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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 2552

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

HONORABLE RICHARD C. GARNER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

For Plaintiff-Respondent:

HON. JOHN K. VAN DE KAMP
State Attorney General
Department of Justice
110 West "A" Street, Suite 700
San Diego, California 92101

For Defendant-Appellant:

IN PROPRIA PERSONA

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JILL D. MC KIMMEY, C.S.R., C-2314
and
BRIAN V. RATEKIN, C.S.R., C-3715
Official Reporters

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE)
OF CALIFORNIA,)

Plaintiff,)

vs.)

KEVIN COOPER,)

Defendant.)

NO. OCR-9319

VOLUME 54

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REPORTERS' DAILY TRANSCRIPT

BEFORE HONORABLE RICHARD C. GARNER, JUDGE

DEPARTMENT 3 - ONTARIO, CALIFORNIA

Thursday, July 26, 1984

APPEARANCES:

For the People:

DENNIS KOTTMEIER
District Attorney

DENNIS KOTTMEIER
District Attorney
By: JOHN P. KOCHIS
Deputy District Attorney

For the Defendant:

DAVID MCKENNA
Public Defender
By: DAVID NEGUS
Deputy Public Defender

Reported by:

JILL D. MCKIMMEY
Official Reporter
C.S.R. No. 2314
and
BRIAN RATEKIN
Official Reporter
C.S.R. No. 3715

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26 MR. KOTTMEIER: Your Honor, as the Court I am sure

1 is aware from its reading of the cases, there virtually
2 are no cases that allow the use of a prior with
3 distinctive similarities that have a combination of
4 all distinctive characteristics. Usually it comes down to
5 one particular item that is very distinctive or unusual
6 when compared with other crimes of a like nature. I would
7 submit that in this particular case, the combination of
8 items one and two, that is, the escaping from custody and
9 then the going and breaking into a house a short distance
10 from the escape, as well as the confrontation of people
11 outside, as opposed to running away, are the distinctive
12 characteristics between the Pennsylvania case and the
13 present charged issues before the Court.

14 The other item --

15 THE COURT: There's confrontation here. What's
16 similar about that?

17 MR. KOTTMFLER: In this particular case, obviously,
18 the prosecution's position is that the defendant confronted
19 the victims, as opposed to sneaking around, removing
20 whatever it was that he was interested in, if he was
21 interested in removing anything. At the Ryen house there
22 was a confrontation, assuming that the People's case is
23 proven.

24 THE COURT: Well, in the Pennsylvania case, you
25 have something of a crime of opportunity, do you not, to
26 where the girl knocks on the door, the defendant's there

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1 and then pulls her inside, allegedly.

2 MR. KOTTMEIER: Except for the fact that --

3 THE COURT: So that kind of a confrontation. Here,
4 dissimilarly, you have what apparently appears to be a
5 premeditated stealing into a house in the middle of the
6 night.

7 MR. KOTTMEIER: Except for the difference --

8 THE COURT: The defendant's seeking them out. Excuse
9 me.

10 MR. KOTTMEIER: Except for the difference, Your Honor,
11 that when Miss Strahl knocked on the door, the defendant
12 was not visible. It was after the second time that she
13 knocked that the defendant responded to the door and went
14 through the physical exercise of pulling her in and hitting
15 her at the same time and grabbing her by the hair, which
16 is, I submit, distinctive in regard to the fact that most
17 defendants in a similar situation, as escapees from an
18 institution, would have run or hidden, as opposed to
19 coming to the front door and responding.

20 THE COURT: Okay.

21 MR. KOTTMEIER: And I would submit it on the written
22 points and authorities from the cases we have cited,
23 Your Honor.

24 THE COURT: Mr. Negus?

25 MR. NEGUS: Yesterday you gave an indicated ruling
26 that you are not going to change. If you are not going to

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1 change that, I won't belabor it at length. I won't. If
2 you want me to respond, I will.

3 THE COURT: As I studied this yesterday afternoon
4 and made my own notes, and I haven't re-read it this
5 morning. The Jamison, you have a single girl in a confronta-
6 tion, not brought on by the defendant, where here you have
7 a married family where the defendant has allegedly -- he
8 allegedly seeks them out. There's a different situation.
9 You have a different method of entry. You have what
10 appears to be a sex motive in Pennsylvania. I can't tell
11 what the motive is in the Ryen case. You have one victim
12 versus five victims. You have minimal violence with
13 reference to Jamison, and maximum violence in the Ryen
14 case, threat versus no threat, and I look at the things
15 that you might show by bringing in the Pennsylvania
16 matters. The intent is not all that clear in Ryen, and
17 I'm not at all sure that the Pennsylvania case would help
18 to show intent. For common plan, scheme or design, I simply
19 can't find the signature, the distinctive method that's
20 similar enough to where I can say this is the same MO at
21 all or the unique methodology as the cases speak about to
22 show identification of the perpetrator, peculiar behavior
23 pattern.

24 I really, Mr. Kottmeier, with all respect, do not
25 feel that the Pennsylvania matter would tend logically,
26 naturally and by reasonable inference to prove an issue

1 in this case, and the prejudice -- I'm weighing the
2 prejudice also, and I think the prejudice of it outweighs
3 the probative value of it. I don't think so.

4 MR. KOTTMEIER: Your Honor, I would request the
5 opportunity out of the presence of the jury to reopen this
6 particular issue if the defendant were to testify. As
7 indicated in the case of Brown that's cited toward the end,
8 as well as Salazar and, I believe, Matsor, the issues may
9 change dramatically, depending on what is said if the
10 defendant testifies in this case, and I would at least
11 reserve, with the Court's indulgence, the opportunity to
12 be heard, should the defendant testify, as to the relevance
13 of the issues, as well as the Pennsylvania evidence at that
14 time.

15 MR. NEGUS: I think that's really hard. I will --
16 I think there is -- there's a certain justice to the
17 prosecutor's position and a certain injustice, and I'm
18 willing to try and distinguish between what I think is
19 the justice and injustice. Everything that has gone so
20 far in this particular case would indicate that the issue
21 involved in the case is going to be solely identity. Was
22 Mr. Cooper the person that did the crime? And the cases --
23 the Jamison case doesn't apply to the issue of identity.
24 The cases that apply to the issue of identity, People vs.
25 Thornton, which Mr. Kottmeier cited, and I think he also
26 cited People vs. Haston, and there's an exhaustive

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1 discussion of the whole other bad acts thing in People vs.
2 Tassell, which is recent, 36 Cal.3d, 77.

3 THE COURT: Counsel, I read all the cases except
4 Easley I never did.

5 MR. NEGUS: Easley doesn't have anything to do
6 with this issue.

7 THE COURT: I never did find that case.

8 MR. NEGUS: But if the Court's ruling I think is --
9 is -- is -- is predicated on the issue of identity primarily,
10 if there should become a question of state of mind, that
11 is, if there was a question if there was like a diminished
12 capacity defense, the issues might change, but I would
13 submit that no matter what the defendant says, as long as
14 the issue remains identity, then the prosecutor should not
15 have a right to -- to relitigate the motion.

16 If the defense changes, if there's some other
17 defense proffered, then I think that the -- that it shouldn't --
18 the reason for that is I have to have some sort of idea of
19 what's coming in.

20 THE COURT: Does that sound reasonable to you,
21 Mr. Kottmeier?

22 MR. KOTTMEIER: No, because I disagree that identity
23 is the sole issue as far as when the defendant testifies.
24 If the defendant portrays himself as just a casual walkaway
25 with no concerns other than returning to the California
26 State Prison, that is one state of facts or mind that, in

1 effect, is placed in issue, particularly in light of the
2 background of this particular series of circumstances out
3 of Pennsylvania,

4 (No omissions.)
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1 MR. NEGUS: If Mr. -- if Mr. -- I would agree, if
2 Mr. -- if Mr. Cooper tries to proffer some sort of defense
3 to the escape which indicates that he didn't want to get away,
4 I would certainly think that that would be a -- that would
5 be another type thing which could come up. But if the sole
6 testimony is he didn't do the crime, then I don't see that
7 how the things would change. And I should have the assurance
8 that we're not going to -- that in picking a jury I don't have
9 to voir dire on it and that sort of thing, because it's
10 obvious that the kind of thing, if -- if -- if it's going to --
11 you know, I see that the Prosecutors have the right -- not to
12 sandbag me, but if my representation is the only thing we're
13 going to argue is he didn't do it, then I think that -- that
14 the Court's ruling is eminently correct under the cases.

15 THE COURT: Well, we had two things, at least, don't
16 we? (a), "I didn't do it," is going to be the position, and,
17 (b), it wasn't all a mistake or a casual walk away or something
18 like that.

19 MR. NEGUS: I don't think I'm going to offer a
20 defense to the escape charge.

21 THE COURT: Yes.

22 MR. NEGUS: I mean, if I start trying to do that,
23 then that's something else again.

24 THE COURT: You know, like in Walz --

25 MR. KOTTMEIER: There's a degree of --

26 THE COURT: -- Walz, you can see the tremendous amount

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1 of work involved in preparing for perhaps a slim contingency.

2 MR. KOTTMEIER: Your Honor, this issue has been
3 prepared. Mr. Forbush has been back to Pennsylvania. This
4 is not an area that the Defense is offering or trying to in
5 effect have set aside so they don't have to prepare. It's
6 obvious, because if we should reach a penalty phase, this
7 particular incident is going to be highly relevant under the
8 state of the law at this time.

9 THE COURT: All right. We're just talking about
10 guilt phase.

11 MR. NEGUS: All I'm talking about is the guilt phase.
12 I don't -- I mean, penalty phase is totally different issues.
13 And none of these motions are going to the penalty phase.

14 MR. KOTTMEIER: And all I'm asking is that I be
15 allowed to have a say after the defendant testifies.

16 THE COURT: Well, I think I'm inclined to give you
17 that in spite of the fact that I know that Mr. Negus is going
18 to be taking that into consideration, that there's a possibility
19 at least that it may get into the Pennsylvania matter in the
20 guilt phase. I think it's slim, Mr. Negus, and I'm inclined
21 to agree with your analysis mostly at this point. But I just
22 can't predict what might happen all the way in trial, so --

23 MR. NEGUS: All I'm asking is if none of these -- if
24 no -- if no issue other than identity is in -- is interjected
25 into the thing which the Pennsylvania rape might have a
26 tendency and reason to prove, let it stand, because I --

1 because I think that at least -- I can represent that that's
2 what I think the issue's going to be.

3 I mean, if I were to be sneaky and change it, then
4 that would be one thing. But in terms of picking a jury and
5 voir diring, if -- you know, I -- I think I need to know in
6 advance, as long as I live up to my representations, that I'm
7 not going to have it re-litigated on me.

8 THE COURT: Well, you know, as I looked through the
9 various things the similars show and thought about them
10 yesterday, though there's been no offer of proof, I don't
11 believe you pinned yourself down as to the issues that you
12 would prove. Identity basically is -- is the only one. I
13 don't think we -- it shows motive. Intent to kill is not an
14 issue. Identity of the perpetrator is about the only thing.
15 Common plan, scheme and design is simply not evident, I submit,
16 from the -- from the similar features.

17 MR. KOTTMEIER: The motive, Your Honor, is relative
18 to the fact that the defendant had been identified out of
19 Pennsylvania in regard to this particular rape through finger-
20 prints. Also, it illustrates a degree of desperateness upon
21 his part, knowing that he is facing all these other charges
22 out of Pennsylvania, should he be apprehended, once he
23 escapes from CIM. And all of these issues relate circumstan-
24 tially to identity. Identity is not as --

25 THE COURT: You don't have somebody cornered who
26 strikes back and commits murder unnecessarily, so to speak.

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1 What the evidence has shown so far is he didn't --

2 MR. KOTTMEIER: I'll --

3 THE COURT: -- he didn't do it to protect himself
4 from discovery by Pennsylvania or California authorities.
5 That this was -- whoever committed these murders apparently
6 sought the victims out in the still of the night, and there
7 was some other motive for going into that house at the time.

8 MR. KOTTMEIER: I disagree about being cornered.
9 The defendant makes phone calls to the two people that he
10 thinks will help him, who both turn him down and say, "We
11 are not going to help you."

12 THE COURT: They were not going to send any money.

13 MR. KOTTMEIER: "We're not going to come and get you,
14 either."

15 MR. NEGUS: The defendant didn't do anything to try
16 and hide his identity in the Lease house, either.

17 THE COURT: But I don't see how that particularly
18 helps you.

19 MR. KOTTMEIER: He is frustrated.

20 THE COURT: You talk -- when you mention it, it
21 shows the degree of desperateness the defendant is in. I
22 just don't -- if the defendant is the one that committed these
23 crimes, I just don't see this as being a desperate act at all.
24 You know, it's not -- it's not something that was forced
25 upon the attacker in this case. The attacker sought them
26 out deliberately, apparently. Possible that he could have

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1 gone to the house thinking that it was empty, but not likely,
2 since apparently the hatchet was removed and taken as well as
3 other weapons.

4 So I will reserve your right to call, Mr. Negus.
5 But the chances of it happening are pretty slim. Depends
6 upon what happens. Some way we will certainly have a hearing
7 out of the presence of the jury before any reference would
8 come in. And that's the best I can do at this time. Other-
9 wise, your motion is denied.

10 MR. NEGUS: You mean their motion to have it
11 introduced is denied.

12 THE COURT: That's true. What did I say, your motion?
13 They moved. Was their motion -- well, maybe it wasn't.

14 MR. NEGUS: I'm not sure. But I -- it's clarified.

15 THE COURT: Your motion is basically granted with a
16 hooker.

17 MR. KOTTMEIER: Your Honor, there's an -- there's
18 a side issue that comes in, at least in reference to this.
19 And that is that, at least as far as the conversation with
20 Diane Williams from Pittsburgh at the time of the defendant's
21 presence at the Lease house, there is conversation about the
22 Pittsburgh authorities looking for the defendant. And I would
23 submit that at least in general terms that that was discussed,
24 without going into detail, because there was no detail in the
25 conversation, that that --

26 THE COURT: What was said in the conversation?

1 MR. KOTTMEIER: Something to the effect of the
2 defendant knew that Pittsburgh was out looking for him and
3 that there was conversation about the Pittsburgh authorities
4 trying to find the defendant, and --

5 THE COURT: What relevancy does that have to this
6 case? The issue of bringing in the conversation is to place
7 him at the location, I would think.

8 MR. KOTTMEIER: Yes. But to in effect say that we
9 have to excise or try and limit what was said in the
10 conversation puts a burden --

11 THE COURT: We do it all the time, Mr. Kottmeier.
12 We edit confessions, admissions, instruct witnesses before
13 trial to leave a certain matter out. We do it all the time.
14 We can live with that.

15 I think that that's obviously a reference to other
16 crimes, obviously a reference to what we have talked about,
17 and that it would have to be excised in some way from that
18 conversation when you put Diane Williams on the stand.

19 MR. KOTTMEIER: I would offer that, as far as Diane
20 Williams is concerned, that I doubt that I will have
21 sufficient control over her or Mr. Negus or potentially even
22 the Court that she will not in some way, depending on how
23 the question is framed, relate her fears of the defendant,
24 and that her fears are based on the fact that he also seems
25 to be getting out of custody and coming after her.

26 THE COURT: Do you have any objection to that portion

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1 of the conversation?

2 MR. NEGUS: Yes, Your Honor. And I -- basically
3 we're going to get to Diane Williams later. I agree with the
4 Court that the only -- the only issue that I can see that
5 Diane Williams' testimony is relevant on is -- has to do with
6 Mr. -- with -- with Mr. Cooper having made a phone call to her.
7 And that's not going to be disputed. I mean, I don't -- I
8 don't intend to dispute that Mr. Cooper made phone calls to
9 Diane Williams on June the 3rd, I believe it was, June the 4th
10 and June the 6th from -- two from the Lease house and one
11 from Tijuana, so --

12 THE COURT: You're going to dispute what you're sure
13 they're going to prove, apparently?

14 MR. NEGUS: Well, I --

15 THE COURT: In any event --

16 MR. NEGUS: -- am only disputing what's not true.

17 THE COURT: In any event --

18 MR. NEGUS: I have a separate motion on Diane
19 Williams later on, if you want to reserve this part of it
20 until we get to that.

21 THE COURT: What's the nature of your motion?

22 MR. NEGUS: I don't believe that Diane Williams will
23 be possible to testify truthfully, and they know it, as they
24 just indicated from their -- from their -- some indication
25 of that in their statement. I don't believe she has personal
26 knowledge about anything other than the phone calls. And I

24 THE COURT: Well, work on it. If she's a flakey
25 witness in some way -- I got into her testimony at the, I
26 guess, the Preliminary Hearing at one stage in this, at some

1 stage. And, as I recall just offhand, it seemed like there
2 was a question about the times or the dates of the phone calls
3 she got mixed up on that.

4 MR. NEGUS: She doesn't know. She doesn't remember
5 anything. And there's all kinds of things about her
6 credibility which could -- she's also impossible to control,
7 as Mr. Kottmeier says. And as such, she's just the kind of
8 witness that would love to cause a mistrial for no good
9 reason. And I -- I think that -- that the only thing that
10 she can prove is the phone calls. And I don't disagree with
11 phone calls were made.

12 THE COURT: Right now I will tell you that if she
13 testifies she must not be permitted to bring out statements
14 from the defendant indicating that the authorities in
15 Pennsylvania are after him. I think I have been fairly
16 effective in the past of admonishing witnesses before they
17 step before a jury in no uncertain terms, "Do not mention
18 this," and I can be attentive as well to the questions that
19 are asked and interrupt before it gets out of her mouth, maybe.
20 We can all be guarded against it.

21 We will have -- if she testifies, let's make certain
22 that we have a hearing out of the presence of the jury first.
23 If you want to avoid the can of worms that it may open that
24 Counsel suggests, Mr. Negus, it might be to your benefit as
25 well. Each of you work on some sort of a stipulation, what
26 specifically you want from her, Mr. Kottmeier, under the

1 circumstances, and show it to Mr. Negus, and maybe you can
2 arrive at a stipulation. Okay?

3 MR. KOCHIS: Your Honor, if I may interject, there's
4 another witness that presents the same issue, and that's
5 Yolanda Jackson.

6 THE COURT: Another girlfriend, allegedly.

7 MR. KOCHIS: And her situation is a little different
8 in that she has approximately an hour and 30 minute phone
9 call with Mr. Cooper. One hundred and ten minutes, sixty
10 minutes in an hour, so it would be --

11 THE COURT: One hundred and ten minutes.

12 MR. NEGUS: Almost two hours.

13 MR. KOCHIS: That places him getting off the phone
14 at about the same time the Ryen and Hughes boys are leaving
15 the barbecue and heading home to their home.

16 MR. NEGUS: No, that's not true.

17 MR. KOCHIS: I believe the phone call is somewhere
18 around 8:30 in the evening.

19 MR. NEGUS: The phone calls made Thursday night
20 are -- Diane Williams' phone call is the one that's -- that
21 ends at 8:39.

22 MR. KOCHIS: I have to check. In any event, in the
23 Yolanda Jackson phone call, there's a number of references
24 to the defendant's proposed future actions, what he's going
25 to do, why he's going to do it, why he has to leave the area.
26 And those touch on Pittsburgh as well.

1 THE COURT: Well, I would think that anything that
2 can be considered an admission to show the California
3 authorities are after him for any reason would probably
4 well be admissible, but I see no reason why we shouldn't
5 continue to make the effort to excise out references to
6 Pennsylvania. There -- in addition to the matters that
7 I mentioned before with reference to the out-of-state
8 similars, we have an obvious 352 question here, the time,
9 the expense, the possible confusion to the jurors, the
10 misleading of jurors with reference to bringing in another --
11 other acts and charges in Pennsylvania, so it's a balancing
12 aspect of prejudice and probative value, and right now you
13 simply haven't shown me that Pennsylvania has that much
14 bearing upon California; so we're going to have to try
15 and make the excise. Okay? Anything further on that --
16 those points?

17 MR. NEGUS: No. I don't like to be contradictory,
18 and I'm not trying to change your mind about your ruling
19 on the Beagle motion yesterday, but --

20 THE COURT: Sure you are.

21 MR. NEGUS: No, I'm not. I swear -- I actually am
22 not, I'm not trying to change your mind, because I really
23 don't believe in that.

24 THE COURT: Okay.

25 MR. NEGUS: But what occurred to me is that by
26 forgetting to say something, I might have cut myself off

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25 THE COURT: They haven't charged burglary at the
26 Lease house.

