

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION:

The points addressed in all sections of this brief except those dealing with insufficiency of evidence and ineffective assistance of counsel arise under the Due Process Clause of the Fourteenth Amendment to United States Constitution along with corresponding provisions of the California Constitution and concern destruction and suppression of evidence and the presentation of false evidence. The legal principles governing this area of law are well settled and were summarized as follows by the Supreme Court in Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972), wherein the Court held:

"As long ago as Mooney v. Holohan, 264 U.S. 103, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3. L.Ed.2d 1217 (1959), we said, '[t]he same result obtains when the State, although not soliciting false evidence, allowed it to go uncorrected when it appears.' *Id.*, at 269, 79 S.Ct., at 1177. Thereafter Brady v. Maryland, 373 U.S. [83] at 87, 83 S.Ct. [1194], at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.'" (Gilio v. United States, *supra*, 405 U.S., 153).

Furthermore, as the High Court pointed out in United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985), "the reviewing court may consider directly any adverse effect that the prosecutor's failure to [disclose] might have had on the preparation or presentation of the defendant's case." (473 U.S., 683).

These principles apply throughout this brief and are incorporated in each section which addresses the prosecution's suppression, destruction, alteration or fabrication of evidence in this case.

I THE PROSECUTION SUPPRESSED EVIDENCE OF A BULLET FRAGMENT REMOVED FROM THE HEAD OF SENATOR ROBERT KENNEDY DURING AUTOPSY AND PRE-OPERATIVE POLICE PHOTOGRAPHS TAKEN OF SENATOR KENNEDY'S EXTERNAL WOUNDS, THEREBY VIOLATING DUE PROCESS.

The so-called Sirhan revolver held eight bullets. The police inventory purported to account for eight bullets. (Ex. 1, Trajectory Report prepared by De Wayne Wolfer). Seven bullets were removed from victims, and an eighth was listed as having been lost in a "ceiling interspace." (*id.*). The inventory lists a single grossly deformed bullet with fragments as having been removed from Senator Kennedy's head. (*id.*). If, however, Senator Kennedy had actually been shot twice in the head, nine bullets would have

been fired in the pantry, and two guns would have been used in committing the crime. There is important evidence suggesting that Senator Robert Kennedy suffered two head wounds and not one. The suppression of this evidence will be explained below and constitutes a violation of Due Process.

Peoples Exhibit 48 consisted of a grossly deformed bullet fragment and smaller fragments removed from the mastoid area of Robert Kennedy's head during surgery in the early morning hours of June 5, 1968. The prosecution maintained that Senator Kennedy suffered only one wound in his head. However, the autopsy report describes two bullet tracks located in Kennedy's head. (Ex. 2, Autopsy, page 10). These tracks diverge from each other at an angle of 45 degrees. The autopsy report reads as follows:

"There are two bullet tracks. One extends slightly anterior to the vertical dimension (15 degrees). The second extends 30 degrees posterior to the vertical dimension, so that the two tracks diverse 45 degrees." (id., 17).

These tracks may evidence two head bullets or one bullet which fragmented within the head itself. If there were two bullets responsible for these two tracks, the total number of bullets which struck victims would be eight. Since the LAPD has stated that one bullet was lost in a ceiling interspace, this would raise the total number of bullets to at least nine, in direct conflict with the LAPD's bullet count.

A. THE PROSECUTION SUPPRESSED PRE-OPERATIVE
PHOTOGRAPHS MATERIAL TO A DETERMINATION OF THE
NUMBER OF HEAD WOUNDS SUFFERED BY ROBERT KENNEDY

Photographs of the back of Senator Kennedy's head prior to the inception of surgery would help resolve the issue of whether Kennedy suffered two separate wounds to the head. Presumably, if the two bullet tracks described by Dr. Noguchi in his autopsy report were created by two separate bullets, this would be reflected in photographs taken of Senator Kennedy's head prior to the inception of surgery.

Such photographs were indeed taken. This is confirmed by a gratuitous remark contained in testimony by Dr. Cuneo, the neurosurgeon who operated on Senator Kennedy. Describing the autopsy photographs, Dr. Cuneo testified:

"No, all that is visible is the discoloration in the back, the soft part of the ear, and there were photographs that the police officers took of this area before the surgery because we knew that after we had operated there would no longer be visible the wound."

(RT 4240).¹

The existence of these photographs is also confirmed by police files withheld from the public until 1988. (Ex. 8, page 656, Records of Special Unit Senator ("SUS"), California State Archives). However, this photographic record of Robert Kennedy's head prior to surgery was suppressed at trial. This is clear for two reasons.

First, Dr. Cuneo was only shown autopsy photographs rather than the pre-operative photographs taken by a police photographer. (4239). As Dr. Cuneo remarked, the photographs he was shown depict the area only after the "area of where the gunshot would have occurred has been removed." (RT 4239).

¹ Numbers appearing in parentheses after the letters "RT" coincide with page numbers of the Reporter's Transcript of Petitioner's trial.

It was never explained why autopsy photographs were introduced during the questioning Dr. Cuneo instead of the preoperative photographs taken by police, particularly in light of the fact that the prosecutor had asked, "And do you see there the area of the gunshot wound that you have testified to?" (RT 4239). Also, Dr. Cuneo was a treating physician. Presumably, he would have been able to authenticate pre-operative photographs. Yet although he testified that such photographs had been taken, he was never asked to authenticate them or even describe them during his testimony. The fact that these photographs were not shown to Dr. Cuneo is at best most curious.

Secondly, it is equally strange that the LAPD Property Report, which lists 155 items of evidence, does not even mention the existence of these critical pre-operative photographs. (Exhibit 3, LAPD Property Report).

Finally, the pre-operative photographs described by Dr. Cuneo's testimony were never presented at trial.

In sum, it is reasonably probable that the prosecution suppressed pre-operative photographs which could possibly have revealed two head wounds rather than a single wound, thereby arguably disclosing the utilization of a second gun during the crime.

B. THE PROSECUTION SUPPRESSED
THE EXISTENCE AND INFORMATION
INDICATING THE DISAPPEARANCE OF
AN ADDITIONAL HEAD BULLET FRAGMENT REMOVED
DURING THE AUTOPSY ON JUNE 6, 1968.

The fatal bullet and its fragments from the right mastoid area of Senator Robert Kennedy are collectively described by Dr. Noguchi as gunshot number 1. Various portions of the fatal bullet (gunshot number 1) were removed on two separate days. During surgery on June 5, 1968, the major portion of this bullet and its fragments was "removed from the operating room by Dr. Wertlake, Good Samaritan pathologist, and taken into custody. . . ." (Ex. 3, LAPD Property Report, SUS, 773). Later that afternoon, the fatal bullet and fragment were "released to FBI Special Agent E. Rhead Richards, Jr, credential number 4560, on June 5, 1968 by Sgt. W. E. Brandt, #10004." (Ex. 3, LAPD Property Report, p. 777 SUS).

During the course of Dr. Noguchi's autopsy following the Senator's death, still another bullet fragment from gunshot number 1 was removed. This fragment measured 6mm x 3mm x 2mm. (Ex. 2, RFK Autopsy Report). The FINAL SUMMARY of this autopsy report reads as follows:

"GUNSHOT WOUND NUMBER 1
(FATAL GUNSHOT WOUND)

ENTRY: Right mastoid region.

COURSE: Skin of right mastoid region, right mastoid, petris portion of right temporal bone, right temporal lobe, and right hemisphere of cerebellum.

EXIT: None.

DIRECTION: Right to left, slightly to front, upward.

BULLET RECOVERY: Fragment (see text)." (Ex. 3, Autopsy Report, p. 2). [290].

In spite of the words "see text", there is no reference to the recovery of gunshot no. 1 bullet fragment in the RFK autopsy report. (Ex. 2, Autopsy Report). On the other hand, gunshot number 3's Bullet Recovery is described in the "Final Summary" of the Autopsy Report at page 4 and again in the text on page 24 of the same Autopsy Report.

(Ex. 2). The contrast between the Autopsy Report's description of gunshot number 3's recovery and the non-existence from the same report of the promised subsequent reference to gunshot number 1 is noteworthy and supports a strong inference that the autopsy head fragment was suppressed.¹ As has already been mentioned, bullet fragments were removed from Senator Kennedy's head during surgery and turned over to police in two batches. The bulk of the fragments appear in a jar bearing the designation Item # 24 and in a smaller vial labeled Item # 25 containing one barely visible speck. (Exhibit 4, copy of photograph taken by criminalist Allen Gilmore at the California State Archives; Ex. 5, Declaration of Rose Lynn Mangan). But according to the autopsy report, Dr. Noguchi found a fragment measuring 6mm x 3mm x 2mm during the autopsy. (Ex. 2, autopsy report, page 10). Other than this reference in the autopsy report, there is no record of this fragment recovered by Dr. Noguchi. No reference to such a fragment appears in the property report, (Exhibit 3). This missing fragment is not described in the trial testimony, and it is not found at the Archives. (Ex. 5, Mangan Declaration). Furthermore, no evidence envelope exists for this missing bullet fragment recovered during the autopsy. (id., Mangan Declaration). In fact, the autopsy report does not even disclose the recovery of this bullet except for the words, "BULLET RECOVERY: Fragment (see text)." (Supra). By contrast, the Autopsy Report discloses the recovery of the bullet later marked as Peoples' Exhibit 47 in the vicinity of the sixth cervical vertebrae of Senator Kennedy's neck. (Ex. 2, pages 10, cf. p. 24). Where is this crucial piece of evidence, and how could it have disappeared?

There is one ambiguous reference in the trial record to this specific autopsy fragment. Prosecutor Fitts makes the following comment:

"MR. FITTS: I have a large evidence envelope and, for the purpose of identification, it contains, in the upper left-hand corner the designation Item Numbers 26 and 27. It contains two vials containing bullet fragments.

"May that be marked as People's next in order, as People's 48?

"THE COURT: In evidence, Mr. Cooper?

"MR. COOPER: I have no objection, your Honor.

"MR. FITTS: And the next, Mr. Cooper, is a bullet

fragment contained with the vials as part of Exhibit 48, which was removed from the head of Senator Robert F. Kennedy, both during the course of surgery performed upon him prior to his death and later upon the autopsy performed subsequent to his death.

"MR. COOPER: So stipulated." (RT 4130).

It was never explained how this one fragment elliptically described in Fitts' last remark could possibly have been removed both during surgery and during the later autopsy. Was Fitts attempting to gloss over something for which he could not account, to wit, a by-then non-existent bullet fragment removed by Dr. Noguchi?

Logically, this fragment should have been People's 49. It is certainly not part of Exhibit 48. The reason this is so clear is that People's 48 is accompanied by an evidence envelope which reads "217 PC," rather than PC 187, which means that its contents were recovered prior to Senator Kennedy's death. Instead, People's 49 is a photographic enlargement of the largest bullet fragment of Peoples' Exhibit 48, and

¹ Gunshot number 2 passed through Senator Kennedy and was not recovered. (Ex. 2, Autopsy Report, p. 3).

Peoples' Exhibit 50 consists of two bullet fragments removed from victim Paul Schrade. (RT 4131). What happened to the fragment removed from Robert Kennedy's head during the autopsy?

What might such a piece of evidence show? Might not the weight of the fragments recovered during surgery, when combined with the weight of the fragment removed by Dr. Noguchi, yield an excessive weight over and above that of one bullet?

There are unresolved questions about the presence of two bullet tracks. This would be consistent with the presence of two bullet tracks and the strange disappearance of pre-operative photographs that could confirm their having originated with two separate entry wounds. The unexplained disappearance of a substantial bullet fragment removed from the brain of Senator Kennedy during the autopsy raises the most troubling questions.

C.EVIDENCE OF SUCH SUPPRESSION IS
PROVIDEDBY ALTERATIONS AND IRREGULARITIES
CHARACTERIZING THE LABELING AND
ORGANIZATION OF ITEMS OF EVIDENCE
LISTED IN THE POLICE PROPERTY REPORT.

Evidence that this fragment was simply suppressed or destroyed is provided by a clearly apparent alteration of the Peoples's 48 evidence tag. The original evidence envelope describes the offense as PC section 217. (See Ex. 4, photograph of evidence tag taken by criminalist Alan Gilmore on March 11, 1994 for Rose Lynn Mangan at the California State Archives; Ex. 5, Mangan Declaration). Yet the evidence inventory report prepared by Patrick Garland as part of Court Order Number 2 during a 1975 judicially mandated reexamination of bullets and other evidence describes this envelope as a 187 PC (murder) on June 5, 1968, the day before Senator Kennedy's death.

As has already been mentioned, the envelope accompanying Peoples' Exhibit 48 included one vial (Item # 25) and one jar with a black top (item #24), respectively. However, the numbers 24 and 25 the envelope were renumbered 26 and 27 in darker ink. The numbers 24 and 25 are clearly visible below the darkened numbers 26 and 27. At some time, someone altered this evidence envelope by changing the numbers 24 and 25 to read 26 and 27. The accompanying photograph, (Ex. 4), clearly shows this alteration.

It will be recalled that Dr. Noguchi found two bullets or fragments during his autopsy. One was People's 47, the neck bullet. The other was the above-described 6mm x 3mm x 2mm fragment removed from Kennedy's head, which is mentioned only in the autopsy report. If the property report were organized by topic rather than in the order in which an item was obtained by police, item numbers 26 and 27 would belong to the two objects removed by Dr. Noguchi during the autopsy.

One of those items, the neck bullet, survived. The other, however, has disappeared. The neck bullet appears in the Property Report as Item number 53, completely separate from the items 24 and 25, the head bullet fragments removed during surgery.

The head bullet fragment removed during the autopsy is not listed at all.

Without question, the absence of any listing in the Property Report of the autopsy head fragment is entirely unjustifiable. What happened to this item?

One indication of what happened to this critical evidence is provided by the neck bullet's listing as item 53 rather than as item 26 or 27. Along with other anomalies, this

seeming irregularity reveals a serious problem with the Property Report's numbering system. This is apparent from the following chart summarizing the LAPD Property Report in this case, Exhibit 3:

<u>ITEM NUMBERS</u>	<u>TOPIC</u>	<u>DATE OF ACQUISITION</u>
1-10	Items recovered from Sirhan.	June 5,
	12:45 AM	
11-12	Revolver and spent casings	June 5, 1:45 AM
13-23	victim clothing, blood, etc.	June 5, 12:40 AM
		- 3:30 AM
24-25*	[NUMBERS SKIPPED IN SEQUENCE]	
26 *	"Vial (glass) w/clck top, containing sponge & bullet fragment"	June 5 see above
27 *	"Vial, glass, w/stopper containing 1 bullet fragment"	June 5 7:00 AM
24 *	"Photographs taken by George Clayton prior & Subsequent to the 217. The photos show various groups & persons in & about the crime scene. Mkd CCC for I.D."	June 5 12:45 AM
25 *	"35mm film container containing a 35% film negative strip with 30 sep. pictures. Mkd CCC for I.D. Clayton, DOB 2-4-47, was at the scene prior & Subsequent to the incident. Through out [sic] the incident Clayton took 30 photographs with his camera. Clayton asked ofcs. at the scene if they would like to have his film. The film as taken to Ramp. Dets. where Insp. McCauley advised that the film strip be taken to Photo Lab. and developed. Prop. bkd at Tamp. Sta. under DR# 68-521 466."	June 5 12:45 AM
28	Floor plan of hotel	June 5 1:30 AM
29-44	Taken from Sirhan's residence	June 5 11:30 AM
45 *	Evans bullet fragments	June 5 unknown
46-51	Items taken from Sirhan's vehicle	June 6 11:30 PM
52	letter to Kennedy left at hotel	June 5 12:00 PM
53 *	[Kennedy neck bullet, which became People's Exhibit 47]	June 5 9:30 AM
54	citation	June 5 11:30 AM
tape		June 6 11:25 AM
55		
56 *	Weisel bullet	June 6 5:25 PM
57 *	Schrade bullet	June 6 5:25 PM
58-68	female clothing	June 6 6:00 PM
69	Film	June 7
70	Photos	June 7
71	material from Sirhan residence	June 7
72-77	Sirhan's clothing	June 7
78-79	Sign in sheets at gun range	June 8
80-81	clothing of Edwin Ness	June 9
82	paper from Sirhan's car.	June 9
83-101	taken from Sirhan's car pursuant to warrant.	June 15
102-103	fire department photographs of hotel	June 19
104	.25 cal. bullet	June 20
105 *	Stroll bullet	June 5
106	.22 cal. bullets found at college where Kennedy spoke on 5/20/68	June 5
107-112	Documents pertaining to Sirhan residence or neighbor	June 6
113 *	Goldstein bullet	June 5
114-15	material associated with Goldstein bullet.	June 5

116	tape	June 27
117-120	crime scene material	June 28
121	gun range material	July 3
122-123	material from another Kennedy speaking engagement	July 15
124	tape	July 15
125	notebook	July 17
126	x ray of Sirhan	July 18
127-138	Sirhan medical, student and driving documents	July 23
139	helmet	August 1
140-142	Sirhan bible study material	August 14
143	Tape of Frank Burns	August 14
144	Goldstein pants	August 19
145	a polka dot dress	August 20
146	Sirhan Rosicrucians application	August 22
147-151	shell casings from gun range	August 28
152	bag with dress and letter	October 31
153-154	checks from ranch	January 14, 1969
155	Corona police gun range sign in sheet	January 14, 1969

Although the organization of the Property Report is generally chronological, there are notable exceptions. Bullets from shooting victims Stroll and Goldstein, Items numbers 105 and 113, respectively, were both recovered on June 5 but are listed after items recovered on June 20. The Kennedy neck bullet, Item 53, was received at 9:30 A.M. on June 6 but is listed after items received later that morning at 11:30 A.M. and 12:00 P.M.. Item numbers 24 and 25 are initially skipped. Items 26 and 27, (in reality, numbers 24 and 25, respectively) are bullet fragments removed from Senator Kennedy's head during surgery. Items 24 and 25 are listed next, out of order, and are described as George Clayton as photographs received by LAPD before the head bullet fragments were obtained. Thus, the fatal bullet and its fragments (item 24 and 25) share the same item number as the George Clayton photograph.

The numbers 24 and 25 also appear on the vials containing the Kennedy head bullet fragments removed during surgery. The numbers 24 and 25 were initially placed on the evidence envelopes for these two items but were then respectively replaced by the superimposed numbers 26 and 27 in heavy black ink. (Supra). The alteration of the evidence tag and the initial designation of the fragment vials as items 24 and 25 are clearly depicted in Exhibit 4, a photograph of these items taken at the California State Archives. (Supra).

Furthermore, the Property Report creates the false impression that the Schrade and Weisel bullets are listed in sequence of proper acquisition. It does this by designating June 6 as the date upon which these bullets were acquired by LAPD. But as is apparent from Exhibit 6, the hospital tissue examination form for the Schrade bullet is dated June 5, 1968. (Exhibit 6, photograph of Tissue Examination form 24 for the Schrade bullet). Exactly the same is true of the Weisel bullet, as to which the tissue examination also occurred on June 5. (Exhibit 7). The evidence tags for the Schrade and Weisel bullets, (Exhibits 6 and 7, respectively), contain the dates of June 6, yet both bullets were removed and subjected to tissue examination on June 5. Given the importance of these bullets to the investigation, it is simply inconceivable that LAPD would have allowed them to set unrecovered for a day. If these bullets were not booked immediately, where were they in the interim? Who had custody of these bullets during this gap? The Property Report glosses over this glaring problem and creates a false impression that it provides a listing of items of evidence organized in sequence of

acquisition. Significantly, the label on the vial containing the Schrade bullet describes the date as "6 _____" (Ex.6, supra, photograph of Schrade bullet vial.)

In general, the Property Report appears to be organized chronologically--except for bullets. There is one other exception to this rule of organization: the photographs described as Items 24 and 25 as also out of sequence, and this is apparent from the numbers attached to them. These exhibits are listed after the Kennedy head bullet fragments from surgery, which were originally given the numbers 24 and 25 and which were thereafter renumbered 26 and 27. The photographs are listed in the Property Report as having been taken from George Clayton, who, the Report states, voluntarily surrendered them after appearing at the police station. The photos are carefully described in the Property Report as depicting events before and after the assassination. It has been discovered that in actuality, photographs seized at the Ambassador Hotel from amateur photographer Jamie Scott Enyart photographs were filed under the name of George Clayton in the State Archives, which had long represented that Enyart's photographs could be found. What is the explanation for this? (Infra).

