

COPY

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

vs.

KEVIN COOPER,

Defendant-Appellant.

CR 72787

**Supreme Court
No. Crim 24552**

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

HONORABLE RICHARD C. GARNER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

For Plaintiff-Respondent:

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IN PROPRIA PERSONA

21
**VOLUME ~~12~~ volumes.
Pages 959 to 1021, incl.**

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and
BRIAN V. RATEKIN, C.S.R., C-3715
Official Reporters**

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1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF SAN BERNARDINO

3 THE PEOPLE OF THE STATE)
4 OF CALIFORNIA,)

5 Plaintiff,)

6 vs.)

NO. OCR-9319

7 KEVIN COOPER,)

8 Defendant.)

VOLUME 12

Pgs. 959 thru 1021, incl.

9
10 REPORTERS' DAILY TRANSCRIPT

11 BEFORE HONORABLE RICHARD C. GARNER, JUDGE

12 DEPARTMENT 3 - ONTARIO, CALIFORNIA

13 Tuesday, April 17, 1984

14 APPEARANCES:

15 For the People:

DENNIS KOTTMEIER
District Attorney

16 DENNIS KOTTMEIER
17 District Attorney
18 By: JOHN P. KOCHIS
Deputy District Attorney

19 For the Defendant:

DAVID McKENNA
Public Defender
20 By: DAVID NEGUS
21 Deputy Public Defender

22
23 Reported by:

JILL D. McKIMMEY
Official Reporter
24 C.S.R. No. 2314
and
25 BRIAN RATEKIN
Official Reporter
26 C.S.R. No. 3715

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Tuesday, April 17, 1984

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1 ONTARIO, CALIFORNIA; TUESDAY, APRIL 17, 1984; 10:04 A.M.

2 DEPARTMENT NO. 3

HON. RICHARD C. GARNER, JUDGE

3 APPEARANCES:

4 The Defendant with his Counsel, DAVID
5 NEGUS, Deputy Public Defender of San
6 Bernardino County; DENNIS KOTTMEIER,
7 District Attorney of San Bernardino
8 County and JOHN P. KOCHIS, Deputy
9 District Attorney of San Bernardino
10 County, representing the People of the
11 State of California.

12 (Jill D. McKimney, C.S.R., Official Reporter, C-2314

13 Brian Ratekin, C.S.R., Official Reporter, C-3715.)

14
15 (Whereupon the following proceedings
16 were held in chambers.)

17 THE COURT: Good morning, everybody. Apparently,
18 Counsel has requested to come to chambers. Mr. Cooper's
19 present with Mr. Negus, with the District Attorney, Mr.
20 Kochis, as well.

21 What's up?

22 MR. NEGUS: I have had a request, or, Mr. Forbush
23 has had a request from a man named Roger Lang. You remember
24 Roger Lang. He's the man, one of the -- one of the owners
25 of the vacant house.

26 THE COURT: You said in your Petition -- your Points

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1 and Authorities that he had a San Diego connection.

2 MR. NEGUS: Yes. I would -- he doesn't wish to
3 have that publicized because he would just as soon not have
4 a bunch of tourists coming down there looking at him. But
5 Mr. Lang does have a horse ranch in Fallbrook. It is in
6 the process of being developed. It apparently is quite
7 extensive. He does own property down there.

8 And the north county of San Diego, Mr. Forbush
9 has looked around, and I would attest myself, my parents
10 living there, there are a considerable number of ranchers,
11 horse breeders, that sort of people in the north county,
12 in the north county area.

13 MR. KOCHIS: Your Honor, I'm prepared to stipulate,
14 so we don't have to mention it in open court, that Mr. Lang
15 owns real property, a horse ranch, in Fallbrook, provided
16 the stipulation includes the fact that he also owns real
17 property in Chino, and his domicile, where he resides,
18 happens to be in Burbank, and his business, computer
19 business, is -- is in Los Angeles.

20 MR. NEGUS: His - I think you're inaccurate about
21 that. He lives in Irvine.

22 THE COURT: Counsel, I see no reason whatever to
23 mention it in open court.

24 MR. NEGUS: Okay. I just want --

25 THE COURT: It's not a significant factor one way
26 or the other. That I can tell you now.

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1 MR. NEGUS: Well, the -- the District Attorney, in
2 his statement, alleged that there's no connection of the
3 victims with San Diego County. And I don't believe that's
4 true. Secondly, I have --

5 THE COURT: I don't think that is the victim he had
6 in mind. But I understand.

7 MR. NEGUS: That may be true. But, nonetheless,
8 I think it nonetheless is a significant factor.

9 Secondly, I have, in response to Mr. Kochis'
10 argument about the ability of other capital defendants to
11 get a fair trial in San Diego, I have a response I would
12 like to make to that. That response is one that you might
13 call inflammatory, if it were publicized, in that it's
14 critical of the -- of the Prosecution. And I would request
15 permission to make that argument in chambers so that we
16 don't cause any hard feelings.

17 THE COURT: Any objection?

18 MR. KOCHIS: No. Perhaps I would say some
19 inflammatory things back, so --

20 THE COURT: I've got to interrupt you both for just
21 a second on another matter.

22 (Whereupon the Court made a phone call in
23 another case.)

24 THE COURT: Is this extensive argument?

25 MR. NEGUS: Not terribly extensive. I just don't
26 want anybody getting upset.

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1 in the Norco bank robbery were survivalists, I think was
2 the word that they used, members of a survivalist group.
3 That is to say, they thought a coming Communist invasion
4 and race war was imminent, and that was one of the purposes
5 for their activities. And in assessing San Diego County,
6 I believe that they could certainly be aware that in North
7 San Diego County is one of the strongest concentrations of
8 Klan sympathizers in the State of California. Tom Metzger --

9 THE COURT: Of what kind of sympathizers?

10 MR. NEGUS: Ku Klux Klan. Tom Metzger, the head
11 of the Klan in California, won the Democratic nomination
12 in North County.

13 I personally, as I say, am fairly acquainted with
14 the Fallbrook area. When you drive into Fallbrook from
15 Bonsall, there are numerous spray painted signs saying
16 "KKK".

17 THE COURT: Counsel, may I interject for a second.

18 MR. NEGUS: Okay.

19 THE COURT: I'll let you finish your thought.

20 I'm aware that if the case goes to San Diego that
21 the courtroom conceivably could be downtown or it could be
22 in Vista; I don't know. In fact, last night I -- I
23 considered perhaps calling the Judicial Council to see if
24 they would clarify that for me, because that would help
25 us to some extent.

26 It would be my desire to put it in downtown San

MR. NEGUS: Well, the thing is that you don't have it -- (a) you don't have any choice, (b) the jurors from the county come from the whole county and, in assessing the particular point of the county, you have to look at --

1 at all points of it and -- at all parts of it, I think.
2 I don't think you can assume that -- that you're going to
3 one part as opposed to the other.

4 THE COURT: I can't; that's right.

5 MR. NEGUS: And so I think it's relevant that there
6 is this sentiment in San Diego County in favor of the Klan,
7 and that that is even more significant if you remember
8 that the testimony at the previous hearing was that on
9 November 9th, Klanspeople demonstrated outside of this
10 particular courthouse and so there is no other county in
11 the State of California to my knowledge where the Ku Klux
12 Klan has managed to get a domination of a major party for
13 a Congressional office.