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1 MR. NEGUS: They have not charged it, but that is
2 something which I believe that I might be entitled to
3 under Geiger, and I don't want to make up my mind on that
4 before the end of the case.

5 THE COURT: What does that have to do with Beagle?

6 MR. NEGUS: I made a Rist argument yesterday, and I
7 neglected to put in the Rist argument that there might be --
8 there might in -- be a lesser. I am not trying to change
9 your mind on the -- on the -- on that decision. I just
10 don't want to be in a position where I'm ambushing you on
11 the -- on the -- on the Geiger issue.

12 THE COURT: No. I think that's fine to bring that
13 up at some point. I'm wondering. It's a lesser of what?

14 MR. NEGUS: It's incidentally related. It doesn't
15 have to be a lesser included offense anymore. If the
16 lesser offense is closely related to that charge factually,
17 then it doesn't matter about the -- the People vs. Martin
18 and all those other elements anymore. It's a different
19 situation, so --

20 THE COURT: I will have to read that case.

21 MR. NEGUS: All I wanted to do was not to make you
22 think that I'd ambushed you by leaving that out of my
23 Rist argument, and so I don't want to preclude myself
24 from arguing I should get the lesser burglary because of
25 my sloppiness in the Rist argument.

26 THE COURT: Motion regarding reference to lack of

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1 prosecution discovery of defense evidence and to actions
2 of defense lawyers and investigators. Mr. Negus, do you
3 want to amplify on that?

4 MR. NEGUS: I thought Mr. Kochis --

5 MR. KOCHIS: Well, we did amplify on it, Judge, you
6 leaving it, which surprised me somewhat, is you said, well,
7 you're just going to have to move for discovery of those
8 reports, and that's how we're going to handle it, and I
9 have cited to the Court I believe the -- some cases Tuesday.
10 The Olson case is final as of today. I did not check this
11 morning to see if a hearing was granted. I don't know if
12 Mr. Negus did.

13 MR. NEGUS: We haven't got -- when the time I left
14 the office, we had not got the latest advance sheets.

15 MR. KOCHIS: I have a copy of that case. It's
16 similar to the ruling and reasoning of the Polos case.

17 THE COURT: I'm not sure that I have a copy of it
18 yet.

19 MR. KOCHIS: Well, you don't, because I don't think
20 it would be proper for a lawyer to hand the Court a copy of
21 a case which isn't final. There are rules against doing
22 that, against citing cases that aren't final, and if I
23 handed you a copy, I'd be citing it.

24 THE COURT: I did read the Reed case, the Meredith
25 case, the Polos case somewhat on the same point.

26 MR. NEGUS: Basically, all those cases I don't think

1 are on the point that I was making. The point that I was
2 making was that we shouldn't have testimony in front of
3 the jury about defense discovery procedures, whether the
4 defense gives discovery or not. The issue of whether the
5 prosecutor gets discovery is totally different than whether
6 or not it all gets -- it all gets put out in front of the
7 jury, and the theory behind that is that --

8 THE COURT: Well, I don't really have any quarrel
9 with your position, Mr. Negus.

10 MR. NEGUS: Okay. Then we don't have an issue.

11 MR. KOCHIS: No. Wait a minute. Wait a minute.
12 I agree with the separation of the issue, and the issue
13 I wanted to address is the one Mr. Negus specifically
14 refers to in number eight. It seems to me unusual that
15 in a fact-finding process, he is able through questioning,
16 through argument and through insinuation to suggest that
17 perhaps the plaintiff is hiding, manufacturing evidence,
18 and yet in a situation where a witness gets on the stand,
19 has been interviewed by his investigator six, seven, eight
20 months ago, can't honestly recall what they said, to do
21 that, we'd need to refer to the transcript. Why is that
22 being hidden from the witness if what we're searching for
23 is the truth?

24 THE COURT: Are you going to maintain the position
25 that you're not going to let the witnesses refresh their
26 recollection with tapes before they're called to the stand

1 and testify or transcripts?

2 MR. NEGUS: I suspect that that's going to depend
3 on different witnesses. I mean I -- I don't believe
4 that I'm required to turn over anything.

5 THE COURT: Now, he's going to be a cross-examiner,

6 MR. NEGUS: Maybe yes, maybe no. There's a lot of
7 witnesses that I suspect he's going to call that
8 Mr. Forbush has talked to.

9 THE COURT: Let's assume for a second that
10 Mr. Kochis and Mr. Kottmeier is cross-examining one of
11 your witnesses on matters that would be a ripe subject for
12 cross-examination.

13 MR. NEGUS: First of all, the phrase "my witness,"
14 there are very few people that Mr. Forbush has talked to
15 who can be at all considered to be sympathetic or favorable
16 to Mr. Cooper. Many of them, like Linda Headley and others,
17 are in fact quite anti-Mr. Cooper. I'm stuck with the
18 position where I have to go -- the only -- I can't find
19 Mr. Cooper's friends, relatives and family in positions
20 to observe that which I need to prove, so I have to go
21 with adverse-witnesses, and they are very adverse, some of
22 them.

23 THE COURT: Still, they are witnesses in some cases
24 that he will not be calling, that you will be calling.

25 MR. NEGUS: Right, but --

26 THE COURT: And if you in one way can cast stones,

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1 his argument is that should not they be able to counter
2 that?

3 MR. NEGUS: I know, and that's obviously a very,
4 as it were, human feeling; however, the law, I believe,
5 is that Mr. Cooper's on trial. I'm not. Now, it may seem
6 unfair in the scheme of things that I -- in a personal
7 sense that I can suggest and introduce evidence that the
8 prosecution team has misbehaved, but the law focuses in
9 on the conduct of Mr. Cooper and not of the defense lawyer.
10 I'm not --

11 THE COURT: Let's cut through it, Mr. Negus.

12 MR. NEGUS: Okay. Do you want the cases?

13 THE COURT: What authority do I have to deny him
14 the right to fully cross-examine like you might have?

15 MR. NEGUS: Well --

16 MR. KOCHIS: Your Honor, I might add I'm not interested
17 in casting aspersions on Mr. Negus or Mr. Forbush. There's
18 some witnesses that, although they may be sympathetic to
19 Joshua Ryen, say things that certainly are as adverse to
20 my case as an alibi witness. I want to cross-examine that
21 witness, even if she's a fine, upstanding hospital citizen
22 employee, the way I would an alibi witness, and I want to
23 test her memory. I want to show how it's faulty. I want
24 to find out why she hasn't reviewed a document, and I want
25 the jury to understand that it's not my fault that she
26 hasn't reviewed a document, and I want to challenge her

3 THE COURT: I don't blame you for that. Normally
4 I would protect your right to fully cross-examine as I
5 just indicated.

6 MR. NEGUS: Let me just make a distinction between --
7 the fact that she hasn't reviewed a document is one thing.
8 Why she hasn't reviewed a document is another thing. The
9 fact that she hasn't reviewed may be probative.

10 THE COURT: Well, let's think about it. It's hard
11 for me to think of rulings in this type of case in the
12 abstract when I don't know of a particular witness, I don't
13 know what the particular response can be, so all I can do
14 is think of hypotheticals for a second. She gets on the
15 stand and she can remember the few salient questions or
16 answers to questions that you may ask, but he, to go into
17 the rest of the conversation and to fully cross-examine,
18 runs up against the blank wall, and he says, did you make
19 a statement to Mr. Forbush? Have you looked -- have you
20 refreshed your memory? Have you tried to refresh your
21 memory? What's wrong with that?

22 MR. NEGUS: Let's focus it on two things. First of
23 all, let's take a witness that I just ask questions, the
24 witness answers questions, I haven't shown the witness
25 their -- their transcript, and I don't ask them any
26 questions about the transcript. All right?

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3 MR. NEGUS: But they haven't used it to refresh
4 their recollection. I'm not referring to it in my questions.
5 I just ask them about what they remember. Obviously, the
6 transcript has nothing to do with their memory at trial.

12 MR. KOCHIS: There's no question, Your Honor, that
13 I will be making that motion. In fact, I withdrew it at
14 one point. Technically, it is my position we are in trial,
15 jeopardy has attached; therefore, technically 1102.5
16 applies. Linda Headley has testified at trial.

17 (No omissions.)

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1 THE COURT: Well, if I -- if I go --

2 MR. KOCHIS: -- at trial.

3 THE COURT: -- along with that and there's some
4 dispute in the Appellate Courts, and the Supreme Court hasn't
5 spoken on that, apparently, yes, but if -- if I give you the
6 right to see reports that are made by Mr. Forbush --

7 MR. KOCHIS: That would obviate --

8 THE COURT: -- you could -- you could then say,
9 "Your Honor, may I have a recess for the witness and I to
10 take a look at the report," in which case we don't really have
11 a problem. And I don't know. So maybe we're getting the
12 cart before the horse here until -- until we know which cases are
13 final and which are not final.

14 MR. NEGUS: Well, it's clear, I think, under the
15 cases, Prudhomme, Polos, all those cases, that they can't get
16 anything until they have rested. That's a self-incrimination
17 problem.

18 THE COURT: Yes.

19 MR. NEGUS: And they haven't rested yet.

20 THE COURT: Part of their case in chief, they --

21 MR. NEGUS: Right.

22 THE COURT: It's only after the witness has
23 testified on direct.

24 MR. NEGUS: Right. That -- and so we're not anywhere
25 near that place yet, because they haven't rested. And if they
26 do, I'd like to make an 1118 Motion.

1 MR. KOCHIS: The statute -- the statute doesn't say
2 that. The statute simply says after the witness testifies
3 on direct at trial. We're in trial.

4 THE COURT: Oh, Counsel --

5 MR. KOCHIS: But I agree with the Court, and I can
6 wait until we have rested to make the motion. But to save
7 time, I will make the motion when we rest as to people I
8 anticipate Mr. Negus is going to call so I'm not in the
9 position, in a long trial and at 2:00 o'clock in the afternoon,
10 of asking the Court if we can be dark for the rest of the
11 afternoon.

12 THE COURT: You're trying to get all this in
13 advance, aren't you? I wasn't aware of that. While this
14 may be trial, 402 type motion, so to speak, we're not in
15 trial, as far as I understand the spirit of 1102.5. It's
16 after that witness testifies before a jury, at that point on
17 direct that I -- that you're entitled to. I haven't looked
18 at it with that point in mind. Have I overlooked something?

19 MR. KOCHIS: Well, Your Honor, I think the purpose
20 for which the statute was designed is so, when Defense witnesses
21 testify, I am allowed to look at reports of what they have
22 said so I can determine if there's some selective reading.
23 When they've testified in a motion, it's as important as
24 anything that's going to take place during the trial.

25 I'm not at this point demanding that I get discovery
26 under 1102.5. I'm going to make that motion when I rest as

1 to every person that I anticipate Mr. Negus calling.

2 THE COURT: Okay. I'll take another look at it and
3 be more prepared at that time. And I think that -- I think
4 that we're far down the road before I have to rule on this
5 extremely fine and minute point, Mr. Negus.

6 MR. NEGUS: Okay. Well -- well -- but let -- let
7 me just -- let me just give you an example. Okay. Linda
8 Headley got up on the stand and asked in court when she
9 testified here, pursuant, I believe, to instructions of
10 Sergeant Arthur -- I don't think anybody would deny that --
11 to have a copy of her tape. Mr. Woods has instructed various
12 other witnesses when they get to court at trial to demand to
13 see a copy of their tape.

14 THE COURT: I don't know of anything illegal or
15 immoral about doing that.

16 MR. NEGUS: That was a different issue. Okay? I'm
17 not -- I'm not saying whether -- I'm just telling you that
18 that has been done, okay? What -- I think that doing that
19 in front of a jury is irrelevant, prejudicial and tends to
20 turn the focus of the case from the defendant's guilt or
21 innocence to the Defense lawyer's.

22 I certainly understand that, given my particular
23 personality and the way that I -- that I process this case,
24 that many, many people on the other side would like to have
25 a chance to -- a chance to -- to point out things that I have
26 done that they haven't liked. That's a very human response.

1 The problem is that the law, as I understand it,
2 is to the contrary. You're not supposed to put the Defense
3 lawyer on trial; you're supposed to put the defendant on trial.
4 It may seem like a lack of symmetry, but that's the way it is.
5 And that's the purpose for the motion.

6 The 1102.5 motions with respect to various witnesses
7 that -- that have testified, I think, will be very much the
8 issues as to -- that material which is used to impeach any
9 witness will be very much obviated at trial, because I don't
10 expect to have the same type of limitations on giving out
11 reports to the Prosecution after they have rested and after
12 the witness has testified on defense that we did here.

13 The reason that we brought it up the way it was
14 here was that my understanding of what Prudhomme and the
15 other cases say is that giving it to them before they have
16 rested lightens their burden. And that's a no-no for a
17 Defense lawyer.

18 They -- the -- the issue that I'm -- the other issue
19 that I'm concerned about, for example, though, is witnesses
20 who have good memories, who have talked to the Prosecution,
21 have talked to the Defense and who I'm not going to impeach.

22 THE COURT: This is simply not that big of an issue.
23 Let's take the type of thing that you're trying to guard
24 against. When Headley or some other witness gets on the stand
25 you're asking her a question in direct examination, she says,
26 "Before I answer that, Mr. Negus, may I please see or read

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1 the transcript or hear the tape that you made of your interview?
2 I need it to refresh my memory, and I'd like to be more precise
3 when I answer the question," and thus perhaps embarrass you
4 or the defendant at trial. That's what you're worried about,
5 isn't it?

6 MR. NEGUS: Basically.

7 THE COURT: So on that, it's just a question of
8 timing. If you're trying to make a point, I don't see any
9 reason why I shouldn't instruct the witness ahead of time or
10 you instruct him, Mr. Kochis, not to make such a request on
11 direct examination. You can surely make it on cross, and
12 you're probably going to do it. No way he can stop you from
13 doing that on cross examination.

14 So what -- what he's trying to avoid in the midst
15 of his part of it, you can ask, "You didn't know. When you
16 testified on direct, you hadn't seen your -- your transcript.
17 Your memory was not all that clear until you got it a few
18 minutes ago," or something like that. So I think you can
19 cover it on cross examination.

20 MR. KOCHIS: I'm sure I can.

21 THE COURT: I'm sure you can. So what are we
22 fighting about?

23 MR. NEGUS: Okay.

24 THE COURT: All right. I don't find any reason why
25 I shouldn't make a blanket instruction that that type of
26 question shall not be asked by Defense witnesses on direct

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1 examination.

2 MR. NEGUS: Okay. The other -- the other -- the
3 other issue is Prosecution witnesses. For example, Mr.
4 Forbush, I believe, has talked to Larry Lease on numerous
5 occasions. And the Prosecution is not entitled to discovery
6 of Mr. Forbush's reports on Prosecution witnesses unless I
7 elect to impeach them with it. That seems to be a clear case
8 that it is irrelevant to --

9 THE COURT: That's something that we didn't hereto-
10 fore mention.

11 MR. NEGUS: I know. That's why I'm -- so that's --
12 that was the other thing that -- that does concern me, is
13 there's lots of Prosecution witnesses that Mr. Forbush has
14 talked to. And if --

15 MR. KOCHIS: Well, Your Honor, that would come up
16 another way. That's going to be a 771 issue. I imagine the
17 witness is going to say yes or no, he's going to put Mr.
18 Forbush on, Mr. Forbush is going to say, "On X date I talked
19 to Mr. Lease, and he said A," on cross I'm going to ask him,
20 "That was a year ago. What did you rely on?" And he's going
21 to say something --

22 MR. NEGUS: I anticipate Mr. Lease is necessarily
23 going to contradict anything that he -- I mean, I expect him
24 to testify the way he has talked to Mr. Forbush and the way
25 he has talked to the police. I mean, there's lots of these
26 witnesses that Mr. Forbush has talked to that I don't expect

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1 to impeach.

2 THE COURT: You know, you know --

3 MR. NEGUS: And that's what I'm talking about.

4 THE COURT: You know when you're getting heard and
5 when you're not getting heard or when you can help and when
6 you can't help. By the time we get around to the jury in
7 this case, let's don't -- let's don't fight just to fight.

8 I don't think there's any necessity for me ruling on
9 that at this time.

10 MR. NEGUS: Well, I just wanted to bring it up so
11 that it doesn't happen in front of the jury. And, you know,
12 it's a lot easier, I think, to do it now than try and make
13 motions for mistrial and get into that kind of nonsense. And
14 I -- I --

15 THE COURT: You will take up matters in chambers.
16 I'd like advance notice, certainly appreciate that. We'd
17 like to avoid disruptions in the trial as much as possible.
18 But I'm sure we'll have a number of chambers motions or out
19 of the presence of the jury motions during the trial.

20 I think -- I think you're talking on the same wave
21 length. He's talking, "Don't worry about it. As soon as
22 they impeach him, I'm going to get it."

23 MR. KOCHIS: Your Honor, I'm not going to be
24 advising people to demand from the witness stand on direct
25 to see their transcripts. That's not the way I operate. I
26 usually tell people --

1 MR. NEGUS: But --

2 MR. KOCHIS: -- "Answer the questions. If you can't
3 remember, say, 'I can't remember.' If people start quoting
4 things to you, if you remember that, say you do. If you
5 don't, say you don't."

6 THE COURT: Okay. You aren't pressed for any
7 ruling at this time?

8 MR. NEGUS: As long as that's what happens, that's
9 fine. But Mr. Woods has told people otherwise. And I just --
10 that's why I brought it up. I didn't expect Mr. Kochis to
11 do it. Mr. Woods has already done the job, and Mr. Hughes.

12 See, the problem, there's a lot of witnesses --

13 MR. KOCHIS: I think we're really arguing at this
14 point, really, about nothing. I think when the witnesses --
15 those witnesses testify, Mr. Negus can tell me before they
16 get on the stand what he's concerned about, we can bring the
17 witness into chambers and we can have further discussion on
18 it and, if necessary, admonish the witness.

19 MR. NEGUS: That's fine.

20 MR. KOCHIS: I think we're taking time --

21 THE COURT: Sure, it is. I'd like to minimize those
22 where we can. So I think, in the first instance, however,
23 there can be some indicated positions from the Court. On
24 these witnesses that you have dialogue with that the witness
25 is going to be called, simply tell them not to make a demand
26 for tapes or transcripts of their interviews in the first

1 instance on the direct examination, do just what you
2 suggested a moment ago. "If you can answer it, do it. If
3 you can't answer it, say you -- say you can't." Tell them
4 why. But I see no point in -- I don't see it matters to a
5 hill of beans whether it comes out one way or another.

6 MR. NEGUS: Right. I don't think it's going to
7 come out the t'other, in the way that you're anticipating.

8 THE COURT: Okay. Motion regarding separate jury
9 for guilt and penalty phases.

10 MR. NEGUS: On a lot of these motions now we're
11 getting into, Your Honor, I -- as I say, I have been working
12 as fast as I can. And I have not completely gathered all
13 the material that I need in support of the motions. One way
14 that I -- and I certainly don't have anybody prepared to
15 testify as to the basis for the motions. I am attempting
16 to gather as quickly as I can the written --

17 THE COURT: Testimony? Testimony on that issue?

18 MR. NEGUS: Uh-huh. But I -- I think it could be
19 obviated, because I -- if the Prosecution is willing to agree
20 that you can consider published materials on it rather than
21 having -- rather than -- rather than having to gather
22 witnesses. I haven't had a chance to gather witnesses. I
23 have incompletely gathered some published material which I'm
24 trying to present to both Court and Counsel and see whether
25 or not that published material can be the basis of -- of the
26 motion rather than having to try and get expert witnesses to

1 come in and testify as the -- in the same way as published
2 material. I do think that I need to have factual basis for
3 some of the contentions that are made.

4 With respect, then, to -- if I could just -- starting
5 on the separate jury thing, if I could articulate why it is
6 important to have the separate jury and indicate some of the
7 things that I would -- would rely on in putting that forward,
8 in People -- or, Hovey vs. Superior Court, whatever cite that
9 was --

10 (No omissions.)

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1 THE COURT: I have it. I know it,

2 MR. NEGUS: -- pages 54 to 57 of that decision
3 set out a series of public opinion polls in which the
4 court found that more women oppose the death penalty than
5 do men, and more Blacks oppose the death penalty than do
6 whites. The general overall percentage of people that are
7 opposed to the death penalty in the country is something --
8 something like -- sixty-some-odd people are in favor of
9 the death penalty, and twenty-some-odd percent are opposed,
10 and the rest are wobblers. If I recall the figures
11 correctly in Hovey, of Blacks, only I think less than
12 half the Blacks in the country are in favor of death
13 qualifications.

