July 19, 1990 and that the murder of Julie Cross was committed while appellant was engaged in the commission of the crime of robbery within the meaning of Penal Code section 190.2(a)(17). (CT 587.)

Finally, the information alleged 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.)

On the People's motion, the information was amended after the verdict was returned to strike the allegation that Julie Cross was a

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<sup>2</sup> In addition to the motions to dismiss, to strike the prior conviction and to strike the testimony of witnesses who had been hypnotized, Ms. Kopple also filed an extensive discovery motion. (CT 791-809.)

California peace officer (RT 7643-7644).<sup>3</sup> In lieu of this allegation, the information was amended to allege that Julie 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). (CT 590.)

The allegation that Cross was a federal law enforcement officer in the terms of Penal Code section 190.2(a)(8) was ultimately struck on the defense's motion (RT 7654) on the ground that there was insufficient evidence that appellant knew or should have known that Julie Cross was a federal law enforcement officer. (RT 7660.)

The importance of the erroneous allegation that Cross was a California peace officer was that this allegation was continually paraded before the jury panel to appellant's detriment, as set forth in Argument III.

However, the negative significance of this allegation is not limited to the damaging effect of the many references to this entirely erroneous allegation. As appellant pointed out in a *Marsden* motion filed nearly two years prior to trial to relieve Ms. Penelope Watson, his court-appointed attorney at the time, attorney Watson's failure to attack this allegation shows that her representation of appellant fell below professional standards. (CT 1484-1485.) It is also true that the long life of this erroneous special circumstance allegation in this case – it was not struck until after the verdict was returned (CT 3857) - shows that appellant was injured by the trial court's refusal to appoint attorney Kopple to represent him. Attorney Kopple would have taken steps to eliminate this allegation. (Argument II.) Attorney Kopple's contributions to the case at bar are summarized at pp. 212-214, *infra*.

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<sup>3</sup> Federal law enforcement officers are not California peace officers but may exercise the powers of arrest of peace officers under certain limited

### III. PRE-TRIAL PROCEEDINGS

#### **A. Appellant Pleads Not Guilty; Attorney Watson is Appointed as Appellant's Counsel but is Relieved After Seven Months (August 2, 1993 – March 30, 1994)**

On August 2, 1993 in Department 100, Judge Ito presiding, appellant, represented by Ms. Kopple, entered a plea of not guilty and denied the enhancements. (RT 2-3; CT 879.) The case was 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 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.)

Appellant's efforts to secure the appointment of Ms. Kopple as his attorney are recounted in detail in Argument II [“Appellant Was Deprived of his Constitutional Right to Counsel”]. These efforts came to an unsuccessful end on February 17, 1994, when the Court of Appeal denied appellant's petition for the appointment of Ms. Kopple as his counsel. (*Alexander v. Superior Court* (1994) 22 Cal.App.4<sup>th</sup> 901.)<sup>4</sup>

Attorney Watson was appointed as appellant's counsel on September 28, 1993. (RT 278.)<sup>5</sup> In tandem with his efforts to have Ms. Kopple appointed as his counsel, appellant vigorously and repeatedly requested that attorney Watson be relieved as his counsel. Appellant's efforts regarding attorneys Kopple and Watson are intertwined and therefore are recounted

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circumstances. (4 Witkin and Epstein, *California Criminal Law* (4<sup>th</sup> ed.), *Pretrial Proceedings*, section 8, p. 207.)

<sup>4</sup> As recounted at p.10, *infra*, appellant made one more effort in the Superior Court in April-May 1994 to have Ms. Kopple appointed as his counsel. This effort also failed.

<sup>5</sup> Attorney Watson had been appointed on August 3, 1993 to evaluate the case. (CT 882.)

together and in detail in Argument II.<sup>6</sup> In the event, attorney Watson was relieved as appellant's counsel on March 30, 1994, when appellant's request to proceed in pro per was granted. (CT 1502; p. 10, *infra*.)

In addition to the pro se motions filed by appellant regarding attorneys Kopple and Watson that are summarized in Argument III, on September 24, 1993 appellant filed the following motions in pro per, all of which were denied on September 30, 1993:

1. A motion for the appointment of counsel to prepare a writ regarding the denial of appellant's request for court documents and records. (CT 970; RT 285-286.)

2. A motion to relieve Ms. Watson as counsel on the grounds that he and others had smelled liquor on her breath, (CT 972-973 [Marsden Motion].) Appellant also personally objected in open court to being represented by Ms. Watson and to the removal of Ms. Kopple as his lawyer. (RT 271; RT 284-285.)

3. A motion to relieve Ms. Watson as counsel due to her conflict of interest. (CT 974-975; RT 285-286.) The court also declined to appoint a lawyer to investigate the conflict. (RT 285.)

4. A motion to appoint attorney Gerstein as counsel for Penal Code sections 995 and 1382 [denial of speedy trial] motions. (CT 976-985; CT 989.)

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<sup>6</sup> As is set forth more fully in Argument II, on March 25, 1994, appellant's motion to relieve attorney Watson specifically referred to her failure to raise the issue that Julie Cross was not a California peace officer for the purposes of Penal Code section 190.2(a)(7). (CT 1484-1485.) Although this motion was denied on March 25, 1994 (CT 1490; RT 766-778), ultimately the People conceded that appellant was correct when the information was amended on the People's motion to allege that Julie Cross was a federal law enforcement officer. See fn. 3, pp. 6-7, *supra*, and accompanying text.

During the hearing on September 30, 1993, appellant stated that he was not waiving his right to a speedy trial. (RT 282; 290.) However, the court found good cause for a continuance to allow counsel to file a Penal Code section 995 motion. (RT 290-291.) The court set a hearing over defendant's objections for October 13, 1993. (RT 291.) On October 15, 1993, the pre-trial conference was continued to October 18, 1993 due to counsel's illness. (CT 1000.)

On October 18, 1993, appellant filed a pro se motion to dismiss the case pursuant to Penal Code section 1382, for violation of his right to a speedy trial. (CT 1001-1014.)

**B. The Section 995 Motion; Denial and Appellate Review  
(October 4, 1993 – November 29, 1993)**

Ms. Watson filed a Penal Code section 995 motion on October 4, 1993. (CT 990-999.) Appellant objected to the motion being filed and argued by Ms. Watson. (CT 1030.) 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.) Appellant also moved to have Ms. Watson relieved as his attorney. (CT 1016-1029.) Appellant's objection and his motion to relieve Ms. Watson were denied on October 19, 1993. (CT 1030.)

Appellant, represented by Ms. Watson and Dennis A. Fischer as special counsel, filed a petition for a writ of prohibition in the Court of Appeal, Second Appellate District on November 3, 1993. (1047-1108.) The petition alleged that the evidence was insufficient to sustain the special circumstance allegation that the murder was committed in the course of a robbery. This was one of the grounds of the section 995 motion filed by Ms. Watson. The Court of Appeal denied this petition summarily on November 29, 1993. (CT 1212.)



The ground that appellant urged should have been raised in the Penal Code section 995 motion – that the special circumstance allegation that Julie Cross was a California peace officer was erroneous – was never raised by Ms. Watson. Yet, ultimately, after the verdict had been returned, this allegation was struck. (CT 3857.) However, by this time the damage was done, as is set forth in Argument III.

**C. Appellant In Pro Per; Advisory Counsel is Appointed  
(March 30, 1994 – July 26, 1994)**

Appellant’s petition to proceed in pro per was filed on March 30, 1994. (CT 1495-1501.) Following a hearing held the same day, the motion was granted, and Judge Horan sent the file to Department 100 in order for that department to determine whether there was a need for advisory counsel. (CT 1502; RT 783-796.)

On April 13, 1994, before Judge Ito, appellant joined in Mr. Gerstein’s request that the court appoint Mr. Gerstein as appellate counsel to argue a motion to appoint Ms. Kopple as appellant’s trial counsel. (RT 864-865; CT 1536-1541.) The court granted the motion and appointed Mr. Gerstein for this purpose. (CT 1542.) Judge Ito appointed Mr. Rowan Klein as advisory counsel while the motion regarding Ms. Kopple was pending. (RT 869-870; CT 1542.)

On May 20, 1994, Mr. Gerstein filed a motion for reconsideration of appointment of counsel, in which he sought an order appointing attorney Kopple as counsel. (CT 1611 – 1633.) (The opinion of the Court of Appeal denying the request to appoint Ms. Kopple as counsel had been filed on February 17, 1994 [see p. 7, *supra*, and CT 1350-1378].)

The hearing on the motion for the appointment of Ms. Kopple as appellant’s counsel was held on June 9, 1994. (CT 1701.) The motion was denied on June 13, 1994, with reasons stated in the minute order. (CT 1702.) Mr. Klein continued as advisory counsel.

On June 23, 1994, appellant filed a motion to have restraints removed during court appearances. (CT 1709-1728.) On June 28, 1994, the motion was denied; the court stated it would reconsider the ruling at the time of trial. (CT 1729.)

**D. Attorney Klein Appointed as Appellant's Counsel;  
Pre-Trial Motions; Continuances  
(July 26, 1994 – November 28, 1995)**

On July 26, 1994, appellant gave up his right to represent himself and agreed to have Mr. Klein appointed as his defense counsel. (CT 1737.) In accordance with the defense's requests, the case was continued several times throughout the balance of 1994. (CT 1737, 1738, 1740-1744, 1745, 1748-1754, 1755.) On December 23, 1994, the court granted a motion to continue the trial for one year. (CT 1745.)<sup>7</sup>

On June 19, 1995, the district attorney filed a notice of evidence to be offered in aggravation. (CT 1779-1792.)

A hearing was held on August 17, 1995 regarding the prosecution's motion for the release of a jacket, Exhibit 4, for testing. The defense objected to the release of the jacket. (RT 1340-1342.) Following a continuation of the hearing on August 30, 1994, Judge Horan granted the prosecution's request for the jacket. (RT 1348-1364.)

On October 16, 1995, the defense filed a motion for information to locate witnesses, for discovery and for a continuance (CT 1873-1876); a motion in limine in opposition to other crimes evidence (CT 1877-1880); and motions to view all physical evidence (CT 1881-1883) and to release physical evidence for examination by defense experts and for discovery. (CT 1884-1888.)

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<sup>7</sup> The motion to continue the trial is at CT 3435-3436; the supplement to the motion is at CT 1740-1743.

On October 23, 1995, the court denied a defense request for a knife that was an exhibit in the prior case of the three homicides. (CT 1895-1897.)<sup>8</sup>

On November 7, 1995, the defense filed motions to dismiss based on a violation of the due process clause [preaccusation delay] (CT 1932-1960), to suppress the testimony of hypnotized witnesses (CT 1961-1973), to preclude the introduction of prior convictions for impeachment (CT 2013-2019), and to dismiss because of the loss of and destruction of evidence. (CT 2020-2029.)

On November 7, 1995, the People filed a motion to permit the introduction of evidence of other crimes. (CT 1974-2012.)