14 (No omissions.)
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1 THE COURT: Oh, but San Bernardino County has as
2 many Klans members I think as almost anywhere.

3 MR. NEGUS: They certainly haven't -- that may be
4 true, but they certainly haven't had the political organi-
5 zation, which is the sort of thing that affects jurors, as
6 they had in San Diego County.

7 THE COURT: I am not fully apprised of the circum-
8 stances of that, but what I gather, he was basically
9 disavowed, Metzger was, by San Diego in total, and that
10 was an aberration, to some extent.

11 MR. NEGUS: I think he was disavowed by the
12 Democratic party. The voters in the Democratic primary
13 thought otherwise.

14 THE COURT: Okay. Anything else of such sensitivity
15 you want to mention in here?

16 MR. NEGUS: No. The only other thing I would
17 request that I was informed that apparently the discussions
18 we had in chambers over the last couple of weeks were not
19 reported.

20 THE COURT: What?

21 MR. NEGUS: Were not transcribed.

22 THE COURT: Oh.

23 MR. NEGUS: Excuse me, and my understanding was
24 that everything was going to be transcribed, and I would
25 request that the Court order those be transcribed as soon
26 as humanly possible.

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2 Mr. Kochis.

15 Mr. Metzger was rather easily defeated in the
16 general election, which shows what the people in San Diego
17 felt about him.

21 MR. NEGUS: Yes, extensively.

22 THE COURT: Publicly known?

23 MR. NEGUS: Publicly known extensively. He ran as
24 a member of the Klan, and all candidates -- all the
25 candidates opposed to him designated him as a Klans member,
26 and some of the opponents even got money from outside

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1 because of that.

2 THE COURT: Okay. Anything else, Mr. Kochis?

3 MR. KOCHIS: No.

4 THE COURT: Is it possible to have any stipulations
5 in lieu of your desired further evidence? I don't want to
6 go outside and have you say, Judge, I want to continue
7 this two weeks so I can get the evidence from Northern
8 California. How did you intend to cover that?

9 MR. KOCHIS: Northern California has not complied
10 with our subpoenas. We contacted them by phone yesterday,
11 and the person who is in charge of that was not in the
12 office and has not responded to our office. I think --

13 THE COURT: Would it be a fair stipulation -- could
14 you perhaps consider this: That the television coverage
15 there would be, for purposes of this hearing, in approxi-
16 mately the same proportion as the newspaper coverage?

17 MR. NEGUS: I think it's less, considerably.

18 MR. KOCHIS: I would agree to what the Court
19 proposed.

20 THE COURT: I have no way of knowing, of course.

21 MR. KOCHIS: I think Mr. Negus would stipulate
22 that the crime did receive television coverage when the
23 crime was discovered during the week of June the 5th and
24 on June the 6th of 1983; that it received coverage when
25 Mr. Cooper was formally charged by the District Attorney
26 in this county on June the 9th; that it received coverage

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1 when Mr. Cooper was apprehended in the Santa Barbara area
2 on July the 31st and when he was arraigned in San Bernardino
3 County on August the 1st.

4 MR. NEGUS: That's true.

5 THE COURT: Okay.

6 MR. KOCHIS: That's at the very least.

7 THE COURT: So stipulated?

8 MR. NEGUS: I think that's approximately all there
9 was, but so stipulated.

10 THE COURT: Accepted.

11 MR. NEGUS: When we go out to court, I want to put
12 Mr. Forbush on essentially to make some representations
13 about additional television coverage in the San Diego area.

14 THE COURT: Whatever. I'll hear it.

15 MR. NEGUS: Okay. We are going to -- I assume that
16 we are going to be discussing the counties openly; is that
17 right?

18 THE COURT: I think so. I'd like to have, following
19 the decision -- if I make the decision from the bench, I'd
20 like to have a prompt recess before either one of you get
21 mad and start making noises. Okay?

22 MR. KOCHIS: I would appreciate that as well.

23 THE COURT: Will there be further evidence from
24 anybody that I'm going to have to recess to read or review?

25 MR. NEGUS: No. I don't think so.

26 MR. KOCHIS: No.

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MR. NEGUS: Oh, yes. There's one thing I had marked, a bill from the legislature.

MR. KOCHIS: From Santa Clara County.

THE COURT: A bill?

MR. NEGUS: From the legislature.

THE COURT: Oh, all right. I will consider that outside. That's not going to take long, I assume.

MR. NEGUS: You got the ones that I asked to have marked yesterday, did you?

THE COURT: Did you give me something else yesterday?

THE CLERK: The tape, Your Honor, and the folders.

THE COURT: Oh, yeah. We have reviewed that all yesterday.

MR. NEGUS: Just the last paragraph is what I'm, interested in.

THE COURT: You have marked V-71 exhibit. The last -- Section 4 of the AB2774 says -- "Recent prison escapes have caused fear and confusion in communities surrounding existing and proposed correctional facilities. In order to reassure the citizenry and restore public peace of mind, it is necessary that this act take effect immediately."

It talks about a citizen advisory committee apparently on a statewide basis, the type of thing they organized in Chino, to some extent.

MR. NEGUS: Yes.

THE COURT: All right. Thank you.

1 We'll go back outside.

2 (Whereupon, the following proceedings
3 were had in open court:)

4 THE COURT: Good morning, Counsel.

5 For benefit of the media to some extent, we had
6 a brief appearance in chambers wherein I permitted counsel
7 to speak freely on any sensitive areas with regards to --
8 or what might be considered sensitive or sensitive to the
9 people of a county where this case might be transferred to.
10 There wasn't a great deal that went on, but they were able
11 to speak more freely on just a couple of brief points, but
12 we are here this morning to hear perhaps final argument
13 with respect to where this case should be moved following
14 the change of venue order, and I will now disclose the
15 direction from the Judicial Council that we have been
16 given. Counsel and I have known for approximately ten days
17 the choices that I have, and I disclosed it to counsel when
18 I received it so that they might prepare their presentation.
19 We did not disclose it to the media, and we don't wish to
20 engender any more publicity about the case than -- to make
21 citizens nervous anywhere and get everybody watching the
22 case with more interest than we have to; so for that reason,
23 we have kind of kept it confidential, but we recognize
24 that this is a public hearing and that we will now disclose
25 that the Judicial Council gave me approximately ten days
26 ago the counties of Alameda, Sacramento, San Diego, and a

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20 THE COURT: I considered them, so they must at this
21 time be received.

26 THE COURT: Yes. So ordered. That is simply a

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1 R O N A L D F O R B U S H, called as a witness by and
2 on behalf of the Defense, was sworn and testified as
3 follows:

4 THE CLERK: Raise your right hand, please.

5 You do solemnly swear the testimony you are about
6 to give in the action now pending before this Court shall
7 be the truth, the whole truth and nothing but the truth
8 so help you God.

9 THE WITNESS: I do.

10 THE CLERK: Please be seated.

11 State your name, please, for the record and spell
12 your last name.

13 THE WITNESS: Ronald L. Forbush, F-o-r-b-u-s-h.
14

15 DIRECT EXAMINATION

16 BY MR. NEGUS

17 Q Mr. Forbush, pursuant to my instructions, did you
18 determine the identities of cable television companies
19 operating in San Diego County?