14 I have as an exhibit that I'd like to mark, it's
15 not a certified copy, because the original of a certified
16 copy is in another case file, but I presume that counsel
17 will not object, as to the vote on Proposition 7 in the
18 1978 election, which was the Briggs Initiative in which
19 people not only -- you know, it wasn't a vote pro and con
20 the death penalty. It was a vote should the death penalty
21 statute which we had be made more punitive and encompass
22 more crimes, so I have here the results for the various
23 counties and the total results of the state as to that,
24 which I'd like to have considered on that issue,

25 THE COURT: Any objection if it's received, Counsel?

26 MR. KOCHIS: Well, Your Honor, how would that be

1 relevant if it's not a statement of votes on the position
2 on the death penalty for murder but expanding it to other
3 crimes which really is not the issue in this case? This
4 case we have a specific crime for which the death penalty
5 is applicable, and perhaps the vote of the various counties
6 on --

7 THE COURT: It shows some position of favorability
8 or disfavor, doesn't it, of the population?

9 MR. NEGUS: You couldn't vote in favor of that
10 unless you were in favor of the death penalty, so the
11 people who -- the people who voted against it would include
12 some people who are in favor of the death penalty but
13 thought the old law was good enough, and those people who
14 are opposed to the death penalty, so, you know, the "yes"
15 vote is a smaller universe than -- than the whole --

16 THE COURT: Where are we going? What's the bottom
17 line?

18 MR. NEGUS: The position -- the position of it is
19 the death qualification of jurors is going to -- is going
20 to eliminate what -- what little chance we have of getting
21 a Black on the jury, because the -- the attitudes of --
22 because it doesn't cut -- cut down -- it doesn't cut evenly.
23 When you death qualify, what you do is you bias the jury
24 in favor of white males and against Blacks and against
25 females, and so the effect of death qualification is to --
26 is to --

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1 THE COURT: You're blazing a trail, Mr. Negus, aren't
2 you?

3 MR. NEGUS: Oh, no, Your Honor. If I were blazing
4 a trail, I'd have to have all these witnesses, but this
5 material has been presented in many courts and is pending
6 in the State Supreme Court, and I'm not blazing any trail,
7 I'm copying the State Public Defender.

8 THE COURT: I have just simply never heard of a case,
9 since '78, at least, where we do -- you have to death
10 qualify a jury in some manner. You have to -- you have to
11 Witherspoon them.

12 MR. NEGUS: Well --

13 THE COURT: Whether you do it in chambers or not,
14 you have to Witherspoon them.

15 MR. NEGUS: I'm saying that if you do it, you have
16 to balance off the effect of Witherspooning, which gives
17 you a lily-white jury, as opposed to the advantage of death
18 qualifying. One of the relevance of those particular
19 statistics is that there's an overwhelming percentage of
20 people in favor of the death penalty in state, anyway, and
21 so it's really just -- it's just an exercise in getting
22 the prosecution a better jury. It's not really necessary
23 in order to preserve the prosecution's right to a fair
24 trial.

25 THE COURT: Excuse me just a minute to where I
26 understand. You mean that we should limit our questions

1 in some way to where we do not ask jurors if there are any
2 circumstances where you could or could not vote for or
3 against the death penalty?

4 MR. NEGUS: Well, there's two separate ways you can
5 go about it, and those are motions one and two, Okay?
6 One way is that you have separate juries on -- on guilt
7 versus penalty.

8 THE COURT: Motions one and two? What are you talking
9 about?

10 MR. NEGUS: Well, a and b, okay, separate juries
11 or the Witherspoon one.

12 THE COURT: This is 9a and 9b?

13 MR. NEGUS: Right. They are essentially in the
14 alternative. Okay? A -- the easiest way, although it may
15 not be the most -- the cheapest way is just to have a
16 separate jury on the issue of guilt, which is not Withers-
17 spooned, and an issue -- if you have to Witherspoon,
18 then do it on penalty, In this particular case, the issue
19 that is before us that's -- that, you know, the biggest
20 issue is -- is the guilt issue, and what the prosecution
21 gets by Witherspooning is a jury that is going to be more --
22 more inclined to be in their favor.

23 I have another study that I'm trying to get a hold
24 of, and I just have -- I think I have a couple of press
25 clippings about it. I hope --

26 THE COURT: Let me go back a moment to the prior

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1 document that you marked. It seems to be a copy of a
2 certification from the Secretary of State, March Fong Eu,
3 with the proposition submitted to voters, I will overrule
4 your objection as far as relevancy is concerned, Mr. Kochis.
5 Any further objection to it?

6 MR. KOCHIS: No.

7 THE COURT: All right. Then it will be received.
8 Now move to your next item.

9 MR. NEGUS: Okay. These items, I hope to have the
10 complete study in a printed form available to you on --

11 THE COURT: Have you seen these items?

12 MR. KOCHIS: The one that's just been admitted, I
13 have,

14 THE COURT: Let's take a 10-minute recess and show
15 him what you've got.

16 MR. NEGUS: Okay. I was in the middle of showing
17 him what I had when you walked in.

18 (Recess,)

19 THE COURT: All right, Counsel, we have had a recess
20 now.

21 Have you finished showing Mr. Kochis --

22 MR. NEGUS: Yeah. I finished them. I don't know how
23 you want to do this.

24 THE COURT: Is there anything that can come in without
25 opposition?

26 MR. KOTTMEIER: No, Your Honor.

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1 MR. NEGUS: I don't think that it's -- they haven't
2 had a chance to read any of this stuff because I just got
3 it together last night,

4 THE COURT: All right,

5 MR. NEGUS: And some of it is not even the actual
6 item itself, but it's just a preview of what it's going to
7 be when I get a hold of it, okay, which should be Monday.

8 MR. KOTTMEIER: Your Honor, let me -- maybe I can
9 help the Court and Mr. Negus as far as this particular issue
10 is concerned. I cited to the Court the authorities that,
11 in effect, have, I think, laid the issue of death-qualified,
12 separated juries to rest, and I will not be interested or
13 prepared to stipulate to any written type of documentation.
14 If this issue has to be relitigated, if after an offer of
15 proof, you find that this is an area that should be reliti-
16 gated, then we're going to --

17 THE COURT: What do you mean relitigated?

18 MR. KOTTMEIER: Well, I submit that this issue has
19 been settled, death qualification as well as --

20 THE COURT: You mean elsewhere?

21 MR. KOTTMEIER: Yes, by the California Supreme Court,
22 so that if we are going to get into studies, recommendations
23 and so on and so forth, then we will have to call our
24 witnesses and the defense will have to call theirs. I'm
25 not going to sit by and let a lopsided record come in with
26 no cross-examination and no presentation of experts from

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1 our side.

2 THE COURT: Well, he's not raising the issue that
3 was raised in the Thornton case, for example, or the Gilbert
4 case that you cited to me.

5 MR. KOTTMEIER: I'm only indicating for the Court
6 that should you find, after an offer of proof, that this is
7 a new issue or an issue that the Court is going to litigate,
8 then we are going to have to do it on the record with the
9 witnesses called and with the opportunity for the People to
10 present our witnesses in opposition.

11 MR. NEGUS: What I want to do right now is I under-
12 stand their position, and I mean it's not necessarily, in
13 my mind, an unreasonable position, but the reason that I'm
14 proceeding the way that I am is that I haven't had time to
15 do otherwise. I would like to -- and I thought that it
16 would -- I am more comfortable making offers of proof
17 based upon printed materials by people who know more than
18 I do than trying to articulate what my offer of proof
19 would be. What I am trying to get together is the printed
20 documents which would -- which constitute an offer of proof
21 as to what I would expect to prove if we had a contested
22 hearing. If after I get all these materials, which I hope
23 to have all marshalled and available on Monday, I'm just
24 trying to give -- give you a record now so that you can
25 have something to start in on the weekend, because there's
26 quite a bit to it, and so that counsel has a chance to

1 start looking at them too. If, based on the offer of
2 proof, you feel that you would -- you would still rule
3 against me, then we don't have to do it, but I want to
4 at least -- I want -- I feel it's incumbent upon me to
5 be able to make these offers of proof, because I think that
6 Mr. Cooper is not going to get a fair trial if we have
7 an all-white jury, and I think we are going to get an all-
8 white jury, so I'd like to at least make the offers of
9 proof as to the various social science research that's
10 been done since Hovey. ~~4~~

11 (NO omissions.)

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1 THE COURT: Well, you can make the offer of proof.
2 And I would suggest that why don't you hold off on it -- I
3 don't really know; this is kind of an interesting idea to me --
4 until we see what that offer of proof is and perhaps take a
5 look at the material. And I can even set your matter over
6 for you, give you a chance to respond a week or a reasonable
7 time thereafter before I made -- but if I -- if, in reviewing
8 that --

9 MR. KOTTMEIER: I only --

10 THE COURT: -- I decide that I'm going to rule
11 against him, then we don't have to go any further.

12 MR. KOTTMEIER: And all I'm saying, that I am not
13 stipulating that these are items of evidence but are just
14 merely the offer of proof for the Court to rule on.

15 MR. NEGUS: I understand that. And that's basically
16 what my understanding of what I was doing was, too.

17 THE COURT: Well, then, but you still, even with
18 that kind of an understanding, that it's offer of proof as
19 opposed to evidence, but I can consider and read it, you still
20 don't have all the materials together.

21 MR. NEGUS: No. And I'll describe to you basically
22 from what I understand.

23 THE COURT: No.

24 MR. NEGUS: Well, let me just --

25 THE COURT: Go ahead and collect it, show it all
26 to him, and then get some kind of a stipulation that I can

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1 consider whatever you then have, and then I can maybe do it
2 over the weekend or something.

3 MR. NEGUS: Well, I'm not going to have most -- I'm
4 not going to have -- can I give you what I have now?

5 THE COURT: Okay.

6 MR. NEGUS: Because I think that will -- maybe that
7 will give you something to do over the weekend. The rest of
8 it I may not get until Monday.

9 THE COURT: Bless you, my child.

10 MR. NEGUS: Thank you.

11 Okay. Let me -- there is -- I have a copy of a --
12 did I give you Keeten vs. Garrison?

13 MR. KOTTMEIER: Yes.

14 MR. NEGUS: I have a copy of a case from the -- from
15 the Federal Court in North Carolina which has summaries of a
16 bunch of social science data. Some of that social science
17 data is -- is summarized, and I just have the table of contents
18 at the present time. I don't have the actual -- the actual
19 article, but it's summarized and published in this publication,
20 Law and Human Behavior.

21 I have, in addition, testimony of two sociologists
22 that took place in the case of People vs. Bonillas. There's
23 a little bit about the -- about a survey we did in San
24 Bernardino County, but most of it -- most of it is -- is
25 general information which has to do with this motion plus
26 the motions that I'll be making next week about jury surveys.

1 That's --

2 THE COURT: About what?

3 MR. NEGUS: Jury surveys.

4 THE COURT: Jury service?

5 MR. NEGUS: About trying to find out what the
6 racial composition of the people who actually show up at
7 San Diego --

8 THE COURT: Oh, survey.

9 MR. NEGUS: -- right -- at the San Diego County
10 Courthouse.

11 THE COURT: Right.

12 MR. NEGUS: And then this --

13 THE COURT: Would the clerk punch holes in it and
14 put it in a stapler.

15 MR. NEGUS: That was run out without clerical
16 assistance in the middle of the night last night.

17 Then, finally, there -- the leading book on the
18 subject of problems with jury selection procedures at the
19 present time, which is referred to in the -- in the --

20 THE COURT: There's no way I can read all this
21 material in a weekend.

22 MR. NEGUS: I know. That's why I'm -- I don't
23 expect you to have it all mastered. But I'm just trying to
24 give -- give it out, because that's why I feel I need to have
25 for the -- to make an offer of proof. I was trying to get
26 it out earlier in the week, but I just didn't get to it.

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1 Finally --

2 THE COURT: Do the same with this one?

3 MR. NEGUS: Finally, I have just some newspaper
4 articles describing what a study I hope to give you on Monday
5 will be about.

6 THE COURT: There are apparently three articles
7 there.

8 MR. NEGUS: Last but not least, I have drafted --

9 MR. KOTTMEIER: Excuse me. I think that's going to
10 be a different issue. That's the questionnaire.

11 MR. NEGUS: The questionnaire.

12 MR. KOTTMEIER: Yes.

13 THE COURT: Now --

14 MR. KOTTMEIER: Your Honor, as far as the materials
15 that have just been submitted, the fact that I said that we
16 could have an offer of proof does not mean that I think that
17 these items should be read in their entirety by the Court and,
18 further, that they should be incorporated as a part of the
19 record. I'm only suggesting that Mr. Negus has the opportunity
20 to refer to them by title or whatever and then glean from
21 them in some articulate fashion, as I'm sure he can, the
22 specifics of what he's going to prove. I think it is entirely
23 improper to do --

24 THE COURT: Well, I assure you I'll not read them
25 verbatim, every single word. But I'm trying to be somewhat
26 selective. May I do that?

1 MR. KOTTMEIER: I would submit that it is incumbent
2 on Mr. Negus, as opposed to offering all the material in the
3 abstract, to show what is different, if anything, over the
4 cases that have decided this particular issue in the past
5 that would require this Court to re-litigate in effect an
6 issue that has been settled.

7 THE COURT: What he's trying to do, apparently, is --
8 the general rule is we must have the same jury, they'll be
9 tried by the same jury except for good cause shown. He's
10 trying to do the latter, to show me good cause why I should
11 deviate from the general rule and -- and the statutory scheme
12 of things --

13 MR. KOTTMEIER: Except the --

14 THE COURT: -- and the legislative -- the clear
15 legislative intent that there be a single jury penalty hearing.

16 MR. KOTTMEIER: Except that in Fields, the Court
17 was very specific that this is not an area involved in good
18 cause. This is a separate issue.

19 MR. NEGUS: The problem is that Fields was a three
20 judge plurality, joined by Justice Kaus in a brief opinion.
21 Justice Kaus referred in fact to some of the materials that
22 I'm giving you and indicated that, as far as he was concerned,
23 it might still later be decided differently by a Federal Court
24 and noted the pendency of litigation in the Federal Courts
25 on this particular issue.

26 Fields hardly closes off the issue. Justice Kaus

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1 specifically leaves it open. And so that's the reason why
2 I wish to make an offer of proof. I think you make an offer
3 of proof --

4 THE COURT: When you -- when you make -- it didn't
5 occur to me what the alternative here is. The second
6 alternative, Number b -- 9b, perhaps.

7 MR. NEGUS: That we do away with the Witherspoon
8 qualification.

9 THE COURT: Now, tell me this, then. How, if we
10 did away with Witherspoon, how would we select the jury panel
11 that involves a possible death penalty?

12 MR. NEGUS: Just like you select any other jury
13 panel.

14 THE COURT: Well, some people are, "Hey, Judge, I'm
15 against the death penalty."

16 MR. NEGUS: That's irrelevant, because the -- what
17 I'm -- what the argument is is that if you don't have
18 separate juries, okay, if you don't, it's either one -- either
19 way. If you don't have separate juries, you have to balance
20 off the interests involved. You've got conflicting
21 Constitutional interests. You've got the right to a fair --
22 to a fair jury and you've got the Prosecution's right not to
23 have -- not to have hangers on it.

24 I submit that the Prosecution's right not to have
25 hangers is perhaps getting a less portion than the defendant's
26 right to have a fair cross section.

1 THE COURT: You mean people on the fence?

2 MR. NEGUS: No. A hanger is somebody that -- that --
3 who would say, "Well, I'm against the death penalty, so I
4 would never go for it," and so obviously they have -- that's
5 what Witherspoon says, is they have a right to have a jury
6 qualified, but -- qualified so that they don't get those
7 people.

8 But you're getting into an -- you're getting into an
9 area where you have competing -- you have competing
10 Constitutional problems. You've got the Prosecution's right
11 to that, but, then, you have the defendant's right to
12 representative cross section and a fair jury. You also have
13 the defendant's right not to have people that are so ground
14 down by the death qualification process that they're ready to
15 just go out and hang somebody just after they get through
16 the voir dire.

17 THE COURT: Having tried a number of them, I -- I
18 know we get people both ways. Some people, "Hey, if he
19 killed somebody and did it on purpose, I'm going to give him
20 the death penalty."

21 MR. NEGUS: But Mr. -- but his research, as I
22 understand the way it's been represented to me by Mr. Haney
23 and others, is that the -- he has done research which is
24 summarized in one of these articles, which I still haven't
25 got from the state P.D. yet, to the effect that that process
26 conditions people to vote for death, that it's just doing the

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1 bringing them in, sequestering them, all that kind of stuff,
2 all the -- the -- the problems that Hovey sought to solve
3 weren't solved by the Hovey procedures, according to his
4 research.

5 That's all been done, obviously, since Hovey. And so
6 I -- my -- the argument I have is you've got -- you know,
7 we're getting to an area where the evidence shows that there's
8 a conflict. The evidence -- and the -- and the results, I
9 think, are -- are clear in the -- in the Stanford study as
10 to the effect of all this.

11 The penalty for killing a white person is death.
12 The penalty for killing a Black person is life. And if you
13 look at the victims on -- on death row, there's 19 Black
14 people, people that killed -- 19 of the victims of the people
15 on death row were Black, one hundred and some-odd people
16 were -- were White. There's ten times as many people on
17 death row for killing a White person as there is for killing
18 a Black person.

19 And that is the result of the racist system of
20 jury selection which we have. We underrepresent Blacks at
21 every stage. And this is just one of the arguments on that.

22 MR. KOCHIS: Your Honor, that statement is absurd,
23 because what the study shows is if you're White, your chances
24 of being killed are much better than if you're Black. There's
25 just a lot more White victims out there than there are Black
26 victims.

1 The study doesn't show how many Black victims are
2 killed in a death penalty situation which qualifies for the
3 death penalty which goes to court and which a jury comes back
4 with a life sentence. It doesn't show that.

5 THE COURT: You know, I'm concerned that even if
6 there's an imbalance shown, and I've read the, at least, the
7 late papers of the results of this White versus Black thing,
8 even if there's an imbalance shown, the alternative to me is
9 an absolute lack of being assured of getting a fair trial if
10 we're never able to ask them --

11 MR. NEGUS: Well --

12 THE COURT: -- "Can you possibly, under any circumstances,
13 vote one way or the other?" And I don't see how you could
14 ever get -- you know, we've got somebody on there that's
15 unalterably opposed to being able to act fair and impartially
16 depending upon the evidence.

17 MR. NEGUS: Then I guess the only alternative, then,
18 is separate juries.

19 THE COURT: No. That wouldn't solve it.

20 MR. NEGUS: Yes, it would, because --

21 THE COURT: Well, you're going to have --

22 MR. NEGUS: I never heard --

23 THE COURT: -- you have, to do death, to qualify
24 them for the -- for the penalty phase.

25 MR. NEGUS: I never heard a single juror in all -- in
26 all the transcripts of everything, and maybe Mr. Kochis has

1 heard otherwise, but I never heard a single juror say that
2 "My opposition to death penalty would be -- would make it
3 impossible for me to be fair on the issue of guilt."

4 MR. KOCHIS: I have heard several of those in the
5 Gray case, where they have said, on a close case, "There's
6 no question I may consider it knowing that if I vote guilty
7 I'll get to that second phase."

8 THE COURT: Yes. That -- I recall that.

9 MR. KOTTMEIER: In fact, I have had it go much
10 further than that, which I think is the crux of the issue,
11 and that is that the juror has told the Judge, "Judge, I
12 will not follow the law. I will not follow the law."

13 MR. NEGUS: On guilt?

14 MR. KOTTMEIER: On guilt.

15 MR. NEGUS: Well, maybe so. But my experience has
16 been -- has been the contrary. I think that's a very, very
17 small percentage of people that --

18 THE COURT: May I take a look at the material,
19 Counsel, for a preliminary indication --

20 MR. KOTTMEIER: Yes, Your Honor.

21 THE COURT: -- at some point next week, and it may
22 be Monday.

23 MR. NEGUS: Okay. And then the -- well, the other
24 counter to that is you don't have to tell people at the guilt
25 phase that -- that their -- that their findings are going to
26 result in a -- in a finding of death. And if they are, it's

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1 MR. NEGUS: I have for you -- I wrote out a little
2 script to give to jurors and then a proposed questionnaire.
3 I would indicate that as to questions 21 and 22, which ask
4 for their occupation, I am of mixed mind about that, and
5 if anybody didn't like it, I would be glad to withdraw
6 doing that in questionnaire form.