On November 13, 1995, the defense moved for an order permitting Mr. Klein to view some matters seized during a search of the residence of Clifton and Emma Alexander on May 10, 1991 that included confidential communications between appellant and prior counsel. (CT 2062-2070.)

On November 14, 1995, the People filed a motion for an anonymous jury and for confidentiality of juror questionnaire information. (CT 2488-2571.) The defense objected to an anonymous jury. (RT 2052-2056.)

On November 14, 1995, the court denied the defense motion for release of evidence and granted the People's motion for an anonymous jury. (CT 2572.)

**E. Hearings on Pre-Trial Motions  
(November 28, 1995 – December 4, 1995)**

Appellant's motion seeking the exclusion of testimony by witnesses who had been hypnotized was heard and testimony and evidence were taken thereon, on November 28-30, 1995. (CT 3419, 3420, 3421.)

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<sup>8</sup> This request was renewed and again denied on November 14, 1995. (RT 2078.)

Appellant's motion to dismiss for a violation of due process [prearrest delay] was heard, and testimony was taken thereon, on November 29, 30 and December 1, 1995. (CT 3420, 3422.)

Appellant's motion to dismiss because of loss of, and destruction of, evidence was heard on December 1, 1995. (CT 3422.)

All three motions were denied. (CT 3422-3423.)

**F. Dismissal of the Jury Panel for *Wheeler* Error;  
Authorization of Telephonic Wire Taps on January 1 1996; the Wire  
Taps (December 5, 1995 – January 17, 1996)**

Jury selection commenced on December 5, 1995. (CT 3424.)

Appellant's motion to preclude use of the prior conviction for impeachment was denied. Guidelines for impeachment were set. The ruling on appellant's hypnosis motion was extended to witness Torrey. (CT 3432.)

On December 12, 1995, appellant's *Wheeler* motion was denied. However, the court found that the People had made a prima facie showing on their *Wheeler* motion. Jury selection continued. (CT 3434.)

On December 13, 1995, the court granted the People's *Wheeler* motion and the People's motion for mistrial. The prospective jurors were excused. (CT 3438.)

On January 1, 1996, wire taps of six telephone numbers were authorized under the authority of Penal Code section 629.10 on January 1, 1996 for thirty days. (CT 3503.)<sup>9</sup> Actual interceptions began on January 5, 1996 (CT 3507) and were discontinued on January 17, 1996. (CT 3540.) Seven 72-hour reports were filed on these intercepts.<sup>10</sup> The telephones

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<sup>9</sup> Section 629.02 to 629.48 were repealed by Stats.1997, c. 355. New provisions to the same effect are found in Penal Code section 629.50, et seq.

<sup>10</sup> Report No. 1 was filed January 4, 1996 (CT 3503-3505), Report No. 2 was filed on January 8, 1996 (CT 3506-3514), Report No. 3 was filed on January 10, 1996 (CT 3515-3524), Report No. 4 was filed on January 16, 1996 (CT 3478-3502), Report No. 5 was filed on January 16, 1996 (CT

intercepted were those of appellant's parents (CT 3512), Darcel Taylor (CT 3512 [appellant's sister]), Corbin Alexander (CT 3513 [appellant's brother]), and Jessica Brock (CT 3535 [a former girlfriend and a witness in this case]). The 72-hour reports list 23 "pertinent" calls and 7 "privileged" calls, with a total volume of 1522 outgoing and 577 incoming calls. (CT 3540.)

### **III. TRIAL, VERDICT AND SENTENCE**

#### **A. The Jury is Impaneled; Further Motions (January 17, 1996 – January 29, 1996)**

Jury selection commenced again on January 8, 1996. (CT 3475.)

The jury was impaneled on January 17, 1996. The defense's *Wheeler* motion was denied, the court finding that a prima facie showing had not been made; even so, the court invited the People to elaborate on the 11<sup>th</sup> and 12<sup>th</sup> challenges. (CT 3659.)

The court ordered the wire tap records to be released to the defense. The court barred Emma Alexander, appellant's mother, Darcel Taylor, Clifton Alexander, appellant's father, Debra Edwards, a former girlfriend, and Melvin Alexander from the Criminal Courts Building during the trial. The same persons, as well as Howard Taylor and Betty Alexander, were ordered not to communicate with any potential witnesses. Appellant's phone privileges, except with his attorney and investigators, and his visitation rights were curtailed. (CT 3663-3664.)

The People moved for the admission of luminol and phenolphthalein evidence. (CT 3669-3673.)

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3525-3530), and Report No. 6 was filed January 22, 1996. (CT 3531-3538.) The final report was filed on January 22, 1996 (CT 3539-3651); attached to this report are the wire monitoring logs.

Defense motions to continue the trial and for a mistrial were denied on January 29, 1996. (CT 3674.) The same day, the People made their opening statement and the first witness testified (CT 3674.)

**B. Verdict and Finding of Special Circumstances  
(January 29, 1996 – March 6, 1996)**

On January 29, 1996, appellant filed in pro per a motion to disqualify Judge Horan. (CT 3675-3680.) The court filed an answer to appellant's motion (CT 3793-3797), and on February 8, 1996, the court ordered appellant's motion to disqualify Judge Horan stricken. (CT 3813.)

On January 30, 1996, appellant filed a request for a temporary stay of the trial and a petition for a writ of mandate/prohibition with the Court of Appeal. (CT 3725, 3727.) The Court of Appeal denied the request for a temporary stay. (CT 3685.) The petition for a writ of mandate/prohibition was denied by the Court of Appeal on February 1, 1996, with the notation that appellant had not complied with the requirements of Penal Code section 1050. (CT 3711.) Appellant filed a petition for review in the California Supreme Court. (CT 3716-3728), which was denied on February 5, 1996.<sup>11</sup>

On February 6, 1996, the defense filed a motion to dismiss for interference with the right to counsel. (CT 3731-3781.)<sup>12</sup> The same day, the defense filed a motion to suppress electronic surveillance evidence. (CT 3782-3792.) The latter motion was heard and denied on February 8, 1996. (RT 5985-5992; CT 3811.)

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<sup>11</sup> As to the order denying the petition for review, appellant requests that this Court take judicial notice of its own records. (Evidence Code section 452(d) [judicial notice may be taken of records of the courts of this state].)

<sup>12</sup> The People's opposition appears at CT 3802-3810. This motion was heard and denied on April 23, 1996, after the jury had returned the verdict of death. (CT 4059.)

On February 6, 1996, the People's motion to admit evidence of appellant's drug addiction was denied, and the People's motion re admission of luminol, etc. was granted. (CT 3798.)

Closing arguments were made on February 26-27, 1996. (CT 3846-3847.)

The jury announced it had reached a verdict on March 4, 1996, the fifth day of deliberations. (CT 3851.) The jury found appellant guilty of murder in the first degree and found that appellant had been armed with a firearm and had personally used a firearm. (CT 3855.)

On March 5, 1996, on the People's motion, the information was amended, striking the special circumstance allegation pursuant to PC 190.2(a)(7). The special circumstance allegation pursuant to PC 190.2(a)(8) [murder of federal law enforcement officer in the commission of his duties] was substituted (RT 7643-7644), but then was dismissed on the defense's motion because the evidence was insufficient to show that appellant knew or should have known that Julie Cross was a federal law enforcement officer. (RT 7654, 7660; CT 3857.)

Trial of the special circumstances was held on March 6, 1996. (CT 3860.) On March 6, 1996, the jury found that the murder had been committed during the course of a robbery (PC 190.2(a)(17)) and that appellant had been previously found guilty of murder in the first degree (on July 19, 1990). (CT 3859-3861.)

**C. Penalty Phase and Sentence  
(March 6, 1996 – April 23, 1996)**

Trial of the penalty phase commenced on March 6, 1996. (CT 3861.) The People rested on March 7, 1996. (CT 3862.) The defense case commenced on March 11, 1996. (CT 3863.) The case went to the jury on March 13, 1996. (CT 3876.)

The jury returned a verdict of death on March 18, 1996. (CT 3879, 3985.)

The defense filed a motion for personal jury identifying information on March 22, 1996. (CT 3990-3994.) The People filed their opposition on April 4, 1996. (CT 3996-4005.) The motion was denied on April 11, 1996. (CT 4006.)

On April 12, 1996, the defense filed a motion for a continuance to file the motion for a new trial. (CT 4007-4009.) The motion was denied on April 16, 1996. (CT 4014; RT 8435-8438.)

The following events transpired during the hearing held on April 23, 1996:

1. Appellant filed a motion in pro per for a new trial based on ineffective assistance of counsel. (CT 4015-4057.) The motion was denied on the same day. (CT 4059.)

2. The court denied the defense motion to dismiss for interference with the right to counsel that had been filed on February 6, 1996. (CT 4059.)

3. The defense was “deemed” to have made a motion for new trial and that motion was denied, as was the motion for a modification of sentence. (CT 4059.)

The minute order of the court’s ruling, handed down on April 23, 1996, appears at CT 4060-4063.

The Commitment of a Judgment of Death was filed on April 23, 1996. (CT 4078-4085.)

Notice of appeal was filed on April 25, 1996. (CT 4064.)



## **STATEMENT OF FACTS**

### **I. PRE-TRIAL HEARINGS**

#### **A. The Exclusion of Testimony by Witnesses Who Had Been Subjected to Hypnosis**

##### **1. Introduction**

The defense moved to suppress the testimony of Special Agents Lloyd Bulman and Terrey Torrey, and of the Los Angeles Police Department's composite sketch artist, Frank Ponce. The defense contended that Bulman and Torrey had been hypnotized, and that Ponce's sketches were based on the statements of the previously hypnotized witness Bulman. (CT 1961.) The defense based its motion on *People v. Shirley* (1982) 31 Cal.3d 18, 40 [testimony of a witness who has been hypnotized for the purpose of restoring his or her memory is barred] and Evidence Code section 795, effective January 1, 1985 [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 only under specified conditions].).

The trial court ultimately ruled that Bulman had never been hypnotized and denied the defense motion. (RT 2974-2984.)

##### **2. The Hypnosis Session Conducted on June 6, 1980**

###### **(a) Statements Made Prior to the Hypnosis Session**

Bulman, called by the People, testified that he was interviewed on June 5, 1980 at 12:05 a.m. by Detective Thies and Special Agent Renzi in the Los Angeles field office of the U.S. Secret Service. The interview took approximately an hour. As part of the interview, the three went back to the scene and then returned to the field office. (RT 2245.) Thies and Renzi took notes. (RT 2246.) Bulman gave Thies and Renzi everything he remembered about the incident with as much detail as possible. (RT 2248.) Bulman did

not remember leaving anything out as to what occurred. (RT 2248.) Thies testified that he dictated the notes that he took during Bulman's interview to a typist on the afternoon of June 6. (RT 2564, 2575.) Bulman came back to the field office at approximately 9:20 a.m. on June 6, 1980. (RT 2246.)