20 A Yes, sir.

21 Q And approximately how many different counties (sic)
22 did you determine the existence of?

23 A How many companies?

24 Q Yes.

25 A Approximately six.

26 Q Of those, were there two that had overwhelmingly the

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- 1 largest number of subscribers?
- 2 A Yes, sir.
- 3 Q What were those two companies?
- 4 A KCOX Channel 2 and Southwestern Cable.
- 5 Q How many subscribers did KCOX have?
- 6 A Two hundred fifty thousand, approximately.
- 7 Q That was in San Diego County?
- 8 A Yes, sir.
- 9 Q And how many did the other one have?
- 10 A Southwestern had eighty thousand, approximately.
- 11 Q Did KCOX receive news broadcasts from Los Angeles
- 12 television stations?
- 13 A Yes, sir.
- 14 Q And which news broadcasts did they receive?
- 15 A Depending on the channel that the subscriber would
- 16 be tuned to, it would be KNBC, Channel 4; KTLA, Channel
- 17 5; KTTV, Channel 11; KCOP, Channel 13; KMEX, Channel 34;
- 18 KSCI out of Los Angeles; CNN, which is a satellite
- 19 broadcast, and other satellite programming that may
- 20 have news items on it.
- 21 Q And which news broadcasts could people who subscribe to
- 22 Southwestern receive?
- 23 A KNBC, Channel 4; KTTV, Channel 11; KCOP, Channel 13;
- 24 KABC, Channel 7; KHJ, Channel 9; CNN, USA, and CSPAN,
- 25 the three of which are satellite.
- 26 Q And, for example, for the -- for the people that could

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1 receive NBC, Channel 4, out of Los Angeles, was that
2 the full news broadcast, everything that was put out
3 on Channel 4 in Los Angeles?

4 A Yes, with one possible exception.

5 Q What was that?

6 A If the local KNXT station had similar information that
7 would be put -- that would also be put out by the
8 Los Angeles station, one might usurp the other. They
9 would not duplicate similar type information.

10 Q Did you also contact Channel 8 television station, the
11 CBS affiliate in San Diego?

12 A Yes, sir.

13 Q And before contacting them, did I give you four dates
14 which Channel 2 had broadcast material in Los Angeles?

15 A Yes, you did.

16 Q And were those dates November 9th, November 10th,
17 November 15th and January 5th?

18 A Yes, sir.

19 Q Did you determine from Channel 8 whether or not they
20 had had any broadcasts of that material that they
21 received from Channel 2 in Los Angeles on those dates?

22 A Yes, I did.

23 Q Which dates did they -- did they have broadcasts?

24 A On three out of the four.

25 Q Did they make a distinction between an on-camera
26 broadcast and a video broadcast?

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2 Q What was that distinction?

8 On January 1st, they had on-camera at 5 p.m. and
9 video at 6:30 p.m.

11 A Yes, I did.

13 A. Yes, I did.

17 (The exhibit was handed to the witness.)

19 Q Now, on this -- in this exhibit, No. 70, there are
20 references made to editorials on various dates in --
21 in June; is that correct?

23 Q Did you determine from the person who is in charge of
24 the editorials at Channel 39 the general content of
25 those editorials?

26 A. Yes.

1 Q As to one that's -- that's on June 14th, which is, I
2 believe, labeled "Otay Mesa," what was the content of
3 that particular editorial?

4 MR. KOCHIS: Your Honor, I'm going to object, I
5 think, to that question. That calls for his opinion as to
6 what the general content of the interviews were.

7 Q (BY MR. NEGUS:) What did the person who was
8 responsible -- I'll withdraw the question.

9 What did the person who was responsible for the
10 editorials tell you was the content?

11 A The individual I spoke to was Mr. Tom Chilling, and
12 he read the -- from the script a quotation that had to
13 do with, quote, "The terrible murders in Chino."

14 Q Are we now talking about the editorials that were
15 broadcast on June 17th through June 20th?

16 THE COURT: Talking about June 14th, I understood.

17 THE WITNESS: It's my understanding it was --
18 okay. I am in error. It was not the 14th. It is the
19 June 17th, 18 and 19 editorial that was on their video
20 tape No. 293 that is entitled "Prison Security."

21 Q (BY MR. NEGUS:) Okay. That one had to do with what,
22 then?

23 A That one had to do with a reference being made about
24 the terrible murders in Chino. That was dealing with
25 escapes in general and made a reference that 1983 had
26 136 escapes, which was lower than, apparently, previous.

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1 years, and that they were trying -- the main thrust
2 was that they were trying to make a pitch in favor of
3 computerized fingerprinting for immediate identification.

4 Q The June 14th broadcast had to do with expansion of
5 the facility at Otay Mesa, the state prison facility
6 which is under construction; is that true?

7 A That is correct.

8 MR. NEGUS: Thank you.

9 I have nothing further.

10 THE COURT: Cross examine.

11
12 CROSS EXAMINATION

13 BY MR. KOCHIS:

14 Q Mr. Forbush, have you actually seen any video broadcasts
15 that you have testified to?

16 A I have not.

17 MR. KOCHIS: I have nothing else.

18 THE COURT: Thank you, sir. You may step down.

19 Any further evidence?

20 MR. NEGUS: Would like the Court just to consider
21 the, as -- also as evidence the print out that I put at
22 the back of my -- as Exhibit 2 at the back of my Points and
23 Authorities that was, I can -- that if I could just identify
24 it, that print-out was obtained from a travel agent, asking
25 them to give us the prices of all available flights from
26 Ontario to Sacramento, which is abbreviated on that "SMF";

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1 San Diego, which is abbreviated "SAN"; and Oakland, which
2 is abbreviated "OAK." And the person -- the way the --
3 the person explained it was that the print-out prints out
4 all prices that are -- that conceivably could happen. The
5 only ones that -- where there's actual practical available
6 flights at any reasonable time are the ones that she
7 bracketed. And I'd like to have that considered as -- as
8 evidence as well.

9 THE COURT: I have already done so. Anything
10 further, Mr. Negus --

11 MR. NEGUS: No.

12 THE COURT: -- by way of evidence.

13 MR. NEGUS: That's by --

14 THE COURT: Do you have any evidence, Mr. Kochis?

15 MR. KOCHIS: No.

16 THE COURT: Wish to be heard in argument?

17 MR. KOCHIS: We both do. Who would you like to hear
18 from first?

19 THE COURT: I don't particularly care.

20 Mr. Negus, I'll give you your right to open and
21 close.

22 MR. NEGUS: Basically, Your Honor, in both of our
23 presentations, I guess we assumed that downtown Los Angeles
24 was not available because of some things that you told us.
25 And so my presentation was based, basically, on that
26 assumption.

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1 I believe you know my position with respect to
2 downtown Los Angeles and the downtown Los Angeles juror
3 from our previous comment. So I'd just like to address
4 the difference between San Diego and the two Northern
5 California counties.

6 First off, in looking at the District Attorney's
7 presentation, I think that, despite the fact that they have
8 attempted to write it out with numerous different factors,
9 the only actual -- what -- what it all boils down to is
10 essentially one thing, that San Diego is closer than the
11 Northern California counties.