7 THE COURT: Give me just a minute, please.

8 MR. NEGUS: And I --

9 MR. KOCHIS: Perhaps we could break it for two
10 minutes so the Judge can review the questionnaire. I have
11 objections to it, both generally and specifically, and so
12 perhaps the Court could review it.

13 THE COURT: No. It's not taking that long.

14 MR. KOCHIS: Then 30 seconds.

15 THE COURT: You want a recess?

16 MR. KOCHIS: No,

17 MR. NEGUS: He wanted to shut me up.

18 THE COURT: All right. I have looked it over. To
19 whom would you propose giving this, Mr. Negus?

20 MR. NEGUS: Everybody that shows up as a potential
21 juror in the community, en masse.

22 THE COURT: That's fine.

23 MR. KOCHIS: I have some objections. I don't know
24 when you want to hear me.

25 THE COURT: Let's talk first about what we're
26 working with. You're talking now if we did it at all

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1 similarly to the way we did Gray, you're going to have, say,
2 60 people in at a time to excuse those for time, and we
3 wouldn't have them -- well --

4 MR. NEGUS: Yes, we would.

5 THE COURT: Yes, we would.

6 MR. NEGUS: So you take the first 20 minutes of
7 that excuse business to have them do the questionnaire.

8 THE COURT: Okay. I would probably modify it a little
9 bit more to have them fill it out even if they know that
10 they can't serve on the case, so to each of those 60 people,
11 the first thing would be to do --

12 MR. NEGUS: Read them the Information.

13 THE COURT: Let them fill it out, and then come back
14 in and start going through the questions on time.

15 MR. NEGUS: Right,

16 THE COURT: And I'm not -- I thought at first you
17 wanted something like disrupting all the panels that might
18 come into the jury assembly room.

19 MR. NEGUS: That's a different issue.

20 THE COURT: There you're going to run into a little
21 resistance.

22 MR. NEGUS: But this is a different issue.

23 MR. KOCHIS: Your Honor, before we get much further
24 down the road, can I articulate on the record my objections
25 to this?

28 THE COURT: Yes.

1 MR. KOCHIS: This is a case in which we already
2 have in the neighborhood of 4,000 pages of discovery in
3 terms of police reports, over 10,000 pages, I believe,
4 now, of transcripts. This is a four-page questionnaire
5 when multiplied by 3 or 350 times is going to be an
6 additional 1200 pages of discovery that lawyers and the
7 Court are going to have to review and categorize.

8 There are questions on the questionnaire that we
9 would never routinely ask a juror in open court.

10 THE COURT: I know. I haven't gone through some
11 of those. Some of them I think we can edit out.

12 MR. KOCHIS: And the length of time that would be
13 saved I think is small considering the time it would take
14 to fumble when they get in the box and look for their name
15 alphabetically. My experience, and I'm sure the Court's
16 experience and Mr. Negus' experience, is when the jurors
17 get in the box, it takes them anywhere from three to four
18 minutes, if that long, to give their name, their place of
19 residence, their occupation, the number of children in their
20 family. It allows the lawyers to take records of people
21 that are actually in the box and going to be prospective
22 jurors. It allows the jurors to answer some questions
23 that are non-threatening, that are in no way personal, gets
24 them comfortable speaking in a courtroom, and that reduces
25 the duplication this procedure would cause in that we are
26 undoubtedly going to lose a lot of people due to the length

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1 of this trial. We are going to lose a good percentage of
2 people, perhaps 15 to 20 percent, on the Witherspoon issue,
3 because I imagine in this case once jurors hear the number
4 of victims, a percentage of the jurors are going to say
5 I don't care what he has to say, the defendant, in a penalty
6 phase; if I convict him, he's going to get the gas chamber.
7 All those people would be excused, and we would have
8 questionnaires on all those people that would seem to be
9 meaningless and a waste of time, and I can't see why we're
10 keeping track of people that can't sit due to time, can't
11 sit due to financial resources, can't sit due to Witherspoon.

12 MR. NEGUS: But I'm going to be objecting, and I'll
13 tell you right now, to excusing any of those people.

14 THE COURT: Is what?

15 MR. NEGUS: To excusing people for financial hardship,
16 and one of the reasons -- obviously one of the reasons that
17 I -- unless ordered not to, I'm going to ask all those
18 questions. I think it's a lot less embarrassing to me to
19 have them do it in writing than to have me do it. I think
20 I am entitled to ask --

21 THE COURT: Ask them whether they're male or female?

22 MR. NEGUS: Well, unfortunately, if you -- I mean you
23 sit there, you look at the transcript, and you've got
24 Marion Jones, and if -- you might say Mrs. Jones or Miss Jones
25 or Mr. Jones, but it doesn't always appear on the transcript.
26 Certainly race doesn't, and anything else -- male or female

26 THE COURT: D, David, pay jurors a living wage? I

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1 thought I'd already denied that.

2 MR. NEGUS: Well, I hope not, because the offer of
3 proof is based upon the testimony of Mr. --

4 MR. KOCHIS: You made a tentative ruling in that
5 you can't imagine doing that, but you did not fix it,

6 THE COURT: Well, let me retract that. I can
7 imagine my doing most anything, with the education I some-
8 times get, so it's off the wall, as far as I'm concerned,
9 but I'll reserve your right to show me what you've got.

10 MR. NEGUS: Okay.

7b 11 THE COURT: I asked you a moment ago to assume that
12 I would deny your request for lack of Witherspoon or for
13 separate juries, and we were talking the other day about
14 the time it would take if we're back -- if we go through
15 the Hovey procedure as well as Witherspoon, Press Enterprise,
16 all of that, and you indicated somehow that you would ask
17 the three questions in Hovey -- Witherspoon and --

18 MR. NEGUS: What I was suggesting is that if we
19 have to do this Witherspoon nonsense, that we pare it down
20 that we --

21 THE COURT: Did you make a script for me in that
22 regard? That's what I wanted to see first,

23 MR. NEGUS: I -- I -- the script that -- the way
24 you had the questions phrased when you did it in Gray --
25 let's see. Sitting --

26 THE COURT: Your answer is negative, so you've got

1 no script.

2 MR. NEGUS: Well, no. Yes, I do. I don't think I
3 had any objection to the first four questions,

4 THE COURT: I don't have mine here.

5 MR. KOCHIS: I made a copy for you, Your Honor.

6 MR. NEGUS: Let me find -- let me just get -- I
7 didn't get a chance to finish writing last night, and my
8 secretary just managed to get through the questionnaire
9 this morning, but -- does that say "voir dire"? Okay.

10 THE COURT: You said the first four --

11 MR. NEGUS: Let me find the --

12 MR. KOCHIS: Your Honor, for Mr. Negus, I believe
13 questions two, four and five are the three verbatim
14 Witherspoon-type questions.

15 MR. NEGUS: That -- well, I think they could be
16 reworded to be understandable, My experience is that
17 nobody can understand those questions when you ask them to
18 them the first time.

19 THE COURT: Well, the way it worked in Gray is that
20 sometimes we reframed the question in a more understandable
21 manner.

22 MR. NEGUS: Right. Well, I'd suggest that we try
23 and do that before we start, because I think that anybody
24 that can understand the bench book and -- as it comes out
25 in the bench book is -- Judge Keene may be able to, but
26 he's the only one that I can imagine,

MR. NEGUS: Yeah, I understand, but --

THE COURT: Five may well not come up, for instance.

MR. NEGUS: The thing is what I'm saying is that there's two different -- there's two different ways that it goes down, okay, and one is that you just ask the questions, you accept the answer, you don't do any follow-up. If they give the wrong answer, you kick them off. If they give the right answer, they stay and nobody questions them in detail about just those three questions. That's one way to do it, and in this particular case, I can't imagine there being a sort of easy, in-between alternative. If Mr. Kochis is going to be allowed to ask other questions, then I'm going to try and ask all the questions that I have to ask. I don't think I can give him the advantage of being able to ask other questions without my doing it. I'd like to have neither of us do it. Okay?

(No omissions.)

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1 THE COURT: Counsel, I think it would be probably
2 improper for me to, as much as I'd like to shorten the
3 procedure, to be the exclusive asker of questions unless
4 there was a very strong waiver and stipulation.

5 MR. NEGUS: Well, we're -- I'm willing to do that.

6 THE COURT: So what -- so what I did was, "Defense
7 Counsel," after I finished, "do you have any questions?"
8 Sometimes you say, "No, I have none, no," or, "Yes, just a
9 couple," and they would be fairly brief. And then it was
10 likewise brief. That's why I think we went, what, from six
11 to ten minutes normally, occasionally a little longer.

12 MR. NEGUS: But --

13 THE COURT: But, again, you --

14 MR. NEGUS: -- when I did, it took longer.

15 THE COURT: I'm sure.

16 MR. NEGUS: And if I take longer than Mr. Kochis,
17 then Mr. Kochis can take longer for the most part. And what
18 I'm saying is that -- that both sides are at a certain dis-
19 advantage, just taking the answers at face value that the
20 jurors get. I mean, it can cut both ways. It's not something
21 which -- which is going to necessarily favor one side or the
22 other. I'm stuck with their answers; he's stuck with their
23 answers. And we don't -- we don't -- we don't sit around
24 belaboring the point for -- in -- inculcating this whole
25 idea of death penalty into them when Mr. Cooper hasn't been
26 convicted any more with his --

1 THE COURT: Let's think about it over the noon
2 period. Resume at 1:30.

3 MR. NEGUS: Well, do you want -- I don't know how
4 much more we're going to be able to do -- to resolve today.
5 I mean, do you want to --

6 THE COURT: There's somewhat that we can resolve
7 today. Let's be back at 1:30. We haven't finished this up
8 yet.

9 MR. NEGUS: Thank you.

10 (Whereupon the noon recess was taken at
11 12:00 o'clock until 1:32 p.m.)
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1 ONTARIO, CALIFORNIA; THURSDAY, JULY 26, 1984; 1:32 P.M.

2 DEPARTMENT NO. 3 HON. RICHARD C. GARNER, JUDGE

3 (Appearances as heretofore noted.)

4
5 THE COURT: Where were we?

6 MR. NEGUS: Don't know.

7 MR. KOCHIS: We were -- we had not left the
8 questionnaire, which is 9c.

9 MR. NEGUS: I thought we had gone onto the voir
10 dire thing.

11 THE COURT: Well, I told you at one point I would
12 call it all kind of interrelated.

13 MR. NEGUS: The questionnaire is discussed -- or,
14 some of the theory behind the questionnaire is discussed
15 also in the materials.

16 MR. KOCHIS: I'm sorry. I was just talking about
17 the -- I thought we were on the limited issue. We had moved
18 to what we would do in chambers on Witherspoon.

19 MR. NEGUS: Okay. That's what I -- okay; take it
20 back -- we agreed on.

21 MR. KOCHIS: The script, then, not the questionnaire.

22 MR. NEGUS: The script.

23 MR. KOCHIS: And we were looking at the questions,
24 the nine questions the Court has asked in a previous death
25 penalty trial. And I gave you a copy.

26 THE COURT: Is this?

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1 MR. KOCHIS: Yes.

2 MR. NEGUS: Yep.

3 THE COURT: All right. We're assuming, then, that
4 we do have two phases, two juries, and that we do have
5 sequestered voir dire for purposes of our discussion, not
6 being locked into that, and still having some other things
7 to discuss.

8 MR. KOCHIS: I think you said we assume we're going
9 to have two juries, and I don't think we have.

10 THE COURT: I didn't mean that. One -- one panel.

11 Is there anything on here -- would you be even
12 interested, in case we do that, Mr. Negus, in knowing terms
13 of, second page, eight and nine? Those are of minimal value,
14 perhaps.

15 MR. KOCHIS: Those are ones that I'm interested in
16 asking either to the Court's voice or my own.

17 THE COURT: Wouldn't forego them?

18 MR. KOCHIS: I wouldn't feel comfortable foregoing
19 them, no.

20 THE COURT: Mr. Negus, if we go through it, I have
21 no idea what additional questions you might like to ask, but
22 I'd like to give you reasonable rein to inquire yourself
23 what your estimates are.

24 MR. NEGUS: Well, what I'm saying is that -- that
25 all I'm asking, I haven't got a script right now as to what
26 questions I asked. You can look at the one I did of

0-1-2-3-4

1 Mr. Bonillas, if you want. But I don't think I'll be asking
2 the same questions, because it's a different case. But I
3 was just saying that neither of us have been given an
4 opportunity, neither Mr. Kochis or myself.

5 MR. KOCHIS: I'm willing to forego it if I'm sure
6 that he is. If not, then I'll have to figure out what I'm
7 going to ask. And I haven't done that.

8 THE COURT: Are you sure of that, Mr. Kochis? Would
9 you be willing to not inquire?

10 MR. KOCHIS: No. I don't recall ever having lengthy
11 voir dire with any juror individually in a Witherspoon case.
12 I typically ask one or two questions or no questions. But
13 I think what Mr. Negus wants, and I can't agree to it, is
14 he's saying, "Judge, I'll go one of two ways. I'll let
15 you ask three questions, and none of the lawyers, any
16 questions, or I want full rein to take -- if it takes 15
17 minutes a juror, 15 minutes."

18 I'm -- I don't think either one of those is necessary.
19 I don't feel comfortable with just three. And I certainly
20 wouldn't ask 15 -- 15 minutes of questioning of any juror, nor
21 would I even ask 10 minutes.

22 If Mr. Negus needs 15 or 20 and the Court needs 5,
23 I can probably do mine in a minute. But I can't agree to
24 the extremes. He's proposed to me two extremes. And I'm
25 not comfortable with agreeing with those.

26 MR. NEGUS: I think I just proposed one extreme.

0-1-2-3-4-5

1 THE COURT: You know, real particularly, we run
2 the gamut of many variations of opinion on the subject, and
3 there are some areas that I quickly, after concluding my
4 brief inquiry, turned it over to Counsel that I think very
5 properly should follow up. And, yes, I couldn't excuse for
6 cause for it. So I wasn't looking to have the Judge do the
7 only voir dire in chambers for the death penalty. I don't
8 have any improvements for this particular script.

9 (No omissions.)
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1 MR. NEGUS: Well, as far as then if we're going to
2 be allowed to have the counsel do it, then I would request
3 you ask the three questions. I don't think that number
4 one is relevant. I don't think that -- I think number
5 three is redundant. I think number six is redundant. I
6 think number seven's redundant.

7 THE COURT: All right. Maybe we will. Let's see.
8 To some extent, I think three -- one just kind of softens
9 the leading into the tough questions. That's bare bones,
10 but I have no objection to doing that, if we get into it
11 with the same assumptions we mentioned before.

12 There would necessarily have to be some follow-up
13 to make certain that we understand; in other words, I
14 would have to go, with an affirmative answer, to one of
15 them. Then I'd probably have to go to 4-A, 4-A-1 or 2,
16 but initially I think those three questions might be
17 sufficient under the law.

18 MR. KOCHIS: Well, technically they are sufficient
19 under the law. The reason I think I am inclined to ask
20 the Court to follow this area is the Court, in my experience,
21 is able to ask questions in a more rapid and succinct
22 fashion than either I am or Mr. Negus is. And if you don't
23 ask some of the other questions, I may ask one or two of
24 those to satisfy in my own mind the mental state of that
25 juror, and that simply may take longer. It doesn't really
26 make a difference to me whether I do it or the Court does it.

1 I can certainly save the Court's voice.

2 MR. NEGUS: If Mr. Kochis asks questions eight and
3 nine, I'd object to them, eight because it's irrelevant
4 what position somebody took over seven years ago, and nine
5 I'd object to because I think it's almost nonsensical. I
6 mean I don't see how you can answer that till they heard
7 the verdict.

8 MR. KOCHIS: Starting from the bottom, I don't know
9 why, but there is a percentage of people, in my experience,
10 that have a problem in -- it has surprised me, but it
11 continues to exist that people in a Witherspoon say, you
12 know, Your Honor, I voted for the death penalty in 1977,
13 I could never make the decision myself, or I certainly
14 could never put my signature on a verdict if I was foreman,
15 and if I was polled in a courtroom, I just can't handle the
16 decision with that personally, in the abstract I can, on
17 a case-by-case basis I can't. And I think as a prosecutor
18 I have a right to know that.

19 As to number eight, I can't think of any question
20 that is more designed to get at the heart of the matter
21 as to what someone actually thinks about the death penalty
22 than those two questions, I am not interested in all the
23 typical questions that people ask about different philos-
24 ophies in the Old and the New Testament and their reasons
25 behind the death penalty, but I think number eight, those
26 two limited questions, goes right to the heart of the matter,

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1 and when people answer those, they usually provide the
2 type of information that allows me to evaluate them, and
3 it's not necessary for me to ask other types of questions
4 in that area.

5 If the Court doesn't want to ask it, that's one of
6 the questions I would ask permission to ask.

7 THE COURT: Mr. Negus, on the basis of relevancy,
8 I'd have to overrule your objection.

9 MR. NEGUS: What difference does it make -- I mean
10 I assure you that there's lots of opinions I had seven
11 years ago which I don't have anymore, and I just don't see
12 what difference somebody's opinion seven years ago has now.
13 You have already asked them about their conscientious scruples.
14 Certainly neither of those questions -- well, certainly
15 number eight does not go to cause; therefore, I don't think
16 it is appropriate for the Court to ask, and I still don't --

17 THE COURT: Well, suppose -- suppose they were one
18 of the petitioners who passed around and circulated the
19 petition.

20 MR. NEGUS: That doesn't go to cause. You can't
21 kick somebody off for that.

22 THE COURT: Well, of course, you know --

23 MR. NEGUS: My understanding of the case law, and
24 I could be mistaken, but if Mr. Negus is going to stipulate
25 that we're only going to ask questions of jurors that go
26 to cause, not peremptory challenges, we're really going to

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1 shorten the voir dire process.

2 MR. NEGUS: The point I made was that Williams talks
3 about lawyers asking questions as to going to exercising
4 peremptories, not lawyers using the court to ask questions
5 that go to peremptory,

6 The additional objection besides relevance to what
7 one's opinion was seven years ago is that this number eight
8 question is really one of Mr. Kochis' peremptory questions
9 and doesn't go to cause at all and, therefore, if it's
10 going to be done, it should be done by Mr. Kochis and not
11 by the Court, because you're sort of giving -- I don't think
12 it makes any difference.

13 THE COURT: I have no objection to that. I'm not
14 volunteering to preempt voir dire. I will not therefore
15 ask eight and nine. Mr. Kochis can use his own discretion.
16 Otherwise, I will then run through mine. I'll turn it over
17 to you, Mr. Negus, and then I will permit Mr. Kochis to
18 inquire.

19 MR. NEGUS: Can -- can we reserve the right, if I
20 can think of a way that's agreeable to Mr. Kochis and to
21 you, to perhaps change the wording on a couple of those so
22 that they get the same sense?

23 THE COURT: Sure. I'll be happy to reconsider
24 whatever you wish to do.

25 MR. NEGUS: Do you have a proposal from the Gray case
26 or something else of the introductory script? The one that's

1 in the bench book is incomprehensible. I mean in our
2 last thing when we read that to the people, over 50 percent
3 of them didn't know what you were talking about.

4 MR. KOCHIS: I believe I handed Mr. Negus a copy,
5 a rather lengthy document, that was a proposed statement.
6 I handed it to him yesterday. It was a number of pages,
7 and it included what the Court would read --

8 THE COURT: Do you have a copy for me?

9 MR. NEGUS: I probably have it. I just --


10 THE COURT: It won't be the same as Gray, I assure
11 you, because there were three phases,

12 MR. NEGUS: I'm sorry.

13 THE COURT: But I haven't looked this over, but
14 this will be a long statement to the -- let's see. I'm
15 not sure whether I read -- you know, this was the last
16 thing that I did before we took a recess. First thing I
17 do is to basically qualify them for the time involved and --

18 MR. NEGUS: Did you do that in groups of -- in mass
19 groups of 60?

20 THE COURT: Sixty. And then we wind up with maybe
21 about -- we're going to wind up with maybe 15 or 20 out of
22 that that will be able to afford the time that this case is
23 going to take.

24 MR. NEGUS: Just -- I'm not sure I said this earlier
25 or not, but I'm going to be objecting to excusing people
26 because of financial things, because that's another thing 

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1 that gives me rich white males.