In a word, the Property Report lists items of evidence in their rough sequence of acquisition with the significant exceptions of bullets and the "Clayton" photographs. It also misrepresents the date upon which some bullets were acquired by police, creating the impression that its listing of items is more chronological than was the case. ¹

As shall be shown below, grave doubt surrounds the authenticity of those items listed in the Property Report which appear out of their actual sequence of acquisition by police, i.e., (1) the bullets and (2) the "Clayton" photographs, which share the same item numbers as bullet fragments.

D. SUMMARY

The foregoing discussion demonstrates that an extra or surplus fragment of bullet described in the autopsy report as having been recovered during the autopsy was suppressed. No such bullet fragment is listed in the Property Report, the trial record, the grand jury record or at the Archives, although this fragment was clearly and definitely described in the autopsy report. As was mentioned above, photographs taken before surgery which could show the possible presence of the two head wounds suggested by the autopsy report's description of divergent bullet tracks were suppressed and are nowhere to be found. Further, the numbering system characterizing the property report shows that unlike other kinds of evidence, bullets and bullet fragments were withheld or removed from the booking process without explanation or justification until significantly after their acquisition. An unexplained gap in the Property Report's numbering system is consistent with the suggestion that the autopsy head bullet, which would have been received by police along with the autopsy neck bullet, was removed from police custody never to reappear. To reiterate, the numbers 24 and 25 are initially skipped. Items 26 and 27 are a vial and a jar containing bullet fragments removed during surgery. The numbers 24 and 25 are then reassigned to the so-called "Clayton" photographs--the legitimacy of which is also highly questionable. The autopsy neck bullet then appears far down the list, well out of sequence of acquisition. Along with the other bullets, it is strangely out of acquisition sequence. The head bullet fragment described in the

³ It should be noted that "SUS", i.e., "Special Unit Senator", was composed of specially selected officers according to the SUS report.

autopsy report has vanished without a trace in the record beyond the autopsy report, which conclusively documents its existence.

Petitioner requests an evidentiary hearing so that questions raised by the foregoing discussion can be resolved. It is apparent that the prosecution suppressed pre-operative photographs taken by police and documented by Dr. Cuneo's testimony suppressed. It is also apparent that the police suppressed a significant bullet fragment removed from Senator Kennedy's head during the autopsy. Petitioner is entitled to an evidentiary hearing at which he can develop further proof of these two instances of evidentiary suppression.

Petitioner's right to a fair trial was impaired by the foregoing actions. The suppressed autopsy head fragment and the suppressed pre-operative photographs could have undermined the prosecution's single-assailant theory of the case.

II
THE PROSECUTION SUPPRESSED THE NECK
BULLET ACTUALLY REMOVED FROM SENATOR KENNEDY
DURING THE AUTOPSY AND SUBSTITUTED
ANOTHER BULLET IN ITS PLACE,
THEREBY VIOLATING DUE PROCESS.

A bullet was removed during the autopsy of Senator Kennedy in the vicinity of the sixth cervical vertebrae. (Ex. 2, Autopsy Report, p. 4). The Autopsy Report states that Dr. Noguchi placed the initials TN31 on the base of the Kennedy neck bullet. (Ex. 2, p. 24). This bullet later became Peoples' Exhibit 47 at trial. Yet when this exhibit was examined in 1975, court appointed panel member Patrick Garland wrote that the base of the bullet presented to him by the court clerk as Peoples Exhibit 47 bore the letters "DW" "TN". (Ex. 13, Court Order Number 2, Inventory). The 1975 panel inventory describes Peoples Exhibit 47 as follows:

"Contents:

1 copper colored coated bullet, hollow point ID mark "DW" (base) "TN" (base)." (id).

This bullet also appears out of sequence on the Property Report. (Ex. 3). (Supra). This glaring contradiction strongly suggests that the bullet introduced into evidence at trial as the Kennedy neck bullet and purportedly identified with Sirhan test bullets was not, in fact, the Kennedy neck bullet after all.

Everything that is known about Peoples Exhibit 47 supports this. What is known is the following:

1. On June 6, 1968, a bullet was removed from the vicinity of Robert Kennedy's sixth cervical vertebrae by Dr. Thomas Noguchi, who placed the initials "TN31" on its base and recorded this fact in the autopsy report. (Ex. 2, Autopsy Report, page 24). (The bullet removed by Dr. Noguchi shall hereinafter be described as "TN31"). Dr. Noguchi drew a picture of this bullet on the evidence envelope containing it and also stated in his autopsy report that a drawing was included in the autopsy report. (Ex. 14, Photograph of Peoples' Exhibit 47 envelope; Ex. 5, Declaration of Rose Lynn Mangan). However, the autopsy report as released does not include such a drawing. (Ex. 2, Autopsy Report). The missing autopsy drawing of "TN31" is one of the first of many irregularities surrounding the handling of this bullet.

2. On June 6, the bullet is given by Dr. Noguchi to LAPD Sgt. Jordan, according to the Autopsy Report. (Ex. 2, page 24).

3. That same day, June 6, the bullet was received by LAPD criminalist De Wayne Wolfer and compared by him with test bullets purportedly fired from the "Sirhan" revolver.

4. Wolfer testified from the outset that he achieved a "match" between those test bullets and the Kennedy neck bullet. (Ex. 15, Grand Jury Transcript, p. 257).

5. The neck bullet appears on the Property Report as Item # 53. (Ex. 3). This presents two important irregularities:

a. The bullet appears out of order, as explained in the above analysis. (See previous section of brief).

b. The Property Report does not contain a reference to "TN31" or any other marking. (Ex. 3). There is a space on the LAPD Property Report form for identification marks, but this space is left blank as to Item #53, the Kennedy neck bullet. On the other hand, the Property Report describes the Weisel bullet by noting its identifying initials, LMO. (Id).

The effect of the foregoing circumstances is simply that there is no way of determining whether the bullet given to Wolfer and described as the neck bullet was in fact "TN31". The LAPD Property Report omits reference to markings on the Kennedy neck bullet--markings the existence of which is confirmed by the Autopsy Report.

6. On June 7, 1968, a bullet is shown to Dr. Thomas Noguchi before the Grand Jury. Dr. Noguchi identifies the bullet as the one he removed from Kennedy's neck and specifically mentions that it bears the mark TN31 which he placed on it. (Ex. 15, Grand Jury Transcript, p. 22).

7. On February 21, 1969, a fourth irregularity emerges. A secret stipulation is reached outside Sirhan's presence before the trial court. The defense agreed that the bullets yet to be introduced by the prosecution are all presumed to be authentic and stipulated to their admissibility. At the time at which the stipulation is obtained, prosecutor Fitts admitted in chambers that the reason for the stipulation is that the prosecution does not have foundation at this time, "as I will concede." (RT 3967). In other words, the prosecution cannot establish the authenticity of the bullets and is aware of their possible if not probable inauthenticity.

8. Three days later, all bullets are introduced by stipulation. (RT 4129-4130). Wolfer is never asked to describe any of the bullets he examined, and consequently, he was never asked whether the "neck bullet" he "matched" to a "Sirhan test bullet" was in fact "TN31". (id). This is an irregularity of major proportions.

9. Dr. Noguchi testifies at trial but is never even asked to view the bullet, although he is the one who removed it. (RT 4503-4534). This is an equally glaring irregularity. In order to establish a chain of custody, Dr. Noguchi's identification testimony would be essential, and this testimony would have included a reference to the markings he placed on the bullet's base. The stipulation obviated the need for any authentication.

bullet" was the same bullet as the one removed from Kennedy's neck by Dr. Noguchi.

10. In 1974, Dr. Noguchi appeared before the Board of Supervisors and is shown a bullet. He identifies it as the one he removed from Kennedy's neck and states that it bears the mark "TN31". (Ex. 17, Board of Supervisors hearing transcript, p. 80).

11. This bullet was photographed with a Balliscan camera belonging to the Coroner's office pursuant to a court order issued at the request of Supervisor Baxter Ward. The balliscan photograph made at this time matches the balliscan photograph made earlier by criminalist William H. Harper. (Ex. 17, Noguchi Board of Supervisors

The

transcript, p. 80). All of this indicates that whenever he was shown a bullet, Dr. Noguchi was shown "TN31", the actual bullet he removed from Kennedy's neck.

12. In 1975, a panel of experts was appointed by Superior Court Judge Robert A. Wenke to independently review Wolfer's findings. Initially, the court indicated an intention to appoint Dr. Robert Jolling to head up the panel. However, this task was given to Patrick Garland. (Ex. 18 and 19, Draft #1 and # 2, respectively, of Court Order # 1).

13. As a condition of the panel investigation, the Court required that Wolfer certify that the bullets to be placed before him in court were the same ones he examined in 1968. (Ex. 19, par. 6).

14. Patrick Garland examines the bases of the bullets and notes that the Kennedy neck bullet shown to him has the marking "DW" "TN" on the base. For the first time in the history of the case, affirmative evidence of a substitute Kennedy neck bullet emerges. (Ex. 13, Inventory incorporated in Court Order # 2). This is an irregularity of major significance. The identification markings on the base of the bullet examined as the 1975 "Peoples' Exhibit 47" are materially different from the "TN31" marking placed on the Kennedy neck bullet and identified by Dr. Noguchi in his Autopsy Report, in his Grand Jury testimony and in his testimony before the Board of Supervisors.

15. How could this irregularity have been detected? Patrick Garland need only have examined the autopsy report or a transcript of Dr. Noguchi's Grand Jury testimony or Board of Supervisors testimony, wherein the neck bullet is specifically described as having "TN31" on its base. The first court order authorizing the examination of evidence listed the Autopsy Report as among the items to which the panelists were to have access. (Ex. 18). However, an amended court order removed the autopsy report (along with Senator Kennedy's clothing and the shell casings) from the court's evidence list. (Ex. 19). The transcripts of Dr. Noguchi's Grand Jury and Board of Supervisors appearances were never included in the access list. Thus, the withdrawal of the autopsy report from the access list (compare Court Order numbers 1 and 2) deprived Patrick Garland of the one means through which he might have noticed the all-important fact that the actual neck bullet was "TN31" rather than the bullet given to him as the neck bullet, "DW" "TN".

16. Was the bullet examined by the panelists the same as the bullet that was examined and photographed with the balliscan camera by William Harper in 1970 and later at the Coroner's office in 1974? The court did not furnish the panelists with a balliscan camera, even though the court-ordered examination arose in response to public pressure that began with the Board of Supervisors' hearing at which Dr. Noguchi testified and identified a balliscan photograph of Peoples' Exhibit 47, "TN31". Consequently, there was no way to compare the bullet authenticated by Dr. Noguchi before the Board of Supervisors with the bullet examined by the panel of experts. This is all the more true in light of the fact that while the autopsy report describes the bullet by reference to linear measurements, the 1975 panelists described the bullets by weight. (Ex. 2, Autopsy Report, p. 24; Ex. 21, Panel members' Work Sheet).

The panel simply assumed that "DW" "TN" was the correct neck bullet and confined itself to an assessment of Wolfer's "match" conclusions. The question of whether Wolfer examined a faked neck bullet was never addressed or considered. Information and equipment that would have allowed the panel to recognize the importance of this question was either not given to or was withdrawn from the panel.

17. All seven panelists reached the same conclusion: Wolfer's opinion testimony matching the Kennedy neck bullet with his test bullets was erroneous and

insupportable. In their "Comprehensive Joint report of the Firearms Examiners" (Final Joint Report), (Ex. 23), the panelists wrote, "It cannot be concluded that Exhibit 47 [the Kennedy neck bullet], 52 [the Goldstein bullet] and Exhibit 54 [the Weisel bullet] were fired from the Sirhan revolver." (id., pp 1-2).

18. The panelists photographed the bullets and concluded that the "Kennedy Neck Bullet" shown to them was the same as the bullet depicted in "Special Exhibit 10," a comparison photomicrograph produced by Wolfer after years of LAPD claims that no photomicrographs of the bullets had been taken. (Ex. 22, Bradford Report, p. 6; Exhibit 26, Initial Joint Report; Ex. 32, transcript of Wolfer deposition in *Wolver v. Blehr*, p. 101).

19. Assuming that Wolfer was correct in his 1975 conclusion that the panelists were shown the same bullets as the ones he examined in 1968, and further assuming that the bullet shown to Wolfer in 1975 was actually the same one that was examined by Patrick Garland during the same time period, it would follow that Wolfer was given a substitute neck bullet for his 1968 examinations, namely, "DW" "TN", instead of "TN31", the true neck bullet.

20. Special Exhibit 10 is thus in reality a comparison photomicrograph of the purported Kennedy neck bullet and another bullet, which Wolfer claimed in his 1975 Superior Court testimony to be a "Sirhan test bullet" but which the examiners found to be the Goldstein bullet. (Ex. 22, 23; Exhibit 16, Kranz report, p. 56).

21. What further demonstrates that the bullet examined by the panelists as Peoples Exhibit 47 was not the true Kennedy neck bullet is the fact that while the panelists unanimously concluded that the bullets they examined (including the neck bullet) all were two-cannelure bullets, (Ex. 23, par. 2), Professor Herbert Leon MacDonnell found that Peoples Exhibit 47 was a one cannellure bullet. (Exhibit 24, Affidavit of Herbert Leon MacDonnell, p.1). Since the Harper Balliscan photograph matches the Balliscan photograph made at the Coroner's office and identified by Thomas Noguchi in his Board of Supervisors' appearance describing "TN31", "TN31" was a 1-cannellure bullet rather than the 2 cannellure bullet described by the panelists in their Comprehensive Joint Report, (Ex, 23)--a bullet which Wolfer was required by the court's order to identify as the same neck bullet he had examined in 1968 in order for the panel examination to proceed. (Ex. 19, par. 6). This further confirms that Wolfer and the panel did not examine the true Kennedy neck bullet.

The problem identification markings and the panel's failure to take its own balliscan photographs means but one thing: its report does not either impeach or even address Professor MacDonnell's extraordinary findings.

22. The cannellure issue raises additional troubling questions. According to Omark, which manufactures Cascade Cartridges, all .22 long Cascade ("CCI") bullets were 2-cannellure bullets. (Ex. 25, Omark correspondence of September 25, 1994 to Herbert MacDonnell). Police records state that the shell casings removed from Sirhan's revolver were all manufactured by Cascade Cartridge Company. (Ex. 3, item 12). (It should be noted that no identification markings were placed on the Sirhan shell casings removed from the "Sirhan" gun at the time of its acquisition by police. (id)). Thus, if Sirhan shot Senator Kennedy, "TN31", the actual Kennedy neck bullet, would have been a 2 cannellure bullet. "DW" "TN" was a 2 cannellure bullet, (Ex. 23, Comprehensive Joint Report of Firearms Examiners, par. 2), but "TN31" was found to be only a 1 cannellure bullet by both criminalist William Harper and Professor MacDonnell. (MacDonnell Affidavit, p.1, par. 1). "TN31", the true Kennedy neck bullet, thus did not come from the "Sirhan" revolver's eight shell casings. If Sirhan used

H53725, the serial number of the so-called Sirhan revolver, he is not the one who shot Robert Kennedy.

23. Furthermore, Professor Herbert MacDonnell concluded that the bullets presented at the crime scene were not of the same manufacture. Professor MacDonnell pointed out that whereas the Kennedy bullet Balliscan photograph he examined ("TN31") was a one-cannelure bullet, the Weisel bullet was a two-cannelure bullet. (Ex. 24, MacDonnell affidavit, page 1). This means simply that the true Kennedy neck bullet and the Weisel bullet were not from the same batch of ammunition. (id). All of the shell casings removed from the "Sirhan" weapon were "CCI" (i.e. Cascade Cartridge company) cartridges. (Ex. 3). There is thus no evidence that Sirhan's ammunition came from two different batches. This raises a powerful inference that different shooters were responsible for the Kennedy neck and Weisel wounds--unless some person other than Sirhan used bullets from different ammunition manufacturers in firing both the Weisel and the Kennedy neck bullets.

24. The panelists unanimously concluded that the bullet "matched" in Special Exhibit 10 to the "Kennedy neck bullet" was really the bullet removed from victim Ira Goldstein rather than a Sirhan test bullet, as Wolfer claimed. (Ex. 22, 26). Thus, according to the panelists, Wolfer actually matched two victim bullets rather than having matched the Kennedy neck bullet with a Sirhan test bullet, as he had claimed in his testimony.

25. This completely undermines the prosecution's claim that Wolfer had matched the Kennedy neck bullet with a Sirhan test bullet.

26. As has been shown, the bullet matched in Special Exhibit 10 with what the panelists described as the "Goldstein Bullet" was really a substitute Kennedy neck bullet ("DW" "TN") and not the real item ("TN31").

27. Further, the "Goldstein" bullet depicted in Special Exhibit 10 is also illegitimate. There is no indication in the panelists report of an X mark on the base of this bullet, (Ex. 13). However, such a mark was placed on the Goldstein bullet by Dr. Max Finkel at the time it was removed from shooting victim Ira Goldstein at the hospital. (Exhibit 38, SUS pages 183, 951).

28. Therefore, what is actually shown in Special Exhibit 10 are two matching substitute victim bullets and not, as the LAPD maintained, a match between a Sirhan test bullet and the Kennedy neck bullet. The panel was also mistaken. Contrary to the panel, Special Exhibit 10 does not match the Kennedy neck bullet with the Goldstein bullet. Special Exhibit 10 "matches" a fake Kennedy neck bullet ("DW""TN") with a fake Goldstein bullet (no X on base). Wolfer, in short, really only matched two fake victim bullets with each other in Special Exhibit 10. No authentic bullets, whether "test" or victim bullets, were involved in the process of creating Special Exhibit 10. The entire exhibit was a fraud, and it was manufactured in order to support Wolfer's testimony purporting to "match" Peoples' Exhibit 47 with a Sirhan test bullet.

29. In 1992, Robert Jolling, who had originally been considered by the court to head the 1975 panel of firearms examiners, met with Sirhan researcher Rose Lynn Mangan and allowed her to inspect a negative. (Ex. 5, Mangan Declaration.) Jolling later sent Mangan a photograph made from the negative he had shown her. A copy of this photograph is attached hereto as Exhibit 27.

30. Jolling advised Mangan that the negative he showed her was in actuality the original Special Exhibit 10 which Los Angeles County Coroner Thomas Noguchi told Jolling that he had removed from evidence and given to Jolling, saying at the time, "Hold onto this for safekeeping. We may need it some day." This suggests that the Los

Angeles County Coroner, Dr. Thomas Noguchi, strongly suspected that a major cover-up was in progress and that its extent and dimensions were so serious that nothing short of his removal of a crucial item of evidence for safekeeping would allow the truth to someday emerge. As it turned out, Dr. Noguchi's apprehension of a massive cover-up was well-founded. The foregoing discussion demonstrates that Special Exhibit 10 was the result of an attempt by the LAPD to simply fabricate evidence of a match between the Kennedy neck bullet and a Sirhan test bullet. In actuality, it documented nothing more than a "match" between two imposter victim bullets.

31. Special Exhibit 10 is thus affirmative evidence of a police attempt to manufacture evidence of a link between the "Sirhan" gun and the Kennedy neck bullet. It is because this Exhibit actually shows a police cover-up of the first magnitude that the LAPD concealed this Exhibit altogether. The District Attorney's office maintained that it knew nothing of Special Exhibit 10 until 1976. (Exhibit 16, Kranz report, p. 51). An undated document of unidentified origins located in the SUS file and entitled "Confidential Addenda to the Lowenstein Inquiry," (Ex. 28), states:

"There exists a photograph of the Kennedy bullet and a test bullet taken through a comparison microscope showing one Land comparison.

" . . .

" . . . The photograph shows identical Land widths between the Kennedy and test bullet. It also shows a comparison area between the shoulders of the Land widths.

"The existence of this photograph is believed to be unknown by anyone outside of this Department. It should be effective rebuttal evidence were this case ever to be retried. However, the release of this information at this time would be susceptible to criticism because lay people would in all probability have difficulty deciphering the photograph. The issue as to this not being revealed at an earlier time may further make its authenticity suspect, particularly to the avid, assassination buff." (id).

By its own admission, the LAPD suppressed Special Exhibit 10 prior to Petitioner's trial. Because, as the 1975 panelists unanimously concluded, Special Exhibit 10 did not in fact depict the victim-test bullet match that Wolfer claimed it to confirm, this Exhibit would have suggested a police effort to "frame" Sirhan Sirhan. The panelists had no difficulty reaching the conclusion that the "authenticity" of this exhibit was "suspect", and that is why LAPD caused it to be suppressed, just as is confirmed by the above-quoted LAPD "Confidential Addenda" document.