12 The -- it has a few inaccuracies, that, first of
13 all, it's not true that San Diego County does not have a
14 state prison. They have a facility which is going to be
15 at least a 2,200 bed facility, as was pointed out in the --
16 in the materials submitted to you from San Diego newspapers
17 at Otay Mesa, which is in the process of construction,
18 that is, there's -- actual building there has not yet been
19 completed so that there's inmates in it, but it has been
20 an ongoing issue in San Diego County for -- for some period
21 of time, as you can see just from the -- from the -- from
22 the articles which only deal with the period since -- since
23 June and don't go to all the history before. But even from
24 that, I think you can see that it does give a prison that's
25 been there for a long period of -- a long period of time.

26 (No omissions.)

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1 MR. NEGUS: Secondly, the prosecution claims that
2 the political overtones that I mention in my change of
3 venue motion don't exist in San Diego County. Well, I'm
4 not quite clear as to what that means. If it means that
5 we -- in San Diego County they don't have their elected
6 District Attorney sitting in the courtroom or their
7 Sheriff getting on the television and attempting to take
8 advantage of the press coverage, I think that's correct,
9 but in terms of the thrust of what I presented, most of
10 the things -- I think that the sentiments in San Diego
11 County about prisons are just as active as they are in
12 the rest of the state in those counties which actually
13 have a prison in their community.

14 One piece of evidence which I just introduced to
15 the Court is a bill which is pending in the legislature
16 as a piece of urgency legislation. The rationale for
17 making it urgency legislation is that in those communities
18 which have prisons, or which are getting prisons, there
19 is fear and confusion caused by the presence of those
20 facilities in the community, and Mr. Sher from Santa Clara
21 County wants to try and reassure the people by proposing
22 this particular piece of -- piece of legislation. If
23 you'll recall, when Brenda Tatro testified at the -- at
24 the hearing back on March the 12th, page 252 through 255
25 of our -- our transcript, she indicated that her organi-
26 zation, which is in favor of prison construction, but also

1 in favor of people in the community having say as to the
2 kind of security measures they can because of the great
3 fear, that her organization felt that when she discussed
4 where their organization was getting its memberships, it
5 was only in communities where -- excuse me. I shouldn't
6 say "only". I believe the word was "primary," primarily
7 in communities that -- where there are people that live
8 close to either existing prisons or proposed prison sites.

9 We saw in the television tapes that even a county
10 road camp in San Diego County can cause a great public
11 outpouring of the citizens of Escondido when they proposed
12 to put a county road camp near the people of Escondido;
13 so I think that all the evidence suggests that the same
14 sentiments about prisons, the fear of prisons that existed
15 in this county in Chino and Adelanto, likewise exist in
16 San Diego where they are just going through the process
17 of having a State Prison installed in their particular
18 county, and the Los Angeles Times article about the -- about
19 the Deer Park incident in fact specifically tied in
20 Mr. Cooper as a cause for those particular fears, and I
21 don't think that you have to look very far between the
22 lines in the Sher bill to see that Mr. Cooper is the
23 person that has inspired that particular bill.

24 The State Bar Committee where I first saw that,
25 the bill was originally -- immediately thrown by all the
26 people of the room towards me, assuming that it would be

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4 The prosecution in their points and authorities
5 does not make a compelling case that there is a large
6 cost difference in the case between going to San Diego
7 County and going to a Northern California county. Whatever
8 is involved we are all going to have to have living
9 quarters, lodging, meals, same for the witnesses. The
0 only real difference is in the cost of transportation.

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21 Finally, as far as the district attorney's
22 presentation, I think it's important to notice what they
23 don't show and don't even make any claim of, and there
24 is no claim that either of the Northern California counties
25 would give any difficulty to the State in getting a fair
26 trial. That is what we are concerned with is not some

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1 sort of real substantive problems for the prosecution in
2 getting a fair trial, because there's no -- there's no
3 evidence, nor I doubt there could be, that there's any
4 substantial prejudice in Northern California against the
5 authorities of San Bernardino County, but there is
6 substantial evidence that there's prejudice against
7 Mr. Cooper in San Diego County. Mr. Kochis says that
8 (a) there's been publicity about this case everywhere,
9 but if you look back to the change of venue cases, I think
10 that it doesn't take an awful lot to see that what they
11 are all concerned about is, okay, publicity is one thing,
12 but people tend to forget, and the manager of the Oakland
13 Tribune, when I was calling him up getting the papers,
14 said, you know, we've got our own murder cases up here.
15 We don't have to be worried about -- about yours. We don't
16 have that many stories. In fact, they didn't have that
17 many stories. Basically, the newspapers have dropped the
18 story once you got into -- once you got -- Mr. Cooper was
19 arrested and we had the arraignment, stories died out in
20 Northern California and, therefore, people have had that
21 opportunity to forget, which the cases that Mr. Kochis
22 cited at the change of venue motion made such a big deal
23 of, like Odle and the other cases, where they had a big
24 bunch of publicity at the beginning and then a dying down.
25 Certainly, San Diego County has not had the same
26 kind of publicity that San Bernardino County has. That I

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1 think is easy to see, but San Diego County has had
2 continuous and sustained coverage of the case so that
3 they could not have a possibility of forgetting it.

4 First of all, there's just the geography thing.
5 San Diego County is -- people in San Diego County watch
6 Los Angeles television. They watch Los Angeles news.
7 The third largest newspaper circulation in San Diego County
8 is the L.A. Times. Most -- many people in San Diego County
9 subscribe to the L.A. Times with the San Diego edition,
10 you know, the San Diego zone, to the exclusion of the
11 Copley newspapers.

12 Los Angeles television is not available to
13 everybody in the county, although you can -- the KTLA
14 map of the viewing area that was -- that was submitted as
15 part one of the original exhibits with KTLA does show
16 San Diego County as part of their viewing area, and it
17 is I think accurate to say that some places in San Diego
18 you'd actually pick up L.A. television with a -- with an
19 antenna, but, nonetheless, just the two largest cable
20 companies, 330,000 people -- Los Angeles news is available
21 to a substantial percentage of the population in San Diego
22 County via the large number of cable subscribers that you
23 have. You've got more cable subscribers that have Los
24 Angeles television news available to them than you do
25 people who subscribe to the Copley newspapers, so I think
26 that the impact of that availability is very, very strong.

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(No omissions.)

So it's a lot closer in terms of the interest between San Diego and Chino as opposed to the basic dis-interest in -- in -- in Northern California. I don't -- I have never -- I don't have any contact with Sacramento County. But I do know, from extensive contacts that I have with people in the Bay Area, that basically most of them don't -- can't even identify this particular case.

That's certainly not true in -- in -- in San Diego,
in San Diego County.

THE COURT: Counsel, I'm not sure that that's proper consideration for me. You're not a sworn witness. And I'm not sure that's a fair survey.

MR. NEGUS: I'm -- it seems -- I think you can make that same sort of inference from just knowledge of geography and of the publicity that you have in the particular case. If you have any doubt about that, Your Honor, I'm perfectly capable, perfectly willing, before -- before we finally move somewhere, to order a survey and -- and demonstrate this.

I think that the publicity itself is -- is -- is -- should be sufficient to show that there's a vast difference in the amount of publicity and material available to people in San Diego County as opposed to -- to the northern counties. But I'm perfect -- if there's any doubt about that, I'm perfectly willing to have public opinion surveys done to demonstrate that.