2 THE COURT: You did say it.

3 MR. NEGUS: Okay.

4 MR. KOCHIS: And I am not sure how that's going to
5 work, because my experience has been that in a lengthy case,
6 the prosecution loses the vast majority of jurors that they
7 would want, and those type of people are usually excused
8 because of time problems, but I'd rather let Mr. Negus be
9 the unreasonable party in that regard.

10 THE COURT: That's going to be probably the one
11 singlemost request for excuse. They simply can't afford
12 to serve six to eight months on a case that's going to pay
13 them five dollars a day.

14 MR. NEGUS: I know, but I can't afford to let
15 Mr. Cooper get convicted by people that can.

16 MR. KOCHIS: Your Honor, in that light, I would hope
17 at the end of the motions when we're both relatively
18 confident -- Mr. Negus, myself and Mr. Kottmeier -- what
19 types of evidence are going to be admissible, that we can
20 give the Court a somewhat reasonable limit or length of
21 the trial, and that I think jury selection is going to take
22 a number of weeks, five to six, and the jurors aren't going
23 to be expected to be there for those five or six weeks,
24 I think they will be there once for Witherspoon.

25 THE COURT: I'm fully aware of that. We did the
26 same thing in Gray.

1 MR. KOCHIS: So I'm not sure it's going to last
2 eight months. I think our six- to eight-month limit would
3 include, I would hope, jury selection.

4 THE COURT: You're just making a record on your
5 objection for financial hardship, or is there any authority
6 for that?

7 MR. NEGUS: Well, my experience is that most people
8 get up and say, well, it would be difficult for me, but
9 most people it wouldn't really be difficult for them, and
10 they would -- what we normally do is we let people who
11 want to be on the jury be on the jury and dismiss those who
12 don't. That tends to give a very pro prosecution jury.

13 I've sat through it before, and I'm -- I disagree with
14 Mr. Kochis, I think that most of his people stay and most
15 of my people go.

16 THE COURT: I don't know how to handle that.

17 MR. KOCHIS: We would have to handle that --

18 THE COURT: That's an area that's fraught with
19 danger.

20 What did you say?

21 MR. KOCHIS: We're just going to handle it on a
22 case-by-case basis, because I don't think that's what
23 you're going to find. I'm sure the Court's experience
24 and Mr. Negus' experience, if he thinks about it, is
25 you get a lot of jurors that appear to be men who are
26 Caucasian who are between 40 and 55 and they say, Judge,

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1 I'm a supervisor, I supervise 15 or 20 people, they can't
2 replace me for six months, or I'm a president of a company,
3 and they can't replace me for five or six months, And
4 those people leave, and I can't imagine Mr. Negus wants
5 12 of those individuals in the jury box.

6 (No omissions.)
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1 THE COURT: So raise your objections at the time,
2 Mr. Negus.

3 MR. NEGUS: I'm not making it a blanket thing. I'm
4 just going to tell you that I'd like, when we do the hard-
5 ships, I think we probably -- what I did in the last time we
6 had the trial was we took all the excuses, everybody wrote
7 down what the excuses were, like the 60 people, you write
8 down the excuses, and then we went back and we agreed to
9 some, didn't agree to others, and the Judge ruled on those
10 we didn't agree to.

11 THE COURT: Wrote down the excuses?

12 MR. NEGUS: Well --

13 MR. KOCHIS: We typically have done that in your
14 court, Your Honor. We have the people stand up for time,
15 we note their excuse on the jury sheet, and --

16 THE COURT: I did it all orally.

17 MR. KOCHIS: Well, from time to time you -- my
18 recollection was you have taken both attorneys back into the
19 chambers and said, "I'm inclined to let these 10 people go.
20 Any objections?"

21 THE COURT: That's all oral. He's talking about
22 something in writing.

23 MR. NEGUS: No, no, no, no. I'm just -- I'm just --
24 I'm -- all I said was you can -- if you -- if you can
25 remember what their excuses are without writing them down,
26 then that's --

1 THE COURT: Oh. I write them down, yes.

2 MR. NEGUS: Okay. That's -- that's what I'm
3 talking about, is that you write them down, I write them
4 down, D.A. writes them down, and then we go back and do it.
5 That has the added advantage of not keying people into what
6 the magic words are, I mean, because, you know, the people --
7 there's a lot of people that just want to get off, and they
8 see Juror No. A get up and say, "Well, I'm going on vacation."
9 "Goodbye." Juror No. 2 gets up, says, "My company can't
10 afford to let me go." "Stay." Then everybody's got a
11 vacation.

12 THE COURT: Well, I think, generally speaking, I'm
13 more inclined to ask a juror to tell their boss to blame
14 the mean old Judge or something, typically my type of words
15 in that type of situation. And I'm resistive to excusing
16 jurors unless indeed it indicates to me that -- that --

17 MR. NEGUS: I know that --

18 THE COURT: -- they can't serve. Although I'm
19 fairly quick to take stipulations from Counsel. And if
20 there will be no stipulations forthcoming --

21 MR. NEGUS: I didn't say there would be no stipulation,
22 but I'm --

23 THE COURT: I'll have to study this. There's no
24 point in, I think, in us going through this anymore. Both
25 Mr. Negus and I will study that.

26 Do you foresee us doing about the same thing -- now,

1 Gray was a what, 30 to 60 day case?

2 MR. KOCHIS: Six to seven weeks.

3 THE COURT: 30 to 60 days. And this one is
4 going to be substantially longer, jumping around again.
5 But how many people on a -- if we brought in 60, and I
6 can't remember what the seating arrangement was there, but
7 I think I could probably do it by putting them in the jury
8 box as well. So how many of those 60 do you think that we
9 need to go through to get a panel, say, for -- if we're
10 going to go through individual voir dire and the 60 -- when
11 I -- when I get over the time hurdle, then I'll -- then I
12 step off the bench, Mr. Negus, and they line up and they
13 go through the clerk and the bailiff, the two of them, using
14 appointment slips and schedule them to come in for sequestered
15 voir dire, if that be the procedure. And throughout this
16 I'm just making an assumption that we'll go because I think
17 you have the laboring oar on that. But it may not be.

18 MR. KOCHIS: If we could work backwards, I think
19 it's easier to arrive at the numbers, how many --

20 THE COURT: Once we clear how many is going to be
21 enough to permit 26 peremptories, is that what you mean?

22 MR. KOCHIS: These are the figures. You need 52,
23 you can write 50 down; that's 26 a side. Then how many
24 people do we want to have sit through the duration? Do we
25 want 14, 16, 18, 20? How many do you want?

26 THE COURT: Let's take that situation now. I tell

1 you now that the jury box, like this one, seven and seven,
2 for a total of fourteen, there's room for at least one more
3 and I believe two more, which would make it a total of
4 sixteen or four alternates. I'd like to have another couple
5 of alternates, but I absolutely find no reasonable way to
6 put them in that jury -- in that room, unless I maybe put
7 a number of seats on the other side of the room.

8 MR. NEGUS: Well, if you have four, that's another
9 sixteen challenges.

10 THE COURT: It doesn't say that, but I'll probably
11 give it.

12 MR. NEGUS: Well, I think it does say that, and --

13 MR. KOCHIS: Well, in terms --

14 THE COURT: One per alternate.

15 MR. NEGUS: Not in capital cases.

16 THE COURT: It doesn't say for capital cases. It
17 doesn't make an exception. But I -- but I, nevertheless,
18 went with the spirit of capital cases. I think I have
19 always permitted it. So it says one per alternate, and it
20 doesn't break it down into capital cases.

21 Well, that would be just for the jurors and peremptories
22 alone.

23 MR. KOCHIS: That's a minimum of 84 people. And I
24 think in this case it's reasonable that, during the actual
25 voir dire not related to Witherspoon, that it might be
26 possible for each side to have as many as 10 challenges for

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1 cause. That would put us at 104. And, therefore, it would
2 seem to me that, as a -- with a potential of additional
3 excuses, you would want to have --

4 THE COURT: I must have missed it somewhere. You've
5 got 52, 16 --

6 MR. KOCHIS: Pardon?

7 MR. NEGUS: Then you've got to get the jury in,
8 another 16.

9 THE COURT: All right. I added that. That comes
10 to 84.

11 MR. KOCHIS: Right. And then the challenges --
12 I assume Mr. Negus may have some challenges for cause.

13 MR. NEGUS: I see 10 apiece for cause.

14 MR. KOCHIS: For cause. That's an estimate, of
15 course. Then we're up to 80 -- we're up to 104. So it
16 would seem to me that, as a bare minimum, to be safe, you
17 would want to have in the neighborhood of 120 jurors left
18 after Witherspoon.

19 MR. NEGUS: So -- and how many people do you think --
20 how many people do you think would get Witherspoon excused
21 on this case?

22 MR. KOCHIS: In this type of case, I would expect
23 there would be a lot of people who would. My guess would
24 be there would be a lot of people who may be excused un-
25 challenged by Mr. Negus who would say, "The family was
26 killed, four people were killed, I would give the defendant

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1 the death penalty in every case."

2 MR. NEGUS: I think that's probably true, because
3 I -- certainly they said a lot of that in the last case I
4 had and there weren't any kids involved.

5 THE COURT: Well --

6 MR. KOCHIS: So I would expect --

7 THE COURT: -- we run up against a kid aspect; no
8 doubt about that.

9 MR. KOCHIS: So I would expect to lose as many as
10 20 to 25 people out of every 100 on Witherspoon alone.

11 MR. NEGUS: So what you're saying, then, is we
12 should have 160 people, approximately --

13 MR. KOCHIS: I think --

14 MR. NEGUS: -- to Witherspoon.

15 MR. KOCHIS: That would be a minimum to Witherspoon.

16 THE COURT: I don't find any trouble with the number.

17 MR. NEGUS: I do. I mean --

18 THE COURT: It's a lot of trouble, but --

19 MR. NEGUS: That's what I meant. I'm sorry. It was
20 just a joke.

21 THE COURT: Yes. Oh, it's terrible. But I don't
22 know how to avoid it.

23 MR. KOCHIS: And then to reach --

24 MR. NEGUS: We --

25 THE COURT: We could go ahead and try it with a
26 lesser number, and then you -- you won't wind up with a full

1 jury box, most likely.

2 MR. NEGUS: It doesn't mean -- whether you want to
3 take -- whether you want to go through them all at the
4 beginning or whether you want to go through them in stages
5 doesn't matter to me.

6 MR. KOCHIS: And then I think in this case, due to
7 the length of time, we may lose due to time one out of every
8 three people.

9 MR. NEGUS: We lost one out of every three in a 30
10 day case with me objecting.

11 MR. KOCHIS: So I -- I think with -- my estimate
12 would be is that we would have to have four sessions of 60
13 each to end up with 160 people to Witherspoon. And then we
14 can tell if, after the end of the first day, if, after
15 talking to 120 people, we had 105 people left, we might
16 not even have to get to the second panel, if, after the first
17 day, we had 30 people left.

18 THE COURT: You mean -- you don't mean that.

19 MR. KOCHIS: That's --

20 THE COURT: Four sessions at 60 each would be 240.

21 MR. KOCHIS: Right.

22 MR. NEGUS: You lose --

23 MR. KOCHIS: If you lose a third of those people --

24 MR. NEGUS: 160.

25 MR. KOCHIS: -- that comes out exactly 160. You
26 lose 80 of them due to time, one out of three.

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1 MR. NEGUS: Mr. Kochis thinks we may have to have
2 160 people to ask questions of. If you bring in 240 people,
3 you're going to lose at least 80 of them, because they --
4 they're going to have vacations scheduled and what have you.
5 So he's saying in order to ask questions of 160 people you
6 need a 240 group to start with.

7 MR. KOCHIS: And, Your Honor, I'm taking into account
8 that I assume the Court's going to follow a procedure that's
9 similar to the procedure in past cases where, when you
10 brought the groups of 60 in, you not only talked about time
11 but we mentioned the names of some of the witnesses and the
12 nature of the case, and some of the people you excused at
13 that point, people who had a close relationship with a
14 particular witness and said they wouldn't -- couldn't be
15 fair on his testimony or because of the nature of the case.
16 We lost some people --

17 MR. NEGUS: I would be objecting to that in the
18 general -- that general thing. I don't think that -- that
19 may work in a situation like Mr. Gray, but in this particular
20 case you're starting to get into -- you're going to get into
21 publicity, and all of a sudden people are blurting out things.
22 And I think that's going to cause problems.

23 MR. KOCHIS: That may be the case, but that -- that
24 was -- would be my number to start, is -- is about 240
25 people. And then we could adjust that up or down. If every-
26 body is staying, we obviously don't have to talk to everybody.

1 If everybody is being lost, then we -- it may take more
2 people than that. And even at 100, if we're able to have
3 160 people from which to Witherspoon, even moving through --

4 THE COURT: Wait a minute. I don't understand.

5 MR. KOCHIS: Even moving through 12 to 18 a day,
6 Witherspoon's only going to last two and a half, three weeks.

7 THE COURT: We can't start off with 240 people and
8 get a jury in this case.

9 MR. NEGUS: You think that's too little?

10 THE COURT: I do. Let me find out where my thinking
11 is wrong.

12 MR. NEGUS: I think it --

13 THE COURT: For the time question, how many do you
14 think we'd lose there?

15 MR. KOCHIS: 80, one out of every three. And
16 that's an estimate. You could be right, if we lose --

17 THE COURT: I think you're going to lose 50 percent
18 of the time.

19 MR. KOCHIS: Well, then, we would be down to 120,
20 and we would be below what we need. If you're -- if you're
21 thinking of 50 percent, then what you're talking about is
22 320 people to talk to. You're talking about one week of
23 bringing them in in groups of four days, 80 a day, 40 in
24 the morning, 40 in the afternoon.

25 THE COURT: Oh, no. We go 60 at a time. I'm -- we
26 can almost take in three of those panels a day, but probably

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1 not. If I did, I'd have to bring in extra clerical people.

2 MR. NEGUS: And extra --

3 THE COURT: What?

4 I'll tell you once we get started on the individual
5 sequestered voir dire, if we do, if we're going to go through
6 week after week of that, we're going to work diligently and
7 fairly long.

8 MR. NEGUS: I can't do it, Judge. I can't go beyond
9 five hours, like we have been doing.

10 THE COURT: No, Mr. Negus. Flat no.

11 (No omissions.)

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1 MR. NEGUS: Judge, that was -- that was the
2 commitment you made, and I just can't physically do it
3 and do all the other things I have to do.

4 THE COURT: No, I don't remember making that
5 commitment.

6 MR. NEGUS: Well, that's what -- you said that we're
7 not going to go beyond five hours a day four days a week.

8 THE COURT: That's for trial. I have mentioned
9 a couple times that during voir dire, it's not the --
10 these things get to be done -- you can do them in your
11 sleep once we get started on it, particularly if we wind
12 up with 320 of them.

13 MR. NEGUS: You're asking me to do something I can't
14 do, and I have been planning on -- on the basis of that,
15 because I figured I'd be able to use the evening time to do
16 the other work of preparation which I haven't done yet,
17 and I can only do so much. 

18 MR. KOCHIS: I think we're ahead of ourselves. I
19 think 320 jurors are not going to be with us for very long,
20 and if the Court's accurate, it's going to put us back to
21 the figures that we originally discussed, and we're going
22 to be able to move through the Witherspoon, I would think,
23 in a rather succinct and organized fashion, and we're not
24 going to spend months on it.

25 THE COURT: Well, it's still an open question. I
26 told you before, and I mention it again, that I should give

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1 instructions on this to the people there as far in advance
2 as I can. It doesn't have to be at the moment, because I
3 don't see us going down there within the next 30 days, but
4 I'm going to be trying to firm that up early on. I don't
5 even know the source of the jurors there for downtown,
6 where the jurors come from. Do you know? Have you checked
7 that out?

8 MR. NEGUS: No. That's -- I was going to ask you
9 to -- to have them send us that information, and also their
10 procedures in summoning them.

11 THE COURT: What do you mean by procedures in
12 summoning them?

13 MR. KOCHIS: How they get the names and what they
14 do to get the names into the courtroom.

15 THE COURT: Haven't you done that already, Mr. Negus?

16 MR. NEGUS: No, I haven't, Your Honor. I have been
17 pretty much busy with the Hitch issue.

18 THE COURT: Use your legal runner.

19 Okay. I can do that.

20 MR. KOCHIS: Your Honor, the one thing we haven't
21 discussed, and I think we should get, if possible, some
22 idea at this time, 9d is sequestered questioning, and I
23 wonder if we could get an indication from Mr. Negus so the
24 Court can make some tentative rulings as to what, in
25 addition to Witherspoon, if anything, he would want the jurors
26 voir dired on individually.

0-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26

1 MR. NEGUS: Publicity, period.

2 THE COURT: You were going -- I asked you once before,
3 My jury is still out on that question. I'm hesitant and
4 reluctant to open it up to that.

5 MR. NEGUS: In Hovey or Press Enterprise -- I forget
6 which -- they even suggest that publicity is another area
7 which should -- which could possibly in certain cases be
8 gone into.

9 THE COURT: Oh, there's a lot that possibly could be
10 gone into.

11 MR. NEGUS: But they suggest that -- and the obvious
12 reason is -- you don't do it is you have to do it that way,
13 I think, in order to preserve your panel, is if you ask
14 somebody what they've heard and somebody blurts out
15 something about, for example, Pennsylvania rapes, then
16 you've got to -- I move to send the people home and we
17 have to start all over again, or else I think you build in
18 error.

19 THE COURT: You write me a script on -- or just tell
20 me now generally how you would approach that subject in
21 chambers.

22 MR. NEGUS: I would like to have the questions there
23 that I put in the questionnaire, have them done in written
24 form first so that we have some idea as to whether or not
25 there's -- whether -- you know, what kind of person we're
26 talking about. Once I know that information, I'm probably

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1 just going to ask them, you know, like what have you heard,
2 and then go on the basis of follow-up. If they haven't
3 heard anything, then it doesn't come up.

4 THE COURT: Everybody's heard something.

5 MR. NEGUS: Well, then I want to know what they
6 heard, and then, depending on what they heard, I want to
7 know whether that's going to make an effect on them, but
8 it's not a script sort of thing, It's an open-ended thing,
9 just tell me what you heard, and then, depending on what
10 they say, go from there. I don't think it's -- especially
11 if I have it in the questionnaire form so I don't have to
12 go through newspapers they read, what radio programs, if
13 we have that beforehand all written out for us, then I --
14 I don't imagine it taking very long. Somebody who's --
15 who -- I can imagine a person who gives me reason to
16 believe that there's -- that there's something to get rid
17 of them for cause but doesn't want to get rid of for cause,
18 that could take five or ten minutes. Somebody who's straight-
19 forward about it, in the past, I would expect it would take
20 considerably less, so I don't think -- it's not necessarily
21 a particularly time-consuming process. It doesn't save any
22 time to do it in open court, as opposed to doing it in
23 voir dire, because I'm going to ask the same questions:
24 What have you heard? I need to know the individual responses
25 in open court, the -- so there's no time saving doing it
26 with a bunch of people as opposed to just doing it individually.

0-1-2-3-4-5-6-7-8-9-0

1 THE COURT: Let me go through your questionnaire
2 just for a second here. Going to number seven, why do you
3 exclude Mexican-Americans from that and have a separate
4 category?

5 MR. NEGUS: Well, the -- those things are based on
6 the census, and it's described -- Dr. Decker describes how
7 he did -- why he did it in that particular way. Those --
8 that's the way the census does it, and so that's the way
9 that -- that I did it. The Mexican-American is not a racial
10 category, because if you'll talk to -- if you look at the
11 next question, next question, go on to the next question,

12 THE COURT: I see, but why do you make two questions
13 of it?

14 MR. NEGUS: Because -- because -- because that's the
15 way social scientists deal with the question. That's
16 the way the United States census deals with it now. That's --
17 that is the way it is on the census.

18 THE COURT: Neither one is applicable to this case.

19 MR. NEGUS: What do you mean?

20 THE COURT: Why should we single them out and treat
21 them differently for our purposes, not census purposes, not
22 for social object purposes?

23 MR. NEGUS: The reason is that in order to tell a
24 person who's a Mexican-American, for example, a Mexican-
25 American might very well answer question number seven as
26 white, as Indian, as a whole bunch of different things.