**(b) Preparation of the Composites**

*Introductory Note regarding the Composites.* Testimony was presented during the pre-trial hearing on the hypnosis issue, as well as during the trial, about the composites of the two suspects drawn by Ponce, the police composite artist, from descriptions given by Bulman. Testimony about the composites, both prior to and during the trial, centered on whether the composites showed one of the suspects, i.e., the suspect who shot Julie Cross, with or without a moustache. The People's position was that the original composites drawn by Ponce showed both suspects with moustaches. The defense's position was that the original composite drawing of the suspect who shot Cross did not show a moustache and that, acting under Bulman's instructions, a moustache was added to this suspect's drawing by Ponce. The question whether Bulman changed the description of the shooter under hypnosis relates to whether hypnosis affected Bulman's memory.

Ponce gave testimony during the preliminary hearing that is relevant to the impact of the hypnosis session performed on June 6, 1980 on Bulman's recollection of the description of the suspects. The People incorporated Ponce's preliminary hearing testimony in their Response to Appellant's pretrial 'hypnosis' motion. (CT 2071 [“PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS TESTIMONY OF LLOYD BULMAN” (hereafter “People's Response to Hypnosis Motion”) etc., Attachment D, CT 2127-2157.]

**(i) Ponce's Testimony Given in the Preliminary Hearing**

Ponce, a police composite artist employed by the Los Angeles Police Department (L.A.P.D.), testified that hypnosis played a role in the preparation of composite drawings. (CT 419.) According to Ponce, he would first prepare a composite drawing based upon information given to him by the witness (CT 418), and that drawing would then be "...exposed to the person being hypnotized in an effort to see if we can obtain additional information or maybe make the drawing closer to the person." (CT 419.)

Ponce testified that Exhibits 26 and 27<sup>13</sup> were Xerox copies of the composites that he prepared in this case prior to hypnosis. (CT 420.) These were drawings of the two suspects. (CT 431-432.) The originals of Exhibits 26 and 27 were lost. (CT 432.) About five years prior to the preliminary hearing, and again two weeks prior to his testimony, Ponce was asked to locate the originals but was unable to find them. (CT 441-442.)

After Ponce drew the originals of Exhibits 26 and 27, he went to Captains Nielsen's office in Parker Center where Bulman underwent hypnosis. (CT 437.) Ponce was present during the hypnosis session and had the originals of Exhibits 26 and 27 with him in case Bulman modified his description under hypnosis. (CT 437.) Exhibits 26 and 27, which were copies of the originals, were kept in order to compare the changes in the originals made during hypnosis with the drawings prepared prior to hypnosis. (CT 432.) Captain King was "asking questions." (CT 438.)<sup>14</sup>

According to Ponce, the drawings were shown to the person under hypnosis "after the person is within that hypnotic trance." (CT 438:6-7.)

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<sup>13</sup> The Exhibit numbers in the preliminary hearing were the same ones used at trial. (RT 2283-18.)

<sup>14</sup> It was later shown that Los Angeles Police Captains King performed the first hypnosis session on Bulman. This occurred on June 6, 1980, after Bulman's session with Ponce during which Ponce drew Exhibits 26 and 27.

Ponce testified that the originals of Exhibits 26 and 27 were “...altered under hypnosis.” (CT 432.) Ponce also testified that there were modifications made to the original composites during the hypnosis session, although, according to Ponce, the modifications were minor. (CT 439.)

While on direct examination by the People, Ponce stated that Exhibits 5A and 5B, which respectively correspond to Exhibits 26 and 27, represented the completed drawings after the hypnosis session. (CT 421.)

Ponce’s cross-examination and Bulman’s later testimony in the pretrial hearing on the hypnosis motion shows this to be incorrect. As noted, under cross-examination Ponce stated that modifications were made to the original composites during the hypnosis session. (CT 432, 439.) This makes sense since the entire procedure, as described by Ponce, involved working with the original composites while the subject was under hypnosis. (CT 418-419, 438.) Bulman testified in the pretrial hearing that he was shown the composites *after* the hypnosis session and that no changes were made at that time. (RT 2251.) Thus, the change reflected by Exhibit 5A (a moustache – see text immediately below) must have been made during the hypnosis session.

**(ii) Bulman’s and Thies’ Testimony (Pretrial Hearing and Trial)**

Bulman testified that he went over to the L.A.P.D. and there met with Ponce, the Department’s composite artist. (RT 2246.) It took Ponce approximately an hour to develop the composite drawings. (RT 2246.) Bulman felt fairly successful in his ability to describe the way the people looked, and he was comfortable with the result of the composites drawn by Ponce. (RT 2246-2247.) Ponce did one composite for each individual. (RT 2247.)

Detective Thies was present when Ponce drew the composites. (RT 2566.) Thies confirmed Ponce’s testimony that Exhibits 26 and 27 were copies of the original composites. (RT 2569, 2579.) However, contrary to

Ponce's testimony, *who drew the composites*, Thies testified that Exhibits 5A and 5B were drawn *prior* to the hypnosis session. (RT 2567.)

Bulman testified that he did not recall seeing Exhibits 26 and 27. (RT 2290.) Like Thies, and contrary to Ponce's testimony, Bulman testified that Exhibits 5A and 5B were drawn prior to the hypnosis session with Captain King. (RT 2290.)

During the trial, Thies testified that Exhibits B and C were copies of the original composites and that they were marked "pre-hypnosis." (RT 6856.) Bulman testified likewise. (RT 4877-4878.)

Exhibit C shows the person with the shotgun on the passenger side of the vehicle. (RT 4882.) Exhibits 26 and 5A show the same person, i.e., the person on the passenger side of the vehicle with the shotgun who shot Julie Cross. (RT 2283-21.) Thus, *Exhibits C, 26 and 5A all show the same person, i.e., the person with the shotgun on the passenger side of the car who shot Cross.*

**(iii) There Was No Moustache on the Original of Exhibit 26**

Thies first testified that both original composites had moustaches. (RT 2569.) He changed his mind while under cross-examination and admitted that he could not see a moustache on Ex. 26. (He could see a moustache on Exhibit 27.) (RT 2578-2579.)<sup>15</sup>

During trial, Bulman testified that Exhibit C does not show a moustache. (RT 4882.) During the pre-trial hearing, when asked to compare Exhibits 26 and 5A, Bulman stated that the two Exhibits showed the same person but one had a moustache and the other did not have a moustache. (RT 2283-21.)

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<sup>15</sup> Thies also testified that Exhibits 5A and 5B both show moustaches. (RT 2579.) It is to be remembered that Ponce, who drew the composites, had testified that Exhibits 5A and 5B represented the completed drawings after the hypnosis session. (CT 421.)

The report prepared by Thies of his interview of Bulman on June 5, 1980 does not indicate that the suspect who was the shooter, i.e., the man with the shotgun, had a moustache. (RT 2578.) Nonetheless, Thies testified that his report was accurate. (RT 2576-2577.)<sup>16</sup>

**(c) The Hypnosis Session**

Captain Richard K. King of the L. A. P. D., called by the People, testified that he conducted a hypnosis session with Bulman on June 6, 1980. (RT 2446.) This occurred after the original composite sketches were made. (RT 2250, 2466.)

King had received training for hypnosis and had conducted about 35 hypnosis sessions for the L.A.P.D. (RT 2446-2447.) King discussed the case with Detective Thies to get a general idea of what had happened.<sup>17</sup> King had heard about the homicide on the news and knew that it had occurred at the airport. The news said two suspects were involved. (RT 2448.)

Bulman appeared to King to be very tired and very, very sad. He looked like he was under stress and as if he did not want to be there. He was very quiet and not very responsive to King's questions. (RT 2448.) King concluded that Bulman was not hypnotized, and that he could not concentrate or participate at all. (RT 2450.) Bulman never went beyond the light stage of hypnosis, which was to sit quietly, not speaking, doing

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<sup>16</sup> Thies was called by the defense in its case-in-chief and testified that, even though the moustache was an important descriptive point that he would normally put in his report, he did not do so. (RT 6859; see p. 144, *infra*.)

<sup>17</sup> Thies told King that two Secret Service agents had been on a stake-out for possible counterfeit suspects on June 4, 1980; that two male suspects approached the vehicle parked on the street; that the female agent was disarmed; and that, after she was out of the vehicle, a shooting occurred. (RT 2458-2459.) Thies related that one of the suspects opened the passenger side and disarmed the female agent. (RT 2459.)

breathing exercises and with eyes closed. This state is not considered hypnosis. (RT 2450.)

As was normal practice at the time, Thies was present during the hypnosis session. Captain Cobb was also there, as were two or three people from the Secret Service. (RT 2460.)

During the session, Bulman stated that they, i.e., he and Cross, were on duty and described what they were doing. When he got to the part about suspects with guns coming up, he opened his eyes<sup>18</sup> and King asked him if he wanted to take a break or if anything was wrong. Bulman said no. King asked him to close his eyes and he did. King asked him if he heard any name, and Bulman shook his head and opened his eyes. (RT 2467.)

King asked Bulman to describe the suspects. (RT 2468.) This was the main purpose of the session. (RT 2468.) They were trying to get some additional information about the suspect on the other side of the car. (RT 2469.) King testified variously that he didn't remember how good a description Bulman gave (RT 2468) and that Bulman was not able to come up with a description. (RT 2470.) King didn't recall whether Bulman came up with any information. (RT 2469.)

According to King, it is a waste of time to attempt hypnosis immediately after a traumatic event, as here. Bulman displayed a great deal of guilt, was not together mentally, and was sad and depressed, so this was not a good time to do hypnosis. The ability to concentrate is very important, and Bulman could not concentrate at all. (RT 2453.)

King's report of this session appears at CT 2162-2165. The report was an attachment to the People's Response to the Hypnosis Motion. (CT 2071 et seq.) King noted in the report that Bulman was able to give additional information during the hypnosis session on the description of the

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<sup>18</sup> According to King, opening one's eyes is very unusual for anyone who is even under a "light trance state." (RT 2469.)

man with whom he fought. (RT 2162.) The report also states that the “post hypnotic suggestion given” was “that he would recall info about his partner.” (CT 2162.)

A tape-recording was made of this session, as was the practice. (RT 2457.) To King’s surprise, this tape was erased. (RT 2480.)

Thies filled out a hypnosis questionnaire after the session. The questionnaire was attached to the People’s Response to the Hypnosis Motion. (CT 2071, 2159-2161.) Thies’ answers to the questions “To what degree do you estimate the subject was actually hypnotized” and “To what degree was the memory of the witness improved as a result of being hypnotized?” were: “Not at all” and “Light state.” (CT 2159; RT 2571.) Like Captain King’s report, Thies noted in the questionnaire that ‘some additional information’ had been elicited while Bulman was in a state of hypnosis. (RT 2159.)