1 I -- I just don't think it's -- I didn't want to
2 go through the cost of that. But I think that it's easily
3 demonstrable if you -- if you think otherwise.

4 Getting down to the bottom line, the Prosecution's
5 argument basically comes down to one of the cost and
6 distance. But I would submit that, as I said in -- in the
7 Points and Authorities, that their attitude towards trying
8 the case in downtown Los Angeles demonstrates that cost and
9 distance is not primarily what's on their mind, because
10 downtown Los Angeles is closer and cheaper to get to by far
11 than San Diego. But the Prosecution was not willing to have
12 the case go there.

13 Had cost been what they were looking for, I think we
14 wouldn't have been having this motion right now. The ,
15 problem is that what they want is a jury which is going to
16 be prejudiced against Mr. Cooper that they can get in San
17 Diego County. I don't think they can get it up north.
18 That's why I -- I think it would be denying Mr. Cooper a
19 right to have a fair trial if you were to balance some
20 undemonstrated cost savings, that is, the prosecution didn't
21 prove that, against the very real differential in publicity
22 and the likelihood of getting a fair trial in Northern
23 California as opposed to the Southern California.

24 THE COURT: All right, thank you.

25 Mr. Kochis.

26 MR. KOCHIS: Your Honor, one thing I think we should

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1 trial. And that's not a consistent argument.

2 The McGown case has indicated that essentially
3 what this Court must do is consider the nature of the
4 publicity in the other counties and balance that against
5 the hardships that exist to the parties in going to any
6 particular county.

7 We also quoted another cite from Manson in our
8 response which indicates that a change of venue is useless
9 if the entire jurisdiction has been permeated with
10 publicity. And we recognize that we're beyond that parti-
11 cular hurdle; the case is going to be moved. But we
12 brought that to the Court's attention to remind the Court
13 that the media has -- has succeeded in putting this case
14 before everybody in the State of California. Even if you
15 turn to an area as remote as Alameda County, there has been
16 newspaper coverage of the facts and circumstances of this
17 crime, the nature of the victims, their age, their sexes,
18 the fact that the entire family was involved, that children
19 were involved. There has been coverage about the defendant,
20 his past history, his status as an escapee at the time this
21 brutal crime was committed. There has been coverage about
22 citizens in this county blaming CIM. There has been cover-
23 age about the governor of this state offering a reward for
24 Mr. Cooper's capture. There was coverage of Joshua's
25 progress in the hospital and when he was released, coverage
26 of Mr. Cooper's capture in Santa Barbara, and coverage of

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So it's not a situation that if we transfer the case to Northern California it's as if by magic we're going to get a group of potential jurors who have never heard about the case. That's not what's true in this case.

We propose that the case be transferred to San Diego for the following reasons, and we believe the Court should look at the standards that have been set in the change of venue cases as to where the case should go. Those cases speak to the status of the victims and the defendant as it relates to a particular county where the case is to be tried.

Mr. Cooper is a stranger to San Diego County.
Likewise, the victims were strangers to San Diego County.
They lived in San Bernardino County, apparently two of them
worked in Orange County.

Second, San Diego has a population, in terms of the size of its county, it's the third largest county in the state in terms of its population, the second largest in terms of the population of the city. That mitigates in favor of San Diego.

It's a large metropolitan area. It's much larger in terms of population than either Alameda or Sacramento. It has tried very serious, high notoriety multiple murder cases in the past, the Harris case and the Norco bank

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This Court has tried a number of long cases with multiple witnesses. The witnesses in this case, in terms of number, will probably range between 88 and 100. The Court is aware that in cases in which multiple witnesses are involved there is scheduling problems. If we finish early on one particular day, it's often necessary to move witnesses up or to delay witnesses. And in a situation where we would be in Northern California, when the only way to get the witness to court would be by airplane, that would cause a problem in that airlines need some notice to schedule reservations.

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1 or Van Nuys or the San Fernando Valley, who live in the
2 largest county in the state, who live adjacent to the
3 largest city in the state, are somewhat different than the
4 person who lives in downtown L.A., and that they're less
5 cosmopolitan and they would be less likely to give Mr.
6 Cooper a fair trial. We don't feel that's a logical or
7 consistent argument.

8 THE COURT: Let me interrupt you, Mr. Kochis.

9 With apologies, I'm going to have to declare a
10 recess on this case. I've got something of an emergency
11 situation with a judge down in Texas, and a family is split
12 up between the two states. And I promised him that I would
13 call him at 11:15 our time. And I need to make some
14 preparations before I make that call. So we're going to
15 probably be 10 to 15 minutes here, and then we'll resume
16 with your argument.

17 We'll be in recess.

18 (Recess.)

19 (No omissions.)
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1 THE COURT: All right. Back on the record with
2 reference to Mr. Cooper.

3 Would you pick it up again where you left off,
4 Mr. Kochis.

5 MR. KOCHIS: Your Honor, when I stopped at the
6 recess, I believe we were talking about Los Angeles County,
7 one of the two Southern California counties that have been
8 proposed, and my comments in regard to that county would
9 be that if there is a cosmopolitan type of individual that
10 could give Mr. Cooper a fair trial in that county, that it
11 would seem a representative section of that entire county
12 would include those persons, and any fear Mr. Negus has
13 could be resolved by a countywide panel if the case ended
14 up in an outlying court in the Los Angeles area, and we
15 are aware that were the case tried in Los Angeles, many
16 of the cost and distance hardships that exist in Northern
17 California would not exist in a trial in that county.

18 Turning to Northern California, we have discussed
19 those counties together as a group, and we feel that the
20 case should not be transferred to Northern California because
21 those counties, Sacramento and Alameda, have received
22 pretrial publicity about the facts and circumstances of
23 this particular case. The cost in moving the case to that
24 county would inflict a hardship on this county. The
25 logistics and the mechanics involved with the large number
26 of witnesses in this case would create a hardship on the

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1 attorneys and on the people in this particular case, and
2 we would ask that the Court transfer the case to San Diego
3 County.

4 THE COURT: All right. Thank you.

5 Finally?

6 MR. NEGUS: Mr. Kochis seems to have interposed a
7 choice which I wasn't aware of that we were even considering,
8 and that's the Los Angeles suburbs. I did not present
9 evidence of all the newspaper articles which we subpoenaed
10 from Los Angeles County suburbs because it was my under-
11 standing that wasn't before the Court. If that's -- if I'm
12 wrong about that, then I need to be corrected.

13 THE COURT: Counsel, I'm simply -- my position
14 hasn't changed from what I told you before. Under the
15 circumstances, I am not going to send the case to Los
16 Angeles County, based upon the evidence that I've seen,
17 without a stipulation of the parties and all the proper
18 waivers, so it's simply not going to go to Los Angeles
19 County as things stand at this time.

20 MR. NEGUS: Then in terms of the other choices,
21 the -- Mr. Kochis argued that the same factors that apply
22 to change of venue motions are the same for this particular
23 decision. That's not what McGown says. McGown says that
24 there can be factors which may not justify a change of
25 venue once we get there, out of -- if you were to send it
26 to San Diego County and I were to make a change of venue

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1 motion, it may or may not win, but those factors, nonetheless
2 at a hearing as to which county it should go to are
3 different. That is, there's a lesser showing of prejudice
4 required at this stage than there would be if it were
5 transferred to San Diego County and I was trying to get
6 out of it.