1 Some of them will even describe themselves as Black,
2 usually white or Indian, and they vary in their description.
3 Mexican-American is an ethnic heritage, and that is -- it's
4 unreliable to do it that way. The Mexican-Americans have
5 been fighting for years not to do it that way, I don't
6 want to insult them, and that's the way that they prefer to
7 see it. That's the way the social scientists prefer to see
8 it. That's the only way that the answers we get can be
9 compared with other data, and circling two questions doesn't
10 seem to make much difference,

11 THE COURT: Are number 18 and 20 the same?

12 MR. NEGUS: That's a mistake on my part. Twenty
13 should be about Kevin Cooper, and not the Chino Hills murders.

14 THE COURT: Strike the Chino Hills murders and just
15 insert Kevin Cooper.

16 MR. NEGUS: Yes.

17 Twenty-one and twenty-two I just -- that's not --

18 THE COURT: Let me share a couple thoughts with
19 you. My experience is that the longest part about voir
20 dire, potentially, in this type of case is going to be the
21 sequestered voir dire, if we go that route. I have no
22 objection to revising this somewhat, taking off some things
23 that I don't think need to be gone into, and still pick up
24 your ethnic or racial background questions, as well as the
25 publicity questions, and to doing that to all 320 jurors,
26 if you so desire, if that will shorten the sequestered part

1 of voir dire, you know. Anything that needs to be asked
2 or followed up on, of course, but if you plan a long,
3 extended voir dire anyhow ~

4 MR. NEGUS: If somebody, for example, tells me on
5 the questionnaire how much do you remember hearing in the
6 newspaper about the Chino Hills murder? Nothing. How well
7 do you remember what you heard? I remember nothing. How
8 much do you remember hearing in the news media? Nothing,
9 and then I remember nothing about Kevin Cooper, I'm not
10 going to ask them any questions.

11 (No omissions.)
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1 THE COURT: Asking to excuse him for cause most
2 likely is being a bit silly, perhaps.

3 MR. NEGUS: But, you know -- and so the -- those --
4 the answers to the questions will clue me to which -- to
5 which things I want to ask. Same way with the source of
6 the news, because Mr. Kochis and I both are, I'm sure by
7 now, and you are as well, aware of the content of the
8 different news stations and -- and what have you.

9 So having that background information, I can then
10 focus in and -- and so whether there's any -- any prejudicial
11 information that they have had which has -- which has caused
12 them to make up their minds one way or the t'other. And
13 that's all I really want to do. And I just want to do it
14 so that their answers don't pollute anybody else. I mean,
15 we have to do it on an individual basis no matter what.

16 So I think that the questionnaire will shorten the
17 sequestered voir dire, because if I have to ask all those
18 ten questions to each juror in the chambers, no matter how
19 fast it goes, when you get -- when you just start rattling
20 off ten questions, it still takes a certain amount of time.
21 I just know from experience that goes a lot slower if you
22 have to -- if you have to ask it.

23 I don't see anything that's -- I don't see anything
24 that we lose by having them fill it out in advance. And --

25 THE COURT: Wouldn't your average, to change the
26 subject, Mexican-American, when he looks at number seven,

1 which would be first on your questionnaire, wouldn't he
2 say, "How come they left out" --

3 MR. NEGUS: Well, the reason that we do it that
4 way is because -- because the census and the -- and the
5 Mexican-American community has -- has gone through that.
6 You'll find --

7 THE COURT: You have indicated that to me. My
8 question to you is is there going to be, looking through
9 this and searching, isn't their initial reaction going to
10 be resentment before they finally discover number eight?

11 MR. NEGUS: I don't think -- well, we can probably
12 retype it so that we have it on the same page.

13 THE COURT: Okay.

14 MR. NEGUS: And renumber it so it's on the same page.
15 Some of them write "Mexican" under the "other" because they
16 feel like it, some write "Chicano," some people write
17 different things. I mean, it's been the experience of
18 investigators.

19 But this -- but in fact, race is different than
20 ethnicity. I mean, as being from the -- from being -- coming
21 from a -- from Mexico or Cuba is different than -- than
22 race. There's a lot of Cubans, for example, that are Blacks.
23 And so you -- the racial question and the "where do you come
24 from" is a different question. And that's the reason why
25 people have done that.

26 THE COURT: Anything to interject before I move on?

0-1-2-3-4-5-6-7

1 MR. KOCHIS: Well, I -- I think I --

2 THE COURT: I'm not through with the subject. I'm
3 going to move on to certain --

4 MR. KOCHIS: I think I articulated my objections
5 to the entire questionnaire this morning in terms of the --
6 and I --

7 THE COURT: Let me cover part of it.

8 MR. KOCHIS: I have specific, for example, objections
9 as to date of birth, ZIP Code --

10 THE COURT: Let me go through it, Counsel.

11 MR. KOCHIS: I mean, I --

12 THE COURT: And then I'll come back to you.

13 I have initially, Mr. Negus, crossed out the following
14 ones as ones that I will either be covering in open court
15 or I don't consider appropriate subjects.

16 Two, three -- looking at all of them here -- four,
17 five, six, on gender, nine, annual income of family, ten,
18 members in the household, eleven, how far do you go to
19 school. Twenty-one and twenty-two, occupation and spouse's
20 occupation, cover that in open court.

21 MR. NEGUS: As I say, no objection to kicking off
22 twenty-one and twenty-two. If in fact all the other questions
23 are covered in open court, then I have --

24 THE COURT: I won't cover all the other questions.
25 I wouldn't cover -- well, marital status I would cover, yes.
26 Gender I wouldn't ask in open court. I never go into income.

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24 THE COURT: I just don't think there's any authority
25 for that, that where I have to do that in order to lay a
26 foundation for punishing the District Attorney for excusing

1 on recognizable class.

2 MR. KOCHIS: Well, it's not -- I think Wheeler
3 says both plaintiff and defendant, so I don't want you to
4 feel that I'm the only one that you should be looking at.
5 If Mr. Negus starts kicking cognizable classes, I'm going
6 to ask for sanctions, too.

7 MR. NEGUS: I don't think Wheeler does that.

8 THE COURT: At that point I can modify my procedure.
9 At some point, I can start going into it. But I'm not going
10 to take the whole group here and go into their private
11 finances. 

12 MR. NEGUS: Well, the -- then -- well, see, the
13 problem is that there's no way that -- that if -- if you
14 ask them obviously your gender and your -- your gender, then
15 there's no problem as -- as far as that -- as far as that is
16 concerned, because you can get them as long as we establish
17 Mr. and Mrs. My experience has been the records are sloppy
18 about that. But usually that's -- that's not a big problem.

19 THE COURT: No, it isn't. "Marie" is not going to
20 be a male name, a male person; that's all.

21 MR. NEGUS: But, like, Marion and what have you.

22 THE COURT: Depends on how they -- how she spells
23 her name.

24 MR. NEGUS: Or whatever. I agree that the section
25 is not a big problem, so I can live with that. But in terms
26 of you -- you're not going to -- you're not going to be able

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1 to tell from the records whether you have a poor person or
2 a rich person unless you get the -- unless you get some sort
3 of -- some sort of indication of their annual income.

4 This question is from the census. Therefore, it's
5 easily comparable to other -- other data.

6 THE COURT: Okay. Is there any possibility of you
7 doing that, looking to excuse poor people?

8 MR. KOCHIS: I can't imagine it.

9 THE COURT: I can't, either.

10 MR. NEGUS: Well, but you can't -- but I -- but I --
11 my experience is they always do, and --

12 THE COURT: Looking for other factors. They may
13 coincidentally be poor. But if they're --

14 MR. NEGUS: But Wheeler says that that -- how else
15 am I going to establish whether he's kicking off a bunch of
16 poor people unless we know the --

17 THE COURT: I don't know. I'll be happy to revise
18 the record and -- and to permit questions in open court,
19 perhaps, if it becomes an issue. But initially I'm simply
20 not going to go into their private affairs. I don't think
21 it's warranted at this early stage.

22 Counsel, I simply don't want to go into it anymore,
23 Wheeler notwithstanding. I'm not going to go into it at
24 this time. And I'm -- I'm very quick to pick up on any
25 discrimination in jury selection.

26 MR. NEGUS: Then can I -- the date of birth reason,

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1 that could even be shortened to month and year, if you --
2 if there's a privacy interest in the date, it's the easiest
3 way to, and the most honest way to, determine age. And,
4 again, in -- especially in San Diego, I think that there
5 are tremendous differences between -- between people in terms
6 of their age. And the whole record doesn't reflect that.
7 I mean, you can't tell from the record --

8 THE COURT: You know, I'm not an Appellate Court,
9 doggone it. I'm a trial bench. We have the person before
10 us and we're looking at him. And you make your record
11 some other way, but I'm --

12 MR. NEGUS: How can I make a record, Judge? I mean,
13 you -- I mean, how can you make a record any other way? I
14 mean, do you want, after each -- after each witness, we go
15 up and say, "May the record reflect that -- that the last
16 witness appeared to be 55." I mean, it's -- it's nonsensical.
17 This is a very easy, simple way to make a record.

18 THE COURT: Not for resentment by giving age. Male
19 and female.

20 MR. NEGUS: That's why we put "date of birth," and
21 that's why you can make it month and year.

22 THE COURT: I don't know. There's other ways you
23 can handle it. If your investigator sits through all of
24 this, as he has through most of these hearings, he can make a
25 note and you can make a declaration for appeal, if you wish.

26 MR. NEGUS: He is going to have to go out and run

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1 through all their driver's licenses to find out how old
2 they are? Think of the cost of that. I mean, this is the
3 most -- it is the most cost effective way of doing it. And
4 if you do it in a questionnaire form, they don't have to
5 give it to anybody else other than -- other than the Court.

6 We have done it before. You have done it before
7 in the jury room, and have it with the month and the year.
8 People filled it out and --

9 THE COURT: I know. This isn't the same case.
10 You've gone --

11 MR. NEGUS: I'm just telling --

12 THE COURT: You've gone through an nth degree further
13 in this case than you did any other.

14 MR. NEGUS: That's true. But this is a -- that's
15 why. It's because it's not the same case. But there's
16 no other way that one can make a record as to the ages of
17 the people that get excused.

18 MR. KOCHIS: Sure there is.

19 THE COURT: I beg your pardon?

20 MR. KOCHIS: There is.

21 THE COURT: How's that?

22 MR. KOCHIS: Without insulting people, you give
23 them the boxes just like you do on race, "20 to 30, 30 to 40
24 40 to 50, over 50."

25 MR. NEGUS: The reason that they -- that they do
26 the date of birth is, as opposed to the boxes -- and I don't

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1 care about -- I mean, if we want to go to the boxes, that's
2 fine. But normally, according to the social scientist,
3 and I think there's some testimony about that by Dr. Decker
4 in the -- in the offer of proof, that people will be more
5 likely to give you an honest answer if you ask them for
6 their date of birth because it's harder to fudge than it is to
7 fudge on the number of years, how old, years they are old.

8 That's the only reason for doing date of birth as -- and
9 month of the year as opposed to -- as opposed to doing the
10 bracketed. And they have done this -- I mean, the reason --
11 this is not the -- those questions were not developed by --

12 THE COURT: People have done everything, but I don't
13 necessarily follow them.

14 MR. NEGUS: I know. But this is something that --
15 that there's -- it's fairly standardized within the social
16 science business, and --

17 MR. KOCHIS: But we're not in the social science
18 business.

19 MR. NEGUS: But the social science business is the
20 business of -- of how to get information about this kind of --
21 about this kind of stuff. And if you're going to ask them
22 the boxes, you might as well ask them --

23 THE COURT: You know, you're looking -- you're
24 looking -- looking for a record on appeal. I'm looking to
25 give both of you a fair trial. That's all I'm looking for.

26 MR. NEGUS: No. I'm looking for a record in front

00-1-23-10

1 of the Court, Your Honor. How else am I going to -- how
2 else am I going to make a record? None of us can remember
3 people that have been kicked off after we have been doing
4 it for a while and, you know, how old they were. It's
5 going to be a matter of dispute.

6 I mean, we start -- I say, "Well, he kicked off
7 seven young people." "I don't remember that being young."
8 I mean, it always comes out that way.

9 This is the easiest, most cost effective, least
10 controversial, most accurate way of doing it.

11 THE COURT: Any other -- other that you want in
12 there?

13 MR. NEGUS: The reason I want the ZIP Code is because
14 then that makes it -- that's a -- that is essentially, for
15 me, it makes it easier to figure out the demographic
16 characteristics of the place they live.

17 THE COURT: We wouldn't have to ask them in open
18 court where they live.

19 MR. NEGUS: Okay with me. Just give me the ZIP Code.
20 You can get the phone books and you can figure it out.

21 THE COURT: If that's all right with you, that
22 might be all right.

23 MR. KOCHIS: Your Honor, I -- again, the last thing
24 I need is 1200 new pages of discovery to assign an investigator
25 to match ZIP Codes with areas in San Bernardino.

26 THE COURT: 1200? How do you come up with 1200?

0-1-2-4-1-1

26 THE COURT: San Ysidro, we find out, is part of San Diego.

1 MR. KOCHIS; People will say they live in Point Loma,
2 Sunset Cliffs, Ocean Beach, Pacific Beach.

3 MR. NEGUS: But those -- those -- those things
4 don't happen to have -- they're not tied into census
5 data. This is -- this is purely for --

6 THE COURT: Do you have a list of the --

7 MR. NEGUS: -- census data --

8 THE COURT: -- areas that we would be able to under-
9 stand?

10 MR. NEGUS: Yeah. I'll xerox you a copy of the --
11 of the phone book which has a map of the ZIP Codes. You
12 can look at it. The thing is that -- that the ZIP Codes
13 are tied in to census data. All the census data is
14 organized in terms of ZIP Codes. That way it's -- in fact,
15 you usually find that your jury commissioner will summon
16 people in terms of ZIP Codes. That's what they do in this
17 county, and it's the easiest --

18 THE COURT: That sounds to me to be more precise,
19 in a way, if by a quick, ready reference here you can find
20 out what part of the area they're from. I don't have any
21 objection to that, and leave out the city then. What is
22 their date of birth? What is your ZIP Code? No more
23 marital status here. We can ask them that out -- outside
24 for self and spouse, not gender. All right. We will leave
25 number seven as is. Eight leave it as is, if you want it.

26 MR. NEGUS: I do.

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1 THE COURT: Striking 9, 10 and 11.

2 Going down to 12, 13 and on, if you've made notes
3 of that, you can revise those, leaving off 21, 22 and
4 revising 20.

5 MR. KOCHIS: Well, Your Honor, if you're going to
6 ask two and four, could you include three so those of us
7 that don't want to match a ZIP Code with a city or a town
8 in every case don't have to?

9 MR. NEGUS: I have no objection to that, I think
10 it's more accurate, and it doesn't take more than a second
11 more for them to fill it out.

12 THE COURT: No. I'm trying to cut out all the
13 surplusage at all. Your objection is you don't want to
14 have to work with another list beside you?

15 MR. KOCHIS: Not in every case.

16 THE COURT: Let's see what it looks like. I don't
17 think I've ever really looked at that.

18 MR. NEGUS: What you get --

19 MR. KOCHIS: It's more general. People who live in
20 four or five communities are obviously going to have the
21 same ZIP Code, or possibly more.

22 THE COURT: Do you think some people wouldn't know
23 their ZIP Code?

24 MR. NEGUS: That's the reason why we put the city
25 and the ZIP Code. That's true that they don't, so that's
26 the reason why we have both in the --

0-1-2-3-4

1 THE COURT: All right. Let's give both of them,
2 It's not that much more.

3 Okay. Now, I want it clearly understood that while
4 I don't wish to inhibit you unfairly, there might be a
5 difference of interpretation, and if I find we're going to
6 be spending an undue period of time in chambers on
7 publicity, I simply am not going to --

8 MR. NEGUS: I'll be forewarned, and --

9 THE COURT: I'll just cut it off. Well, you know,
10 let's communicate, I just think that that can be done
11 outside, and I do that in every case, and I have handled
12 a lot of celebrated cases. I've never yet done that on a
13 sequestered basis, Mr. Negus, so you're getting me to do
14 things I've never, ever done before.

15 MR. NEGUS: I just -- I will make sure that I don't
16 abuse you on that particular issue so you don't get mad at
17 me, but I feel that --

18 THE COURT: I never get mad at you. I may just sound
19 mad or angry sometimes.

20 MR. NEGUS: If you don't find that I'm using undue
21 time, and the reason is I feel it doesn't -- the time
22 element remains the same, but the prejudice element is
23 considerably less.

24 THE COURT: With reference to time, the clerk will
25 take from our 60 people, if we wind up with -- whatever we
26 wind up with. She's going to schedule. She, with the bailiff,

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1 will schedule them in at -- what were our intervals before?

2 MR. KOCHIS: I think we did eight -- sixteen a day,

3 THE COURT: Well, we were adding to that, but this
4 is going to take longer, so maybe keep it at eight and eight,
5 at least to start with.

6 MR. KOCHIS: And then we did go up to I think nine
7 or ten a session. We ended off with 18 to 20 a day, as
8 opposed to 16.

9 MR. NEGUS: I hope we can do -- I think it will take
10 longer than it did in the -- in the --

11 THE COURT: I'm allowing for that, but we were through,
12 basically, by 11:00 o'clock when we started out with eight
13 and eight.

14 MR. NEGUS: Is that right? The way that Judge Jones
15 did it, it turned out to be horrible. I mean he read --
16 he spent 15 minutes a person in chambers reading the bench
17 book to them, and then I would spend 15 or 20 minutes
18 questioning them, and Mr. McPherson would spend 5 or so
19 minutes questioning.

20 I assume that you're not going to read the bench
21 book to them for 15 minutes.

22 THE COURT: You know what I'm going to read, and it
23 goes fast. I will be through in about three to five
24 minutes maximum.

25 MR. NEGUS: That's -- I would hope then that we
26 could do 20 to 30 minutes per person, leaving time for

1 Mr. Kochis,

2 MR. KOCHIS: That's fine. That only calls for
3 eight hours a day for voir dire to do sixteen people or
4 less,

5 THE COURT: If we have --

6 MR. KOCHIS: If he's talking 30 minutes a person --

7 THE COURT: It's not going to take 30 minutes a
8 person. It's simply not going to take it, not on the
9 sequestered voir dire. If we had eight, let's see how it
10 goes, that was allowing -- if we allowed fifteen minutes a
11 person, that's four per hour. If we started at 9:00, that
12 would be 12 in the morning; so if you started at 9:30 at
13 15 minutes a piece, that would be 9:30 till 12:00, we'd
14 get 8 in, wouldn't we?

15 MR. KOCHIS: You could conceivably spend almost 20
16 minutes a juror, I think, on 8 in the morning and 8 in the
17 afternoon, because my experience is every session, one or
18 two people self-destruct almost immediately with something,
19 within two or three minutes. It doesn't take 20 minutes
20 for them to say I forgot to tell you that I'm getting
21 married next month or I can't sit.

22 MR. NEGUS: I think there are very few people that
23 have done it in as short a time as you did it in the Gray
24 case,

25 THE COURT: I'm inclined to agree, to some extent,
26 Mr. Abubakari was not verbose.

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1 MR. NEGUS: You know me,

2 THE COURT: Well, restrain yourself, Counsel, and go
3 to the gist of it, and do the rest of it in open court
4 on a class basis as much as you can. You don't really --
5 I'm not going to lecture you, because I don't think really
6 counsel sway the jurors like you sometimes think that you
7 do.

8 MR. NEGUS: My questioning has not been designed to
9 sway them, but I think the questions that I think go to
10 cause sometimes take longer.

11 THE COURT: What we can do is to if we find that --
12 you know, we can juggle the list. We can take the ones
13 on the end and add them up or delay them or something else,
14 reschedule them.

15 MR. NEGUS: How are we going to -- okay. Let's say
16 that we go -- that we pick however many names that we're
17 going to pick and we death qualify them so that we have
18 120 or however it is that -- however many Mr. Kochis figures
19 we need who are death qualified. What are you going to do
20 then? How are we going to go through those people once we
21 get to the general voir dire? Do we draw them out?

22 MR. KOCHIS: No. What we did last time is if at
23 the end of their sequestered voir dire when they left the
24 courtroom, we gave them a group and a day to appear, and
25 we did, as I recall, at random every -- every third or fourth
26 person,

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1 THE COURT: We go back and we get another 60
2 people in the courtroom. They may be 60 people out in the
3 community. We put 12 of them in the jury box. We go through
4 more questioning, wind up with 12 of them, and we go right
5 through and excuse for cause and peremptories.