Why else would LAPD have suppressed Special Exhibit 10? The answer is again revealed by the LAPD's "Confidential Addenda to the Lowenstein Inquiry." As is admitted by this secret document, De Wayne Wolfer used a comparison microscope in the Sirhan case which was known by the LAPD to be defective! As is confirmed by the "Confidential Addenda" document, LAPD did not disclose this defect to the defense and suppressed this vital piece of potentially exculpatory material evidence. The document states:

"The fuzzy area on the left side of the photo [Special Exhibit 10] is due to a deficiency in the optics of the microscope. This defect has existed since the Department first received the microscope and efforts to correct the defect have been unsuccessful.

"The defect was a subject in the Kirschke case. . ." (id).

In the Kirschke case, criminalist William Harper concluded that Wolfer had erroneously linked victim and test bullets by ignoring a significant difference in the rifling angle

characterizing victim and test bullets. (Ex. 29, Declaration of William Harper and Report in support of Petition for Writ of Habeas Corpus in case of In re Jack Kirschke, Crim No. 22007). In the Kirschke case, Mr. Harper then concluded:

"17. I therefore am of the opinion that Mr. Wolfer incorrectly and without scientific basis testified that 'Kirschke's' gun and no other gun in the world fired the fatal shots." (id., p. 6).

In the present case, Mr. Harper again noted a clear difference in the angle characterizing the rifling marks located on the Kennedy neck bullet (Peoples Exhibit 47) and the Weisel bullet (Peoples Exhibit 54) and expressly rejected Wolfer's conclusions in this case on exactly the same basis. In a statement dated February 6, 1975, William Harper wrote:

"Since the rifling angle is a basic class characteristic of a fired bullet, it is my contention that such a difference would rule out the possibility of these bullets having been fired in the same weapon." (Ex. 30, William Harper Statement of February 6, 1975).

In other words, the Kennedy neck bullet and the Weisel bullet were fired from different weapons!

What became a "subject in the Kirschke case" and what is also a subject in the present case is De Wayne Wolfer's undeniable pattern of falsely identifying victim and test bullets after ignoring substantial indications of non-identity between them, particularly differences in rifling angles.

In sum, the prosecution:

(a) Suppressed Special Exhibit 10, which evidences a police attempt to manufacture a false link between the Kennedy neck bullet and a Sirhan test bullet;

(b) Suppressed evidence that Wolfer's purported identification conclusions were based upon observations and photographs made with a seriously defective microscope;

(c) Introduced false testimony erroneously linking the Kennedy neck bullet and the Weisel bullet.

32. William Harper was not alone in concluding that the Weisel and Kennedy neck bullets did not come from the same gun. This is known to the District Attorney's office as of this writing. And undated hand-printed memorandum bearing the name of Larry Baggett ("Baggett Memo") located in SUS files sets forth the following explosive conclusions:

"Weisel bullet consistent with Omark.

"Kennedy bullet mfg by Fed. Cart. Co. or some other."

(Ex. 31, Baggett Memo).

The Baggett memo confirms that the Weisel and Kennedy neck bullets came from cartridges of differing manufacture. It also confirms that Sirhan is not the shooter of Robert F. Kennedy.

The memo continues:

"Kennedy and Weisel bullets not fired from same gun.

"Kennedy bullet not fired from Sirhan's revolver." (id. page ____; emphasis added).

The short memo that is quoted above exonerates Petitioner Sirhan as the assailant of Robert F. Kennedy. This memo refers to a larger document called "Larry Baggett Panoscopic Report." The larger Report cannot be found in SUS or at the California State Archives. (Ex. 5, Mangan Declaration).

33. In order to investigate these troubling issues, Sirhan's researcher and counsel appeared at the California State Archives in March of 1994 with a criminalist pursuant to written request. The purpose of their visit was to examine and photograph the bullets and evidence envelopes.

34. The bullet which was found by Mangan during her initial visit to the California State Archives to be contained in the envelope marked Peoples Exhibit 47, the Kennedy neck bullet trial identification number, lacked the crucial knob at the tip noted in the drawing on the envelope containing it. This bullet was photographed by criminalist Alan Gilmore. This was a finding of major significance. (Ex. 33, Gilmore photograph; Ex. 5, Mangan Declaration).

35. Researcher Mangan then requested another opportunity to again photograph and examine the bullets and referred to her concern about the discrepancy between the bullet's observed undeformed shape and the deformity that was described by Dr. Noguchi. (Ex. 34, Mangan letter to CSA).

36. Counsel and Mangan appeared with 1975 court panel member Lowell Bradford on August 3, 1994, prepared to examine and photograph the bullets and the markings on their bases. However, Mr. Bradford stated during his examination in the presence of archive staff and a State Police officer that this was rendered impossible by the presence of grease covering the bullets. (Ex. 5; Ex. 35, Bradford Report of CSA inspection). Grease has never before been seen on the bullets. (id). It was never noted by Harper. (id). It was never noted by the panelists. (Ex. 23, 26). And it was never observed by anyone during the Alan Gilmore examination of March, 1994. (Ex. 5). Grease was first noted on the bullets in August of 1994, in the wake of Ms. Mangan's written notification to the Archives that she intended to examine and photograph the bases of the bullets.

Also, the crucial knob atop Peoples 47, which Dr. Noguchi had described in his Autopsy Report as a "unilateral transverse deformation" (Ex. 2, Autopsy Report, page 24), was now finally observed on the bullet contained in the Peoples 47 envelope. (Ex. 5, Mangan Declaration; Ex. 33, photograph of "Peoples Ex. 47 bullet," March and August, 1994). The "knob" bullet was photographed on August 3, 1994. (id., Ex. 33, photograph of "knob" Peoples Exhibit 47). Exhibit 33 is a composite that contains photographs of both the bullet removed from the Peoples Exhibit 47 envelope in March of 1994, (depicted as the bullet on the left), and the bullet removed from the Peoples Exhibit 47 envelope on August 3, 1994, (depicted as the bullet on the right). (Ex. 5).

37. Counsel for Petitioner immediately wrote to the California Archivist and requested the removal of the grease, warning that according to Bradford, the grease could damage the bullets as evidence by causing an erosion of their markings. (Ex. 35, letter of Lawrence Teeter to John Burns). Counsel requested an explanation for the origins of the grease and also asked for an explanation addressing the markedly different appearance of bullets observed in the Peoples' Exhibit 47 envelope in March and August of 1994. (id). The Archivist never answered these inquiries. (Ex. 36, Declaration of Lawrence Teeter). Researcher Mangan was later told that she would have no further access to physical evidence at the Archives. (Ex. 5, Mangan Declaration). A letter from an attorney for the Secretary of State also fails to address the grease and knob issues and does not cite any particular reason for Mangan's exclusion from future access to the physical evidence. (Ex. 37, Letter of Lisa Niegel and Mangan's response).

The foregoing proves that the actual Kennedy neck bullet, TN31, was never matched with any other bullet connected with this case, either a victim or a test bullet. A match was instead achieved between two substitute victim bullets. The ruse was concealed by presenting "TN31" to Dr. Noguchi whenever he testified. The ruse was made possible by a stipulation which obviated any cross-examination of Wolfer and which prevented any demonstration that the prosecution continued to "lack foundation" for the bullets, as Fitts himself conceded in chambers at the time the stipulation was elicited. There is no credible evidence that the purported neck bullet examined by the panelists in 1975 or by Wolfer in 1968 was the same bullet as the one removed from Kennedy neck. The evidence instead shows that from a very early stage in this case's investigation, a fake neck bullet was substituted for the true one. This information was withheld by the prosecution, and the opportunity to discover it was foreclosed by the inept and all-too-willing defense stipulation.

TN31 is a true "magic bullet". It is removed from Senator Kennedy's neck. A bullet with no described identifying markings is then booked into evidence. Wolfer examines a bullet and does not note markings. TN31 next appears with Dr. Noguchi before the Grand Jury. There is no evidence as to what bullet was presented at trial, except that if it was the same exhibit that was shown to the panelists in 1975, it was "DW""TN" and not "TN31". During the trial, the prosecutor conceded in chambers that the prosecution lacked foundation for the bullets. In 1975, Wolfer testifies that the bullet shown to the panelists that same year is the one he examined and "matched" in 1968, indicating that the bullet he "matched" was "DW""TN", a substitute neck bullet. Petitioner's current counsel and Ms. Mangan then saw a substitute neck bullet in the Peoples' Exhibit 47 envelope during their first visit to the archives, (presumably "DW""TN"), as indicated by the absence of the crucial knob on the tip of the bullet which was observed at the time. When they complained, a correctly shaped bullet appears months later. The mysterious and unexplained presence of grease on the bullets just before an announced attempt to photograph the markings on their bases prevents further investigation of the "TN31" vs. "DW""TN" problem. The Archives never responds to questions about the knob or the grease and simply bans Sirhan's researcher from further access to the physical evidence.

Why would the L.A.P.D. have switched bullets in this manner? The reason is not hard to fathom. Police officials could not have known in 1968 that trial counsel would ineptly stipulate to the authenticity of all bullets or that a reexamination of the evidence bullets would take place in 1975. Competent counsel would certainly have been expected to retain their own firearms examiner and conduct their own independent test. If, in fact, the true Kennedy neck bullet did not possess characteristics that would allow it to be linked to H53725, the prosecution's case would face major obstacles. As the foregoing discussion shows, expert testimony excluding H-53725 as the source of the Kennedy neck bullet would have supported a defense argument that someone other than Sirhan Sirhan had shot Robert Kennedy. The removal of the actual Kennedy neck bullet and its replacement by another bullet could eliminate the danger that an official cover-up might unravel before the jury. The failure of defense counsel to retain their own firearms examiner and their willingness to agree that the bullets were authentic prevented the jury from discovering the switch. The prosecution's failure to ask Dr. Noguchi to authenticate Peoples Exhibit 47 is entirely understandable. Had Dr. Noguchi been shown Peoples 47 at trial, he would certainly have noted that his markings were not on it and have refused to identify it. The prosecution's case would have exploded in mid air. Knowing this, the prosecution carefully avoided any attempt to

elicit authentication testimony at trial from Dr. Noguchi concerning the only Kennedy bullet bearing identifiable markings. Recognizing that the issue of bullet markings constituted a potential land mine, the prosecutors asked Wolfer to identify the bullet without raising the question of markings. The prosecution was saved by the willingness of grossly inept defense counsel to stipulate to authenticity, something that L.A.P.D. could not have guaranteed would happen at trial when the Peoples' case was first presented to the Grand Jury.

Was the bullet introduced into evidence at trial as Peoples' Exhibit 47 the same bullet that was given to the panel of experts in 1975 and described by Patrick Garland as having the inscription of "DW" "TN" on its base? Yes, according to De Wayne Wolfer, who was the only person to authenticate the bullets in 1975 prior to the time that they were submitted to the panel of experts for examination. In its order establishing the procedures governing the 1975 reexamination of bullets, the court provided that De Wayne Wolfer be called "for the purpose of establishing that the various bullets introduced into evidence are in fact the same bullets that he examined in 1968." (Exhibit 19, par. 6). When taken together with Dr. Noguchi's Grand Jury testimony and his autopsy report, this confirms that the switching of bullets described in this section took place after Noguchi's Grand Jury testimony but prior to trial.

The substituted bullet was presented to the Sirhan trial jury, the panel of experts in 1975 and to the State Archives, where it was examined and photographed in March of 1994.

The consequences of this substitution are manifold.

First, substitution of a fake neck bullet for the true neck bullet demonstrates that the entire prosecution case against Sirhan Sirhan was a faked case. This renders Petitioner's conviction inconsistent with the most elementary notions of Fundamental Fairness and Due Process.

Second, the fact of this substitution was certainly concealed from defense counsel. Since bullet switching not only would exonerate Petitioner as the shooter of Kennedy but would also demonstrate a conspiracy within L.A.P.D. to frame Sirhan, Petitioner's conviction runs afoul of the Due Process requirement that prosecutors disclose potentially exculpatory material evidence to the defense.

Thirdly, the prosecution's conduct as described above interfered with Petitioner's right to effective representation of counsel as guaranteed by the Sixth Amendment.

Lastly, the failure of trial counsel to explore the issue of bullet switching or even to retain their own firearms examiner in order to cross-check Wolfer's purported ability to identify crime scene bullets as having been fired from another gun bearing serial number H-18602 constitutes the most clearly imaginable instance of ineffective assistance of counsel. Rather than undertake the most elementary independent investigation of physical evidence, defense counsel rolled over and stipulated to the authenticity of all alleged crime scene bullets. Defense counsel then decided not to challenge Wolfer's identification testimony and effectively conceded that Sirhan Sirhan, acting alone, shot Robert Kennedy and the other victims. The unreasonableness of this decision should have been apparent to competent defense counsel even at the time. The autopsy report shows that the pattern of powder burns on Senator Kennedy's neck was produced by a weapon the muzzle of which was no more than 1 or 2 inches away from the surface of Kennedy's skin. (Ex. 2, Autopsy Report, pages 39-40).

The prosecution (a) suppressed the true neck bullet, (b) proposed and induced defense counsel to enter into a misleading stipulation which obviated the need to establish the authenticity of the neck bullet tested by Wolfer and offered into evidence,

(c) introduced an inauthentic bullet into evidence, (d) presented false opinion evidence of a purported match between the Kennedy neck bullet and test bullets, (e) concealed police manipulation and falsification of the ballistics evidence and (f) thereby interfered with Petitioner's right to counsel and (g) violating Due Process. In the wake of these events, there has been a lengthy history of concealment, bullet substitution and evidence tampering, both within the County of Los Angeles and later at the State Archives. Petitioner's trial was, here again, incompatible with the most basic elements of fundamental fairness and Due Process.

An evidentiary hearing is requested in order to address the above-described disturbing anomalies. Petitioner wishes to question Wolfer about the appearance and the identification markings on the "neck bullet" he examined. Petitioner also wishes to examine the State Archivist about the greasing and apparent substitution of Peoples' 47, about the apparent failure to remove this grease and about the unjustified order banning Ms. Mangan from further access to physical evidence in the Archives' collection on this case.

In addition, Petitioner seeks an order of this court requiring the State Archives to cease all attempts to obstruct Petitioner's access to the physical evidence through his counsel and researcher. Petitioner also seeks an order requiring the de-greasing of all bullets and an order that Petitioner's counsel, researcher and experts be allowed to again photograph the bullets and shell casings. Petitioner asks that the court order the Archives to completely cooperate in sharing all information concerning the nature and origins of the grease observed for the first time by Lowell Bradford in August of 1994.

Additionally, Petitioner requests a court-ordered test firing of the so-called Sirhan weapon, H53725, and an evidentiary hearing at which he can present expert testimony concerning the differences which may be present between (1) the firing pin strike marks produced by such a test-firing, (2) the firing pin strike marks found on the eight crime scene bullet shell casings supposedly recovered from H53725 and (3) the firing pin strike marks on two shell casings included in Peoples Exhibit 55 as Sirhan test bullets. The 1975 panel of firearms examiners made no attempt to compare the firing pin markings on test and crime scene shell casings. The eight crime scene shell casings were included in the Court Order # 1 evidence inventory but were inexplicably deleted from the Court Order # 2 evidence inventory.

Further, Petitioner requests that the court require the prosecution to make possible the conduct of neutron activation analysis tests of all bullets which are presently in existence. Moreover, Petitioner asks that the court require the prosecution to turn over all items of evidence material to a determination of the issues discussed herein, including the "Larry Baggett Panascopic Report," the full and complete "Confidential Addenda to the Lowenstein Inquiry," all documents reflecting the results of tests performed in this case, and all other items of evidence relevant to issues discussed above.

III
THE PROSECUTION SUBSTITUTED
OTHER VICTIM BULLETS, THEREBY VIOLATING
DUE PROCESS

The Kennedy neck bullet was not the only victim bullet to undergo substitution at the hands of police. The same fate befell other bullets as well.

A. The Goldstein Bullet:

Victim Ira Goldstein was shot in the left buttock. It has already been demonstrated that upon removing this bullet, Dr. Max Finkel placed an "x" on its base. (Ex. 38, SUS report pages 183, 951). However, the Property Report makes no reference to such a marking, even though it describes the initials "LMO" on the base of the Weisel bullet. (Ex. 3). Patrick Garland, the panel member assigned by the court in 1975 to describe and list the bullets, mentions no X marking and states instead that the number "6" was marked on the base of the Goldstein bullet. (Exhibit 13). This number was the Panel I.D. number affixed on the bullet ogive by Patrick Garland in 1975. The Court's Order for Retesting of Exhibits states:

"The panel of examiners shall place an identifying mark and an index mark on each exhibit. Such marks shall be placed in such a way as not to impair the integrity of the exhibit." (id).

The Court Order further specifies that Panel identification numbers were to be placed "with a circular depression on the ogive, and an identification mark was placed where it would do the least amount of harm." (id). Patrick Garland would not have marked a "6" on the base of a bullet already bearing an "X".

In sum, the bullet examined by Patrick Garland in 1975 and described in the Property Report out of sequence did not bear the "x" mark placed on it by Dr. Finkel.

Patrick Garland's summary describes the evidence envelope for the Goldstein bullet as designating the charge as 187 pc (murder) on June 5, 1968, even though Senator Kennedy was not yet deceased at the time the Goldstein bullet was extracted on June 5.

Furthermore, the Goldstein bullet is listed out of sequence in the Property Report.

There are two suspicious characteristics which the "Goldstein Bullet" and the "Kennedy neck bullet" share in common:

(1) At the time of their examination in 1975, these bullets were described as not bearing the specific markings placed upon them by the physicians who removed them. A new marking (DW""TN") was observed on the Kennedy neck bullet in place of the original one (TN31), and the "x" placed on the Goldstein bullet by Dr. Finkel was absent in 1975 and was replaced by a "6".

(2) Both bullets are listed out of sequence in the property report, which generally follows a chronological system of organization. The possibility of bullet substitution is reinforced by the fact that the envelope containing the x-less "Goldstein" bullet describes the crime committed by the shooter as a murder, (Penal Code section 187), even though at the time the Goldstein bullet was removed, Senator Kennedy had not yet died.¹ This would imply that a substitute bullet was presented in a substitute evidence envelope.

As shall be demonstrated below, anomalies characterizing the Kennedy neck bullet and the Goldstein apply to other bullets as well.

B. The Stroll Bullet:

The envelope containing the bullet removed from victim Irwin Stroll at the State Archives is incomplete. The information contained on this envelope is "One expended bullet, 6/5/68, J.D.D., E.K., Stroll, Panel id--5." (Ex. 39, photograph of Stroll bullet, envelope and court exhibit label.). The Stroll envelope located in the State Archives contains no reference to a DR number, charge or other essential data. In contrast, panel member Patrick Garland describes an envelope which reads, "Envelope tagged,

⁴ Before the victim's death, the proper charge would have been Penal Code section 217.

case number A 233 421, marked: evidence. Date: 6-5-68 Civ. homicide DR. 68-521466. Name: Sirhan, Sirhan B., booking number 495139, location: 5925 San Vicente, charge: 187 p.c. Off.:J.D. Dill, # 6215, W. o.m.: Item # 105, 1-expanded bullet, Stroll. Contents: One copper colored coated bullet, side flattened, initialed on damaged side, "DW" , twice, 3 grooved and two land impressions." (Ex. 13).

The Stroll bullet envelope described by Patrick Garland in 1975 is not the same envelope that is currently housed in the State Archives.

Also, the 1975 Court Order does not mention the name of Officer Kamidoi, even though the envelope found at the State Archives actually contains the initials JDD and EK, (Ex. 39 photograph), and even though the Property Report describes the Stroll bullet as follows: "Evidence not marked for ID due to odd shape but traced in Officer Kamidoi's notebook." (Ex. 3, Property Report). In addition, there is no reference in the 1975 examiner's report to any drawing of this bullet's shape or to Officer Kamidoi's name.

Furthermore, like the Goldstein and Kennedy neck bullets, the Stroll bullet was listed out of sequence in the Property Report.

C. The Evans Bullet

There are also strange anomalies surrounding the bullet removed from shooting victim Elizabeth Evans.

The 1968 Property Report states that LAPD acquired this bullet on June 5. (Ex. 3, Property Report). However, the 1975 report of Patrick Garland, (Ex. 13, Court Order # 2), states that this bullet arrived at Rampart Division of the LAPD on June 6. Why the delay, and why the contradiction?