7 Mr. Kochis likewise cites the Manson case, but the
8 Court rejected his argument earlier that the Manson case
9 precluded a change of venue to someplace. Mr. Kochis
10 indicated that he thought that the evidence showed that
11 the -- that the publicity in San Diego County was
12 substantially less than Los Angeles County, and said that
13 I -- I think he intimated that I conceded that. I don't
14 think that's true. I will concede that San Diego County is
15 less than San Bernardino County, and as practically every
16 county must be, but I don't think that you can concede,
17 based on the evidence that we have, that the publicity in
18 San Diego is any less than it is in Los Angeles. They have
19 access to Los Angeles television. They have access to
20 Los Angeles newspapers. The coverage in the Copley
21 newspapers in San Diego was extensive and continued through
22 the preliminary hearing. If Mr. Kochis is not going to
23 be prejudiced by having the preliminary hearing open, the
24 case should be transferred to a place that wasn't informed
25 about that particular publicity. San Diego County, unlike
26 Northern California county, received Los Angeles Times

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1 newspaper articles and about the serological evidence in
2 this particular case. The Court has recently read the
3 Kelly and Shirley cases in connection with the change of
4 venue. Kelly and Shirley talked about the mystifying
5 effect that jurors give to scientific evidence. San Diego
6 County has been exposed to stories about that evidence in
7 a newspaper which is the third largest newspaper in the
8 county. Nothing like that has ever reached Alameda County
9 or Sacramento County. In my brief, I indicated there doesn't
10 seem to be any reason for preferring Sacramento County over
11 Alameda. The cost factors are a little bit -- are
12 essentially the same, although Sacramento is a little
13 bit further to get to in terms of cost, and there's a little
14 bit more publicity there than there is in Alameda County;
15 therefore, in a choice between the two equals, Alameda
16 would seem to be the -- the preferred between those two
17 because there's been a certain amount less publicity, but
18 I think that -- plus the other factor that Sacramento is
19 the site of Folsom Prison, whereas Alameda County is one
20 of the counties in California that does not have a State
21 Prison in it, does not have a proposed State Prison in it.
22 Mr. Kochis' comments about the nonexistence of a prison
23 population yet in Otay Mesa I think are unapropos. First
24 off, my understanding is that they are attempting to get
25 people in Otay Mesa, even perhaps before we are finished
26 with this particular case. It's not one of those situations

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I didn't find much controversy about

Yes. They -

URT: It made the news when there was the
cts. It's made the news obliquely whenever
ded prison type stories and the congestion
it's not a controversial thing of any great

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I would submit that the overwhelming

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1 test evidence in this case is that people near prisons
2 have been affected by this case. That's what Mrs. Tatro
3 testified to in her tours around the state, and that's
4 what the different articles that you have considered from
5 each place where there's been prisons, there's been --
6 whenever they talk about prison construction, you found
7 evidence of opposition, and that evidence of that opposition
8 ties in Mr. Cooper to it. That's the problem is that the --
9 this existing opposition to prisons has taken Mr. Cooper
10 (a) as a symbol of what it -- for political purposes, and
11 (b) they have decided that he did the crime and they are
12 scared of him and they have fear, fear and confusion.
13 That's what the Sher bill takes legislative notice of as
14 part of its urgency legislation; that wherever there are
15 communities near prisons, there's fear and confusion.
16 Transferring the case into San Diego County, I submit,
17 transfers it into a county where they've had enough
18 publicity so that it hasn't died down. Everybody knows
19 about the case. They have access to Los Angeles television.
20 They have access to Los Angeles newspapers. Unlike the
21 Northern California media, all of the media in San Diego
22 County have had -- have had publicity since and during
23 the preliminary hearing so the case hadn't had -- hasn't
24 had a chance to die down.

25 There is a substantial difference in Mr. Cooper's
26 ability to get a fair trial in San Diego County than in

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1 Northern California. There is no showing by the
2 prosecution of any substantial difference in costs other
3 than transportation. The lodging and meals are all going
4 to be the same, and again I would emphasize that in terms
5 of the cost to the County, Mr. Cooper didn't have to
6 stipulate that you go with the case. He's already by --
7 by making that particular agreement, already saved the
8 County hundreds of thousands of dollars in costs. The
9 price of his cooperation shouldn't be the loss of a fair
10 trial.

11 (No omissions.)
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1 THE COURT: Thank you, Mr. Negus and Mr. Kochis.
2 You didn't reiterate your legal argument initially

3 to the effect that the defendant Constitutionally should
4 be permitted to choose his county. I read with great
5 interest your Stanford Law Review article which makes an
6 argument to that effect. But I reject that argument.
7 There's no precedent for your proposal. It would certainly
8 permit forum shopping; it would permit a disproportionate
9 burden of publicized cases to be put in, perhaps, one county
10 of the state the Defense might desire more than others.
11 We could have one county trying all the hot cases, so to
12 speak.

13 It's not presently the law, and the defendant was
14 fully aware at the time his motion for change of venue was
15 made that he wouldn't have the choice at the time it came
16 to selecting a county. So I reject that argument.

17 Each of you gentlemen are advocates, and I'm
18 fully aware of that. And you each have your desires, and
19 you're representing a class, and this is all legitimately --
20 you represent a party. This is all legitimate advocacy.
21 And you desire a particular county.

22 I'm certain that you think that counties and
23 particular cities within counties, like jurors, may have
24 a certain class of people with attitudes that make them
25 more or less favorable to your side or to the other side.
26 These are intangible factors that may well exist. They are

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1 of interest to lawyers advocating the case and to
2 psychologists who might assist them. But I'm not sure
3 that they're all relevant to the choice that we must make
4 here now.


5 And I'm talking about the intangibles such as the
6 predominant economic level that exists within a particular
7 county, the level of education of a citizen, political
8 tendencies, racial consideration and other things that we
9 can think of that might well be attributed to a class in
10 general. These are not specifically mentioned by either
11 Counsel. But you would be remiss if you didn't consider it
12 in doing your job.

13 The people in a class, however, or within a county
14 are not homogeneous units. And that's why some serious
15 cases are given even more peremptory challenges than you
16 are in the regular criminal type cases that come up. And
17 the people that exhibit the undesirable traits as brought
18 out in voir dire can be excluded.


19 McGown mentions the factual issues that should be
20 considered by the Court. I have carefully listed and made
21 a list which has been added to even during this argument,
22 the various factors mentioned by each of you, and I have
23 added some of my own and I have tried to consider each and
24 every one of those.

25 First, a couple of general factors. Great weight
26 in argument is made upon the effect of prison news upon

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1 the citizens that might try this particular case. Counsel,
2 I simply don't find that to be a significant factor. 

3 It's a factor here in this county, and that's one of the
4 strong reasons why the case was moved out of this county.
5 But I have been trying prison cases, because we do have
6 the California Institution for Men right close by us here,
7 for many years, some 18 years. And I do not find that
8 the citizens even here are unable to rise above local
9 prejudices and biases, perhaps, against prisons in their
10 community, to where they hesitate at all in finding
11 defendants not guilty in possession of contraband cases,
12 in escape cases, in other -- in assault cases and murder
13 cases that come out of prison.