6 MR. NEGUS: When do you draw the order?

7 MR. KOCHIS: His question was how do you choose
8 which 60 are the first to come back out of the 120?

9 THE COURT: I was going to get to that. The clerk's
10 scheduled at instructed intervals and by agreement of
11 counsel. They didn't want them all to be from the first
12 group and all from the second group, so she was allowing
13 to fill in -- I might have you explain that, Mrs. Lewis,
14 You were bringing some of the last group in the first day
15 of the first 60 group that we had?

16 THE CLERK: You had three separate groups, and then
17 we took one of each group and set it up on the list of the
18 days they were going to come back, so the first one maybe
19 would come on the first day, but number three would come on
20 the first day later. It was done in rotation.

21 THE COURT: That's as far as individual voir dire,
22 and then how did we get the large group, the 60 in later
23 on?

24 MR. KOCHIS: That's how. When you brought eight in
25 in the morning, the first person to qualify at random went
26 into group one that was coming back Monday morning. The

00-1-2-4-1-07

1 second person to qualify would be in group two brought
2 back the second day. The third person would go in group
3 three, and you kept dividing everybody up into groups of
4 three,

5 MR. NEGUS: There was never any drawing of names?
6 It was self-selected on the basis of the order in which
7 they got in the line?

8 MR. KOCHIS: And the order of who had been excused
9 prior to them. Someone who could theoretically --

10 THE COURT: No. There's no drawing as far as when
11 to bring a group in here. The drawing is when we put them
12 in the jury box.

13 MR. KOCHIS: I know, but I think what Mr. Negus is
14 asking, or getting ready to ask, is that we don't do it
15 that way, and that there's a second random.

16 THE COURT: What's concerning you?

17 MR. NEGUS: I don't like it, and it happened to me
18 last time, that there the non-random elements of the
19 selection, and that strikes me as -- as -- as -- we're
20 not going to have the present clerk or present bailiff in
21 San Diego. I don't know who we're going to have, I
22 wouldn't -- there are those -- these people I wouldn't have
23 the same objection with, but --

24 THE COURT: That can be easily handled, I would
25 think, if you have --

26 MR. KOCHIS: We kept -- the lawyers kept track of

0-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100-101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-1099-1100-1101-1102-1103-1104-1105-1106-1107-1108-1109-1110-1111-1112-1113-1114-1115-1116-1117-1118-1119-1120-1121-1122-1123-1124-1125-1126-1127-1128-1129-1130-1131-1132-1133-1134-1135-1136-1137-1138-1139-1140-1141-1142-1143-1144-1145-1146-1147-1148-1149-1150-1151-1152-1153-1154-1155-1156-1157-1158-1159-1160-1161-1162-1163-1164-1165-1166-1167-1168-1169-1170-1171-1172-1173-1174-1175-1176-1177-1178-1179-1180-1181-1182-1183-1184-1185-1186-1187-1188-1189-1190-1191-1192-1193-1194-1195-1196-1197-1198-1199-1200-1201-1202-1203-1204-1205-1206-1207-1208-1209-1210-1211-1212-1213-1214-1215-1216-1217-1218-1219-1220-1221-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2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-

1 that.

2 THE COURT: If we're going to get down to -- if our
3 estimate is, say, 160 and if -- if we therefore could only
4 accommodate 160 people with putting them in the courtroom
5 A, B and C, do you see what I mean on three days, whenever
6 they may be, then we can have -- we could have three
7 numbers in the box, in the wheel, and then as the jurors
8 finished with their sequestered voir dire, the clerk would
9 draw out one of the three numbers, if you want, until we
10 exhaust either A, B or C and then only have two left,
11 any number of ways that you want to. Something like that
12 wouldn't take any time.

13 (No omissions.)
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1 MR. NEGUS: Okay. I -- I don't think that the --
2 that the things take even time. It's just a different
3 way of organizing them. I'm trying to --

4 THE COURT: Well, I'm open to suggestion.

5 THE CLERK: Your Honor, when we did it last time
6 on the Gray trial, the attorneys were also able to keep
7 track of what groups they were in because I had three
8 different dates for appointment schedules, and I would give --
9 and I had them marked 1, 2 and 3. The attorneys also knew
10 which ones were going in there.

11 THE COURT: When you say "appointment schedule,"
12 you're talking about?

13 THE CLERK: Where they were to come back for the
14 final jury selection, when you started pulling the names
15 out of the box.

16 THE COURT: Then we start out -- I've forgotten
17 already. If we start out with 60 people on, say, a Monday,
18 when are we going to get to the second group of 60? When
19 do we have them come back?

20 MR. KOCHIS: We would either have them come back
21 the following morning at 9:30 or in the afternoon. We would
22 try to estimate how long it would take us to do a general
23 voir dire of that group of people and exercise the peremptory
24 challenge that would exhaust them as a group. And then
25 what happened was we never got beyond the second group,
26 because everyone runs out of peremptory challenges.

0-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26

1 MR. NEGUS: This may be a tad more complicated way
2 of doing it. But let's just -- let me see if I can make a
3 suggestion. We're going -- the order in which the people
4 come in the first 60 is going to be, I presume, random.
5 That is, we're going to get 60 randomly selected people,
6 then another 60, another 60.

7 THE COURT: Well, let's think about it for a second.

8 MR. NEGUS: All right.

9 MR. KOCHIS: What -- where we're --

10 THE COURT: We're talking about the very first time
11 we're getting anyone in the courtroom.

12 MR. NEGUS: Talking about step one.

13 MR. KOCHIS: That will be up to, I assume, the
14 Jury Commissioner as to how those people get in. We will
15 have no say.

16 MR. NEGUS: We will have no say, so that's 60
17 people random.

18 THE COURT: All right.

19 MR. NEGUS: If we -- and we'll have anywhere between
20 40 to -- 30 to 40 survivors, depending upon whose estimate
21 is more accurate as to how many we lose, right?

22 MR. KOCHIS: Yes.

23 MR. NEGUS: All right. If we draw the order of
24 appointments in a random manner so that --

25 THE COURT: That's no problem.

26 MR. NEGUS: -- Juror Jones is given appointment No. 1,

0-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26

1 2, 3, all the way through, then we are maintaining a random-
2 ness in the order in which we -- we voir dire people. On --
3 on the Hovey, if we then maintain that same randomness, we
4 haven't lost any randomness, and both sides then know what
5 order the jurors would be called into the box and we don't
6 have to do any more drawings, and it's easier to schedule
7 stuff.

8 MR. KOCHIS: I am now completely lost, because from
9 the 20 or 30, what's going to happen next is Witherspoon.

10 MR. NEGUS: Right.

11 MR. KOCHIS: And they're going to get a day certain
12 to come back for Witherspoon.

13 MR. NEGUS: Right.

14 MR. KOCHIS: And we -- the -- what we lose a little
15 bit is the flexibility of a juror saying, "I have a doctor's
16 appointment that morning."

17 THE COURT: We made a lot of -- we made a lot of
18 adjustments in that regard to accommodate you.

19 MR. NEGUS: We didn't. And we know that other
20 people --

21 THE COURT: How can that possibly be important?

22 MR. NEGUS: Well, what I'm -- I -- I can't prove it,
23 but I feel that it was important to my last case. Maybe
24 I'm just paranoid, but I -- it -- it -- it allows people
25 the possibility of manipulation. And, as I said, if we had
26 this clerical staff in San Diego, I would have no problem.

00-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00



sure that who comes into the box when is completely random
and has not got to do with the clerk's making assignments
in any point along the way.

THE COURT: Well, let's -- let's think about it, stop just right there for a second.

MR. NEGUS: Okay.

THE COURT: We have excused for cause, that being for time, primarily. We're down to 30 or 40 people in the courtroom. At that point, I will explain the procedure, whatever it may be, to the remaining people, and we, all of us, four of us here, five, if Mr. Kottmeier is here, will then leave. We're going to get the heck out of the courtroom so that the clerk can do her bit --

MR. NEGUS: Right. Okay.

THE COURT: -- with the bailiff. And then at that point, what she's got to do is to give, then, an appointment schedule with a record of that appointment schedule.

MR. NEGUS: There's another way to do it, okay?
When the first 30 come in, at that point in time, we draw
them in order, 1 through 30.

THE COURT: What -- what -- what first 30?

MR. NEGUS: 60 people come in.

THE COURT: Yes.

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1 MR. NEGUS: 30 of them go home.

2 THE COURT: Okay.

3 MR. NEGUS: Okay. You've got 30 left. We put
4 their names in a hat, we draw them out, we give out No. 1,
5 No. 2, all the way down through 30. That is the order in
6 which they will be called to the box. As they are struck,
7 then, you know, somebody else moves up in the list. So
8 we have -- what I'm suggesting is we have a list of the
9 order in which the people are going to go into the box right
10 at the beginning. That is the only practical way that I know
11 of, not having multiple drawings, preserving randomness.

12 MR. KOCHIS: That to me seems like the least random,
13 because what you're saying, then, is you were saying the
14 people that show up the first day you're definitely going
15 to get in the jury box one way -- after everything, after
16 Witherspoon, after pretrial publicity.

17 MR. NEGUS: Right.

18 MR. KOCHIS: They're going to be in the box for sure.

19 MR. NEGUS: And that's -- that's -- but, see, the
20 thing is they're coming in in a random fashion. There's no
21 lack of randomness in who comes in the first day, second day,
22 third day. As soon as you let the clerk determine the order
23 in which people are going to be coming in, then you're open
24 to manipulation.

25 THE COURT: I don't think that that's in accord with
26 the law.

00-1-2-4-2-2-9

1 MR. NEGUS: Well, I --

2 THE COURT: I have to check it out, but it -- it
3 talks in there somewhere of when -- sets out the jury
4 procedure about when you pass by cause, for cause, the jurors
5 shall then be randomly drawn. I think that that has to
6 be the last stage.

7 MR. NEGUS: Well, that's -- that can't be right,
8 because we normally put 12 in the box before we examine for
9 cause, true?

10 MR. KOCHIS: But, you know, Judge, my concern is,
11 practically, what happens is, if we follow that, you're
12 never -- the people who we see the third day of our first
13 general -- the people who are going to be jurors, 250 through
14 350, they are never going to get in the box --

15 MR. NEGUS: What's wrong with that?

16 MR. KOCHIS: -- ever.

17 MR. NEGUS: Why is that a problem? I mean, how does
18 that affect the randomness of it all?

19 THE COURT: Well, you just have a different idea
20 than before. Counsel before felt that was a problem.

21 MR. NEGUS: Well, I mean, it doesn't strike me as a
22 problem. Maybe Mr. Kochis can educate me. I mean, I'm
23 going to learn as to why they thought it was. But I don't --
24 I don't see that there's any significance as to who gets --
25 who arrives here on Day 1 versus who arrives here on Day 3.

26 I do see there's a significance as between males and

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1 females and that sort of thing when the clerk starts setting
2 up appointments, because that's what I feel happened to me.
3 I may be wrong, but that's what I feel. And I don't want it
4 to happen again.

5 MR. KOCHIS: I'm having trouble appreciating what
6 Mr. Negus said, because in our case, no matter what the
7 clerk did in terms of an appointment, that did not have an
8 absolute effect on what proof you went into. If the clerk
9 decided to stack all the women from 9:30 to 11:00 and all
10 the men from 11:00 to 12:00 in the morning, still depending
11 on what happened during Witherspoon, the whole process was
12 still random in that you went one into group one, one into
13 group two, one into group three. And if you looked at the
14 list in the morning, the people you thought were going to be
15 the first group were in the second group, and all of a sudden
16 the people that you thought were going to be in the second
17 group were in the third group, and vice versa. It was all
18 random.

19 MR. NEGUS: Maybe -- how about another way of doing
20 it? This -- this will solve Mr. Kochis' problem and my
21 problem both, perhaps.

22 We -- if we're going to have 320 people show up,
23 okay, on Day 1, we assign them a number drawn randomly from
24 1 to 320. That will randomly distribute them around. And we
25 won't have any other mechanical way of doing it. Follow me?
26 Does that solve your problem?

00-1-2-4-2-08

1 MR. KOCHIS: We never have 320 people show up on
2 the first day.

3 MR. NEGUS: Well, right. But -- okay. That's right.
4 So you'll -- you'll get a random drawing as to whether
5 they're in the first 60 group to be called, the second 60
6 group, or whatever. You follow me?

7 MR. KOCHIS: No. I'm lost.

8 MR. NEGUS: Okay.

9 THE COURT: I think I see it, but I don't think I
10 can do it.

11 MR. NEGUS: Okay. I'm -- I'm talking -- you have
12 30 people out there. We draw. One of them gets the No. 5,
13 one of them gets No. 73, one of them gets No. 82. We
14 distribute it. We know which -- we know which order they're
15 going to be coming into the box, which helps us, I think,
16 in making our -- in our jury selection.

17 It helps us both. I mean, we both get the same
18 advantage out of -- out of that. You do know which order
19 they're going to come in. And it randomly distributes
20 people around, so it doesn't matter which order you interview
21 them in and it doesn't matter which -- nobody else can --
22 nobody else can affect the result of that. Does that solve
23 your problem?

24 MR. KOCHIS: Yeah. The only problem I have with
25 that statistically is I'm not sure we're going to lose people
26 representatively, due to time and publicity, the same percentage.

00-125-250

1 For example, we could give random numbers, and what we find
2 out is all the people who have random numbers from 150 to
3 250 we lose due to Witherspoon or time.

4 MR. NEGUS: Okay. But, then, we -- it's still --
5 then the -- then the selection process is still random.
6 I mean, it's -- even if it turns out to be you go in order,
7 once you lose No. 1, then you skip to No. 2. So if you
8 lose 1 through 150, then you still -- then you just still
9 go in the order of 151 through 320.

10 MR. KOCHIS: That I understand. But one of the
11 things we were concerned about in Gray was telling the
12 jurors, "Okay, you're going to be here for half a day to
13 get a date. And then within the next three weeks, you're
14 only going to come back once. It's either in the morning
15 or the afternoon, and it will be for a date certain."
16 And then when they did come back, if they qualified, we told
17 them, "You're free until 9:30 a.m. at this particular time."
18 And the clerks didn't have to scramble around and call
19 people and move them up. And that's one of the things I'm
20 concerned about.

21 I'm not, as I think about it, I may not be opposed
22 to Mr. Negus' original suggestion. But we're going to be
23 imposing on San Diego enough. And I'd like a system where
24 the jurors come in, they get a date certain for Witherspoon,
25 and, when they leave, they know exactly the day and the time
26 that they're to come back for general voir dire, and that

1 no one has to do anything in the interim to them, don't
2 have to --

3 MR. NEGUS: We can stack the general -- I mean,
4 okay. I think that the way I suggested will essentially
5 accomplish that, because you're going to get a random
6 distribution of the numbers from --

7 THE COURT: Go through it again briefly.

8 MR. NEGUS: First, we have -- if we're --

9 THE COURT: 60 people come in first. What do we
10 do?

11 MR. NEGUS: We have 320 numbers in a hopper.

12 THE COURT: Okay.

13 MR. NEGUS: The clerk sits in and assigns the person
14 a particular number from 1 to 320. If the number is from
15 1 to 127 or whatever it turns out to be, then they're on
16 the first day of general voir dire, and we can schedule their
17 appointment for -- for Witherspoon whenever it is convenient
18 for them. If they're from 128 to 216, they're on the
19 second day of general voir dire, and they can schedule their
20 appointment whenever is convenient for them. If they're
21 from a number from, whatever it is, to 320, then they're on
22 the third day of general voir dire, and they can schedule
23 an appointment whenever is convenient for them. And that
24 way --

25 THE COURT: Counsel, why are you doing this?

26 MR. NEGUS: Because --

CO-123-11-11

1 THE COURT: What is wrong with the way that we're
2 doing it? We're drawing them -- they're drawn by random.
3 We have initially 60 people coming in at random. We're
4 scheduling them -- you're going to exercise your for cause
5 and your peremptories in the usual manner. We're going to
6 put from 40 people or 30 out. We're going to draw 12 people
7 into the box by random.

8 MR. NEGUS: Because -- because -- because which
9 person comes, the important thing is that -- is that randomness
10 of the day in which -- the order in which they go into the
11 box is selected. You are taking the -- you're making it
12 non-random as to who's in the first group to have 40 -- to
13 have their names drawn from the hat to be -- to be -- to be
14 put in the jury, giving the clerk -- clerk the discretion
15 to do that. I don't -- I think that's --

16 (No omissions.)
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1 MR. KOCHIS: But my argument is, one, we're not
2 doing that,

3 MR. NEGUS: Yes, you are.

4 THE COURT: I won't give the clerk any discretion
5 at all, We'll set down the rules. I'll give the clerk
6 absolutely a directive to where they'll have no discretion.

7 MR. NEGUS: Then you can't change the order of the
8 appointment.

9 THE COURT: All right. We won't change the order of
10 the appointments unless she comes back to us and says that
11 they have that marriage coming up or they're going to be
12 sick that day or something.

13 MR. NEGUS: That's unworkable.

14 MR. KOCHIS: I have two thoughts. It's not exactly
15 the day they call as to whether we -- the day they come in
16 under our system. It's what order they happen to fall in
17 on the day they show up. For example, the way we did it
18 in Gray, if you showed up on the last day we Witherspooned,
19 but you happened to be in the group one slot, you came back
20 with the first group. What we could do, if Mr. Negus is
21 concerned about the randomness, is every morning and
22 every afternoon when the eight people show up, put eight
23 numbers in, hand them out, and, then, based on the number
24 they get determines whether we see them first, second,
25 third, fourth, fifth, sixth, and then that would be random,
26 and that's the selection, the order, that's going to

CO-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26

1 determine whether they're group one, group two or group
2 three.

3 THE COURT: I'd rather do something like that.
4 When they leave -- to refine that idea a little bit, we've
5 got eight people come in. When that first one gets ready
6 to leave, the clerk can then -- has all eight numbers, say,
7 in the wheel. They'll --

8 MR. KOCHIS: No, It would have to happen before
9 that. The first person we see, if they Witherspoon
10 qualify, they'll be in group number one, come back for
11 general voir dire the first day, and we'll definitely see
12 that juror one way or the other. If the first three people
13 all Witherspoon qualify, the third person we Witherspoon
14 on day one, we may never get to again.

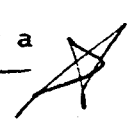
15 MR. NEGUS: Okay, but that's not random, because the
16 clerk has set the order in which the people are coming in
17 to see us. The clerk has determined who's number one,

18 MR. KOCHIS: Well, but it's --

19 THE COURT: It's from random selection from the
20 audience, randomly selected 60 people to show up. That's
21 random to begin with,

22 MR. NEGUS: It's not random when they form a line and
23 the clerk writes down one through eight in the morning,
24 one through eight in the afternoon. That's not random,
25 and it's possible to have manipulation, and I'm opposed
26 to it.

0-1-2-3-4

1 THE COURT: Well, all right. Note your objection,
2 and we're going to do it the way we did it before. I find
3 no infirmity there, and we've got to do something in a
4 reasonably logical manner. I'm not going to appear a
5 complete bumpkin to the people in San Diego. 

6 MR. NEGUS: I am willing to work out any of a number
7 of ways, as long as it's random, Your way allows the clerk
8 to determine the order in which people are assigned.

9 THE COURT: No. We predetermine --

10 MR. NEGUS: How do you do that?

11 THE COURT: We predetermine that the jury commissioner
12 draws in 60 people, hopefully at random, and then their
13 names are -- I don't know if they're arranged alphabetically --

14 MR. KOCHIS: Those people are going to be seen the
15 first week,

16 THE COURT: -- or what, and then we will go for cause.

17 MR. NEGUS: Okay.

18 THE COURT: And then when we excuse those people
19 and we're down to the net the first day, after about 45
20 minutes to an hour, we're down to net, then we leave the
21 room, and the clerk then, by whatever method we want, she
22 can put in all remaining 30 people, if you want, and draw
23 them out one at a time as far as what dates for their
24 appointments.

25 MR. NEGUS: That was the original suggestion that
26 I had. Mr. Kochis objected to that because it didn't allow

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1 any flexibility.

2 THE CLERK: Your Honor, what they had before was
3 the appointment dates were already set up, January 21,
4 January 22, January 23. Then the people -- half the
5 people came to the bailiff's desk and half of them came to
6 mine, and we scheduled them first come on the first appoint-
7 ment date, We had to fill up all the appointment dates.