In addition, the bullet described in 1968 appears to be very different from the bullets examined in 1975. The 1968 Property Report describes the Evans bullet as actually consisting of two bullet fragments. (Ex. 3, Property Report). But in 1975, Patrick Garland wrote of "gauze containing approximately five fragments. Largest fragment copper coated led, flattened." (Ex. 13, Court Order # 2).

The Evans bullet evidence tag now present in the Archives reveals that the original item number was crossed out and replaced with the number 45--a pattern reminiscent of the Kennedy head fragments removed during surgery. (Ex. 40, photograph of Evans tag, court exhibit label and bullet fragments).

Further, the Evans bullet evidence tag bears a stamped date of June 7, 1968, the date of the Grand Jury hearing in this case. The name preceding the space for reporting officer has been crossed out and replaced with the name "Brandt, 1004, Rampart's Division." The crossed out name is consistent with the word "sheriff". (The Los Angeles County Sheriff's Department had initially expressed a desire to examine the bullets independently but was told by LAPD that this would not be necessary." [Ex. 41, letter of Sheriff Peter J. Pitchess to LAPD Chief Tom Reddin]. Both the LAPD and the District Attorney's office declined this offer. [id., letters of LAPD and District Attorney's office]).

Finally, Patrick Garland describes an evidence tag as bearing the name "Evans" and the case number. (13). However, this information is strangely absent from the Evans bullet tag housed in the State Archives. (Exhibit 40, Evans envelope photograph).

D. The Weisel Bullet:

The hospital tissue examination Form 24 for William Weisel bears a date of June 5, 1968. (Ex 7). (See also Ex. 13, Garland inventory, Court Order # 2). However, the evidence tag housed in the State Archives contains the date of June 6, 1968. (Ex. 7, photograph of Weisel evidence tag). As is the case with all other victim bullets, the

Weisel bullet is also listed out of sequence on the Property Report. These two facts are consistent with the pattern which characterizes the other victim bullets and support an inference of bullet substitution.

Moreover, it has already been demonstrated above that the Weisel bullet and the Kennedy neck bullet were not even fired from the same gun. This is absolutely confirmed by the Larry Baggett memo, a document prepared by the prosecution which contains the prosecution's own undisclosed conclusions. Those conclusions are completely inconsistent with its entire theory of the case as presented at Petitioner's trial and exonerate Petitioner as the assailant of Senator Robert Kennedy. (Supra).

E. Summary

A tabulation of irregularities surrounding the various bullets is most instructive:

<u>Bullet</u> <u>Markings</u>	<u>Different</u> <u>Bullet</u> <u>Drawings</u>	<u>Missing</u> <u>Fragments</u> <u>or Photos</u>	<u>Different</u> <u>Number of</u> <u>Dates</u>	<u>Conflicting</u> <u>Acquisition</u> <u>Envelopes</u>	<u>Changed</u> <u>Tags or</u>
Kennedy Head		missing pre-op photos	missing autopsy fragment	P.C. 187 v. PC 217	24 to 26 25 to 27 (Item #s)
Kennedy Neck	TN31 aut. DWTN '75	missing autopsy drawing			
Goldstein	X missing			same as with Kennedy head	
Stroll Kamidoy	DW '75	missing notebook drawing			Envelopes
Evans 5 '75	6/6		2 booked	6/5	Tags
Weisel 6/6					6/5/69

All bullets were listed out of sequence of acquisition in the Report. Further, each indication of tampering characterizes at least two different bullets. Three bullets suffered from the most disturbing indicia of tampering, i.e., outright changes in markings on the bullets and/or missing drawings or photographs. The problem of changed or substituted item numberings, evidence envelopes or evidence tags characterizes three bullets. Two bullets, the Kennedy neck bullet and the Stroll bullet, suffered from both of these infirmities. One bullet or fragment, the Kennedy autopsy head fragment, has simply vanished without a trace beyond the autopsy report.

The cryptic acknowledgement by prosecutor Fitts that his office was unable to establish an evidentiary foundation for bullets to be introduced into evidence constitutes the ultimate understatement. It demonstrates that the prosecutors were probably aware that the ballistics evidence had been tainted by police substitution, alteration and destruction.

In sum, the prosecution destroyed potentially exculpatory material evidence, presented fabricated material evidence, undermined Petitioner's right to effective assistance of trial counsel and violated the most elementary notions of fundamental fairness and due process. An evidentiary hearing should be held to permit an exploration of these crucial issues, and a writ should be granted requiring a new trial for Petitioner.

IV

THE PROSECUTION PRESENTED A FABRICATED CASE AGAINST SIRHAN BY COVERING UP EVIDENCE THAT THREE DIFFERENT WEAPONS WERE CONNECTED WITH THE ASSASSINATION.

A. The Testing of Two Guns:

At trial, the prosecution introduced People's Exhibit 6 into evidence and represented it to be the weapon which Sirhan and his brother purchased from George Erhard. (RT 3104). Erhard had testified that he had been given this weapon by his next door neighbor, Ms. Dana Westlake, who had been given the weapon by its original purchaser and Westlake's father, Albert Leslie Hertz. (RT 3747-3755). According to trial testimony, the Hertz weapon was an Iver Johnson .22 cal. 8 shot revolver bearing serial number H53725. In 1995, People's Exhibit 6 was examined at the California State Archives by Rose Lynn Mangan, Sirhan researcher and assistant to present counsel for Sirhan. Mangan's examination confirms that Peoples Exhibit 6 does indeed contain the engraved designation of serial number H53725. (Ex. 42, Mangan photograph of People's 6; Ex. 5, Mangan Declaration). Also engraved on the weapon is the following information, which is found on the weapon's top strap: "Iver Johnson Cadet Mod. 55 S-A Pat. Pend. I.J.A. & C. Wks. Fitchburg, Mass. U.S.A." (Ex. 5).

However, a second gun has been linked to this case from the very beginning, and this has been kept secret by the LAPD. Accompanying this Petition as Exhibit 43 is a photograph of a disassembled revolver. The photograph bears the Sirhan case DR number, 68-521-466. This is the same DR number that appears on other Sirhan case documents. For instance, the Property Report accompanying this Petition as Exhibit 3 contains the number "68-521 466" in the "DR" box in the top right hand corner of each page.

Two things are immediately apparent.

First, the photograph depicting the second gun has a front gun sight that is undeniably different from the front of the weapon in the State Archives. The Archives weapon sight rises at a consistent angle from the tip, tapers off into a horizontal line parallel to the barrel and then drops down to the barrel at a nearly complete vertical angle. For ease of description, the Archives weapon will be described as having an imperfect "half-moon sight." By contrast, the sight of the weapon depicted in Exhibit 42 to this Petition can perhaps be best described as a "split level sight." The sight rises at a vertical angle from the barrel and then tapers back before falling vertically down to a second level. The second level is longer than the first and makes a horizontal line paralleling the barrel before dropping down at an angle roughly equivalent to the angle characterizing the rise of the first level at the front of the barrel.

Secondly, the split level sight depicted in Petitioner's Exhibit 42 belongs to an Iver Johnson model 55S Cadet rather than to the Iver Johnson model 55S-A found in the State Archives. Attached hereto as Exhibit 44 is a copy of a gun manual drawing of the model 55S with a split level site, and attached hereto as Exhibit 44-A is a gun manual drawing of the model 55S-A with an imperfect half-moon site. (Ex. 44, 44-A, 5).

Furthermore, it shall be demonstrated that the police conducted two different test firings with two different weapons in this case. A second gun was indeed used in the second test firing. At the very least, the police behaved at the outset as though there were two different weapons recovered at the crime scene. This would explain why two different test firings would have taken place.

However, the prosecution has never acknowledged two different test firings. Instead, the District Attorney's office has maintained throughout that there was only one test firing of "the" assassination weapon. According to a report released on October 18, 1971 by former District Attorney Joseph P. Bush in response to public criticism from criminalist William J. Harper and others, this test firing took place on June 6, 1968, the day after the assassination. The Bush Report provides the following description of the activities of L.A.P.D. criminalist De Wayne Wolfer in this connection:

"Mr. Wolfer conducted two series of ballistics tests. The first was conducted on June 6, 1968 with the gun seized from Sirhan, and the bullets from this test were used to identify the bullets removed from the victims of the crime. The second tests were conducted on June 11, 1968, and Mr. Wolfer used a weapon obtained from Property Division of LAPD. The use of this weapon, H18602, was necessitated by the fact that Sirhan's weapon had been entered in evidence before the grand jury and a court order restricted its availability." (Bush report, page 5, a copy of which is attached hereto as Exhibit 45).

If, as Bush maintained, bullets test fired on June 6, 1968 "were used to identify bullets removed from the victims of the crime[.]" then any "unsuccessful" test would have taken place before the "successful" test on June 6 described by Bush.

Was there a test firing of H53725 on June 5, the day before the test firing described by Bush? The answer became clear only when the LAPD, in response to years of public pressure culminating in a resolution adopted by the Los Angeles City Council, finally transferred its records and RFK files, (or some of them, at least), to the custody of the California State Archives. One of the documents which became available for public review at that time was the long-secret 10 Volume Summary Report prepared by the LAPD unit that investigated the RFK assassination, "Special Unit Senator," otherwise known as "SUS". Additional documents also were included in this disclosure. One of these documents was an envelope which clearly confirms that Wolfer test fired H53725 on June 5, 1968, contrary to the representations of the Bush report--a report that was prepared for public dissemination and never intended to be a purely in-house document such as the SUS 10 Volume Summary Report and the remainder of the LAPD files on the RFK assassination. The envelope in question contains the following words on its face:

Victim: Kennedy, Robert

Los Angeles Police Department Crime Lab Test Shot

Name: Doe, John Date 6/5/68

Address _____

Make Iver Johnson Cal. 22 Type Rev.

No. H53725 DR 68-521466

Crime 217 P.C. Officer Melandrez

De Wayne A. Wolfer (signature)

(Exhibit 46 accompanying this Petition is a photocopy of this envelope; also Ex. 13, Court Order # 2). If the Bush report is correct in describing a June 6 test firing, there were indeed actually two test firings designed to link the "Sirhan" weapon with victim bullets.

Furthermore, the evidence is overwhelming that the second test firing was performed with another weapon rather than with "Sirhan's" weapon, H53725. The record shows without the slightest contradiction that on June 6, 1968, De Wayne Wolfer prepared an envelope containing bullets fired into a water recovery tank with the purported assassination weapon and labeled this envelope with the serial number "H18602." A photocopy of this envelope is attached hereto as Exhibit 47. This is confirmed in Patrick Garland's 1975 inventory, Court Order # 2, Exhibit 13.

So far, it has been shown that

(1) the gun sight on People's Exhibit 6 is a prominent sight in the shape of a distorted half moon that is appropriate to a model 55S-A rather than the split level sight that is appropriate to a model 55S and depicted in the secret LAPD photograph.

(2) People's Exhibit 6 bears the serial number of the weapon supposedly purchased by Hertz and supposedly later purchased by Sirhan, and it also bears a designation as model 55S-A; (3) Bullets were fired into a water recovery tank on June 5 and June 6; and

(4) The envelope containing comparison test bullets from the June 6 test firing bears the serial number of a second gun, H18602, while H53725 was test fired on June 5.

It will now be demonstrated that the prosecution carefully attempted to cover up facts set forth in paragraphs (1), (3) and (4). Thus, the prosecution attempted, at trial and/or thereafter, to accomplish the following goals:

(1) avoid drawing any attention at trial to the shape of the sight on People's Exhibit 6;

(2) in light of the fact that both a model 55S-A (the Archives weapon, H53725) and a model 55S (as depicted on the secret LAPD photograph) had been treated as crime scene weapons by the police from the outset, to avoid referring to the model number of the assassination weapon to the greatest possible extent.

(3) conceal the fact that "Sirhan's" weapon was test fired on June 5 and the fact that a second test firing took place on June 6;

(4) later explain away the presence of the H18602 serial number on the envelope containing bullets fired into the water recovery tank on June 6 and reported by Wolfer to be his comparison test bullets.

Moreover, the history of the prosecution's efforts is extremely revealing.

The first examination of the Sirhan weapon was not performed by Wolfer but by LAPD personnel assigned to check it for latent finger prints. The SUS Summary contains the following information about this initial examination of the weapon:

"Latent fingerprint log between June 5 and June 9, 1968, describes .22 Caliber Iver Johnson Cadet Revolver blue steel model 55 S-A, serial H53725, with eight expended .22 caliber brass shells. Gun and brass booked at LAPD Central Property by Calkins, homicide division. Checked out by Moser--took to photographic laboratory by Watson, where gun and empty brass was examined for fingerprints by Moser and Watson. Gun and brass returned to Central Property by Moser 6/5/68, 10:15 A.M. Results, no fingerprints obtained on above items." (Exhibit 48 accompanying this Petition, SUS 835)

The initial LAPD personnel to describe the weapon noted that it was a model 55 S-A. The weapon was returned to the Property Division and therefore became available to Wolfer for what is confirmed by the above described envelope to be his test firing of the weapon on June 5.

On June 6, a second firing of a .22 into the crime lab's water recovery tank then took place. The bullets recovered from this process were placed into an envelope, and Wolfer labeled the envelope with the serial number H18602. (See Exhibit 47). This strongly suggests that Wolfer actually used H18602 in his test firing procedure on June 6, which the prosecution would claim to be the date of the only attempt to recover bullets from the water recovery tank for this case. According to the Bush report, bullets test fired on June 6 were matched with victim bullets. If true, the assassination weapon was not H53725, (55S-A), which was test fired on June 5. It was H18602, (55S), which was test fired on June 6.

Why were two different test firings necessary? The first test firing took place on June 5 with H53725. If a June 6 test firing was necessary with another weapon, this would suggest that the June 5 test firing had failed to produce bullets which De Wayne Wolfer could match with the victim bullets. It will be recalled that all members of the 1975 panel of independent firearms examiners concluded that victim and test bullets could not be matched in this case. The panelists were allowed to make their own test bullets with H53725. (Ex. 13, Court Order Number 2). Comparisons between victim bullets and June 5 test bullets did not in fact result in "matches". This would have explained the reasons for a June 6 test firing--with another weapon. (Supra).

B. A Third Gun:

Yet a third gun entered the case on June 7, 1968, after the first two test firings (H 53725 and H 18602) had been performed. On June 7, the prosecution presented its evidence to the Los Angeles County Grand Jury. A weapon was presented to the Grand Jury and was specifically identified by Henry Adrian Carreon as the same weapon he saw Sirhan firing on the gun range on the morning of the assassination. But as shall be shown below, Mr. Carreon did not describe a weapon with an imperfect half moon site or a weapon with a split level site. Instead, he described a different kind of site altogether. This raises the specter of a third gun which is somehow connected with this case. Iver Johnson in fact manufactured a variation of the 55S-A model with a sloping gun site. This is depicted in Exhibit 44 accompanying this Petition. During his Grand Jury appearance, Henry Adrian Carreon testified that the Sirhan weapon had a sloping sight, declaring, "It didn't have a sight, whereas David's did. He [Sirhan] was asking how to hold it for better accuracy." Carreon was shown a weapon and identified the weapon as Sirhan's, declaring, "This is it." (id). The following proceedings transpired in this connection:

Q. [By Mr. Howard]" Recalling now the gun that you saw at the San Gabriel range, does this appear to be the same gun?

A. This is it.

Q. That is the gun?

A. It is, yes.

Q. When you left, did you have any further conversation with the person identified or photographed in 3-A and 3-B?

A. I'm not definitely sure who asked the question, but there was some--they weren't in agreement as to--to get better accuracy. I think the individual asked David, 'How do you hold your gun to get better accuracy

because this gun doesn't have a sight on it? Do you hold it whereby the front part is definitely, you know, straight ahead with it or do you hold it up or--' It didn't have a sight, where David's did. He was asking how to hold it for better accuracy.

Q. Is that the only time that you ever saw this individual?

A. Yes.

Q. And did you some time later see a picture of this individual.

A. Yes.

. . . " (Ex. 15, Grand Jury transcript, 194-195).

If the gun taken before the Grand Jury and positively identified by Henry Adrian Carreon had a sloping sight, (or, as Carrion put it, no sight), it is not the same as the weapon now in the State Archives as People's Exhibit 6. Nor, of course, is it the split-level sighted weapon depicted in the LAPD's heretofore secret photograph of a model 55S.

The Grand Jury testimony of Henry Adrian Carreon is corroborated by Sirhan's trial testimony. Sirhan testified that at the gun range, he was allowed to fire a couple of rounds from someone else's gun at the range and stated, "His gun was much more accurate than mine was, as far as the sights were concerned." (RT 5160).

It is therefore of more than passing significance that on June 7, prosecutors did not identify the weapon by its serial number, model and manufacture at the Grand Jury proceedings. This is a critical omission under any circumstances, since guns are always identified by serial number, model and manufacture in official documents. It will be recalled that the prosecution showed Thomas Noguchi the Kennedy neck bullet during his testimony before the Grand Jury, at which time Dr. Noguchi specifically identified this bullet by reference to the letters "TN31" which he had placed on the bullet's base. Yet when it came to the gun, any pretense at evidentiary precision, even for the record, was dropped.

The omission of the gun's serial number in the Los Angeles County Grand Jury transcript suggests that the gun shown to Carreon before the Grand Jury was neither H 53725, a Model 55S-A, nor the mysterious Model 55-S depicted on the LAPD's secret photograph. The prosecution's failure to elicit testimony about the model and serial number of the Grand Jury weapon made possible the introduction of this third weapon without a substantial risk of detection. Furthermore, Carreon's testimony about the flattened gun sight was graphic and precise. Showing Carreon either H53725 or the mysterious split level weapon in the secret LAPD photograph would have carried with it the risk of non-identification before the Grand Jury. The risk of non-identification was not one which the prosecution was willing to assume in this case. It will be recalled that whenever the Kennedy neck bullet was shown to Dr. Thomas Noguchi, both before and after trial, the "version" of this bullet that was placed before him was always the real item, TN31, rather than the substitute bullet, "DW""TN".

All of this suggests that the prosecution deliberately concealed potentially exculpatory material evidence that Exhibit 6 was not, in fact, the weapon used by Sirhan at the gun range and therefore, by inference, at the Ambassador Hotel. Nor was Exhibit 6 (H 53725) the assassination weapon, as was proven by test firings conducted with H 53725 on June 5 before the second test firings with a second gun (H 18602) became necessary.

The situation did not improve as the case progressed. At trial, several amazing events took place. These will be outlined below.

C. The Gun Box Label:

On June 6, 1968, Pasadena Police Officer Thomas Young discovered a torn gun box label and other papers in the trash container outside the rear of the Sirhan family residence. (See Exhibit 3, LAPD Property Report, Item # 71). The report describes the label as bearing the designation "S-A" and the serial number H53725. (id). The description of Officer Young's findings is set forth in the following terms in the LAPD Property Report:

"(1) Wht empty business envelope sent from 'Argonaut Insurance Company,' 443 Shatto Place, LA. Letter mailed on 10-23-67 from LA. On rear is written on pencil, 'RFK must be be be be disposed of d 22 disposed disposed of disposed disposed of properly. Robert Fitzgerald Kennedy must soon die die die die die die die die die die. (2) Torn label Johnson Cadet S-A 22 cal.--2 1/2 inch bbl--8 shots. Serial No H53725. (3) One page from notebook with Arabic lettering." (id).

Petitioner's counsel and researcher have examined and photographed the gun box label. Although it has been torn, the following writing is clearly visible on what survives of the label:

"JOHNSON CADET"

S-A--22 CAL.--2 1/2 inch bbl--8 shots

SERIAL NO. H53725

A copy of a photograph of this label taken by Petitioner's researcher is attached hereto as Exhibit 51. (Ex. 5).

This gun box label was placed into an envelope along with a copy of Officer Young's report and the other papers found by Young at the Sirhan residence. Inexplicably, prosecutors never introduced the gun box label into evidence at trial. (infra).

The trial transcript itself discloses that the exclusion of the gun label as an item of evidence was deliberately calculated by the prosecution. After Officer Young disclosed, in response to the prosecutor's question, that he had been employed by the Pasadena Police Department for fourteen years, the following proceedings transpired:

"BY Mr. HOWARD: With the Court's permission, I have here a cellophane jacket. May it and its contents be marked People's next in order, 74 for identification?

MR. FITTS: 75.

THE COURT: 75.

MR. HOWARD: Pardon me. 75.