14 I frankly, honestly and sincerely feel that the
15 citizens of this county, and I'm sure of these other
16 counties that are under consideration, can set aside these
17 tendencies and that one thought on the one hand of "Hey,
18 I don't want a prison in my backyard" with the other one
19 ~~when~~ they take that other oath to well and truly try a case
20 based upon the evidence in court. They keep them separate,
21 and I simply don't find the prison news to be of great
22 significance. 

23 We are going through a period, and the -- both the
24 television as well as the newspaper items of evidence that
25 have come in, we're going through a period when the State
26 of California is having to expand its prison facilities.

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1 And it's a costly and highly political matter. The
2 legislature and the governor and all the citizens of the
3 communities are hassling over that. But I don't find that
4 to have a great effect upon this case.

5 I find further that the publicity is different
6 in kind in its prejudicial effect upon the defendant.

7 You talked about Sacramento -- excuse me, San Diego County
8 having more publicity, I think, in the latter stages than
9 these other two counties. We're concerned with the pre-
10 trial publicity only insofar as it has a prejudicial effect
11 on your client or upon either of your clients in order to
12 give you both a fair trial. And the matters, once it got
13 into the Preliminary Hearing and once the case started
14 going through the judicial process, I don't find that
15 particularly prejudicial. It's neutral or, if at all,
16 the defendant -- the impact upon the watching public or
17 the reading public has not been negative. The bad publicity,
18 when it showed, you know, we had the -- the crime scene,
19 the emotional aspect of that, the manhunt intrigue, the --
20 the bad pictures of the defendant when he was brought down
21 from the northern county into this area and put in jail,
22 that was publicized, all of those were -- had a prejudicial
23 and bad impact of a much greater extent than the appearance
24 in court when we have an orderly proceeding with the
25 defendant well represented and in a quite presentable
26 state throughout.

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1 Some of the factors that the District Attorney
2 mentioned I don't find to be particularly significant.
3 He mentions the populous effect of San Diego, being the
4 third largest county in the state. That's insignificant.
5 Sacramento and Alameda are similarly large cities, all with
6 sufficient population in it from which we can select twelve
7 people plus the necessary alternates to ensure expeditious
8 trial. Political overtones I do not find. I didn't even
9 find it in San Bernardino County. If it's non-existing in
10 San Diego, it is similarly non-existing in Sacramento or
11 Alameda. It's not an issue or a factor.

12 I mentioned before the fact that there are no state
13 prisons in San Diego yet is not a significant factor.

14 It -- it was interesting to me that Sacramento,
15 which does have Folsom, has more publicity about prison,
16 but that's because the prison was a legislative matter of
17 interest, and that logically is going to show up in
18 Sacramento papers more than others. That had more
19 publicity about prisons in general and the funding of them
20 and the population of them and the facilities for them than
21 any of the other areas.

22 Mr. Negus, one of the factors that you mentioned,
23 the cosmopolitan nature of Los Angeles, it may be there,
24 but it's tenuous. It's difficult for me to see that it's
25 any more so there than it is in San Diego, Sacramento or,
26 for that matter, Alameda. These are all cities of large

1 jurisdiction with citizens from all ethnic backgrounds;
2 people of the world, so to speak.

3 The big factor against moving the case to San Diego
4 is the fact that it does, I find, have more publicity about
5 the case than the other two counties than I'm considering;
6 and the fact that it does have penetration by the Los
7 Angeles media, that's inescapable. There are some people
8 there that receive definitely more information about this
9 case from -- than the other two counties.

10 On the other side of my ledger that I prepared are
11 the hardship factors. At the Preliminary Hearing, the
12 District Attorney called 45 witnesses, the Defense, 33,
13 for a total of 78. And I'm informed that there will be
14 more at trial. When you talk about the cost, you must talk
15 about cost in terms of time, money and convenience. And
16 I'm also concerned with a basic fact that I think that a
17 crime that occurs within this jurisdiction is a matter of
18 particular concern to people of this community. And there
19 are a lot of people that are going to want to follow that
20 trial, perhaps personally.

21 If I move it north, they are precluded from doing
22 that. They simply would not be able to do that. If I move
23 it south, and we did have some people that were here through-
24 out the hearings thus far, they will be able to continue at
25 a substantially lesser cost than up north.

26 And when we're talking about time, it's just not

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1 plane connections are not going to be available and would
2 have to stay overnight, and then you have the meal expense
3 attendant with that.

4 All people that watch cable television obviously
5 do not watch the news on cable television. Here we have ✓
6 On, Select TV, The Movie Channel, Showtime. And many of
7 the subscribers to those particular programs are doing it
8 for the entertainment value and not for the news education
9 that they can receive through CNN. And I'm certain that
10 that applies to whatever jurisdiction you go, many people
11 will. But all that does is make it a little bit harder
12 to get a jury.

13 I'm very aware of the lesser standard that's
14 required to exclude a county than it is to transfer venue
15 in the initial instance as set forth in McGown. I also
16 believe, however, that every jurisdiction in this case
17 in this state has basically a fair and impartial system of
18 justice for cases in general. And that's certainly -- you
19 know, L.A. is so big they just never transfer one of their
20 cases anywhere else. And I don't recall a case ever being
21 reversed from Los Angeles because of a venue motion denied.
22 every one of these cities, being as large as it is, can
23 adequately furnish us a fair and impartial jury. I'm fully
24 confident of that. ✱

25 And, Mr. Negus, if you and your client are grieved
26 by the decision to put this case in San Diego County, I

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1 Be in recess.

2 (Recess taken.)

3 (Whereupon the following proceedings were
4 held in chambers.)

5 THE COURT: For the record, Mr. Cooper and all
6 Counsel are now in chambers.

7 I should have said it outside, and I can state it
8 now, the obvious. However, I will have to prepare an
9 order of transfer and send it to the transferee county
10 together with the Judicial Council pursuant to the rules.
11 And that order will be subject to the completion of pre-
12 trial motions.

13 MR. NEGUS: I think they're completed.

14 THE COURT: That -- that was my understanding.
15 I was hoping, however, that the -- I assume, Mr. Negus,
16 I -- I'm sure that you're sorely grieved by this. And I
17 assume that you will want to take an appeal. You have kind
18 of implied it before.

19 MR. NEGUS: That's true.

20 THE COURT: And that's perfectly all right. But I
21 was hoping that we could move on and still have the stipula-
22 tion that jeopardy would attach with all the effect that
23 that would have, and that we could move on pending that.

24 MR. NEGUS: I'm not willing to do that.

25 THE COURT: Any thoughts on this, Counsel?

26 MR. KOCHIS: I have three. I'm still willing to

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THE COURT: Whenever the matter is heard, if you
to file --

THE COURT: Whenever the matter is heard, did you
to file specific Points and Authorities on
issue in advance of the presentation of evidence?

MR. KOCHIS: -- of what the issues are in that we both addressed the Hitch issue, at least in part, and major cases in the 995.