Bulman recalled that Captain King attempted to hypnotize him on June 6, 1980. (RT 2247, 2252.) Bulman wanted to help, and he was willing to attempt to be hypnotized. (RT 2249.) He did not think he was hypnotized because he could recall everything that was said and done during the session. (RT 2249.) He did not feel he was in an altered state of consciousness, did not think his memory was improved or altered, and he did not think that his recollection of the events changed. (RT 2250.)

**(d) Bulman’s Post-Hypnosis Session with Thies, Renzi, and Ponce**

After the hypnosis was concluded, Bulman met again with Thies, Renzi and Ponce. (RT 2250.) Bulman was shown the composites. Bulman testified that he did not request any changes in the composites. (RT 2250.) He was asked whether he wanted to make any changes, and he said he had none to make. (RT 2251.) He was not any less sure about the description of the suspects. (RT 2251.) Bulman did not see Ponce make any changes in the composites. (RT 2251.)



### **3. The Hypnosis Session Conducted on June 19, 1980**

King conducted a second session with Bulman on June 19, 1980. (RT 2453-2454.) Prior to the second session, King had an opportunity to prepare Bulman for the session. He told Bulman to take his time and not to worry about having to give information, that if he did not recall anything, he didn't have to say anything. He tried to reduce the stress, but Bulman still seemed uptight. (RT 2479.)

King did not remember this second session too well. (RT 2480.) It was very quick. (RT 2478.) There was nothing new. Bulman was a little better, but it was still difficult for him to talk about the situation. (RT 2454.) In this session, Bulman closed his eyes only for a few seconds. (RT 2481.) He gave a short description of the incident; when he got to the shooting, he just shook his head and obviously did not want to talk about it anymore. (RT 2481.)

King wanted to complain about doing the hypnosis, because it is not a good to do hypnosis so soon after the event. Bulman had a great deal of guilt and was very stressed. (RT 2454.) He was also very depressed. (RT 2478.) There was no hypnosis, such as eye closing and deep breathing, which are activities preparatory to hypnosis, in the first session and very little in the second. (RT 2455.) King thought that the second session produced either no hypnosis or a light trance. (RT 2485.) The report of this session appears at CT 2185-2188.

The tape of this session was also erased. (RT 2480.)

Bulman confirmed that he underwent another hypnosis session with King on June 19, 1980. (RT 2251.) Bulman was again willing to be hypnotized. (RT 2252.) He testified that this session did not have any effect on him, and that his consciousness and memory were not altered. (RT 2252.)

#### **4. The Hypnosis Session Conducted on July 9, 1980**

Captain Michael Nielsen conducted a hypnosis session with Bulman on July 9, 1980. (RT 2526-2527.)<sup>19</sup> Present during the session were Marty Sloan, a pre-doctoral candidate, and Detective Thies. (RT 2537.) Nielsen had no independent recollection of this session and reviewed his report of it prior to coming to court to testify. (RT 2527.)

The report shows that Bulman was extremely nervous and uptight. “Confusion” techniques are used when, as in Bulman’s case, the subject is extremely nervous and frightened. (RT 2528.) Nielsen used two confusion techniques, something he had never done before. (RT 2528-2529.) They did not get anywhere, i.e., Bulman would not relax. According to Nielsen, the report, which appears at CT 2195-2201, indicates Bulman was never hypnotized. (RT 2529.) It is marked “light,” which means that he relaxed somewhat on occasion, but it was not anything that lasted. The session lasted two hours. (RT 2529.)

Nielsen’s report contains a notation that “Rear window (small) only thing ‘new’”. (CT 2200.) According to Nielsen, this was the only matter that was new that was not known to the investigators. (CT 2530.)

Bulman testified that he met with Captain Nielsen on July 7 [sic], 1980 for another attempted hypnosis session. (RT 2253.) According to Bulman, this session was also unsuccessful. There were no changes in his memory or in his statement. (RT 2254.)

Nielson was in charge of deciding whether tapes of hypnosis sessions would be erased or not. (RT 2533.) Tapes of this session were erased in 1984 because Nielsen did not think that they had any evidentiary value. (RT 2533-2534.) Nielsen testified that he did not actually listen to

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<sup>19</sup> There is a discrepancy between Nielsen’s testimony and his report, which states that the session took place on July 10, 1980. (CT 2195.)

the tapes because that was too time-consuming and “not worth it.” (RT 2534.) Nielsen concluded that there was no evidentiary value in the tapes 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.)

### **5. The Hypnosis Sessions Conducted in May 1987**

Both Bulman and Dr. Harley Stock, a forensic psychologist who conducted the hypnosis sessions in May 1987, testified. Since their testimony differs, it is presented separately.

#### **(a) Bulman’s Testimony**

Bulman testified that he came to Los Angeles on May 20 and 21, 1987 to meet with Dr. Harley Stock. (RT 2254.)<sup>20</sup> Prior to the session, Bulman went back to the scene with Dr. Stock and other agents, and did a reenactment of the crime several times. (RT 2255.) He played himself during the reenactment. (RT 2282-6.)

Dr. Stock told Bulman he would look objectively at everything, that there would be no bad effects, that it would not hurt him in any way and that he would not feel anything concerning the incident. But this is not what happened. It was much worse than anything Bulman had experienced before. (RT 2282.)

Bulman had a strong emotional reaction to coming back in 1987. (RT 2272.) Bulman was feeling nervous because he was having flashbacks and mental stress. (RT 2255.) He was feeling bad because he did not want to go through the whole thing again. He could not sleep because of coming back to Los Angeles and the crime scene. (RT 2259.) He had perhaps 20 or 25 flashbacks about the shotgun blast when the gun was held up to his head

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<sup>20</sup> It was stipulated that the sessions took place on May 30 and May 31, 1987. (RT 2283-4 – 2283-5.)

and the trigger was pulled. (RT 2256.) There were flashbacks to him getting out of the car and wrestling with the individual on his side of the car. (RT 2256-2257.) Bulman was blaming himself for what had happened to Julie Cross. (RT 2260.) Nevertheless, Bulman was again willing to undergo hypnosis in 1987. (RT 2259.) There was a lot of pressure from the Secret Service to come up with some help in solving the crime. (RT 2259-2260.)<sup>21</sup>

Bulman testified that the information he gave Dr. Stock was not any different from the information he had given to Thies and Renzi initially. (RT 2257.)

There were two hypnosis sessions. The first was during the night of May 30, 1987 (RT 2283-4 – 2283-5.) The second started at about 9 a.m. on May 31, 1987. (RT 2283-5.) The first hypnosis session took place at the Los Angeles field office of the Secret Service. Agent Banner was present. (RT 2283-6.) Bulman testified he felt “pressure from the whole thing, not just because Agent Banner was present.” (RT 2283-7.) This session was videotaped. (RT 2258, 2277.)

On direct examination, Bulman testified that he did not feel that he was hypnotized in the first session. (RT 2260.) When he was told to raise his arm, he concentrated on raising it. (RT 2261.) Bulman did not feel his state of consciousness altered, but he did have a flashback. (RT 2262.) The flashback was trying to keep the guy between himself and his partner, going down on the ground, the man being pulled off him, and the shotgun pointed at him and the trigger pulled. (RT 2262-2263.) It was very intense. (RT 2263.) Nothing occurred during the flashback that changed Bulman’s

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<sup>21</sup> Bulman testified that prior to 1987, the Secret Service put pressure on him by showing him photos and asking him to see if they matched the suspect. (RT 2283.) Bulman felt he was under pressure during the entire investigation. (RT 2285.) He did not feel additional pressure as a result of the hypnosis sessions themselves. (RT 2285.)

recollection or his statement about the incident. (RT 2264.) On cross-examination, Bulman stated that the flashback during this session was very different from any he had had before. (RT 2282.)

Although Bulman stated that he was not hypnotized in 1987 (RT 2269), he admitted on direct examination that he may have been hypnotized when he had the flashback (RT 2270) and conceded that he may have stated during the preliminary hearing that he was hypnotized in 1987. (RT 2270.)<sup>22</sup> Bulman thought he was hypnotized in 1987 because of the flashback. (RT 2280.)

On cross-examination, Bulman testified that he had seen small parts of the videotaped session. He had seen about a minute's worth of the videotape on the day he testified. In the part that he saw, he was asked whether he was hypnotized. (RT 2277.) On the videotape, he said, yes, he was. (RT 2278.) Bulman conceded he had made that statement, although he claimed that he did not recall actually making that statement. (RT 2278.)

Referring to his arm rising during the session, Bulman stated on cross-examination that he did not want his arm to rise. He felt like laughing about it going up. (RT 2279.) In 1987, when asked whether he was hypnotized, Bulman said he was because he did not want his arm to rise but it kept going up. (RT 2280-2281.)

Bulman met with Dr. David Spiegel on November 3, 1995 in San Francisco to undergo a hypnotizability test, at which time the 1987 hypnosis sessions were discussed. (RT 2273.)<sup>23</sup> Bulman was very willing to cooperate during this hypnotizability test. (RT 2273.) Bulman told Dr. Spiegel that the only time he was in an altered state was when he had the flashback during the session with Dr. Stock in 1987. (RT 2283-8.) That is

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<sup>22</sup> Bulman testified at the preliminary hearing that successful hypnosis was performed in 1985 and perhaps in 1987. (CT 177.)

<sup>23</sup> See pp. 35-39, *infra*, for Dr. Spiegel's testimony.

the reason Bulman believed he was hypnotized during one or both of these sessions. (RT 2282-8 – 2283-9.) Bulman told Dr. Spiegel before testifying in this case that he would never allow himself to be hypnotized again. (RT 2282-2283.)

No one told Bulman that, if he was hypnotized, that might affect his ability to testify in this case. (RT 2283-7.)

### **(b) Dr. Stock's Testimony**

Dr. Stock, a board certified psychologist, was called by the People. He interviewed Bulman in May, 1987 to see if any new information could be garnered about the murder of Special Agent Cross. (RT 2599-2600.)

The initial interview took place at the Los Angeles field office of the Secret Service. The interview on the videotape took three or four hours. (RT 2601.) The purpose of the interview was to preserve a record of Bulman's recollection at the time of the incident. (RT 2602.)

Prior to the interview, Dr. Stock spoke with Special Agent Ken Banner who gave him a rough outline of the facts of the case. Stock also read the police reports describing the crime scene. (RT 2602.)

No new information came out during the initial interview. (RT 2602-2603.) Everything that Bulman told Dr. Stock had been presented in the police reports. (RT 2603.)

Dr. Stock then did a cognitive interview. This is a memory retrieval tool where the person goes through the event from multiple and different perspectives. (RT 2603.)

They attempted to re-enact the incident. (RT 2603-2604.) Persons played Cross' and the suspects' roles. Dr. Stock had Bulman relate what happened. In the process, Bulman was asked to adopt the perspectives of the perpetrator and of Cross to jog his memory. Bulman actually acted out those parts. (RT 2604.) This took two or three hours. (RT 2605.) It was videotaped. The only substantially new information that came out was that

Cross ended up in the back seat, having jumped over the front seat. (RT 2605.) No hypnotic techniques were used. This information emerged slowly during the re-enactment. (RT 2606.)