THE COURT: It may be so marked.

(Counsel examine.)

Q BY MR. HOWARD: I'd like to show you People's Exhibit 75 for identification.

Will you examine the packet, please?

A. (Witness examines.)

Q. Are you familiar with the material contained in that packet?

A. Yes, sir.

Q. May I direct your attention to June 6, 1968. Did you have an occasion to go to 696 East Howard?

A. Yes, sir.

Q. Did you conduct some type of search in that area?

A. Yes, sir.

Q. In what area in relation to the address?

A. A rear yard to the rear of the residence. There

were several boxes of trash and several cans of trash and garbage at that location and this I found in the trash at that location.

Q. About what time did you go, if you recall, Officer?

A. I arrived at that location around 8:00 o'clock. I located this around 11:00.

MR. COOPER: Is that 8:00 a.m.?

THE WITNESS: Yes, 8:00 a.m.

MR. COOPER: Thank you.

Q. BY MR. HOWARD: You started to search outside of the house, is that correct?

A. Yes, I was assigned to security at the rear of the residence.

Q. And did you find an envelope in this search?

A. Yes, I did.

Q. May I show you from People's Exhibit 75 a white envelope with certain, what appears to be pencil writing. Did you locate this in the search?

A. Yes, I did.

Q. In reference to this envelope which bears on its face, 'Argonaut Insurance Company,' will you tell us where you found that envelope?

A. It was lying in a box of trash at this same location. There was garbage, lots of papers, torn papers, a scratch sheet, and this was partly folded and wadded up, lying in the trash.

Q. When you say 'a scratch sheet' does that mean something?

A. It's a word for a racing form.

Q. Is that a newspaper that has certain information on horse racing?

A. Yes.

Q. Now, after you found the envelope did you retain it in your custody?

A. Yes, I did.

Q. What did you do with the envelope?

A. I took it to the police station, packaged it, stapled it, sealed it, and turned it over to the Lieutenant in charge of working the security.

Q. Now, also contained in Exhibit 75 appears to be a copy of your report, is that correct?

A. Yes, sir.

MR. HOWARD: May we remove that, your Honor?

Q. Yes, sir.

MR. HOWARD: May we remove those, your Honor, and may People's Exhibit 75 now consist of a white envelope with the heading, 'Argonaut Insurance Company'?

The other exhibits will be removed, marked as a separate exhibit 75-A, with the Court's permission.

MR. COOPER: For identification?

MR. HOWARD: For identification.

THE COURT: The other objects that were contained in 75 for identification--in other words, you removed everything except the white envelope--that was retained in 75; the remainder may be 75-A for identification.

MR. HOWARD: Thank you, your Honor.
You may examine." (RT 4327-4330).

The prosecution went to great lengths to make certain that no mention was made of the gun box label. Firstly, this item of evidence was carefully segregated from the Argonaut Insurance Company envelope which the prosecution introduced. Secondly, it was not even described for the jury. Although the prosecutor mentioned that Exhibit 75 also included a copy of Officer Young's report, he avoided the slightest mention of the torn gun box label, which was separated from and also contained in Exhibit 75. Further, the gun box label was marked only for identification, as part of a separate exhibit, (Exhibit 75A), which means that it never was introduced into evidence and consequently could not become part of the official court records in the case. What could be the explanation for the prosecution's exclusion the gun box label and its avoidance of any reference to the existence of this evidence?

The matter was also unexplored on cross-examination. Defense counsel questioned Officer Young about the circumstances under which the material he discovered had been found but also made no reference to the torn gun label. (RT 4331-4334). He then remarked:

"MR. COOPER: Your Honor, having discussed the matter with counsel, there is a stipulation with respect to defendant's stipulated testimony in regard to this and it also applies to that which was found by Officer Young and that is agreeable, is it not?

MR. HOWARD: Agreeable." (RT 4335).

Interestingly, there is nothing in the record which confirms anything this reference to a stipulation regarding Defendant's testimony concerning Officer Young's discoveries at the Sirhan residence. The record is completely silent in all respects about the torn gun box label. The existence of this vital evidence, which was not disclosed either to the Grand Jury or at trial, only became apparent following the 1988 release of materials to the California State Archive, where it was discovered by Petitioner's researcher.

The prosecution's inexplicable and intentional failure to introduce the gun box label discovered by Officer Young is an irregularity with profound and disturbing implications. Introduction of such evidence would have been standard procedure--as standard as identifying the weapon by its serial number and model number before the Grand Jury. The gun box label could have served to create the appearance of a convincing link between gun # H 53725 and Sirhan Sirhan. Since the gun used by the prosecution as the "Sirhan" weapon indeed bore this serial number, use of the gun box label could only have further aided the prosecution. Why, then, did the prosecution make such an effort to avoid any disclosure of the gun box label?

The problem is that as of June 6, when the gun label was found, another gun (H18602) was involved in the case, and a third gun, the Grand Jury weapon with the sloping sight, emerged one day later. The slope-sighted weapon was linked by convincing and detailed eyewitness testimony from Henry Adrian Carreon, who observed such a weapon's being used by Sirhan at the gun range before the assassination! Assuming that the gun depicted in the LAPD's secret photograph was indeed H18602, the weapon that was test fired on June 6, it was that photograph which depicted the weapon fired on the day that the Bush report asserts that test bullets were obtained which supposedly matched victim bullets. The 1975 panelists concluded that the weapon test fired on June 5, H 53725, could not be linked to the victim bullets. If any match was achieved at all, it was therefore with H18602. If H18602 was the split level

sighted weapon depicted in the secret LAPD photograph, the actual assassination weapon was a Model 55S and not the Model 55S-A described on the gun torn gun label and in Officer Young's report. Deleting any reference to the weapon model description would serve to minimize the danger that the defense might seize upon the issue of the death weapon's identification and argue that multiple guns were involved in the crime or that the gun linked to Sirhan by the torn label was not, in fact, the assassination weapon.

That the prosecution was clearly aware of the sloping sight problem is also shown by its direct examination of gun range witness Henry Adrian Carreon at trial. This witness, who had testified at some length before the Grand Jury about the sloping sight on Sirhan's weapon and about Sirhan's complaints that the weapon could not be aimed properly because of this sight, was not asked a single question along these lines at trial--an event, which, in contrast to Grand Jury proceedings, was open to the public. The entirety of Carreon's trial testimony is to be found at RT 3589-3600 of the trial record.

D. The Absence of Identification of H53725

This is not the end of the matter. For the prosecution actually failed to elicit an in-court identification of People's Exhibit 6 (H53725) as the Sirhan weapon! This further supports the thesis that the actual death weapon was H18602 after all--unless no matches were achieved between victim bullets and test bullets produced with any gun at all. The trial testimony of prosecution witnesses deserves special attention in this regard.

The prosecution's purported "identification" of People's Exhibit 6 as the Sirhan gun was accomplished courtesy of a defense stipulation. Grant Cooper, lead trial counsel for Petitioner, obligingly offered, "There won't be any quarrel about the identify of the gun." (RT 3104). This gratuity was bestowed upon the prosecution during the direct examination of Ambassador Hotel Maitre 'd Karl Uecker, who had grabbed Sirhan and his weapon during the shooting and participated in the process of subduing him. Uecker testified as follows:

Q. BY MR. HOWARD: I would like you to examine People's 6 in evidence and first of all, can you, if you will, read the serial number on the weapon? Can you read that number?

A. I recognize the number, yes, H58725. [sic]

Q. Thinking back to June 4, when the struggle for the gun--you say it now looks like the gun, but at that time the gun was not bigger than it appears to be today?

A. It looks like the same one.

BY MR. COOPER: There won't be any quarrel about the identify of the gun." (RT 3104).

It should be noted that this testimony elicited from Uecker differs markedly from the description he provided in his transcribed statement at the Rampart Police station shortly following the assassination. In that statement, Uecker indicated that the weapon displayed to him by police interrogators looked larger than the weapon he recalled having seen and felt in the hand of Petitioner Sirhan. (Ex. 52, Uecker transcribed statement to LAPD). The discrepancy between the size of H53725 and Uecker's recollection of the weapon in Sirhan's hand was made to disappear by a leading question from the prosecutor ("... but at the time the gun was not bigger than it

appears to be today?) and defense counsel's unsolicited gratuity (There won't be any quarrel about the identify of the gun).

It is noteworthy that while the prosecutor asked Uecker to read the weapon's serial number into the record, he made no attempt to ask him to read into the record information about the gun's model. As has been shown above, this information was, like the serial number, engraved on People's Exhibit 6. No witness was asked for this information, either at trial or before the Grand Jury.

In the above-mentioned interview with LAPD officers which was conducted on June 5, 1968, Uecker conceded that he did not get a good look at the gun in Sirhan's hand. The interview contains the following discussion:

"Q. Did you see the gun?

A. I saw the gun, yeah. Yeah.

Q. All right. Let me show a gun, and you tell me if this appears to be a gun similar to the one you saw?

A. I tell you the truth, I don't think it was that big, but could be. I really don't--

Q. You're not sure?

A. No, I'm not sure because I didn't pay too much attention to the gun. See, I was trying to hit his hand away and was trying to hold him." (See Exhibit 52 to this Petition, a copy of the Uecker interview transcript, page 5).

Thus, Uecker's testimony is worthless from the standpoint of gun identification.

Rosie Greer provided testimony indicating that Sirhan's gun was actually lying loose on the steam table at one point and that it again wound up in Sirhan's hand. Greer stated that he "saw the gun in his [Sirhan's] hand at first and then it seemed that the gun was lying on the table. . . . this gun was on the table and I looked back again and it was in his hand and that is when I went for him." (RT 3310).

"Q. Are you telling us you observed the struggle before you looked back for the Senator and then you looked back to the table and this man apparently had the gun in his hand and then he seemed to lose possession of it, and it was lying on the steam table?

A. Yes.

Q. Then you turned and looked for the Senator and when you turned back he appeared to have possession of it in his hands again, is that true?

A. Right, yes." (RT 3310-3311).

Greer initially expressed doubts that People's Exhibit 6 was the weapon he saw in Sirhan's hand:

"Q. I direct your attention to a revolver which is People's 6 in evidence in this case, and ask you if this is similar to the gun which you took from the hands of the person being restrained on the steam table?

A. Yes, but it doesn't, the gun, it looked like it was older that this one." (RT 3312).

The prosecutor asked Greer to repeat this testimony, claiming that he did not hear it.

"Q. Now I have gotten up close to you again and I can't hear you-- would you answer again, sir?

A. I said, 'it is similar, sir.' Of course, I wouldn't be able to tell whether it was the identical gun.

Q. But does it look different?

A. Other than it is clean, and this other one looked like it was dirty.

Q. And this gun looks cleaner, is that right?

A. Yes.

Q. In any other respect except cleanliness it doesn't seem to be any different?

A. It doesn't seem to be any different." (RT 3312).

Greer's admission that he would not be able to tell whether it was the identical gun meant that Greer did not identify People's Exhibit 6 as the Sirhan weapon. His testimony was no more probative on the issue than was that of Karl Uecker.

Rafer Johnson took possession of the gun and later gave it to Sergeant Calkins of the Los Angeles Police Department. (RT 3478). Johnson's testimony on the issue of the gun's identify was confined to the following brief exchange:

"Would you examine that, first of all, as to coloration.

Does that appear to be similar to the size and color of the gun that you took?

A. Yes, sir." (RT 3478).

Sarah Hertz, the wife of Albert Leslie Hertz, testified in similarly equivocal terms. When asked whether the .22 displayed in court looks "like the gun [she] found in the box[,]" Ms. Hertz testified as follows:

"A. I wouldn't know. I suppose more or less it is about that size.

Q. About that size.

A. I guess so.

Q. About that shape, maybe?

A. I guess so." (RT 3740).

Even George Erhard, who sold the gun to Munir and Sirhan Sirhan, could not identify it in court. Erhard testified as follows:

"Q. I would like to show you now People's Exhibit 6 in evidence.

Will you examine People's Exhibit 6, please?

Are you familiar with that weapon?

A. Yes, I am.

Q. That is the weapon that Mrs. Westlake gave you?" (RT 3748).

To this definite question, Erhard replied with the following qualified answer:

"A. That is a weapon very much like the weapon Mrs. Westlake gave me." (RT 3748).

Erhard was then asked to describe the sale of his gun to Munir Sirhan. This time, the prosecutor asked a less definite question, and still, Erhard responded with an indefinite and qualified answer.

"Q At that time did you have the gun, People's 6, or a gun similar to People's 6?

A. I had a gun similar to that gun right there in the car, yes." (RT 3753).

Even George Erhard failed to positively identify People's Exhibit 6. Since no other witness was able to accomplish this identification, the prosecution was saved by defense counsel's gratuitous remark that there "won't be any quarrel about the identify of the gun." (RT 3104).

Thus, the identity of People's Exhibit 6 as the Sirhan weapon was neither established by eyewitness testimony nor even placed in issue by the defense. As the foregoing excerpts of testimony clearly show, the prosecution made no real attempt to

pin down witnesses on the question and appeared almost content with indefinite testimony on the subject.

This renders the prosecution's failure to examine Henry Adrian Carrion at trial on the subject of People's Exhibit 6 all the more significant. If Carreon had remained true to his Grand Jury testimony, he would have testified at trial that People's Exhibit 6 was not the weapon he saw in Sirhan's possession at the gun range on June 4, 1968. The only witness who could describe Sirhan's weapon with any degree of precision was never asked to so do! Further, Carrion's Grand Jury testimony clearly suggests that Sirhan was in possession of a weapon other than Peoples' Exhibit 6 at the gun range.

Inexplicably, Albert Leslie Hertz was never called as a witness. The prosecution remained satisfied with the infirm testimony of his wife, Sarah Hertz (*supra*), the equivocal testimony of George Erhard and the observations of other witnesses who seemed at times to have seen a different weapon than the one presented in court. Why was Albert Leslie Hertz, the gun's purchaser and only registered owner, never called to the stand?

One possible reason is suggested by the opening statement of prosecutor Fitts, who advised the jury:

"First of all, we expect to tell you where the gun that killed Senator Kennedy came from. On the 10th day of August, 1965, while the smoke from the so-called Watts Riots was still hanging in the air, one Albert Leslie Hertz went to a Pasadena Gun Shop gun shop for the purpose of purchasing a revolver. He was waited on a man named Pineda, who will testify in this case. The number of the gun will be offered in evidence.

Mr. Hertz purchased a Cadet model Iver Johnson 8 shot revolver."
(RT 3008).

The implication of this remark was that Mr. Hertz had bought his revolver in response to the ongoing "Watts Riots." Fitts' argument suggests that he was given this information by someone. However, as is clear from the attached articles from "The Los Angeles Times" (Exhibit 49), the "Watts Riots" did not begun until August 11, 1968, one day after Hertz bought his weapon. (Ex. 53). If Hertz bought his revolver in response to the "Watts riots", it was not "H53725" that he bought. But this would certainly explain why Hertz was never called as a witness. As shall be shown below, serious questions surround the authenticity and legitimacy of the document memorializing the Hertz gun purchase, which is known as a Dealers Record of Sale ("DROS"). (Ex. 53).

E. LAPD Descriptions of the Gun:

This is not the end of the matter. It has already been shown that the prosecution went to considerable lengths to avoid any discussion of the gun model at trial. LAPD's secret 10 Volume Summary Report is consistent with this pattern and contains a description of the Sirhan weapon which omits any reference to the model number of this gun. The report describes the weapon and its history as follows:

"Investigation of the assassination weapon. Manufacture and original purchase. The gun used by Sirhan Sirhan in the assassination of Robert Kennedy was an Iver Johnson .22 Caliber Cadet Model 2 1/2 inch blue steel finish serial number H53725. The gun was manufactured on June 3, 1965, at the Iver Johnson factory in Fitchburg, Massachusetts. It was shipped to the California Hardware Company on June 14, 1965. The California Hardware Company sold the gun to the Pasadena Gun Shop, 386 East

Green Street, Pasadena, on July 21, 1965. The Pasadena Gun Shop went out of business on September, 1966.

"James C. Pineda, a salesman, confirmed that Albert Leslie Hertz had purchased the gun from the Pasadena Gun Shop on August 10, 1965, at 9:30 A.M. Pineda identified a Dealer's Record of Sale as being the receipt of the transaction. Both the receipt and CII records show Albert Leslie Hertz as the purchaser of the gun on that date." (SUS Report, page 598, Ex. 50).

The SUS report describes the weapon with great precision until it is time to designate that it was a model 55 S-A. It then falls into complete silence on the subject of the weapon's model and writes the entire issue out of the case--contrary to the LAPD's own latent fingerprint report. In other words, the fact that People's Exhibit 6 and the torn gun box label bore the designation "55 S-A" became an Orwellian "non-fact." It cannot be contended that the use of the word "Cadet" completes the model description, because, as is clear from the information contained in gun manuals, the Cadet comes in two models, Model 55 S and Model 55 S-A. A model 55S has a split level site depicted in the LAPD's secret photograph. Thus, there can be no argument that reference to the weapon as a model 55 S-A was unnecessary to complete the model description.

It is not as though LAPD personnel did not know that the weapon was a Model 55 S-A. It will be recalled that a reference to this fact was included in the documentation prepared in connection with the weapon's examination by latent fingerprint personnel in another department and before the gun was made available to Wolfer and the crime lab for test firing. Once the weapon arrived at the crime lab, however, all reference to its status as a Model 55 S-A disappeared from the official record. For on June 6, 1968, the crime lab test fired a second weapon, a Model 55S--H18602--and produced test bullets that were placed in an envelope reflecting the date of June 6, 1968 and the serial number H18602.

It seems likely that the reason for this is extremely simple. H 53725 is a model 55S-A. The weapon depicted on the secret LAPD photograph (Exhibit 43) is a model 55S. Two weapons were tested as crime scene weapons. One was a model 55S-A. If the other (H-18602) was a model 55S, as implied by the secret LAPD photograph, then the question of the death weapon's model description became an evidentiary hot potato. The entire issue thus immediately disappeared without a trace once test bullets were obtained from a second gun.

Was H53725 really Sirhan's gun after all? No, if Carreon's grand jury testimony is to be believed. H53725 has a half moon site, and Carreon saw Sirhan with a sloping sighted weapon.

F. The Dealers Record of Sale for H53725:

It has already been shown above that there is reason to question the authenticity of the Dealers Record of Sale (DROS) in this case. There is still more to this situation.

As the SUS Report acknowledges, a Dealers Record of Sale ("DROS") was prepared by James C. Pineda as required by state law in connection with the sale of gun number "H53725" to Albert Leslie Hertz. At trial, Everett A. Chamberlain, a representative of CII at the California Department of Justice, appeared as a prosecution witness and provided a photostatic copy of the Dealers Record of Sale for that transaction. (RT 3889, 3692). He also provided a statement authenticating the copy as identical to the original DROS record, which exists in triplicate in CII files. The copy was introduced as Peoples Exhibit 20 pursuant to stipulation. (RT 3663, 3692). There is no indication in the record that the copy was ever inspected and compared with the original

by defense counsel to determine its authenticity. (RT 3692). Indeed, defense counsel showed no interest in any matter related to the genuineness of the gun or bullets and stipulated to their authenticity. (id). The issue of the authenticity of the Dealers Record of Sale is important because the photostatic copy introduced into evidence contains no reference to the model of the gun purchased by Hertz and simply describes it as an Iver Johnson Cadet. (A photograph of the DROS copy introduced into evidence as People's Exhibit 20 accompanies this Petition as Exhibit 53). This description was completely inadequate. As has already been pointed out, the Cadet comes in two models, a Model 55 S and a Model 55 S-A. Description of this weapon as simply an "Iver Johnson Cadet" constitutes an incomplete and inadequate description.

The record does not confirm that James Clarence Pineda's statement to police was ever turned over to the defense. (RT 451-452). Moreover, the issue of the gun model was not explored during Pineda's testimony. There is therefore no explanation in the record as to why Pineda would have omitted such critical information from a document he was required to submit to the California Department of Justice.

Was this description really omitted by Pineda? Based upon information that has become accessible only since 1988, it is now clear that a completed DROS for the Hertz transaction would have identified the weapon Hertz purchased as a model 55 S-A. This was exactly the information which the prosecution tried so desperately to suppress. If Pineda actually included the model description when he filled out the DROS for this transaction, as he was absolutely required to do, then the photocopy introduced into evidence did not accurately reproduce the original. In other words, unless Pineda was derelict in his duty as a clerk at the gun store, someone connected to the prosecution or the California Department of Justice photocopied the original DROS, whited out the model description as a model 55 S-A, photocopied this altered copy and then submitted it into evidence at Sirhan's trial.