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THE COURT: Counsel, I think what I'd like to do,
before you -- before you go on, is to allow time for
reflection and for us to plan our respective roles in the
case and perhaps have you back tomorrow to further consider

11 All it's going to do, Mr. Negus, is -- is be more
12 expensive for us by having it heard elsewhere.

13 As far as -- this would give you also -- are you
14 saying in effect that we have already determined it?

15 MR. KOCHIS: No. What I'm saying, Your Honor, is
16 if we're stuck with the July 2nd date, by that date Mr.
17 Negus --

18 THE COURT: No, apart from that -- I see that, but
19 that's subject -- that's subject to changing. I mean, if
20 we're going to change the -- the -- the plan at this time,
21 then I don't feel bound by that July 2nd date. We must
22 start -- we might start elsewhere right away.

23 MR. KOCHIS: Practically, if Mr. Negus gets a stay
24 from the District Court of Appeals of the trial in a week
25 or two, we obviously aren't going to be starting jury
26 selection in any county on any short notice. And July the

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1 2nd would give us an opportunity to have the matter resolved
2 by that time in the Appellate Court, possibly even the
3 Supreme Court, and I'm not confident of what Mr. Negus'
4 position would be at that time. If he lost all the way
5 around on the state level, he might be willing, hopefully,
6 to express the degree of cooperation I thought we once had.

7 I did not realize this was a tack. It puts me in
8 the uncomfortable position of saying, "Well, Your Honor,
9 I'm going to be as much an advocate as Mr. Negus." And if
10 that's Mr. Negus' position, I will respond in kind.

11 MR. NEGUS: I understand that -- I told Mr. Kochis
12 this prior, that -- what I was going to do several weeks
13 ago if -- whenever we first found out that San Diego was
14 a possibility. At that point in time I asked him if I
15 should communicate my feelings to you at the time. It was
16 his feeling that I should not. And I abided by that
17 because I didn't want to be put in a position of appearing
18 to coerce you in any way in your decision as to where to go.

19 But it's been -- that has been my intention all
20 along. I have thought about it. So I don't need more time
21 to reflect on what my position is. And I have a variety of
22 legal reasons why I think that what I am doing is correct.
23 And I'm not going to change my mind about that. And I
24 have, Mr. Kochis will have, to act as an advocate.

25 THE COURT: I'm not so naive, nor am I so unfamiliar
26 with you, Mr. Negus, that this comes as a surprise to me.

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1 MR. NEGUS: Okay.

2 THE COURT: So, you know, you're a good attorney,
3 and I -- I like you and I respect you, and the same for
4 Mr. Kottmeier and Mr. Kochis, of course. And I admire
5 good advocacy. And I -- I am confident that your respective
6 clients are going to be well served in this case. But I
7 just fail to see how a decision -- you know, of course, I'm
8 going to abide by the Appellate Court if you seek a stay.

9 First, I think it's -- it's -- to -- to decline to
10 grant a change of venue motion, there is a number of cases
11 on that, and they have shown no great reluctance to grant
12 that. I just -- I just think you're battling windmills,
13 however, on the record here to -- to try and persist to
14 ~~get another county other than San Diego. But, nevertheless,~~
15 ~~that's up for other heads to determine. But, assuming that~~
16 ~~you do, the Appellate Court must give you a stay. Other-~~
17 ~~wise your procedure goes on and what is next.~~

18 If you're -- if you're bound and determined that --
19 that we cannot proceed, I'm going to go ahead and prepare
20 the order of transfer. I'll notify that county. The case
21 then goes to their hands. All your proceedings hereafter
22 are going to be there, your appearances would be there.
23 It's just going to be a terrible thing to do.

24 Can you -- you know, you don't have to tell me.
25 But do reflect on it. Would you give me that courtesy,
26 please, to think about it?

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1 MR. NEGUS: Sure, Judge.

2 THE COURT: I appreciate it.

3 MR. NEGUS: I thought about it for months. It's
4 not like it's something that I'm doing --

5 THE COURT: The right to appeal -- the right to
6 appeal is -- I fully respect that. I understand that.

7 MR. NEGUS: No, I --

8 THE COURT: But these are motions that must be
9 determined here or there.

10 MR. NEGUS: Right. I understand, Judge. But I
11 have analyzed the case since whenever -- this occurred to
12 me first, I suppose, when Judge Merriam left the Preliminary
13 Hearing open. So I have been thinking about it for a long
14 time. I will think about it some more. But I'm telling
15 you that my decisions are not based upon any emotional
16 response to what happened in court today. I had had them
17 a long -- planned out before. I have given some hint of
18 them to Mr. Kochis. I discussed them at length with Mr.
19 Cooper. So it's not something that I'm just doing off the
20 spur of my -- of the moment.

21 I don't wish to educate people as to the way
22 Defense lawyers analyze cases and explain why I do, but I
23 think I have good legal reason for -- for taking my position.
24 And it's not one that's arrived at lightly or in anger or in
25 haste. I mean, your decision -- your decision was not
26 unexpected.

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MR. NEGUS: No, this is --

THE COURT: -- to be made to the trial Judge.

MR. KOCHIS: No, Your Honor. It's the admissibility, the scientific reliability of the serology.

MR. NEGUS: There is -- it's a 402 Motion. 402
Motions have to be made --

THE COURT: I understand. I -- I -- I agree with that initially. The --

MR. KOCHIS: You are the trial Judge.

THE COURT: -- the scientific acceptance.

MR. NEGUS: True.

THE COURT: Well, I am and I'm not. That -- that's going to have to formally be made by the presiding Judge, of San Diego County. I fully expect him to, and I have to get an assignment from the other Court. So we still have some work to do.

Let's take it up tomorrow.

Mr. Negus, are you going to be prepared to proceed in any way tomorrow?

MR. NEGUS: On what? Kelly-Frye, Mr. Kochis has an -- I believe his argument was that Hitch motions can be made pre-trial. I disagree with that because of it's -- Hitch was a misdemeanor case, and there's a variety of cases which say, I think, that they can't.

But, whatever, nonetheless, that's a Hitch motion.

26 MR. NEGUS: Right.

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1 THE COURT: And to have a hearing anew, have it
2 decided fresh.

3 MR. NEGUS: Right.

4 THE COURT: I anticipated that. That's what I had
5 in mind. And they're going to be put to the burden of
6 compliance with the Frye case and the Kelly case. But
7 when, I don't know. I'm in a quandary now as to what to do.

8 It's now 12:15. Let's take our lunch. I will --
9 I will be trying to get through my basket, I guess, the
10 rest of the day. I will see the two of you jointly and on
11 the record at any time today. Otherwise, I am going to
12 set the case over for, like, 9:30 tomorrow morning. I
13 want Mr. Cooper here. At that time we are going to make a
14 decision. And if we maintain our present position, then
15 we're going to get very Judge-like and Lawyer-like and --
16 and the case is going to promptly leave this jurisdiction.
17 And Mr. Cooper and everybody else -- Mr. Cooper will be
18 taken down to San Diego, the file will be sent down to
19 San Diego, I will have to get an assignment from the
20 Judicial Council, and we will have to go and proceed that
21 way.

22 You -- you both are aware of these things as I am.
23 So let's see tomorrow morning at 9:30.

24 Reflect on it more, Mr. Negus, please, I urge you,
25 I implore you. I hate to lie fallow. (/)

26 (Whereupon the proceedings concluded at
12:17 p.m.)

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