The final phase was the forensic hypnosis interview. (RT 2606-2607.) Dr. Stock testified that the federal model that was used involved a mental health professional, i.e., Dr. Stock, who induced the state and maintained it, and a trained investigator who asked the questions. (RT 2607.) The latter was agent Banner, who did some questioning. However, Dr. Stock did most of the questioning since Banner had not done it before and was not comfortable with it. (RT 2608.) Dr. Stock was unaware of California law that barred law enforcement personnel from being present during the hypnosis session. (RT 2660.)

According to Dr. Stock, there is no way to determine objectively if someone is hypnotized. (RT 2612.)<sup>24</sup> However, there was no question in Dr. Stock's mind that on May 30 and May 31, 1987, Bulman was hypnotized. (RT 2632.) However, it is difficult to say when Bulman was under hypnosis and when he was not since his "level" [degree to which he was under hypnosis] fluctuated. (RT 2633.)

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<sup>24</sup> According to Dr. Stock, not everybody can be hypnotized. Most mentally retarded persons and some schizophrenics cannot be hypnotized because they cannot follow instructions. (RT 2620.) Other than this, people have the capacity to be hypnotized if they choose to allow the experience to occur. (RT 2620-2621.) Dr. Stock testified that the only way to objectively measure whether someone is hypnotized is to hook the subject up to an MRI and to test brain functioning, since there are cortical shifts when people go in and out of an altered state of consciousness. That is done in a laboratory. (RT 2647-2648.) However, there is no way to measure the depth of a hypnotic event because it is an internal event. (RT 2658.) It is the willingness factor that is important in hypnotizability. (RT 2662.)

The arm raising occurred in both sessions. (RT 2616.) The initial response to the arm levitation indicated that Bulman was in an altered state of consciousness. There was a change in his breathing pattern and in the tone and rate of his speech. (RT 2615.) Bulman said that he did not want his arm to rise, that it was weird, and that he felt like laughing about it. Stock asked whether he thought he was hypnotized, and he said yes. (RT 2638.) Bulman had a dissociative reaction. This was a pretty good indication that Bulman had experienced an altered state of consciousness. (RT 2639.) On a scale of one to ten, Bulman was at a five when the arm levitated. This was an average response. (RT 2659.)

After the arm levitation, Dr. Stock asked Bulman to raise his right index finger to indicate that he was in an altered state. (RT 2649.) This is done to establish a “communication feedback.” On a couple of occasions, there were some sideways twitches but there was never a time when the finger came up. (RT 2650.)

It took Dr. Stock an hour and a half to “put agent Bulman under” during the first session. (RT 2634.) After he “put him under,” Dr. Stock took Bulman through the events of June 4, 1980. (RT 2634.) Until the very end, he did not ask him to come out of the hypnotic trance. During this time, Bulman was in an altered state of consciousness. (RT 2635.)

According to Dr. Stock, nothing new came out as a result of this hypnosis session. (RT 2609.) However, as the People’s hypnosis expert Dr. Spiegel noted, in this statement Bulman changed the direction in which he pushed his assailant. (CT 2419 [Dr. Spiegel’s report].)<sup>25</sup> According to Dr.

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<sup>25</sup> Bulman told Detective Thies on June 4-5, 1980 that, as he grappled with his assailant, he was moving in an easterly direction. (RT 6851.) At trial, Bulman testified that he and his assailant were moving in a westerly direction. (RT 4804.) Thies denied that Bulman ever told him that the fight moved in a westerly direction. (RT 6851.)



Stock, the only occurrence was an abreaction on Bulman's part,<sup>26</sup> an emotional response that was more therapeutic than informative. (RT 2609-2610.) The closer Bulman came to the abreaction, the more his emotional state fluctuated and he became more agitated. (RT 2616-2617.) These fluctuations were true of both sessions. (RT 2618.)

There was no confabulation, i.e., filling in memory by false memory. (RT 2610.) There was no contamination during the hypnosis session, i.e., there was no introduction of information that is supposedly from the subject but that is really suggested by the questioner. (RT 2611.) However, according to Dr. Stock, there is no test for confabulation. (RT 2659.)

On the second day, Bulman appeared to be fresh and Stock again explained to him what he was going to do. (RT 2640.) He reassured Bulman that it was a natural experience that was very relaxing. (RT 2641.)

The second session was a little shorter. There was again an arm levitation. This was an indication that Dr. Stock was able to induce hypnosis. Dr. Stock took Bulman back to the events of June 4, 1980. (RT 2641.) Bulman was going in and out of the altered stage of consciousness. (RT 2642.) Prior to his altered state of consciousness, he was changing internally, which became visible by his crying and by the opening of his eyes. (RT 2642.) Dr. Stock was again able to induce an altered state of consciousness. (RT 2642-2643.) Although 56 minutes had passed, Bulman estimated it had been only 30 minutes, which was another indicator of his altered state of consciousness. (RT 2643.)

In response to questions by the court, Dr. Stock testified that the Stanford, HIP and Barber tests are generally accepted tests of hypnotizability. (RT 2654-2655.) The Stanford test is more widely used than the HIP. (RT 2662.) The score on these tests depends on whether the

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<sup>26</sup> An abreaction is a sudden expression of emotion. See p. 37, *infra*.

person wants to be hypnotized at the time he takes the test. (RT 2655-2656.) A person can score low on the test but it may still be possible to hypnotize him. (RT 2657.) For the most part, clinicians do not use these tests. (RT 2657-2658.)

## **6. Experts on Hypnosis**

### **(a) Dr. David Spiegel (For the Prosecution)**

The People called Dr. Spiegel as an expert on hypnosis.

Dr. Spiegel, a psychiatrist, is a professor of psychiatry and behavioral science at Stanford University School of Medicine. (RT 2294-2295.) He has an extensive background in hypnosis. (RT 2295-2296.) He has testified on the issue of whether someone had actually been hypnotized, and on the issue of contamination of memory from hypnosis. (RT 2297.)

Dr. Spiegel described a hypnotic state. It involves highly focused attention, decreased awareness of ordinary things going on, and suggestibility. It is also a state of attention, not of sleep. (RT 2298.) Someone can come in and out of a hypnotic state in seconds. Some people are extremely hypnotizable, and some cannot be hypnotized. (RT 2299.)

Dr. Spiegel testified that there are two dangers to hypnosis. They are concreting and confabulation. (RT 2301.)<sup>27</sup>

There are two ways of evaluating the testimony of a witness who has been hypnotized. First, you see if they can be hypnotized. Second, you look at whether the subject was pressured. (RT 2302-2303.)

The first phase of hypnosis is called the induction. (RT 2308.) The second stage is hypnotic age regression. (RT 2309.)

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<sup>27</sup> Later, on cross-examination, Dr. Spiegel testified that research shows that two things can happen under hypnosis. The person may add information because he is being pressured to do so, which he would do without hypnosis; some of that information is accurate and some is not. The other thing that can happen is that the person may become more confident, i.e., unduly confident, of the information. (RT 2376.)

Dr. Spiegel evaluated the documentation relating to Bulman (RT 2303), spoke with King, Nielson, Dr. Stock and agents Banner and Bulman (RT 2304-2305), and conducted a test on Bulman. (RT 2305.)

Dr. Spiegel formed the opinion that Bulman was not hypnotized. (RT 2305.) Dr. Spiegel gave his reasons for his conclusion. During the session on May 30, 1987, Bulman's hand rising was a very marginal hypnotic performance. (RT 2307-2308.)<sup>28</sup> Bulman was unable to comply with hypnotic instructions. (RT 2308.) They tried to get Bulman to relive the crime as intensely as possible. This took two hours. (RT 2312.) The hand rising occurred about 25 minutes into the hypnotic induction. (RT 2313.) If someone is going to elevate his hand under hypnosis, it happens within a few seconds, whereas in Bulman's case, it took a long time. (RT 2314.)

In age regression, a person relives the past as if it were happening now. (RT 2317.) Bulman did not respond to this at all. (RT 2317.) He did not respond in a slow hypnotic cadence but stated clearly that he could not see back in the past. (RT 2318.) Dr. Stock gave Bulman directions to regress and instructed him to give an ideomotor response, i.e., a signal that he had regressed (your right index finger will float up), but Bulman gave no such signal. (RT 2319.) When asked where he was, Bulman said that he was in the L.A. field office (where, in fact, he was), and not that he was in the past. (RT 2329.) Bulman's responses were very critical. He stated he could not remember and see things, all of which indicated that he was not hypnotized. (RT 3220.)

During the first session on May 30, 1987, Bulman was, in Dr. Spiegel's opinion, not hypnotized. (RT 2321.) In Dr. Spiegel's opinion,

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<sup>28</sup> On cross-examination, Dr. Spiegel stated that the levitation of the arm on two occasions was "at best a marginal hypnotic response." (RT 2360.)

the same was true of the hypnosis session of May 31, 1987. (RT 2321-2322.) Again, Bulman spoke in a self-critical fashion that indicates he was not hypnotized. (RT 2322.)

At the end of the second session, Bulman began to cry when he remembered a man firing the shotgun right next to his head. (RT 2323.) Dr. Spiegel thought that Bulman was having an emotional response to being nearly killed. Bulman's response was over-controlled in the reenactment that lasted six hours. But now, in the second session, he was weeping for four or five minutes, and he opened his eyes and reached for his face in a normal non-hypnotic gesture with full control of his hands. (RT 2323.) He apologized for crying. (RT 2324.) A person under hypnosis will let the tears flow. (RT 2324.) This was a symptom of post traumatic stress. (RT 2324.)

In a classic age regression session, people speak of the past in the present tense. (RT 2325.) This was not true of Bulman, although he did speak in the present tense when not under hypnosis and during the reenactment. (RT 2326.)

In an interview that took place on November 3, 1995 (RT 2328), Bulman told Dr. Spiegel that he thought he was hypnotized in the 1987 session. (RT 2327.) This was based on the flashback. (RT 2327.) He attributed the flashback to being hypnotized, and he did not want to go through that again. (RT 2327-2328.) Bulman said that it was a traumatic experience, and that he never wanted to be hypnotized again. (RT 2358-2359.)

On cross-examination, Dr. Spiegel explained that an abreaction is a sudden expression of emotion, usually about a traumatic event. (RT 2389.) According to Dr. Spiegel, an abreaction can occur either in or out of a hypnotic state, so it does not prove hypnosis one way or the other. (RT 2389.) An abreaction can indicate hypnosis if it is relived in the present

tense and the emotion contains all the uncertainty about outcomes. (RT 2390.)

Bulman attributed the abreaction to hypnosis, which is understandable. (RT 2390.) However, Dr. Spiegel did not agree with this. (RT 2391.) Dr. Stock thought that the abreaction occurred when Bulman was coming out of hypnosis. Dr. Stock thought he had hypnotized Bulman both on May 30 and May 31. Dr. Spiegel thought Dr. Stock was right for the period that Bulman's arm levitated but wrong about the balance of the time. (RT 2391.)