In order to investigate this possibility, Petitioner's legal team contacted the California Department of Justice and requested an opportunity to view the original DROS for the Hertz transaction. The original DROS was not introduced into evidence and is, therefore, unavailable at the State Archives. However, it should be available at the California Department of Justice. Inquiries to that Department have elicited a most troubling response. DOJ officials have claimed that the DROS for this transaction was probably destroyed as a matter of routine. (See Ex. 54, letter of George Hisamoto, DOJ to Mangan, November 15, 1994).

In assessing the trustworthiness of the Department of Justice's claims concerning the allegedly routine destruction of this critical law enforcement and public record, it is well to consider the rationale advanced by DOJ for its actions. In responding to Mangan's inquiries, DOJ provided a "Records Retention Schedule" dated March 1, 1993 and which provides that DROS records must be retained for 21 years. (Ex. 55). The Schedule also states that the "destruction criteria" for DROS records are "confidential" pursuant to California Penal Code sections 11105 and 11106. (id). However, these statutes do not pertain to DROS records. Section 11105 specifies a duty to index information, and section 11106 pertains to "State Criminal History information." Further, there is nothing in either section which states that DOJ's records retention schedules for DROS records are "confidential." The "Records Retention Schedule Approval Request" form also provided by DOJ in response to Mangan's inquiries contains the following language above the signature of State Archivist John Burns: "Contains material subject to archival review. Items stamped 'Hold/Notify Archives' may not be destroyed without clearance by the Secretary of State."

(Ex 56) DOJ has not indicated whether or not the Hertz DROS records were stamped "Hold/Notify Archives." (Ex. 54). Section 14755(a) of the California Government Code provides that "No record shall be destroyed or otherwise disposed of by any agency of the state, unless it is determined by the director that the record has no further administrative, legal, or fiscal value and the Secretary of State has determined that the record is inappropriate for preservation in the State Archives." The Department of Justice did not even attempted to claim that the State Archives has authorized the Hertz DROS records' destruction. The California Department of Justice's assertion that the DROS for the Hertz transaction has been "routinely" destroyed eliminates any possibility of challenging the pedigree of H53725 as the Hertz weapon. Yet there are two specific reasons for doubting that H53725 was indeed the weapon purchased by Hertz and ultimately sold to Sirhan and his brother via daughter Dana Westlake and neighbor George Erhard.

One reason is provided by Carreon's testimony. Hertz purchased a gun and gave it to his daughter, who gave it to George Erhard. Sirhan and his brother then purchased this gun from Erhard. There is no evidence whatever that Sirhan or his brother made more than one gun purchase. Yet Sirhan was seen at the gun range by Henry Adrian Carreon with a gun having a sloping site, or, as Carreon put it, "no site." Carreon observed a weapon that was clearly not H53725 in Sirhan's hand on the day of the assassination. Not one witness was able to specifically identify H53725 as the weapon in Sirhan's hand or recovered from Sirhan in the pantry after the assassination. The only witness who could provide a clear description of a gun described a completely different weapon in his Grand Jury testimony and was then never asked about the issue in his trial testimony.

This sheds additional light upon the determination of prosecutors to avoid introducing the torn gun label into evidence. If H53725 was not, in fact, the Hertz-Westlake-Erhard-Sirhan weapon, then the torn gun label "found" at the Sirhan residence which bore the number H53725 was "planted" in order to manufacture the appearance of a link between Sirhan and H53725, and further exploration of the issue could raise the specter of evidence planting. Prosecutors certainly were well aware of Mr. Carreon's Grand Jury testimony describing the gun range weapon as having "no site." They understood the explosive implications of this testimony well enough to avoid asking Carreon to repeat it at trial. If Henry Adrian Carreon and the Grand Jury were actually shown H53725, why does the Grand Jury transcript not reflect the identification number of the gun introduced at a Grand Jury exhibit? The inference is inescapable that in all probability, the weapon presented to the Grand Jury was not H53725 after all. But this would explain the prosecution's reluctance to further belabor the issue of the gun's serial number and model number at trial by bringing out the torn gun label. It should be recalled that the only trial reference to serial number H53725 appears when eyewitness Karl Uecker was asked to read the number into the record. (RT 3104). No one was able to identify this weapon at trial as the crime scene weapon. The issue disappeared once Defense counsel obligingly offered to stipulate to the authenticity of Peoples Exhibit 6, (H53725) as the death weapon! To reiterate:

Q. BY MR. HOWARD: I would like you to examine People's 6 in evidence and first of all, can you, if you will, read the serial number on the weapon? Can you read that number?

A. [BY KARL UECKER:] I recognize the number, yes, H58725. [sic]

Q. Thinking back to June 4, when the struggle for the gun - you say it now looks like the gun, but at that time the gun was not bigger than it appears to be today?

A. It looks like the same one.

BY MR. COOPER: There won't be any quarrel about the identify of the gun." (RT 3104).

How could the gun label have been planted at the Sirhan residence? It will be recalled that the label was found outside in a trash container on June 6. (Supra). However, the Sirhan residence was unoccupied by the Sirhan family for a period of seven to ten days following June 5, and during this period of the family's absence from their home, the premises were extensively searched both by FBI and by high ranking LAPD investigators. (Ex. 57, Declaration of Adel Sirhan). Why was no gun label found on June 5, only to be discovered by a low ranking officer lying in plain view in an external trash container the next day together with an envelope containing writings which the prosecution would use to show alleged premeditation by Sirhan?

New evidence emerged after the trial to support a theory of evidence planting. In 1994, Adel Sirhan, Petitioner's brother, discovered a gun box on the bottom book shelf in the living room of the family home. (Ex. 57, Adel Sirhan Declaration). The gun label originally attached to this box had been removed therefrom. (id). Adel Sirhan has also declared:

"2. Following the assassination of Senator Robert F. Kennedy, the Sirhan residence on Howard Street in Pasadena, California, was unoccupied by the Sirhan family for a period of seven to ten days.

"During this period of our family's absence from our home, the premises were available to be searched both by FBI agents and by high ranking LAPD investigators." (Ex. 57).

It is strange indeed that occupying and searching agents and investigators would not have located this box during their extended opportunity to search the residence. Was this box, from which the gun label had been torn, placed in the Sirhan residence after the assassination? If prosecutors suspected this possibility or feared that it might be explored by the defense, their failure to introduce the gun box label suddenly becomes more than understandable.

The existence of strong prosecutorial suspicions about the legitimacy of H53725 as the Sirhan weapon is indicated by something else. The trial record confirms that on January 14, 1969, the prosecutors requested and received permission from the court to gain access the so-called assassination weapon. The ostensible reason for this reexamination was an alleged desire to inspect the gun's grip. No issue was ever made of the gun grip at trial, and no possible basis for such an issue appears in the record. However, as is now known, a major issue exists as to the gun site. (supra). Prosecutors must have recognized this issue. They carefully avoided asking Henry Adrian Carreon to repeat his Grand Jury description of a weapon with "no site" and, with equal care, avoided introducing any reference into the Grand Jury transcript about the gun's serial number. The serial number was given the bare minimum of attention at trial. (Supra).

G. The Destruction of H18602, the Second Gun:

It has already been shown that H18602 was tested on June 6, 1968, the day following the testing of H53725. Former District Attorney Joseph Bush claimed that a match was achieved between a test bullets and victim bullets as a result of a June 6 test firing. If this were really true, then H18602 would be the assassination weapon.

Defense counsel were entitled to an opportunity to test H18602 themselves in order to investigate the possibility that H18602 was indeed the assassination weapon. For if H18602 were the assassination weapon, it is clear that Sirhan Sirhan was not the assassin of Robert Kennedy. For reasons which shall be shortly explained, the possibility that H18602 belonged to Sirhan can be excluded. This is so not only because H18602 has a split-level site rather than the sloping site observed by Henry Adrian Carreon but also for an additional reason as well--a reason which goes to the heart of the prosecution's motive for suppressing H18602 as evidence.

Before addressing this issue further, it is well to consider whether defense counsel were ever given a chance to inspect H18602, test fire it themselves (or have it test fired under court supervision) and compare the resultant newly created test bullets with the victim bullets. The fact is that defense counsel never had this opportunity. For according to a teletype generated in response to an inquiry of California Department of Justice records in 1970, H18602 was destroyed in July of 1968, no more than two months after the assassination. (Exhibit 59). Petitioner's trial did not even begin until January of 1969. Thus, H18602's destruction took place almost immediately after the assassination and months before the trial began.

Furthermore, Wolfer's own testimony establishes that Wolfer knew in June of 1968 that the weapon was going to be destroyed in July of that same year. At the Board of Inquiry, Wolfer testified:

"The gun in question in Mrs. Blehr's letter, H18602. My records indicate I first came in contact with this weapon when it was brought up from Central Property by Sgt. Lee on June 10, 1968. For the record, this was three days after I had released the Sirhan gun and my test shots to the Grand Jury. The Police property record cards would indicate this. Sgt. Lee was present and brought the gun to me. He signed it out to me as normal procedure. The reason for obtaining this gun was to conduct certain tests that were necessary in the investigation of the District Attorney and because the Sirhan weapon, the original weapon, had now been held in evidence at the Grand Jury hearing. It was necessary for me to obtain as close a weapon as possible to the Sirhan gun. For this reason, Sgt. Lee went to the property section of the Los Angeles Police Department, into the basic weapons that were going to be destroyed because of normal destruction. They were no longer needed for police investigation and this is to be done, generally, by Penal Code section between July 1 and July 10. Sgt. Lee brought to me a gun that was as closely duplicated to that of the Sirhan gun, on the 10th of June, 1968."

(Ex. 60, Board of Inquiry transcript, p. 7, emphasis added).

This further serves to corroborate the 1968 destruction of H18602.

The destruction of H18602 was unknown to Petitioner's former counsel until well after the trial. The reason for this is that Wolfer testified at trial on February 24, 1969 that the gun in question was still available, (RT 4224), thereby concealing H18602's almost immediate pre-trial destruction. The prosecution did nothing to correct the impression created by this testimony from Wolfer and accordingly participated in the concealment of a major act of evidentiary destruction.

LAPD would later claim that H18602 was not destroyed until July, 1969. (Ex. 61, p. 4). To support this contention, an LAPD report addressing accusations of misconduct which had been directed toward De Wayne Wolfer asserted that the "Property records show that the gun was withdrawn from Property on June 10, 1969 for

test-firing by Sergeant W.J. Lee, S.I.D. However, it was not removed from the July 1968 'Handguns Destroyed List.'" (id) In fact, however, the Property Card for H18602 (Ex. 62), mentions a withdrawal by Lee on what appears to have been June 10, 1968, after which the card states that the weapon was destroyed in July of 1968. (id). There is no documentary evidence to support LAPD's assertion that the weapon was destroyed only after Petitioner's trial and following a withdrawal from property on June 10, 1969.

This much having been established, the question remains: why would the prosecution want to destroy H18602 and suppress this weapon as evidence?

Aside from the foregoing, H18602 was supposed to have been in police custody immediately prior to the assassination. As is clear from the attached police reports, H18602 was seized by LAPD officers on March 18, 1967 during the arrest of Mr. Jake Williams on robbery charges. (Ex. 63, Arrest Report and related records pertaining to Jake Williams and revolver). LAPD has admitted that the Williams weapon was supposed to have been locked up in the LAPD Property Division at the time of the assassination. (Ex. 61, p. 4). For LAPD to test H18602 as though it were recovered at the crime scene and as though it were used in the assassination raises disturbing and as yet unanswered questions, considering the fact that H18602 was supposed to have been in police custody at the time of the killing. This would provide the existence of a police motive to destroy H18602 before it could possibly be tested by the defense.

As it happens, H18602 was test fired by LAPD Officer Druly on March 22, 1967. (Ex. 60, Board of Inquiry transcript, p 9, June 16, 1971); Ex. 65, Analyzed Evidence Report dated March 22, 1967).

A Board of Inquiry convened within the LAPD to investigate charges of misconduct by De Wayne Wolfer in this case was advised that as of June 16, 1971, Officer Druly's test bullets from the Jake Williams' revolver (H18602) were still in existence. (id). Yet the 1975 panel of independent experts was never provided with Officer Druly's test bullets created in 1967 or even advised that those bullets still existed. The Druly test bullets are not mentioned on the list of items which the panel was authorized to analyze in 1975. (Ex. 13, 18, 19). Since then, Petitioner's researcher and counsel have contacted the Los Angeles Police Department and have been told that the Druly test bullets from H18602 are no longer in existence. (Ex. 5, Mangan Declaration; Ex. 36, Declaration of Lawrence Teeter). There has therefore never been any opportunity to compare H18602 test bullets with the victim bullets in the Robert Kennedy assassination case. This opportunity was lost even before Petitioner's trial as a result of H18602's destruction. Since Petitioner's trial counsel were falsely told during the trial that H18602 had not been destroyed and was still available, they were denied access to information that could have alerted them to the need to seek an independent comparison of the victim bullets and the Druly test bullets created in 1967. Finally, any opportunity to explore the status of H18602 as the weapon which originated victim bullets in this case has been destroyed forever, both as a result of the destruction of H18602 and as a result of the subsequent destruction of the Druly test bullets.

Petitioner has suffered a denial of Due Process as a result of prosecution's destruction of H18602 (the Jake Williams revolver) and its suppression of the fact that this destruction had taken place before trial. This denial of due process also interfered with Petitioner's right to effective assistance of counsel.

H. Suppression of H18602's Test Firing on June 6, 1968:

LAPD and the prosecution also violated Due Process and interfered with Petitioner's right to effective assistance of counsel by suppressing the fact that H18602 was test fired on June 6, i.e., that H18602 was treated as though it had been seized at

the scene of the crime and that test bullets were produced on June 6 by the test firing of this weapon for bullet comparison purposes. The District Attorney's office has maintained that H18602 was only discharged on June 11, 1968 and that it was "destroyed in July 1969 in accordance with State law." (Ex. 45, Bush Report, p. 6). But the Bush Report does not mention that the Property Card reflects H18602's destruction in July of 1968, (Ex. 62), just as the Department of Justice teletype confirmed. (Ex. 59).

Nor has the prosecution ever offered a remotely believable explanation as to why H18602 entered the case at all. According to the Bush Report, the test firing of H18602 was "necessitated by the fact that Sirhan's weapon had been entered in evidence before the Grand Jury and a court order restricted its availability. The second tests were conducted to determine sound characteristics and to verify muzzle distance by examining gun powder patterns." (id., pp 5-6). What the Bush Report fails to mention is that notwithstanding the court order restricting the availability of H53725, prosecutors obtained a court order authorizing their inspection of this very weapon on January 14, 1969. (RT 701-702). At that time, the prosecution requested permission to look at the gun in order to determine "whether it had a plastic handle or a wooden handle[.]" (RT 701). When advised that Judge Alarcon had issued an earlier order blocking counsels' access to the exhibits, the trial judge simply responded, "I don't understand the reason for the order." (RT 704). The court then granted the prosecution's request to inspect the weapon. But the Bush Report does not explain why a similar order could not also have been obtained authorizing the use of H53725 for sound and muzzle distance tests. After all, according to the prosecution, the reason for Judge Alarcon's earlier order "was to avoid perhaps unauthorized exploitation of the photographs used in the autopsies, et cetera, et cetera." (RT 701-702). The prosecution's attempt to suggest an innocent explanation for the entry of H18602 into the Sirhan case is therefore unconvincing in the extreme.

The prosecution has maintained that the envelope showing a test firing of H18602 on June 6, 1968 was the result of mislabeling. (Ex. 45, Bush Report, p. 6). But the official account of Wolfer's use of H18602 for "testing" is fraught with inconsistencies. The official explanation finally selected by the prosecution appears in the 1975 Kranz Report from the District Attorney's office, which contains the following language:

"Concerning the so-called clerical error concerning People's 55 introduced at trial, Wolfer testified that he had handed over four test fired bullets to the Grand Jury (Grand Jury 5B) and had kept three test fired bullets (what Wolfer described as three bullets in better condition than the other four), and had put three bullets in an unmarked coin envelope and placed the envelope in his desk drawer and locked it. Wolfer felt that for security reasons these three test bullets should be placed in his custody in an unmarked envelope until the trial. Wolfer stated in September 1975 that these three bullets remained in his custody until they were offered into evidence at trial. In the weeks preceding his 1969 trial testimony, Wolfer put the wrong serial number, from the subsequently destroyed second gun, on the coin envelope when he asked someone, whom Wolfer does not recall, the serial number of the particular Sirhan weapon." (Ex. 16, Kranz Report, 67).

But this explanation leaves unanswered the question of how it was that Wolfer placed the serial number H18602 on the envelope bearing a date of June 6, 1968. (Ex. 47, Photograph of Envelope, 6/6/68).

The Kranz Report's rationalization of Wolfer's actions is completely unconvincing, because it does not explain the most overtly compromising of those actions: Wolfer's authorship of an envelope label which includes both the serial number "H18602" and the date "June 6, 1968."

There is still further compelling documentary evidence which confirms that H18602 was indeed test fired on June 6, 1968 and that test bullets were obtained from this process. The letter "B" is clearly visible in the lower right hand corner of the June 6-H18602 envelope. (Ex. 47, a copy of SUS photocopy of envelope with "B" in corner). On June 9, 1971, LAPD Questioned Documents Officer-In-Charge K.L. Woodward authored a report opining that Wolfer was responsible for all writings in this envelope, including "the letter 'B' in the lower right-hand corner." (Ex. 65, Woodward Report). The designation "Exhibit 'C' appears on a photocopy made at the Superior Court Clerk's office at the request of criminalist William Harper depicting the envelope containing the Kennedy neck bullet as prepared by Dr. Noguchi on the same date, June 6, 1968, and this is also available at the Archives. (Ex. 14, photocopy of neck bullet envelope; Ex. 5, Mangan Declaration). This would confirm that Wolfer test-fired H18602 on June 6, 1968 and that he recovered test bullets from this process which were then placed in an envelope that he prepared at the time to store those test bullets. Here again, an avalanche of evidence confirms that LAPD personnel treated H18602, a weapon that was in police custody before the assassination, as though it had been re-recovered by police at the crime scene in the Robert Kennedy assassination case. How did LAPD and Mr. Wolfer respond to this situation? In a transcribed statement given at the District Attorney's office on June 16, 1971, Wolfer stated, "My records indicate I first came in contact with this weapon [H18602] when it was brought up from Central Property by Sgt. Lee on June 10, 1968." (Ex. 66, p. 7).

However, Wolfer admitted in his deposition conducted by Barbara Warner Blehr that he used H18602 not only in the two tests described above but also in a test conducted in Long Beach. (Ex. 32, Wolfer Deposition, 108-109). Since Wolfer's log shows that he was conducting tests on June 8 at California State College at Long Beach with a 2" Iver Johnson, (Exhibit 67, Wolfer Log, June 8, 1968), this log confirms that Wolfer was actually in possession of H18602 before June 10, contrary to other statements. But this would explain how it was that he could have placed the number "H18602" on an envelope dated June 6, 1968.

Other contradictions characterize Wolfer's account on this score. Wolfer told the Board of Inquiry, "I just inadvertently looked at the wrong number of the wrong gun, that's about the only way that I can account for it." (Ex. 60, Board of Inquiry Transcript, June 16, 1971, p. 11). Yet the District Attorney's Kranz Report had concluded that in "the weeks preceding his 1969 trial testimony, Wolfer put the wrong serial number, from the subsequently destroyed second gun, on the coin envelope when he asked someone, whom Wolfer does not recall, the serial number of the particular Sirhan weapon." (Ex. 16, Kranz Report, 67). This glaring contradiction casts serious doubts upon Wolfer's credibility and reinforces the inference that Wolfer, the LAPD and the DA's office are engaged in a bad faith manipulation of the facts.

Still further contradictions characterize Wolfer's testimony. Wolfer advised the Board of Inquiry, "I brought [the test bullets] back to the laboratory in a paper bindle to protect them from becoming damaged by carrying them in my pocket. There were

brought back in a paper bindle that I made there at the scene." (Ex. 60, p. 11). Several days later, Wolfer took the bindle out of his top drawer, where he had stored it, and placed the bullets in an evidence envelope. (id., p 12). At that time, he "made out" the envelope. (id.). But then why date the envelope June 6, 1968, unless the bullets contained in the envelope were produced by a June 6 test firing? Another envelope contained bullets produced by a June 5 test firing. Furthermore, Wolfer told the District Attorney's office that he initially placed the bullets in a plain envelope rather than a bindle or a labeled envelope at the time he locked them in his desk drawer. (Ex. 66, Statement of De Wayne Wolfer to District Attorney's office, 11).