8 THE COURT: You had the little slips for appointment
9 filled out?

10 THE CLERK: No. This was a list. The little slips
11 for appointment was after Witherspoon, groups one, two and
12 three, but the other ones we had to fill out -- we couldn't --
13 we couldn't -- like if there was January 21, 22 and 23 and
14 then maybe there was March 1st, 2nd and 3rd, we didn't let
15 them come back in March.

16 THE COURT: I hate to be wasting the record on
17 something like this. Let's see if you can agree to this.
18 What's wrong with this method? If that's agreeable with
19 you, Mr. Negus, we're down to the net, 30 to 40, hopefully,
20 we leave, those 30 to 40 names are put in the wheel, and
21 she draws them out one at a time and she sets them up in
22 whatever manner we tell her to set up, she draws a juror
23 number 15, you get the first appointment, and you're there
24 at 9:30 in the morning on such and such a day.

25 MR. NEGUS: That's what I suggested, I thought, to
26 begin with, and Mr. Kochis objected.

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1 THE COURT: What's wrong with that?

2 MR. KOCHIS: Okay. Let me just understand this.

3 The date that the people get the first day they're here,
4 that's the day they'll come back for general voir dire;
5 is that correct, not for the --

6 THE COURT: No. That's going to be for sequestered
7 voir dire.

8 MR. KOCHIS: Okay, and then the -- then the only --
9 I think this is what Mr. Negus is concerned about, and if
10 he's not, then the slip they get will determine only --
11 there's only going to be a limited number of slips. There's
12 only going to be 16, whether they come back -- well, because
13 we didn't --

14 THE COURT: They're going to all get a slip to come
15 back at 20-minute intervals or whatever we decide upon at
16 that point.

17 MR. NEGUS: If the order of the 20-minute intervals
18 is determined on the first day by a random drawing and then
19 the order in which they come back in the three groups is
20 determined by the sequence in which they go through, then --

21 MR. KOCHIS: So they get a number one through sixteen,
22 The first day they'd be numbers one through sixteen.

23 THE COURT: I don't understand that. Where do you
24 get 16?

25 MR. KOCHIS: Eight a session, sixteen a day; right?

26 MR. NEGUS: If -- what you're saying -- if what

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1 you're saying is that the clerk is drawing the order in
2 which they appear, that is, August 1st from 9:00 o'clock,
3 9:20, 9:40, 10:00 o'clock, 10:20, 10:40, and then we're
4 going to -- when they go through, we go one -- when we go
5 through the Witherspoon, they're put into group A, B or C
6 for the general in terms of first one at A, next one to B
7 and C, then back to A, that's random. I have no problem
8 with that,

9 THE COURT: Let's do it that way.

10 MR. KOCHIS: Done.

11 MR. NEGUS: That doesn't allow you to switch
12 appointments, though.

13 THE COURT: We've got to have some flexibility.
14 We're not machines here, People have --

15 MR. NEGUS: As soon as you get flexibility, you have
16 people manipulating,

17 MR. KOCHIS: But, Your Honor, here's a problem that
18 would come up, and I'm sure Mr. Negus has had this experience.
19 You have four people in the morning. Your clerk would come
20 in and would say, Your Honor, juror number one, Mr. Jones,
21 has car trouble, he's going to be 20 minutes late, do you
22 want to wait or do you want to go to juror number two?
23 You'd go, well, bring in juror number two,

24 Under Mr. Negus' proposal, we can't do it that way.

25 THE COURT: Wrong. I would simply overrule any
26 stupid objection he may make like that.

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MR. KOCHIS: Also, if a juror calls in and says I can't be here this morning, my son's sick, can I show up at 1:30, that throws his thing in the whack also. We have people who stay in the restroom longer --

THE COURT: Do those kind of things bother you?

MR. NEGUS: Yes, sir, because those kind of things came up in my last trial. I think I saw the possibility of manipulation. That's my personal paranoid opinion. I feel that I got harmed by it, and it's -- it's -- I didn't -- until I saw it happen, I wouldn't have thought of making an argument. I think that what you're doing is, therefore, not random. That is, it's allowing people to control it, and that's illegal. If -- any way that you want to do it that we can make sure that the order of which people get in the box is random, I'm easy. I've tried five.

THE COURT: Okay. Mr. Negus, there's going to be some deviations from random drawing, as you define the phrase. The whole thing is random to begin with. I think anything we do after that is superfluous. I'll do it to this extent. There will be no deviation from it done by the clerk. Any deviation would be done by the judge after the clerk can bring us a message that the juror can't come that time, but can come at another time, they've got to take their child to a doctor a certain day. And at that time it can be put on the record in chambers, or wherever we are, and I will make a ruling after hearing from counsel,

1 but there's got to be some room. We're not machines.
2 Okay? So I will simply overrule your objection in that
3 regard.

4 We are going to bring in 60 per day -- per session,
5 like 60 at 9:30 and 60 at 1:30. Of that first 60 we will
6 excuse for cause, we will wind up, hopefully, with 30 to
7 40 people. We will put their names in a wheel. They will
8 be drawn by random and scheduled with no flexibility from
9 the clerk eight in the morning, eight in the afternoon,
10 at least initially, to see how we go. We can add or
11 detract if we can't make it or we go faster.

12 MR. KOCHIS: Your Honor, not to get bogged down in
13 the mechanics, but then they would get a number from one
14 to whatever, and they would be called as if they were
15 standing in line to buy ice cream, and number one would get
16 the first slot, number two --

17 THE COURT: I don't have any trouble with deviating
18 from that. If one of them's in the bathroom, we'll take
19 that one and go back to the first one when he comes out of
20 the bathroom.

21 MR. KOCHIS: I'm talking about the first day when
22 we've got the 30 people left after the general.

23 THE COURT: Okay.

24 MR. KOCHIS: What numbers are you going to have some
25 poor clerk in San Diego who doesn't know we're coming yet
26 put in there, times or numbers, or what are we going to do?

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1 THE COURT: I would think we'll have -- she's going
2 to clip off the little names, put those 32 names, or
3 whatever it may be, in the wheel, going to pull out juror
4 number one is in this first slot. The next one she draws
5 out will be in this next slot.

6 MR. KOCHIS: Fine. Now I understand that. The
7 names are going into the wheel.

8 THE COURT: Any final words?

9 MR. NEGUS: Not that I haven't already said,
10 (No omissions,)
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1 THE COURT: All right. I appreciate that we don't
2 have a date yet to commence and move to San Diego. You are
3 going to make -- have you made up your mind about motions
4 and --

5 MR. NEGUS: I'm going to challenge the jury because
6 I don't think there's a single jury panel in California that
7 has enough Black people on it, certainly not the percentage
8 of the -- of the population. And I'm going to make a motion
9 for a change of venue.

10 THE COURT: Well, what -- that's -- that's two things
11 you're doing.

12 MR. NEGUS: Yes.

13 THE COURT: Challenging the jury?

14 MR. NEGUS: I suppose that the most logical thing
15 to do would be change venue first, because then that's --
16 if it were granted, then the jury challenge would be moot.
17 But, yes, those two things.

18 THE COURT: Challenge the jury for inadequate
19 representation of Blacks?

20 MR. NEGUS: Yes.

21 THE COURT: You expect to be prepared on those?
22 You have already done much preparation as to change of venue,
23 and you probably will have some additional materials.

24 MR. NEGUS: Well, the answer to that question depends
25 upon two things: when we -- when we go down there and how
26 much time I have between, whenever we finish up here and when

1 we go down there.

2 THE COURT: I was going to give you a couple days
3 off.

4 MR. NEGUS: I -- as I said, I think I need at least
5 three weeks between the time we finish here and the time we
6 start there. And I don't think I can be prepared otherwise.
7 If I get that adequate time -- I can't be --

8 THE COURT: We know what -- pretty much what we're
9 going to be doing next week. We went through that. How
10 much time are we going to have after that?

11 MR. KOCHIS: Your Honor, when we stop Monday,
12 what direction does the Court want us moving in on Monday?
13 I can have --

14 THE COURT: Well, we're going to have Gregonis here,
15 as I understand it, and he said he had another ten minutes
16 or something like that on matters that he didn't conclude.
17 In any event, I don't mind another ten minutes or twenty,
18 whatever, something brief, between the two of you. But then
19 we're going to have some questions, and I would suggest -- I
20 don't care which one of you takes the witness to try and
21 answer the concerns that I have. I could do it, or either
22 one of you. I don't care.

23 MR. KOCHIS: I plan to ask Mr. Gregonis in that
24 area, and he may not be the only witness in that area on the
25 issue of photography.

26 THE COURT: Well, all right. Whatever. We're going

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1 to spend that day, such as it is, on those issues, limited
2 re-examination by Mr. Negus, and for you, and then the
3 question of the Hitch issue.

4 MR. NEGUS: The Hitch issue?

5 THE COURT: We're still on Hitch.

6 MR. NEGUS: Can we get the evidence in before we
7 argue it?

8 MR. KOCHIS: I think the Court's talking about argue
9 about the A-41 photograph Hitch issue, are you not?

10 MR. NEGUS: Well, I would -- that's --

11 THE COURT: That's what I'm talking about.

12 MR. NEGUS: Well, I'm not -- I want to have Dr. Blake
13 testify on that before we decide anything on A-41. I -- I --
14 not -- I -- I want --

15 THE COURT: I don't think I would decide --

16 MR. NEGUS: Dr. Blake's coming down Thursday, and
17 that's the -- that's the --

18 THE COURT: I don't think I indicated that I was
19 going to make a decision on that. It's going to be hopefully
20 by the end of next week I will make a decision on Hitch.
21 Thornton's, well --

22 MR. NEGUS: John's going to be on Tuesday, Blake's
23 going to be on Thursday, Wraxall apparently is out of town
24 all next week. If we get his report, I may be able to --
25 if Counsel will stipulate, may be able to have Dr. Blake
26 interpret that report for us so we don't have to wait for

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1 Mr. Wraxall to get back. Otherwise --

2 THE COURT: That's the end of it on Thursday, then?
3 I didn't intend to make a decision after Gregonis.

4 MR. NEGUS: Okay. Assuming that -- that we know
5 the results of UU, because that's the most important, and
6 we can stipulate that the results of the other stuff would
7 be -- would have been the same --

8 THE COURT: All right. So that takes care of next
9 week. And then, following that --

10 MR. KOCHIS: Well, Your Honor, I don't think it does.

11 THE COURT: It doesn't?

12 MR. KOCHIS: Let's assume, for example, Monday Mr.
13 Negus and I, in our very organized fashion, handle Mr.
14 Gregonis by eleven or noon. Which area are we going to
15 move onto at 1:30?

16 MR. NEGUS: I will have more stuff, I hope, to give
17 you on the jury stuff. We -- what I have, my --

18 THE COURT: You're going to have to synthesize it
19 for me. You're just inundating me on that material. I --
20 I -- I am simply not going to -- you know, this -- this may
21 be unworkable, Mr. Kottmeier, as -- as you can see. I don't
22 mind having it here, and I don't mind taking a look at it.
23 But there's simply no way that I can assimilate each and
24 every word of that.

25 MR. NEGUS: Well, I --

26 THE COURT: Unless you're able to annotate it for

1 me or argue from it logically in some manner.

2 MR. NEGUS: I'm prepared -- I would like that to be
3 a record as to what the witnesses would say if they -- if
4 they came. I am perfectly -- I think I'll be able to pick
5 out what I considered to be the high points of it and --
6 but I -- I --

7 THE COURT: Well, I'll have information from what
8 you say, not -- not everything that's in those records.

9 MR. NEGUS: And I'll have to read the reports, I
10 suppose, because I -- that's what the -- or, you know, I'll
11 just ask that I -- I mean, I can ask for a continuance in
12 order to try to get everybody down here, because, you know --

13 THE COURT: Counsel, if you have a motion under
14 Penal Code 995, for instance, there's only portions of that
15 transcript that are crucial to you. Hopefully you don't have
16 to call each and every thing as cited in those reports.

17 MR. NEGUS: Well, the -- let's -- let's -- let's
18 take it one by one.

19 MR. KOCHIS: Your Honor, could we have a five minute
20 recess.

21 THE COURT: Certainly.

22 MR. KOCHIS: Appears we're not going to be done any
23 time shortly.

24 (Recess.)

25 MR. NEGUS: As far as the offers of proof, perhaps
26 we could not argue about that now and wait and see, on when

1 we actually get down to it, how it works out. I don't think
2 we're getting -- I don't think I was being very articulate
3 about the issue, and, when I get ready, I'll probably be
4 more articulate.

5 THE COURT: I don't have your tentative list with
6 me again, Mr. -- yes, I do.

7 MR. NEGUS: Anyway, once I get all the stuff gathered,
8 I can be -- we are not finished with any of the nine except
9 one, I think. And as far as B4, B5, B6, as soon as I get
10 all the stuff together, then I'll have all the stuff together
11 and I can at least articulate and argue what I'm asking for.

12 THE COURT: What did you do with reference to 4,
13 turn over to the Defense for testing serological evidence?

14 MR. KOCHIS: That -- when I talk to Mr. Gregonis on
15 Sunday, I'm going to pin him down as to an estimate as to
16 when he's going to be done, and then we're going to go from
17 there. That was my understanding.

18 MR. NEGUS: And his -- if his estimate is soon
19 enough, that might make me happy.

20 THE COURT: What's the 1385 Motion regarding special
21 circumstances?

22 MR. NEGUS: 1385 is the motion to dismiss. That
23 requires we get into the end of the Hitch motion. And --

24 MR. KOCHIS: It's the section of the Penal Code that
25 gives the trial Judge general discretion to dismiss an
26 action with cause in the interest of justice, or words to

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1 that effect.

2 MR. NEGUS: And -- and -- and --

3 MR. KOCHIS: It's not even limited to murder cases
4 or special circumstance cases.

5 MR. NEGUS: There was a case which I don't have a
6 copy of yet which came out of Orange County.

7 THE COURT: Why would you think I'd want to dismiss?

8 MR. NEGUS: I'm not sure that you would, but I want
9 to make the motion on the grounds that you -- that the
10 death penalty, which is what the special had to do with,
11 requires a certain amount of certainty that, based upon
12 the handling of the scene in this case, we can't have. I
13 don't suspect that to be a long one.

14 THE COURT: Well, prepare for the next session some
15 time on Monday to get to that.

16 MR. NEGUS: Well, I need to have -- I -- I'd like
17 to have the Hitch thing decided beforehand. But it depends
18 upon the outcome of the Hitch. I can do another short 1385
19 one, which does -- which has the racial characteristics --
20 racial thing before, which is based upon the same studies
21 as the other stuff.

22 THE COURT: Let's go to your survey, 5a, survey of
23 racial composition in San Diego jurors. You wish to be
24 heard on that?

25 MR. NEGUS: Not yet. I need to get ready on that.
26 I'm still not -- I'll be able to articulate based upon the

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1 materials that I have given you why that's necessary. But
2 I haven't finished that yet.

3 THE COURT: If we do that for 320 people drawn at
4 random, you think that's an adequate foundation?

5 MR. NEGUS: 320 people, if they all answer it, will
6 give you a confidence level of about 5 percent, which is
7 barely enough to get under Buford. If you do it for 500
8 people, you have a much better -- your -- your confidence
9 level goes up quite a bit.

10 So what I was going to request was 500. First 500
11 in the door, whenever he starts at a given time.

12 MR. KOCHIS: Some of the problems that I have with
13 that is that it seems to be the least random method of doing
14 a survey. And that I don't know if the people -- I don't know
15 who's going to be responsible for handing it out. Are they
16 going to be a Defense investigator who's going to pick and
17 choose and make sure he only hands them to the Caucasian
18 people and not to minority members?

19 THE COURT: Oh, wait a minute. This is for -- this
20 is something you want to do in the jury assembly room, right?

21 MR. NEGUS: Yes, same as last time.

22 THE COURT: We can take the 320 that we have, if we
23 did anything at all, and supplement that with 180, selecting
24 at random out of the jury assembly room, you know. We'll
25 take everything on Monday, and they normally have, say,
26 X a day, and everything on Tuesday, and have them for -- fill

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(No omissions.)

17-1

1 THE COURT: I follow you.

2 MR. NEGUS: Because I can't make the motion before
3 I get the data.

4 THE COURT: I'll hear you about the motion for the
5 survey tomorrow -- whenever you're ready, then.

6 MR. NEGUS: Okay. I mean I have no problem with
7 that, I mean I don't see any -- there's no -- I don't see
8 any problem about just scheduling Witherspoon after a two
9 or three -- and then have the testimony. That's a more
10 economical way of doing it.

11 THE COURT: Well, as long as you're not prepared
12 to do it fully now, let's pass it.

13 MR. NEGUS: Okay.

14 THE COURT: Discovery of jury selection procedures,
15 that's something you want me to request from them?

16 MR. NEGUS: Yes.

17 THE COURT: I don't know -- well, I guess it would be
18 idle speculation to make any -- try and pin it down now,
19 but I'm just -- to tell you what I was thinking about, I
20 don't know if they have a 20-mile rule or anything like
21 that.

22 MR. NEGUS: I know. That's what I'd like to find
23 out, plus which list they use, what they do as far as
24 what they do, if anything, about getting -- about the
25 "no responses" to their summonses.

26 Let me just find my notebook on that.

17a

1 In our county, we have a little -- they print up a
2 thing that gives -- it's called --

3 THE COURT: What would you prefer as far as the
4 source of your jurors, in case they have any options?
5 Would you prefer them mostly from the downtown area?

6 MR. NEGUS: Geographically?

7 THE COURT: Yes.

8 MR. NEGUS: Yes.

9 THE COURT: So if they do have a procedure for
10 drawing jurors from the more metropolitan, as opposed to
11 the more far out --

12 MR. NEGUS: I would prefer downtown.

13 MR. KOCHIS: Well, Your Honor, I think what he's
14 entitled to is a representative -- if he's entitled to
15 anything after his change of venue motion -- and I'm not
16 sure what he's entitled to after he gets a change of venue
17 motion, based on the cases we cited last time -- he's
18 entitled to a representative cross section of that community,
19 not a block, not a street, but the community, the community
20 of San Diego, and I think what Mr. Negus initially was
21 wondering is do they go to voter registration lists, do
22 they go to the Department of Motor Vehicles, do they go
23 the police department and pull criminal records? And he
24 might have some legitimate inquiry as to what type of
25 sources they draw from generally, but in terms of city
26 blocks, hotels, two-mile downtown area --

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1 MR. NEGUS: What I meant by that was whatever they
2 standardly use for their downtown courthouse, I mean, I
3 assume that that's not going to -- I'm not talking about
4 within three blocks of the U.S. Grand, but I'm not -- I
5 would -- you've already indicated that North County would
6 be included. I don't remember exactly whether --

7 THE COURT: Well, I don't know, myself. I told you
8 I wouldn't transfer the case to Vista, you know.

9 MR. NEGUS: Well, I assume that they have -- I know
10 that people in North County do not normally get taken to
11 downtown San Diego on the juries.

12 THE COURT: Where does North County begin? I don't
13 know.

14 MR. NEGUS: North County is essentially -- you
15 take a line from I think probably Carlsbad and draw it
16 across, and so like --

17 THE COURT: Well, that would include all of Rancho
18 Bernardo, Fairbanks Ranch?

19 MR. NEGUS: Escondido, all that stuff, Fallbrook,
20 Carlsbad, Oceanside,

21 MR. KOCHIS: La Costa.

22 MR. NEGUS: I'm not sure about Leucadia and Encinitis,
23 but all of the North County.

24 THE COURT: I would hope we wouldn't have people
25 from that far a distance drive to town,

26 MR. NEGUS: They don't normally. All I could say is

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17-4

1 I know that people in North County don't have to go down
2 to San Diego to be on the jury, because that's where my
3 parents live, and they don't.

4 THE COURT: What else can we do? I'm running out
5 of gas, and I've got work to do for tomorrow.

6 MR. NEGUS: Okay. We're easy.

7 THE COURT: Anything else?

8 MR. KOCHIS: Not at this time.

9 THE COURT: You're going to be ready to go on Monday
10 morning at 9:30?

11 MR. KOCHIS: Assuming Mr. Gregonis returns to this
12 county. I'll be ready on something. I hope to have him
13 here at 9:30 to start examining him.

14 THE COURT: All right. Thank you very much.

15 (Whereupon, at 3:25 p.m. an adjournment
16 was taken in this matter, until Monday,
17 July 30, 1984.)

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