Dr. Spiegel tested Bulman for hypnotizability. (RT 2328.) Hypnotizability is a trait; some have it, some do not. (RT 2329.) It is a very stable trait. (RT 2330.) Dr. Spiegel administered the standard test, the Hypnotic Induction Profile (H.I.P). (RT 2330.) Dr. Spiegel considers it a reliable measure. (RT 2331.) A high score means that the subject is hypnotizable. The score range is 0 to 10. (RT 2333.)

Bulman scored 0 on the H.I.P. This shows that he is not hypnotizable. His hand floating up was very marginal evidence of being in a hypnotic state. Bulman did not have the ability to respond hypnotically when the interview approached an area where he was conflicted and anxious. (RT 2334.)

Dr. Spiegel explained that scoring 0 on the H.I.P. test is comparatively rare; it occurs only one out of twenty times. (RT 2363.) A score of 0 on the Stanford test is also relatively rare. (RT 2363.) According to Dr. Spiegel, the correlation between the H.I.P. and Stanford tests is moderate and statistically significant. (RT 2365.)

Dr. Spiegel pointed out that Bulman also scored 0 on the test administered by Dr. Karlin, the Stanford test. (RT 2335.) (Dr. Karlin was called by the defense on the hypnosis motion. For Dr. Karlin's testimony, see pp. 40-45, *infra*.) Dr. Spiegel took issue with Dr. Karlin's conclusion

that Bulman experienced a hypnotic reaction in the 1987 sessions. (RT 2342-2344.)

Every person who tried to use hypnosis with Bulman over a span of fifteen years concluded that there was little or no evidence of hypnotic performance. (RT 2341-2342.) That is, five people got the same result. (RT 2342.)

Dr. Spiegel asked Bulman whether he was more certain of his recollection after the hypnotic sessions, and he said no. (RT 2347.) Dr. Spiegel saw no evidence in the record that Bulman became more certain about the events after the hypnosis sessions. (RT 2347.) Thus, Dr. Spiegel concluded that there was no contamination. (RT 2347.) Dr. Spiegel testified that Bulman's testimony was not affected in any way by the hypnotic sessions. (RT 2348.)

Dr. Spiegel was cross-examined on the subject of the composite drawings. Dr. Spiegel's understanding was that there were no changes in the composite pictures drawn by Ponce after the hypnosis. (RT 2369.) Dr. Spiegel's impression was that Ponce made some minor changes but that the hypnosis had little impact on the pictures. (RT 2369.)

Dr. Spiegel testified that it would not necessarily mean that Bulman was hypnotized if, after the session, he added a moustache. (RT 2372.) People's memories, hypnosis aside, are incremental, and they tend to remember more over time. (RT 2372.)

Dr. Spiegel was asked about Bulman's response to the May, 1987 sessions. Dr. Spiegel stated that the subject's opinion about whether he was hypnotized is important but not determinative. Bulman was debriefed on videotape after the first session. Bulman's response was that he thought it weird when his hand levitated and he wondered if he could put it down; this is the response of someone experiencing a hypnotic phenomenon, and it seemed quite credible to Dr. Spiegel. (RT 2384.)

**(b) Dr. Robert Karlin (For the Defense)**

**(i) Preliminary Matters**

Dr. Karlin, an associate professor of psychology in the Department of Psychology at Rutgers University, was called by the defense. (RT 2844-2845.) He has written a number of articles on hypnosis. (RT 2845.) He has qualified as a expert on hypnosis in the courts of various states. (RT 2846.)

On voir dire by the People, Dr. Karlin testified that he was licensed in New Jersey in 1976 and practiced until 1985, when his license was suspended for one year. For three years he was under supervision. (RT 2847.)

The People requested that the court find that Dr. Karlin was “not an appropriate expert” in that his credibility was at issue because he had been found to be dishonest and fraudulent. (RT 2854-2855.) The court denied the request. (RT 2855-2856.)

**(ii) Dr. Karlin’s Testimony**

Dr. Karlin testified that hypnosis is a hyper-suggestibility and a lowering of critical judgment that goes along with entering into what has been called a “state.” (RT 2857.) One effect of hypnosis is a generalized increase in the confidence that people have in erroneous information. A tale that is told is set in stone and thus becomes the story. (RT 2857.) Hypnosis concretizes that story that is told. Hypnosis is seen by many people as something that brings back what is real memory because of the vividness of the experience under hypnosis. It makes the story essentially immune to cross-examination. (RT 2858.)

There are three major types of suggestions made in hypnosis. One is where the person is told to do something “motorically,” e.g., raise an arm. A second is when the person is told not to engage in certain activity. The third is for more cognitive matters like amnesia and pain control. As the suggestions become more difficult, fewer members of the population can

follow them. A person with low hypnotizability can do the simpler things, like motor functions, but not the more complex ones. The highly hypnotizable subject can do the more complex things. (RT 2859-2860.)

Hypnosis is used as a psychotherapeutic treatment for post-traumatic stress syndrome; severe depression; habit control, like smoking; pain control; and for its effects on immune system functioning, such as some skin disorders that are not entirely understood. (RT 2960-2861.) It is used in the forensic area, and in magic. (RT 2861.)

Dr. Karlin testified that Bulman was a moderate to low-moderate hypnotizable subject, not someone who is un hypnotizable. (RT 2879.) Non-hypnotizable people are relatively rare. (RT 2923.)

The H.I.P. test has an eye roll test. (RT 2865.) Bulman got 0 on this test. (RT 2866.) According to Dr. Karlin, this was because Bulman was unwilling to be hypnotized. (RT 2866.) People who do not want to be hypnotized cannot be hypnotized. (RT 2861.) Dr. Karlin also gave Bulman the standardized Stanford A test, on which Bulman scored 0. (RT 2918.) Bulman said he was willing to take the Stanford test, but he was unwilling to be hypnotized during its administration. (RT 2920-2921.)

There is no absolute way of determining whether or not a response is a hypnotic response. There is no specific marker for a hypnotic response. (RT 2894.)

According to Dr. Karlin, at the beginning of Bulman's interview with Dr. Spiegel, Bulman stated: "I won't be hypnotized again." (RT 2874-2875.) In a clinical setting, one would stop right there. However, Dr. Spiegel replied that he was not going to go into anything from the past. This was entirely inadequate to overcome Bulman's statement. (RT 2875.) The zero score is entirely predictable, because Bulman had made a "powerful decision" that he was not going to be hypnotized. (RT 2875-2876.) Somebody who holds himself rigidly against the possibility of



hypnosis is not testable. (RT 2876.) Bulman got a zero on the Stanford test, as Dr. Karlin predicted. (RT 2877.)

Dr. Karlin related that Bulman directly told Dr. Spiegel on the tape that the flashback was dramatically different from any other he has had. (RT 2878.) In May, 1987 Bulman was “definitely involved in a hypnotic procedure [at the time of the flashback].” (RT 2878.) The flashback was a response to a suggestion in the context of hypnosis. (RT 2879.) But there is no way to measure whether someone is in a hypnotic state. (RT 2879.)

Bulman was told that all memories reside in the mind. This is one of the reasons that people will accept whatever they remember during hypnosis as fact. This concretization of a story makes it less amenable to contradiction, which happened here. (RT 2883.)

A tape was shown of Dr. Karlin’s interview of Bulman on November 26, 1995. (RT 2884.) There is a swaying sequence in which Bulman catches himself every time, which indicates that he did not trust the interviewer. (RT 2886.) During the eye closure period, Bulman kept his eyes open. (RT 2887.)

Next was the tape of the hypnosis session of May 30, 1987. (RT 2887.) According to Dr. Karlin, there was a hypnotic response in “hearts, spades and diamonds.” (RT 2888-2889.)<sup>29</sup> There was no question that Bulman was hypnotized. (RT 2889.) Bulman’s hand is up at 2135 [a specific point on the tape], which is about 25 minutes into the tape. (RT 2890.) There was “a clearly hypnotic response.” (RT 2890.)

At point 2149 on the tape, Bulman is asked where he is now and he says he is in the LA Field Office. (RT 2891.) He had difficulty with the age regression earlier, and Dr. Stock “essentially deepens the hypnosis by

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<sup>29</sup> Dr. Karlin referred to specific portions of the tape.

going through this metaphor of the book of life and turning the pages of the book of life.” (RT 2891-2892.)

Dr. Stock was able to bring Bulman back into a hypnotic responding after the severe emotional response. (RT 2895.)

When asked to look at the car, Bulman is “clearly engaging in hypnotic responding.” In his mind’s eye, he is looking to see the car. (RT 2895-1.) The response is not that of someone just going along, but one that is typical of responding during an age regression. The response is that of a hypnotized subject in a light, moderate hypnosis. (RT 2895-2.)

People’s Exhibit 5 to the hypnosis motion shows the beginning of Bulman’s breakdown. At this point, according to Dr. Karlin, Bulman has never come out of hypnosis. He has never opened his eyes. Bulman was having a rather strong negative response that lasted for a number of minutes and it took him “more than a little bit to cover his eyes.” (RT 2896.) It is hard to say whether he was in hypnosis. (RT 2897.) He had agreed to be in a situation where he was open and vulnerable to a lowering of critical judgment. He could fantasize and imagine and “have things impact him in ways that they ordinarily don’t.” This was a hypnotic response to a suggestion. (RT 2898.) Bulman never fully came out from hypnosis. There was a lowering of critical judgment in which there is a lack of separation between fantasy and reality. (RT 2898.)

At 10:32, Dr. Stock reinduced hypnosis. (RT 2898-2899.) At another portion of Exhibit 5, Bulman’s behavior was very similar to other moderate hypnotizables that Dr. Karlin has seen. (RT 2899.)

Banner’s presence disrupted the hypnotic process (RT 2901.)

In Dr. Karlin’s opinion, it is very clear that Bulman was hypnotized on May 30, 1987 and that he was under hypnosis a variety of times on May 31, 1987. He was in hypnosis during the arm levitation sequence. There

was no clearly defined moment when he came out of hypnosis. (RT 2902.) He was a hypnotized subject. (RT 2902-2903.)

There are points in the May 30 session when Bulman is clearly visualizing things. Bulman mentioned sideburns when he was clearly visualizing and imagining, rather than just remembering. This is the point where he was vulnerable to additional information coming in. (RT 2903.) It is very difficult, or impossible, to say that he was not hypnotized during any of that time. (RT 2904.) He discusses things in a light trance, and at times in a deeper trance. (RT 2904.)

Defense counsel told Dr. Karlin that Exhibits 26 and 27 were composites drawn prior to hypnosis and that Exhibits 5A and 5B "...has [sic] 'H' on it which suggests that it is after the hypnosis session." (RT 2906:8-9.)<sup>30</sup> Defense counsel stated that a moustache appeared to be on Exhibit 5A.<sup>31</sup> Dr. Karlin testified that the fact that a moustache appears on Ex. 5A shows that Bulman's memory changed during the hypnotic procedure. Referring to the statement Bulman had given Thies and Renzi right after the murder, Dr. Karlin testified that a moustache is not something that a trained agent would miss. (RT 2906.)