It will be recalled that the official explanation for the entry of H18602 into this case is that it was necessary to use a gun other than H53725 for powder and sound tests June 11. (Ex. 44, Bush Report, supra.). Wolfer told the Board of Inquiry that that H53725 was a grand jury exhibit and was unavailable for this purpose. (Ex. 60, Board of Inquiry transcript, page 7). As has already been pointed out, however, it has never been explained why H53725 could not have been removed from the custody of the Grand Jury on application for a court order allowing use of this weapon for further testing. Wolfer asserted in his deposition, "The District Attorney's office told me that the attorneys of record were changing that, both sides had to sign the Court Order to release it, and this was the basic reason that I didn't get it." (Ex. 32, Wolfer Deposition, page 108). However, neither the Bush Report nor the Kranz Report, the two reports by the DA's office to discuss this issue, maintain that the prosecutors could not have sought an ex parte order for the release of H53725.

A second explanation has thus emerged for the necessity of using H18602 in this case. Immediately after proposing the above-mentioned explanation, Wolfer added in his deposition: "Well, if I had used the Sirhan gun for sound tests and the muzzle distance tests, every time you change the characteristics that are produced. So by somebody using it for these tests, we are destroying it for identification purposes." (id). But this explanation has since been impeached by statements made by LAPD Officer Butler, who claims to be in possession of extra test bullets fired from the assassination weapon which he and other officers took as souvenirs. (Ex. 36, Declaration of Lawrence Teeter; See The Killing of Robert F. Kennedy, an Investigation of Motive, Means and Opportunity, by Dan E. Moldea).

Wolfer's account of his handling of these test fired bullets and his creation of the envelope bearing the gun number H18602 and the date of June 6, 1968 is therefore fraught with contradictions and is inherently implausible. This reinforces the already compelling inference that H18602 was indeed test fired on June 6, 1968, just as the evidence envelope indicates.

The prosecution's suppression of the June 6 test firing of H18602 violates Due Process, and the failure of defense counsel to explore the issue denied Petitioner his right to effective assistance of counsel.

I. Summary:

The foregoing acts of evidentiary suppression and tampering violated Petitioner's right to Due Process and interfered with his right to effective assistance of counsel. Furthermore, the failure of defense counsel to explore the issues discussed above constituted a denial of effective assistance of counsel. For each of these reasons, Petitioner's conviction cannot stand. Petitioner requests an evidentiary hearing to explore the issues raised above and seeks an opportunity to question De Wayne Wolfer, Officer Butler, Officer Lee, Department of Justice personnel, and others with

knowledge of matters discussed above. Petitioner also wishes to subpoena the interview tapes used by author Dan Moldea for his book.

Petitioner also requests that the court order the California State Archives to allow his counsel and experts to examine the eight crime scene shell casings comprising Peoples Exhibit 21 with the two test fire shell casings included in Peoples Exhibit 55 with the aid of a comparison microscope. No such examination was made in 1975 due to the elimination of Peoples Exhibit 21 (the crime scene shell casings removed from the "Sirhan" weapon) from the items with which the examiners were to be provided pursuant to Court Order Number 2.

Further, Petitioner requests that the court order that H53725 be refired for the purpose of creating test shell casings to be compared with the Peoples Exhibit 21 and Peoples Exhibit 55 shell casings. The need for such a refiring of H53725 is exceptionally great given the fact that although this weapon was test fired in 1975, (Ex. 68, "Report of Examination" by Lowell Bradford, p. 5), Petitioner's counsel and researcher have been advised that by personnel of the California State Archives that the 1975 test bullets and shell casings created under court order are not available. (Ex. 5).

V

INSUFFICIENT EVIDENCE
SUPPORTS PETITIONER'S CONVICTION.

A conviction unsupported by legally sufficient evidence offends both federal and State Due Process requirements. (Jackson v. Virginia, 443 U.S. 307 (1979); McMillan v. Gomez, 19 F. 3d 465 [9th Cir. 1994]).

Without question, the evidence adduced at trial was legally insufficient to demonstrate that Petitioner shot Robert Kennedy.

Firstly, autopsy evidence places the muzzle of the assailant's weapon at between one and two inches from Senator Kennedy's body. (Exhibit 2, pp. 39-40). In summarizing the evidence relevant to this issue, the Supreme Court in People v. Sirhan, 7 Cal.3d 710 (1972) noted:

"The senator was taken to a hospital where he underwent surgery. He subsequently died on June 6, 1968. According to the autopsy surgeon, the cause of death was a gunshot wound 'to the right mastoid' that penetrated the brain; the senator also received two additional gunshot wounds, one in an armpit and another slightly lower. Expert testimony indicated that the gun was an inch and a half or less from the senator's head when the fatal bullet was fired and in contact with him or within a few inches when the other wounds were inflicted." (id., 719).

The witnesses all placed Sirhan between positions 15D and 16D on a grid. (Karl Uecker: RT 3096; Juan Romero, RT 3189; Vincent Di Piero, RT 3241; Bill Barry, RT 3450). It was established that Senator Kennedy was positioned at 13E on the same grid when shot. (RT 3023). Thus, the distance between RFK and Sirhan was approximately 5.5 feet. Assuming a 2 foot reach for Sirhan, the approximate muzzle distance from Senator Kennedy would 3.5 feet as measured on the grid used by the witnesses at trial. (See Ex. 70, a grid prepared by Ms. Mangan based upon the testimony of witnesses). Clearly, Petitioner was too far away to have shot Robert Kennedy. There is no evidence to the contrary.

Secondly, the autopsy evidence shows that Kennedy was shot from behind. (Exhibit 2, Autopsy Report, pp. 2-4). A police photograph of Senator Kennedy's jacket (Ex. 69) clearly shows bullet holds and powder burns in the rear portion of the jacket. However, the uncontradicted eyewitness testimony place Sirhan in front of Kennedy. This is clear from the placement of Kennedy and Sirhan on the grid by trial witnesses.

Thirdly, the autopsy describes Kennedy's wounds as having been fired in an upward angle. (Exhibit 2, Autopsy Report, page, 24). A police photograph of a crime scene reenactment (Ex. 71 to this petition) shows rods protruding at a sharp upward angle through the rear portion of a model's coat. However, no witness describes Sirhan's gun as having been fired at an upward angle. The trajectory of the bullets that caused the Senator's wounds does not in any way coincide with the angle at which Sirhan's gun was being fired.

Finally, the autopsy report describes three wounds on Kennedy and mentions a fourth shot as having passed through Kennedy's clothing. (Exhibit 2, pages 25-26). However, hotel employee Karl Uecker grabbed Sirhan's hand and deflected it no later than the second shot. (Ex. 76, Uecker's written statement to the FBI).

The evidence thus affirmatively negates the possibility that Sirhan shot Kennedy and is thus insufficient to establish his guilt as the shooter. Since the prosecution never even attempted to prove a conspiracy (and indeed has vigorously resisted the suggestion that there was one), the evidence is insufficient to support Sirhan's murder conviction under any theory advanced at trial. Since the sufficiency of the evidence can only be assessed with reference to what as presented at trial, the writ should issue if only for this one reason. The evidence presented at trial was legally insufficient to sustain Sirhan's murder conviction.

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VI

THE PROSECUTION INTERFERED WITH DEFENDANT'S
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL,
DELAYED DEFENSE COUNSEL'S ACCESS TO
EXCULPATORY MATERIAL EVIDENCE AND
VIOLATED DUE PROCESS BY
DELAYING THE DISCLOSURE OF THE AUTOPSY REPORT.

The prosecution delayed disclosing the autopsy report until the very eve of trial. The autopsy was conducted on June 6, 1968. (Ex. 2, certification page). As of December 23, 1968, however, defense counsel still did not have a copy of the autopsy report. (RT 154, 159). On that date, the prosecution was claiming that as soon as it received the report, a copy would be provided to the defense. Deputy D.A. John Howard advised the court:

"Your honor, we have delivered to the Defense all information we have. We anticipate Dr. Noguchi's medical report of the autopsy. When that is delivered to us a copy will be available to the Defense. (RT 159).

Not a word of explanation was offered for the bizarre fact that more than six months following the return of an indictment in the State's most important murder case, the autopsy report was supposedly still not available. (id). This is not unimportant, considering the fact that the case had been previously set for trial and then continued on

October 22, 1968 at the request of the lead defense attorney, Grant Cooper, whose entry into the case was accepted that same day by the court. (RT 139-142). The prosecution opposed the continuance request but did so without so much as once mentioning the fact that the autopsy report was not yet ready. (id). With an autopsy report supposedly not even complete on December 23, 1968, how could this case have been brought to trial at an earlier time? Yet the prosecution did not move for a continuance at any time in order to allow for the autopsy report's arrival.

The trial commenced on January 7, 1969. Even had the autopsy report been turned over to the defense between December 24, 1968 and January 7, 1969, such a belated disclosure would have afforded the defense virtually no time to digest the autopsy report before trial, especially in light of the holiday season. The first reference to the autopsy report on the record following December 23, 1968 occurred on February 24, 1969, at the commencement of testimony by Noguchi, at which point, prosecutor Lynn Compton made the following enigmatic statement:

"Your Honor, the witness [Dr. Noguchi] has handed me a volume here that runs some 62 pages I believe and a cover which is entitled 'Medical-Legal Investigation on the Death of Senator Robert F. Kennedy,' by Thomas T. Noguchi, MD, and counsel has a copy." (RT 4909; emphasis added).

At what point did defense counsel acquire his copy of the autopsy report? On February 22, 1969, two days before the author of that report began his testimony, defense investigator Robert Blair Kaiser wrote to chief defense attorney Grant Cooper pointing out that the autopsy report defined the muzzle distance as being between one and two inches. (Ex. 72, Kaiser memo dated February 22, 1969). In his attached declaration, Mr. Kaiser states that it was his practice to do things right away and that he would have written this memorandum either on the day of his receipt of the Autopsy Report or, at the latest, one or two days after having received it. (Ex. 100, Declaration of Robert Blair Kaiser).

By that time, of course, the dye had been cast. The jury was sworn on February 5, 1969. (People v. Sirhan, supra, 7 Cal. 3d, 728). After the trial had begun, widespread publicity was given to the asserted fact that Mr. Sirhan was considering a plea bargain under which he would plead guilty to murdering Senator Kennedy. In concluding that Mr. Sirhan had not been prejudiced by this publicity, the California Supreme Court wrote:

"Defense counsel at the time of his motion for mistrial stated, 'Defendant has told this jury in examining it on voir dire that we are not seeking an acquittal, but that they had to determine whether it was murder in the first degree, murder in the second degree or manslaughter; that's the only issue.' In his closing argument at the guilt trial defense counsel stated that 'we are not asking for an acquittal' and that 'I feel that the evidence and the law justifies . . . a verdict of guilty of murder of the second degree. . .'" (Sirhan, supra 731-732, fn. 10).

Thus, by the time that defense counsel received the autopsy report, he had already conceded Defendant's alleged status as Senator Kennedy's assailant to the jury during voir dire. The autopsy report became available to the defense far too late in the litigation to be of any help, even though it effectively exonerates Mr. Sirhan as the assailant of Senator Kennedy. Defense counsel's decision to stipulate to the authenticity of the bullets and the gun offered by the prosecution must be understood in this light, as a direct result of the prosecution's having withheld the autopsy report until the defense

had committed itself to a strategy of conceding Mr. Sirhan's status as Senator Kennedy's assailant.

The autopsy report was, of course, a document which completely devastated the prosecution's case. It states that Kennedy was shot from the rear rather than from the front, where all witnesses placed Sirhan in relation to Kennedy. Further, it provides that the bullets which struck Kennedy were fired from a muzzle distance of between one and two inches. As has already been shown, all trial witnesses placed Sirhan's gun at a distance of about three feet from Kennedy's head. Reports documenting pretrial statements both from these witnesses and from additional witnesses who were never called contained similar information. All reports are consistent with Sirhan's presence in front of and facing Robert Kennedy and are therefore inconsistent with Sirhan's access to Kennedy's rear. In addition, all reports position Sirhan's gun much further from the Senator than two inches.

a. Hotel busboy Juan Romero signed a statement to the FBI dated 6/6/68 in which he declared that "the gun was approximately one yard from Senator Kennedy's head." (Ex. 74, Romero statement to FBI). Romero further stated, "He held out his hand and I shook it. Senator Kennedy kept walking for approximately one or two steps." Thus, Romero's observations place Sirhan face-to-face with Robert Kennedy, and they place Sirhan's gun a yard away from the Senator's head.

(Interestingly, Romero also told FBI agents that two days before the assassination, two stout men wearing Kennedy signs around their necks and claiming to be police officers asked him where they could get uniforms like his. Romero asked to see their identification and took them to a room containing the uniforms, but it was locked.) (id).

b. Karl Uecker has stated that Sirhan's gun was at least 1.5 to 2 feet away from Senator Kennedy when the shots were fired. (Ex. 74, p. 4, Uecker statement to Burns). In a written statement to FBI agents on 6/8/68, Uecker stated, "[S]omebody reached around me and before I knew what happened two shots were fired and the Senator fell to the ground." (Ex. 76, Uecker statement to FBI). Sirhan did not get closer and did not get past Uecker. (Ex. 74., p. 4, Uecker to Burns).

c. Ambassador Hotel banquet waiter Martin Patrusky gave a statement in which he wrote:

"I saw the man, who turned out to be Sirhan, firing at Kennedy. Kennedy's back was not facing Sirhan. Sirhan was slightly to the right front of Kennedy. I would estimate that the closest the muzzle of Sirhan's gun got to Kennedy was approximately 3 feet."

(Ex. 77, par. 2, Statement of Martin Patrusky to Vincent Bugliosi). d. Kennedy supporter Lisa Urso stated in a 1977 interview with District Attorney's Office Investigator Burnett that the distance between Sirhan's gun and Senator Kennedy was "between three and five feet." (Ex. 78, transcript of Urso interview).

e. Ambassador Hotel waiter Vincent Di Pierro furnished a signed statement to the FBI in which he stated:

"As Senator Kennedy shook the hand of the hotel cook he then turned to his right in the direction of the heating cabinet and at that time I saw the white male who was previously standing on the tray holder now standing behind Mr. Uecker at the heating cabinet. I saw this individual reach his right arm around Mr. Uecker and in his hand he had a revolver which was pointed directly at Senator Kennedy's head. The revolver was about 3-5 feet from Senator Kennedy's head. This individual then shot Senator Kennedy in the head. Senator Kennedy at this time threw his hands and arms up,

reeled backwards and fell to the floor . . ." (Ex. 79, p. 3, FBI report quoting Di Pierro's written statement).

As with other witnesses, Di Pierro places Sirhan in front of Senator Kennedy and far outside the muzzle distance range described in the autopsy report.

Also, in the filmed reenactments created by the prosecution with eyewitnesses, Karl Uecker and Lisa Urso never place Sirhan behind Kennedy. Both Urso and Uecker show Sirhan firing horizontally, and they both show his gun far outside the 1-2 inch range required by the autopsy findings. (Ex. 36, Declaration of Lawrence Teeter).

Finally, an LAPD photograph of a staged reenactment clearly demonstrates the sharp upward angle at which the shot passing through Senator Kennedy's shoulder and rear underarm area must have been fired. (Ex. 71, LAPD reenactment photograph). Not one witness suggests that Sirhan's gun arm was held at anything other than a horizontal position at the time of the shooting.

There is therefore a wealth of additional information beyond what was developed at trial which could have exculpated Sirhan Sirhan as the shooter of Robert Kennedy.

However, without the autopsy report, all of this information would appear largely meaningless and insignificant. It was only the autopsy report which rendered the observed distance between Sirhan Sirhan and Senator Kennedy exculpatory to Mr. Sirhan. It was only the autopsy report which rendered the sharp upward angle at which Senator Kennedy was shot exculpatory to Mr. Sirhan. It was only the autopsy report which rendered Karl Uecker's deflection of Mr. Sirhan's gun by no later than the second shot exculpatory to Petitioner. And it was the autopsy report which confirmed that Mr. Sirhan's face-to-face position vis-a-vis Robert Kennedy excludes Petitioner as the Senator's assailant.

The prosecution's unexplained and inexplicable delay in providing this crucial evidence to opposing counsel sandbagged the defense into foregoing an attempt to challenge the prosecution's assertion that Sirhan Sirhan actually shot Robert Kennedy. As has been stated already, the stipulations into which defense counsel entered conceding the authenticity of all purported crime scene bullets and H53725 as both the "Sirhan" gun and as the assassination weapon were the product of a decision to concede Sirhan's status as the Kennedy assailant--a decision which, at the time it was made prior to the onset of voir dire, might have seemed entirely reasonable given the absence of the autopsy report.

The autopsy report would also have pointed toward a second assailant's existence, given its reference to two bullet tracks in Senator Kennedy's brain and the recovery of an autopsy brain fragment which simply vanished from the case record along with pre-operative police photographs of Senator Kennedy's wounds.

This is a most striking instance of prosecutorial interference with Sirhan's right to effective assistance of counsel. Delay in disclosing the most fundamental and significant piece of exculpatory material evidence in the case, the autopsy report, generated ineffective assistance of counsel by goading the defense team into conceding as undeniable that which could have been easily disproven with the aid of the autopsy report--Sirhan Sirhan's identify as the person who shot Robert F. Kennedy.

To this must be added the fact that Grant Cooper, who tried the case as lead defense counsel, became attorney of record only in October 22, 1968, about ten weeks before the commencement of trial. (RT 139-142). This aggravated the effect of the prosecution's sandbagging. Cooper, a late arrival, was compelled to map out trial strategy in short order without even having the most crucial potentially exculpatory material evidence until, for all indications in the record, after the trial's inception and

within approximately two days before the onset of testimony to which the autopsy report related. The prosecution's tactics exploited Cooper's late arrival to the case and placed the defense in a pressure cooker position. If the autopsy report was not provided until shortly before the commencement of Dr. Noguchi's testimony, it was not disclosed until after a strategy rejecting the autopsy's importance had already been selected and announced to the jury by counsel, who were relying upon the apparent absence of any basis for litigating the issue of Sirhan's identify as Senator Kennedy's killer.

That the prosecution's act of withholding the autopsy report was a conscious and deliberate effort to suppress devastating exculpatory evidence is also confirmed by Dr. Noguchi's testimony before the Board of Supervisors, in which the Coroner recounts that immediately following his Grand Jury appearance, he was invited by a Deputy District Attorney to question his own conclusions regarding the distance between the assassination weapon's muzzle and Senator Kennedy's body. (Ex. 17, p. 100, Board of Supervisors Noguchi testimony). Although these efforts were not successful and were ultimately exposed by Dr. Noguchi before the Board of Supervisors, the very fact that such efforts were made at all provides yet another indication of the prosecution's frenzied efforts to suppress exculpatory evidence. Those efforts bore fruit in an otherwise incomprehensible delay experienced by the defense in obtaining access to the autopsy report.

It is readily inferrible that when confronted with Dr. Noguchi's muzzle distance findings before the Grand Jury, the prosecution recognized that a trial could easily wind up proving Sirhan's innocence and establishing a conspiracy and a cover-up. During an in camera conference held on February 10, 1969, (after the trial had begun but apparently before the autopsy report was finally delivered to the defense), District Attorney Evelle Younger expressed a willingness to enter into a plea bargain arrangement under which the prosecution would forego a sentence of death in exchange for Mr. Sirhan's plea of guilty to a charge of first degree murder. (RT 2857). Younger assured the court that he had discussed this possible disposition with the three prosecutors trying the case (Compton, Howard and Fitts) and that they all concurred with this disposition. (RT 2857). Defendant's lead attorney, Grant Cooper, not having yet come into possession of the autopsy report, indicated that the defense was willing to enter into such a disposition. (RT 2855). Judge Walker rejected the proposed plea bargain at this time. (RT 2861). Then, on February 13, 1969, the prosecution again renewed the same plea bargain offer and urged the court to approve it. (RT 2870). After hearing argument in favor of the proposed disposition, the court again rejected it. (RT 2870).