Dr. Karlin could not say whether Bulman was hypnotized on June 19, 1980, although law enforcement had a clearly strong motivation to say

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<sup>30</sup> The trial court and the deputy district attorney maintained that it was the other way around, i.e., that Exhibits 26 and 27 were post-hypnosis. (RT 2370.) Ponce's testimony during the preliminary hearing clearly shows this to be wrong. (CT 420.) And defense counsel also had it wrong when he stated that Exhibits 5A and 5B were drawn after the hypnosis session. As noted at p. 22, *supra*, modifications to the originals could only have been made *during* the hypnosis session. In any event, the critical point is that hypnosis changed Bulman's recollection about the person shown in Exhibits 5A, 26 and C.

<sup>31</sup> Detective Thies had testified that Exhibits 5A and 5B showed moustaches. (RT 2579; see fn. 15, p. 22, *supra*.)

that he was not; however, a hypnotic procedure was performed. The same is true of July 9 or 10, 1980. (RT 2907.)

Over defense objection, Dr. Karlin testified that there was no evidence that eyewitness identification had been created by Bulman as a result of the hypnosis sessions, except for the addition of the moustache. There is no evidence that Bulman solidified his memory as a result of hypnosis, or that he was swayed by the prestige of the hypnotist. (RT 2928.) Dr. Karlin had no evidence that Bulman's testimony concerning identification was contaminated (RT 2935); however, testimony that one of the suspects wore sneakers did sound like confabulation. (RT 2935.)

Under questioning from the court, Dr. Karlin testified that reference to tennis shoes, seven years after the event, is the kind of confabulation that happens during hypnosis. (RT 2946-2947.) On redirect, he stated that if the information about the sneakers was new information, the odds were that it was hypnotic confabulation. (RT 2950.)

### **7. Testimony Relating To Agent Torrey**

Ultimately, the defense withdrew its hypnosis motion as to Secret Service agent Torrey, conceding that Torrey had not been hypnotized during a session held on June 11, 1980. (RT 2960:24-25.) Torrey testified that he did not believe that he was hypnotized on June 11, 1980 (RT 2670), a matter that was confirmed by police lieutenant Gaida, who conducted the session. (RT 2352.)<sup>32</sup>

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<sup>32</sup> The defense argued the hypnosis motion. (RT 2953-2960.) The argument was that the defense had shown that Bulman was under hypnosis and, once this was shown, any violation of Evidence Code section 795 required the exclusion of Bulman's testimony. The prosecution argued that Bulman had not been under hypnosis and that even if he was, as with the arm levitating, he came out of it. (RT 2960-2972.) The court ruled that Bulman had never been hypnotized, and that, accordingly, Evidence Code section 795 did not apply. (RT 2980-2982.) (See Argument VII, *infra*.)

## **B. The Denial of Due Process As a Result of Prearrest Delay**

### **1. Introduction**

In substantial part, the motion to dismiss for a violation of due process as a result of preaccusation delay was based on the fact that between 1980 and 1992, when appellant was arrested for the murder of Julie Cross, a great deal of evidence that showed that Julie Cross had been murdered by Charles and Terry Brock was lost.

The trial court denied the motion to dismiss based on preaccusation delay on the ground that there had "...been absolutely no credible showing of prejudice." (RT 2814:20-21.) At that point in its ruling, the trial court tentatively exempted from its ruling the loss of appellant's employment records. The defense contended that this evidence would have shown that appellant was working at the time that Julie Cross was murdered, i.e., that he was driving a truck to and from San Francisco on June 4, 1980. (RT 2814:22-26.) Later, the court ruled that the prejudice in connection with the employment records was "slight at best." (RT 2987-1.)

### **2. Testimony on Third Party Culpability**

#### **(a) Nina Miller's Testimony**

The defense called Nina Miller who had been a percipient witness to events in an apartment in June 1980. While Miller remembered some of the events that implied, however equivocally, that Terry and Charles Brock may have been involved in the murder of Julie Cross, her memory had failed on evidence that directly inculpated Terry and Charles Brock.

Nina Miller first testified as to the relationships between various people. She did not know appellant. (RT 2402.)<sup>33</sup>

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<sup>33</sup> Charles Brock, who died in 1982 (RT 6430), was the father of Miller's son. (RT 2403.) Charles' nickname was Chino. (RT 2403.) Terry Brock was Charles' brother. Miller had known Terry Brock since 1979 or 1980. Miller knew Steve Faulkner, a friend of Charles, since about that time, as

In June, 1980 Miller was in Steve Faulkner's apartment (RT 24307) in Venice when someone showed her a shotgun. (RT 2404.)

Present in the apartment that night were Terry and Charles Brock, Steve Faulkner, Cathy Boyce and Miller. (RT 2405.) At the time, Charles Brock was Miller's boyfriend. (RT 2405.) Miller had used drugs that day. (RT 2406.)

Around 11:30 p.m. that day (RT 2421), Charles Brock and Miller had gone to meet Faulkner as he was being released from jail. (RT 2406.) Kathy Boyce, who bailed out Faulkner (RT 2422), took Faulkner's Cadillac. (RT 2406.)

In the apartment, Steve Faulkner and Terry Brock sawed off the shotgun. (RT 2407.) After they sawed it off, they acted as if they were shooting something. (RT 2407.) Terry Brock demonstrated how he would use the shotgun. (RT 2408.)

Miller was on one side of the room and they were on the other; whatever they were doing, they were not including Miller. Terry Brock demonstrated how the shotgun would be fired. (RT 2413.) Miller thought she had told this to a police officer. (RT 2414.) In her statements to the police, Miller said there were two other guns in the apartment, but she did not remember that at the time of her testimony. (RT 2414.)

Miller guessed that Charles Brock took the gun home with him. When they left Steve Faulkner's, they left in Faulkner's car and Charles Brock took the shotgun along. (RT 2414.) Miller thought that he put the gun in the trunk, but she was not sure. (RT 2415.)

Miller was interviewed by the police about the shotgun several times. (RT 2408-2409.) Miller remembered giving some statements to the

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well. (RT 2403-2404.) Miller has known Cathy Boyce since 1979 or 1980. Boyce knew Terry and Charles Brock. (RT 2404.)

police; she did not remember others. The night before her testimony, Detective Henry came to her house and read her some of her statements to see if she could remember them. (RT 2409.) To her knowledge, this was not tape-recorded, and no one asked her whether it could be tape-recorded. (RT 2409.)

Miller testified that she did not remember several matters.

Miller did not remember that she told the police that Terry asked Charles, "Did you hear about the special investigator lady that got shot?" and that Terry laughed. (RT 2412.)

Miller did not remember whether, during that night in Faulkner's apartment, Terry Brock ever said that he had killed the Secret Service agent. (RT 2415.) Miller did not remember whether she had ever told the police that she had no doubt that Terry Brock killed the Secret Service agent. In fact, Miller did not remember Terry Brock say anything about killing anybody during that night in the apartment. (RT 2415.) Nor did she remember telling defense counsel, Mr. Klein, on the telephone that Terry had made a statement about killing somebody. (RT 2415.)

Miller did not remember whether, when making the demonstration how the gun would be fired, Terry stated, "This how it went when I shot it." (RT 2416.) Miller didn't remember whether she ever told that to a police officer. (RT 2417.) Miller did not remember anybody saying at the apartment, "We had to get rid of something this morning, you know, about the Secret Service lady in Westchester" nor did she remember making such a statement to the police. (RT 2417.)

After the police searched Miller's house, Charles Brock was taken to jail. He was released after two days. He never said anything about the killing of a Secret Service Agent. (RT 2417.) Miller did not remember Charles Brock telling Terry Brock that the other agent, the male agent, was away from the car and on the ground when he was shot, and that there was

gunpowder all over him, nor did she remember saying that to the police. (RT 2418.)

Miller did not remember whether she told the police that the other agent must have played dead because he was at the lineup but did not identify Charles Brock. Miller did not remember whether Terry Brock then said to Charles Brock, "What are you worried about if he didn't identify you?" (RT 2418-2419.) She did not remember saying that to the police, either. Miller did not remember whether Charles Brock ever described to her the shotgun that was used to kill the Secret Service woman. (RT 2419.)

Miller did not remember Terry Brock asking Charles Brock if he had heard about the investigator that got killed. (RT 2424.)

Miller's statements given to the police in 1980 appear at CT 2599-2607.

**(b) Nina Miller's Statement to Defense Counsel**

Defense investigator Donald Ingwersen listened over the speaker phone to a phone conversation that defense counsel Klein had with Nina Miller. He heard Klein ask whether Terry Brock had made any statements about killing anybody the night Brock was at Faulkner's apartment in 1980. (RT 2490.) He heard Miller say that either Chino or Terry made the statement that they "shot the bitch" and that she was flung in the back seat. (RT 2491.)

**(c) Nina Miller's Statements to Defense Investigator Lonsford**

Defense investigator Richard Lonsford served a subpoena on Nina Miller on November 20, 1995. The first thing she said was that she was in the back seat of the car and must have been asleep. Then she said that maybe she had passed out. She thought about it for a while and then said that she did not remember where she was, and that all she remembered was that she had been taken to Woodruff Street. (RT 2504.)



Mr. Lonsford asked Miller for details, but she had no specific recollection. He asked her specific questions from the police reports regarding her statements to the police in 1980 that she had overheard Charles or Terry Brock. She said she recalled seeing Terry Brock with the shotgun and demonstrating how he had shot the lady, i.e., the agent. She recalled a conversation in which Charles Brock said that the man must have been faking when he was on the ground because he was at the jail the other day and did not recognize him, Charles Brock. Charles Brock had demonstrated what the shotgun that had come from the Secret Service agent looked like; she thought he had tossed it into the sea. (RT 2505-2506.)

On the day of her testimony, while Lonsford was driving Miller from her residence to the courthouse, Miller told Lonsford that, “You know, this is really got me messed up, I don’t know. I know I was in the car, but it was parked around the corner. I didn’t see or hear anything.” (RT 2506.)

In the hallway of the courthouse on the day of his testimony, Lonsford, Miller, defense investigator Ingwersen and Klein were talking about the following statements that Miller had made: “I was not there” “They shot the bitch and flung her over the seat,” and “No, I was in the back seat.” (RT 2506.) There was some confusion about which car Miller was talking about – a car in which she rode to the scene or the car with the agents. (RT 2507.)

Lonsford told Miller that Terry Brock had been given immunity in this case. (RT 2519-2520.) Terry Brock had told Lonsford this in an interview in 1992. (RT 2523.)

### **3. Witnesses Who Could Not be Found, Witnesses Who were Dead and Witnesses Whose Memory was Impaired**

Appellant’s motion to dismiss for preaccusation delay listed 20 witnesses who could not be located. (CT 1938-1942.) Defense investigators

Ingwersen and Lonsford were responsible for locating defense witnesses. Between Messrs. Ingwersen and Lonsford, the defense was unable to locate 9 of the 20 witnesses listed in support of the motion to dismiss for preaccusation delay. These were witnesses Boyce (No. 2 on the list), Mulrooney (No. 3), Walker (No. 6), Parker (No. 8), Cross (No. 10), Holston (No. 13), Kinard (No. 14), Armlin (No. 16) and Chapman (No. 20.)

#### **4. Appellant's Use of Glasses<sup>34</sup>**

Mr. Ingwersen was given information by Eileen Smith, appellant's ex-common-law wife (RT 2494), and by appellant on the subject of appellant's glasses. (RT 2434.)

Acting on that information, Mr. Ingwersen tried to find an optometrist on Van Nuys Boulevard in the San Fernando Valley but he was unable to find an optometrist in the San Fernando Valley who prescribed glasses for appellant. (RT 2435.) Mr. Ingwersen checked Van Nuys Boulevard between Victory and Van Owen; he found no optometrists, but he was told that several who had been there had closed their businesses. (RT 2436.)

Mr. Ingwersen was given the name of Dr. Norman Jacobi in Sherman Oaks. Dr. Jacobi told Mr. Ingwersen that in the 1980's he had had an office on Van Nuys Boulevard but that he had relocated to the Sherman Oaks area. (RT 2436.) Dr. Jacobi said that all of his records from the old location dating to the early 1980's were no longer in existence and that the name Alexander meant nothing to him. (RT 2436-2437.) Dr. Jacobi gave Mr. Ingwersen the names of Dr. Bernard Karlin and Dr. Howard Weiss.

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<sup>34</sup> The relevance of evidence on appellant's use of glasses was that eyeglass frames, a broken eyeglass lens and a case for eyeglasses were found on the street 57 feet in front of the Secret Service vehicle. (RT 5079.) The People attempted to prove that appellant wore eyeglasses in June, 1980 and the defense sought to prove the contrary.

(RT 2436.) When contacted, Dr. Weiss said that he had no records for the Van Nuys location and that the name Alexander sounded vaguely familiar to him. (RT 2437.) Dr. Karlin also had no records and did not remember the name of Alexander. (RT 2338.)

In trying to find where appellant obtained glasses in the early 1980's, Mr. Lonsford covered 47 businesses in the Van Nuys area but was unable to come up with anything. (RT 2504.) Mr. Lonsford finally learned that appellant got his first pair of glasses in the Van Nuys area during 1981 or 1982. (RT 2508.)

#### **5. Appellant's Whereabouts on June 4, 1980**

The defense called appellant to the stand. (RT 2673-2674.)

In 1980, appellant was employed at Swift Foods Distributors in the City of Commerce. He did not wear glasses in 1980. (RT 2675.) He wore sunglasses without a prescription. (RT 2676.) Appellant began to wear prescription glasses for nearsightedness at the end of 1981 or the beginning of 1982. (RT 2676.) At the time, he was living with Eileen Smith in Van Nuys. He got his first prescription glasses on Van Nuys Boulevard. He did not remember the name of the doctor; Dr. Karlin's name did not ring a bell. (RT 2676.)

A card was left on appellant's apartment door in 1980 with a number for Parker Center. (RT 2676.) Appellant called and asked for the person on the card. This person, a detective, said he wanted to come out and talk to appellant in reference to the killing of a Secret Service agent. (RT 2677.) The detective said that he wanted to talk to appellant so appellant could help him solve the Secret Service case, and that they were looking for Terry Brock with reference to that case. (RT 2692.)

Appellant was reluctant to talk to the detective. Appellant said he did not want to talk to him because there were traffic warrants out for his arrest. (RT 2677-2678.) Appellant had failed to appear on some tickets. (RT 2686-

2687.) The detective said not to worry about it, that if appellant would let him in, he would not arrest appellant. (RT 2678.)

Two detectives showed up the same day appellant called, i.e., on July 21, 1980. (RT 1771, 2686.) Appellant was asked whether Terry Brock was involved in the Secret Service case, and whether appellant had any information that would help them build their case against Terry Brock. (RT 2678.) The detective asked where appellant had been on a certain date; appellant did not remember whether he was asked whether he committed the murder. (RT 2678.) Appellant read reports that this interview happened in July, but he did not remember when it happened. (RT 2678.)

Appellant said that he might be able to say where he was on that date. (RT 2678.) Appellant called Swift Foods and asked a person to pull his log to see where he was on that date and to give the person from the police whatever information he wanted. The detective took the phone and talked to the person from Swift Foods. (RT 2679.)

The log book at Swift Foods contained the hours that appellant was on duty driving and off duty. The log book was kept in a file with invoices. When appellant was driving, he would have the log book for that month with him. (RT 2679.) If the police talked to him in July 1980, the log book for June would probably be in the truck. (RT 2680.) He was required to keep the log for 30 days. At the end of the month, he would throw the old log book back where the sleeper is. (RT 2680.)

Appellant knew Terry Brock for 10 to 12 years. (RT 2689.) Around 1978, for a brief time, appellant and Terry Brock “kicked it.” (RT 2690.) Appellant saw Terry Brock after that, in 1979 and 1980. Appellant was not surprised when the detectives asked him about Terry Brock. Appellant did not remember saying specifically that he was not involved in the murder of the Secret Service agent. (RT 2690.) He did not remember being asked this. (RT 2691.)

In June, 1980, appellant drove to San Francisco twice a week. He would normally leave Monday night; sometimes he would leave earlier, sometimes later. (RT 2680.) He would get there, unload, and pick up a load. He would be back Tuesday night or Wednesday morning. "It just all depends." (RT 2681.) Some weeks he drove to South San Francisco twice a week, some weeks once a week. (RT 2700.) Appellant did not recall whether during this period of time he was driving once or twice a week. (RT 2700.)

Appellant could have gone to San Francisco twice that week. (RT 2708.) Normally, he would leave on a Monday night (RT 2709) whether he took one or two trips that week. (RT 2711.) If he left on a Monday night, he would deliver Tuesday morning. (RT 2711.)

Appellant had no memory of what happened the week of June 4, 1980. No week seemed different from another. (RT 2681.)

The first time he heard about the Julie Cross murder was when he came through the front door of his apartment and picked up the Herald Examiner. He came in, sat down, opened the paper, and there it was. It was in the morning. (RT 2681.) Appellant's memory was foggy, but appellant thought that he was coming home from work. He did not remember the day of the week. (RT 2682.) The murder was reported to have happened the day before or a couple days before. (RT 2682.)

Appellant read the entire story. The article was surprising to appellant. It was extraordinary that it was a lady law enforcement officer who got killed. (RT 2683.) Appellant did not recall if the interview with the two detectives was a month, two months or three months after he read the newspaper story. (RT 2685.)

The two detectives who visited appellant prepared a report. (Exhibit B.) Appellant is familiar with the contents of this report; he has read it several times. (RT 2685.) Some of the report sounds familiar and some of it

does not. (RT 2693.) The report states in paragraph 3 that appellant stated that he checked his logs and that the log showed that he left Los Angeles on Sunday night, June 1, 1980. (RT 2703.) The log shows he went on another trip on June 5, and that he came back on June 6. There is no record of appellant working in June 4. (RT 2703.) This information was obtained through a telephone call; appellant did not have the log with him when he was interviewed by the detectives. (RT 2704.)

#### **6. Gregory Matheson (Testing the Jacket for Blood)**

Gregory Matheson, called by the defense, was the chief forensic chemist for the L.A.P.D. crime laboratory. (RT 2750-2751.) He was the Assistant Director of the Forensic Crime Section of the Crime Lab. (RT 2751-2752.)

Matheson testified concerning tests conducted on the jacket (Exhibit 4 from the preliminary hearing) that was taken from the home of appellant's parents in the course of the search done under a warrant. (RT 2763.)

Matheson conducted two separate tests on the jacket on November 1, 1991. One test used phenolphthalein, the other used luminol. (See text immediately following.)

Both were 'presumptive' tests. (RT 2751 [phenolphthalein]; RT 2755 [luminol].) A presumptive test gives one an indication whether or not blood is present; it is not conclusive. The confirmatory test confirms whether the substance tested is blood. (RT 2753.)

In the phenolphthalein test, a small portion of the suspected stain is removed onto a swab or small piece of filter paper. Reagents are then applied to the swab or paper. One reagent is phenolphthalein, the other is hydrogen peroxide. One looks for an immediate color reaction on the swab or filter paper. (RT 2753.)

If a filter paper is used, one can either dampen the filter paper using water to extract a small amount of stain off the cloth and put the reagents on the filter paper. Alternatively, one can rub the dry filter paper on the stain, hoping that some of the blood transfers to the filter paper, add the reagents and look for a reaction. (RT 2754.)

Matheson saw a discolored stain on the inside of the left arm cuff area. (RT 2753-2754.) Matheson dampened a small swab and applied it to the area and observed a positive reaction. (RT 2754-2755.)

One cannot save the substance that is taken off the jacket so that an additional test can be performed for blood. (RT 2755.) Once phenolphthalein is added, the portion of the stain that is removed is destroyed. (RT 2755.)

Matheson testified that the swabs that were used in this test were discarded because the reaction had been observed and the swabs do not hold any value after that. (RT 2759.)

Luminol is sprayed directly on the garment. This test does not destroy any blood that may be present. (RT 2755.) It has to be done in pitch black or total darkness. A luminescence or soft blue glow is an indication that blood might be present. (RT 2855-2756.)

The outer or leather part of the jacket was subjected to the luminol test. (RT 2766-2767.) This test showed a spotty type reaction on the upper body front area and on the inside of the left cuff where the previous test had also given a positive reaction. (RT 2756.)

No other tests were performed. (RT 2756.)

According to Matheson, both tests would react to blood even if it was not human blood. (RT 2757.)

Matheson examined the jacket in court. He noted an area with his initials with a "plus" pointing to a large area of the jacket with the lining cut out. There was another area with his initials with a "negative" pointing

to an area which indicates that he ran a phenolphthalein test on another area of the internal lining of the jacket where he got a negative result. (RT 2764-2765.)

### **C. The Loss and Destruction of Evidence**

The defense moved that the case should be dismissed because evidence had been lost or destroyed. (CT 2020-2029.) The evidence that was lost or destroyed was the erased tape of Bulman at the hypnosis session of June 6, 1980; lost/erased tapes of “other material witnesses;” consumed/destroyed lining inside the sleeve of the jacket; lost/destroyed swab purporting to show positive reaction to phenolphthalein test; lost/destroyed original composite drawings prepared by Ponce; and lost/destroyed photos of alleged positive luminol reaction on the leather jacket. (CT 2028.)

The trial court denied this motion principally on the ground that the evidence had no exculpatory value. (RT 2795-2797.)

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