The autopsy report was the great unknown variable. The prosecution was aware that Dr. Noguchi's medical findings literally precluded a finding that Sirhan Sirhan shot Robert Kennedy. As such, its incentive to avoid a trial was entirely understandable. The defense did not yet have the autopsy report and thus did not realize the true weakness of the prosecution's case during the plea bargain discussions. It was only after all hope of a disposition was dashed by the court's two adverse rulings that the record finally reflects defense counsel's acquisition of the autopsy report.

The prosecution's plea bargain efforts must be understood as a reflection of the weakness of its case against Sirhan Sirhan as Robert Kennedy's assailant. So, too, must the prosecution's delay in producing the autopsy report until the defense strategy of conceding Petitioner's status as Senator Kennedy's assailant was virtually embedded in stone after the commencement of trial.

There appear to be three possible explanations for what happened. These are:

1. The Coroner's office was derelict in producing and completing the autopsy report, and only the Coroner's office was responsible for this.

2. The District Attorney's office and/or the LAPD were responsible for the delay in completing the autopsy report as a result of an ongoing campaign to force its revision.

3. The District Attorney's office was in possession of the Autopsy Report long before the commencement of trial and simply concealed this from the court and opposing counsel.

In addition to the foregoing discussion, there is one other factor which favors the second and third possibilities. The autopsy report does not contain any information setting forth the date upon which it was completed. (Ex. 2). This information is lacking even on the signature page. (*id.*, p. 62). This important omission suggests an effort to conceal the date of the document's completion. Documentation of a completion date within a reasonable time following the autopsy would have made it impossible for the District Attorney's to advise the court on December 23, 1968 that the report was not yet available. On the other hand, if the report were not in fact available as late as October 22, 1968, why was not this problem mentioned by the prosecution on that date when the District Attorney's office opposed a defense request for a continuance?

In any event, even were the District Attorney's office entirely blameless in this situation, Petitioner would still be entitled to relief. The prosecution is a single entity for Due Process purposes. (*Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766 [1972]). Thus, even a finding that the Coroner's Office rather than the LAPD or the District Attorney's office was at fault in creating the disclosure delay would not shield the prosecution from sanctions in this matter.

Moreover, even were the prosecution simply negligent rather than malicious in its dilatory disclosure of the autopsy report, the result would still be the same. As the Supreme Court noted in *Gilio*, *supra*:

"As long ago as *Mooney v. Holohan*, 264 U.S. 103, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3. L.Ed.2d 1217 (1959), we said, '[t]he same result obtains when the State, although not soliciting false evidence, allowed it to go uncorrected when it appears.' *Id.*, at 269, 79 S.Ct., at 1177. Thereafter *Brady v. Maryland*, 373 U.S. [83] at 87, 83 S.Ct. [1194], at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.'" (*Gilio v. United States*, *supra*, 405 U.S., 153).

Accordingly, suppression of the autopsy report "justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.'" (*Gilio v. United States*, *supra*; *Brady v. Maryland*, *supra*).

Regardless of the motivations underlying them, (which have never been explained and are highly suspicious in any event), the prosecution's actions in failing to produce the autopsy report until shortly before the presentation of relevant testimony made Due Process impossible in this case. Due Process requires adequate notice, and the defense was denied even this most basic element of fundamental fairness. The resulting ineffectiveness of defense counsel is squarely attributable, first and foremost, to the prosecution's failure to promptly complete its cause of death investigation, cause it to be reduced to writing and transmit it to the defense sufficiently before the

commencement of trial to allow the report to be considered in formulating defense strategy. In United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985), the United States Supreme Court noted that in reviewing a challenge based upon improper non-disclosure or suppression of evidence, "the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." (473 U.S., 683). The High Court continued:

"The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

"In the present case, we think that there is a significant likelihood that the prosecutor's response to respondent's discovery motion misleadingly induced defense counsel to believe that O'Conner and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government." (id).

That is exactly what happened in the present case. Here, as in Bagley, supra, "there is a significant likelihood that the prosecutors' [failure to produce the autopsy report] misleadingly induced defense counsel to believe that [the prosecution's claims and ballistics testimony purportedly implicating Petitioner as Senator Kennedy's assailant] could not be impeached[.]" A writ of habeas corpus should issue as requested.

There is one final point to be made on this issue. The California Supreme Court relied upon defense counsel's concession of Petitioner's guilt as Senator Kennedy's assailant in ruling that the publicity accorded the plea bargain discussions was not prejudicial to the defendant's constitutional rights. The Court wrote:

"Here neither prejudice to defendant from the publicity nor a probability thereof is shown by the record, even if it be assumed that the jurors were unable to disregard the matters they had heard or seen relating to a guilty plea by the defendant.

"Insofar as the jurors had heard or read only of (1) a guilty plea by defendant without any indication of whether it was to first degree murder or to a lesser crime or (2) statements of an even more general nature, it is unlikely that defendant was prejudiced by their being aware of the foregoing since at the trial defense counsel made it clear to the jury that the defense was not seeking an acquittal and that the sole issue was whether defendant was guilty of first degree murder, second degree murder, or manslaughter." (People v. Sirhan, supra, 7 Cal. 3d, 731).

But defense counsel's concessions were the product of the prosecution's delay in producing the autopsy report. Thus, the Supreme Court's resolution of the prejudicial publicity issue cannot stand. ¹

Petitioner requests an evidentiary hearing at which evidence could be developed regarding the time at which the autopsy report was completed and turned over to the District Attorney's office. Testimony about this most important subject could be elicited from knowledgeable witnesses, including, among others, Dr. Noguchi himself.

⁵ The issue of delay in producing the autopsy report, like the other issues addressed herein, was not litigated on direct appeal. Thus, Petitioner was denied effective assistance of appellate counsel as guaranteed by both the California and United States Constitutions.

VII
DUE PROCESS WAS VIOLATED BY THE
DESTRUCTION AND SUPPRESSION
OF EVIDENCE THAT MORE THAN ONE
GUN WAS FIRED IN THE HOTEL PANTRY.

As has been shown above, the so-called Sirhan weapon held eight bullets. The LAPD trajectory study accounted for seven bullets removed from victims and concluded that an eighth bullet disappeared in a "ceiling interspace". (Exhibit 1). The existence of any additional bullets in the pantry beyond the eight acknowledged by police would point toward a second gunman, since "Sirhan's" weapon could fire only eight bullets. The existence of a second gunman could, of course, exonerate Petitioner as the shooter of Kennedy. If, as the evidence discloses, Mr. Sirhan could not possibly have fired a single shot which struck Senator Kennedy, evidence of a second gunman could explain how the Senator was shot--by someone other than Mr. Sirhan.

At least two and possibly more additional bullets were discovered by police in the pantry. These bullets were removed by police, who, rather than turning over the evidence, continued to deny their existence and suppressed them.

Evidence of such extra bullets comes from a number of independent sources.

1. William Bailey was the first FBI agent on the scene in the Ambassador Hotel pantry after the assassination. Mr. Bailey's written statement dated November 14, 1976 contains the following observation:

"At one point during these observations I (and several other agents) noted at least two (2) small caliber bullet holes in the center post of the two doors leading from the preparation room. There was no question in any of our minds as to the fact that they were bullet holes and were not caused by food carts or other equipment in the preparation room." (Exhibit 80, Statement of William A. Bailey, November 14, 1976).

Then, in a letter to the office of Los Angeles County Supervisor Baxter Ward dated July 1, 1977, Mr. Bailey, who had retired from the FBI in 1971 and had since been employed as Assistant Professor of Police Science Technology at Gloucester County College in Sewell, New Jersey, (Ex. 81), wrote that bullets had been removed from the scene. Professor Bailey explained:

"In regard to Photo No. 1: These items marked 'B' and 'C' are, in my opinion, not even subject to speculation. I definitely recall closely examining these two holes and they definitely were bullets. The item marked 'A' was also closely examined by myself and other agents. These holes are at approximately my eye level. I am reasonably certain that they, too, were bullet holes.

"In regard to Photos No. 1 and 3: The vertical crack was there, I saw it. I believe the significance of the missing piece of wood in Photo No. 2 is that the bullets at point 'A' were easily removed from the center post by simply removing the small piece of wood; hence, they were 'quickly removable.' Those bullets at points 'B' and 'C' were embedded and would require more delicate recovery by criminalist experts. I would speculate that the disparity in the photos (that is, wood present and then missing), is due to this 'quick' recovery. I do not know who recovered these items." (id., p. 1; emphasis added).

Professor Bailey discerned photographic evidence that bullets had actually been removed from the pantry. He also described having seen actual bullets lodged in two holes.

2. The FBI file system itself contains a description of photographs that refers to them as depicting "bullet holes." (Ex. Exhibit 2, "FBI Captions to Photographs"). The document in question lists four photographs (E-1 through E-4). E-1 is described as showing two circled bullet holes. The document's description of E-1 continues as follows:

"The portion of the panel missing also reportedly contained a bullet." (Ex. 82, par. E-1).

This reference in the FBI's own "FBI Captions to Photographs" thus corroborates Professor Bailey's statements about removal of bullets.

Photograph E-2 is described in the FBI's captions listing as showing two bullet holes. As is clear from the accompanying photograph included with Exhibit 82 and marked E2, these holes are situated at an angle of approximately 30 degrees in relation to each other. They are described under E-1 as "showing [the] doorway area leading into [the] kitchen from the stage area." E-3 is described as a "[c]lose up view of two bullet holes which is located in [the] center door frame inside [the] kitchen serving area[.]" Unlike the holes depicted in E2, the holes in E3 included in Exhibit 82 are vertically positioned in relation to each other. E-2 and E-3 thus depict four (4) separate and distinct holes described in the FBI's own "Caption" as bullet holes. E-4 is described as a view of a door hinge that "shows [the] reported location of another bullet mark which struck [the] hinge."

Professor Bailey describes a photograph as depicting De Wayne Wolfer pointing toward a hinge. Bailey wrote, "I definitely recall seeing a mark on this hinge that could have been caused by a ricocheting bullet." (Ex. 81, p. 2). A copy of this photograph accompanies Exhibit 81).

Thus, the "FBI Caption to Photographs" identifies four (4) separate bullet holes and one (1) additional bullet mark. It also confirms that a bullet had been removed from the pantry. (Included with Ex. 82 is a photograph that appears to match the caption's description of FBI photograph E-1).

3. Additional photographs also point toward still another bullet hole. Attached hereto as Exhibit 83 are three photographs depicting the lower area of the door frame. The first photograph shows an officer pointing with a pen. The second shows an officer directing an instrument toward the same area hole. This second photograph is labeled as an "APWirephoto" and contains the following caption:

"A police technician inspects a bullet hole discovered in a door frame in a kitchen corridor of the Ambassador Hotel in Los Angeles near where Sen. Robert F. Kennedy was shot and critically wounded early today. Bullet is still in the wood."

A third photograph shows what appears to be an embedded bullet. A ruler appears in a vertical position in both the first and third photographs, indicating that the bullet contained in the third photograph is probably an enlargement of the area toward which the officer is shown to be pointing in the other two photographs. This is consistent with the APWirephoto caption statement, "Bullet is still in the wood."

4. Los Angeles Police Officer Butler has stated in a tape recorded interview with journalist and author Dan Moldea that "De Wayne Wolfer took the two bullets out of the wall." According to Butler, the bullets were removed from the center divider in Butler's presence, and Wolfer and Bill Lee were digging them out. It was necessary to

disassemble the center divider for this purpose. In his interview, Butler also stated that bullet fragments were found by the steam table. In addition, Butler saw another bullet hole in the wall. (Ex. 36, Declaration of Lawrence Teeter).

The importance of Officer Butler's statements cannot be over-emphasized. Those statements provide an eye-witness account by an officer of the Los Angeles Police Department who observed the removal of extra bullets from the crime scene by Wolfer and the LAPD.

5. Dr. Noguchi indicated in a 1975 statement that Wolfer "pointed to several holes in the door frame of the swinging doors leading into the pantry" and added, "I got the distinct impression from him that he suspected that the holes may have been caused by bullets." (Ex. 84). Accompanying this exhibit are two photographs of Dr. Noguchi pointing toward two separate pairs of holes.

6. Witness John Shirley wrote in 1969 that he had accompanied a photographer into the pantry and that he observed two circled bullet holes. Shirley continued:

It appeared that an attempt had been made to dig the bullets out from the surface. However, the center divider jamb was loose, and it appeared to have been removed from the framework so that bullets might be extracted from behind. It was then replaced but not firmly affixed." (Exhibit 85).

This observation corroborates Officer Butler's statement concerning the removal of bullets from the center divider and the disassembly of that center divider. It also corroborates references to bullet removal appearing in Professor Bailey's letter and the FBI captions list.

7. There is still further physical evidence that more than eight bullets were fired in the pantry. In 1982, an engineering study conducted by Michael H.L. Hecker, Ph.D., F.A.A.F.S, resulted in a finding that based upon a review of three audio recordings of the assassination, "no fewer than 10 (ten gunshots are ascertainable following the conclusion of the Senator's victory speech until after the time Sirhan Bishara Sirhan was disarmed." (Ex. 86, Hecker Declaration).

Overwhelming physical evidence points toward the discharge of more than eight shots in the pantry during the assassination. Overwhelming evidence also establishes that extra bullets were removed from the crime scene by police.

What happened to those extra bullets? There is no mention of these bullets in Wolfer's Trajectory report. (Ex. 1). These bullets were therefore suppressed. How was this done?

According to the prosecution, two expended .22 bullet slugs (Peoples Exhibits 38 A and B) were recovered from Petitioner's car parked near the Ambassador following the assassination. (Ex. 3, Property Report). The examiners from the 1975 panel concluded that wood was present on these bullets. (Exhibit 21, Lowell Bradford Bullet Work Sheet). The prosecution never explored this issue or in any way attempted to explain how wood could have been found on bullets lying in Petitioner's car. For that matter, the prosecution never attempted to determine the origins of expended bullets in Petitioner's car! As has been shown above, extra bullets were removed from the door frame in the hotel pantry shortly after the assassination. One eyewitness who was present in the pantry when the shooting began, Dick Tuck, made the following statements to police in a taped interview on July 12, 1968:

"I thought what was happening was that a table was breaking. It sounded like wood--like often guys stand on--and I heard this crackling sound. It sounded like dry wood snapping." (Ex. 87, Tuck interview transcript, p. 12).

The foregoing strongly suggests that police, unable to account for the presence of extra bullets without admitting to a conspiracy, simply suppressed this exculpatory evidence by claiming that expended bullet slugs which bore traces of wood had been found lying astray, for no discernible reason, in Petitioner's car! The presence of wood on these bullets was concealed by the prosecution and was not acknowledged by Wolfer or anyone else. It only surfaced when the 1975 panel members' work sheet became available long after Petitioner's trial.

There is compelling eyewitness evidence corroborating the discharge of multiple guns in the pantry during the assassination. For instance, Attorney Evan Phillip Freed executed a highly detailed declaration in 1992 in the course of which he recounted having seen two gunmen fire during the assassination. Mr. Freed declared:

"I saw the 2nd man (wearing the darker clothing) who had been in the pantry with Sirhan during the speech pointing a gun in an upward angle at the Senator. Based on the sound I heard, I believe the first shot came from this man's gun. In the background and about 6-8 feet from me, I could see Sirhan firing a revolver held in his right hand in the direction of the Senator. People in the crowd were screaming and grabbing Sirhan, and I remember they were holding his arm as he was shooting. I cannot say how many shots were fired by Sirhan or by the second gunman.

"As the crowd rushed towards Sirhan, they passed by the 2nd gunman. He was backing away, towards the east end of the pantry. I was shoved by the surge of the crowd back against the south wall of the pantry, where I was alone next to another door that exited into the Embassy Room.

"At that time, I observed the 2nd gunman running in my direction. He was not holding a gun at that time. Another man was running behind him in the same direction yelling to me, 'Stop that guy, stop him!' There was no one else other than the 2nd gunman that he could have been yelling at. This took place just as I was opening the door to the Embassy Room to get some help.

"As the 2nd gunman came to the door, the man pursuing him yelled to me again, 'Get him, get it!' As the 2nd gunman passed through the door, the man pursuing him tried to grab him but failed. Both men ran into the Embassy room. The 2nd gunman ran directly out the east doors of the Embassy Room. The man running after him almost fell as he came through the pantry doors, and he continued running in the same direction as the second gunman. I never saw either of these men again. . . "

(Ex. 88, Affidavit of Attorney Evan Phillip Freed, pp 2-3). The Freed affidavit not alone. Pantry eyewitness Booker Griffin also saw a second gunman firing during the assassination. (Ex. 89, pp. 2, 5, transcript of interview of Booker Griffin by Professor Philip H. Melanson). Such eyewitness accounts lend support to the physical evidence described above by confirming that more than one gun was fired in the pantry during the assassination.

Indeed, there are strong indications that one of the shooting victims in this case suffered two separate wounds. William Weisel testified that a bullet was removed from him during surgery. (RT 4005, 4007). Mr. Weisel showed the jury his entrance wound at the request of the prosecutor. (RT 4006). However, he also described an "exit wound . . . on the right side of my spine, in the back." (RT 4006). Since a bullet that is removed during surgery cannot possibly cause an exit wound, Mr. Weisel was apparently shot

twice. One bullet remained inside him, and the other passed through his body. De Wayne Wolfer's trajectory study accounts for only one Weisel wound. (Ex. 1). Since William Weisel's own testimony confirms that he suffered two wounds, this testimony establishes that at least two guns were fired in the pantry and thereby further demonstrates that the prosecution suppressed evidence of extra bullets in the pantry.

Police removed the door frame and ceiling panels from the pantry almost immediately. This evidence was then destroyed by SUS in June of 1969 immediately upon the conclusion of the trial and before the appellate process could begin. (Ex. 92, Archives list).

Petitioner requests an evidentiary hearing at which it will be possible explore the disturbing implications of the foregoing discussion, which points toward a concerted effort to suppress evidence of extra bullets in the pantry. The need for an independent inquiry into this troubling issue is augmented by circumstances discussed in the next sections of this brief.

VIII

THE PROSECUTION SUPPRESSED A SECRET L.A.P.D. INTELLIGENCE REPORT CONFIRMING THE EXISTENCE OF MULTIPLE SHOOTERS IN THE CASE.

The alleged Sirhan Revolver, H-53725, had a firing capacity of eight (8) rounds. (Ex. 1). However, the accompanying affidavit of former L.A.P.D. officer Mike Rothmiller, which was presented to the Los Angeles County Grand Jury in support of a request for a reopening of the Robert Kennedy assassination case, (Exhibit 94, Rothmiller Declaration dated August 26, 1992), the Organized Crime and Intelligence Division of the L.A.P.D. ("OCID"), by which Rothmiller had been employed, maintained a secret Report on the Robert Kennedy assassination. Detective Rothmiller has declared: "5. Shortly after I was transferred to OCID, I found a file on Robert F. Kennedy. The file contained a lengthy report prepared by OCID (the "Report") on the assassination of Senator Kennedy, which report ran to the best of my recollection about 60-100 pages long. I do not remember the date of the report. The Report describes the location from which each bullet recovered at the scene was removed. It reported how many bullets recovered were from each victim and from other locations. I recall that it stated that two (2) bullets had been recovered from a wall, and other bullets had been recovered from victims.

10. The Report listed a total of ten (1) different bullets that had been recovered from the scene of the assassination and victims. I recall that it listed ten (10) bullets because I was aware at the time that Sirhan Sirhan had used a .22 caliber revolver that held only eight (8) bullets. It therefore surprised me when I read in the report that ten (10) bullets had been recovered." The secret OCID file constitutes exculpatory material evidence of the most explosive proportions. It confirms the existence of multiple shooters, thereby demolishing the prosecution's single assailant theory. Furthermore, this report confirms the foregoing analysis of crime scene evidence. In addition, the non-disclosure of this report reflects a calculated policy of concealment by the LAPD.

Nondisclosure of such evidence violates Due Process, because information confirming the existence of multiple shooters potentially exculpates Sirhan Sirhan as the shooter of RFK and corroborates autopsy findings excluding Petitioner as the Senator's killer. This information was known by the prosecution and withheld from the defense.

Secondly, this material confirms that the prosecution's case was in conflict with information known to the police before the case was presented. The prosecution presented a single assailant case, but the O.C.I.D.'s secret file confirms that this was in fact a multiple assailant case. This means that the prosecution, in this respect as in others, presented a fabricated case against Petitioner, thereby violating elementary Due Process and interfering with his right to effective assistance of counsel.

Finally, the Rothmiller affidavit constitutes newly discovered evidence which undermines the entire core of the prosecution case against Petitioner and its core claim that Sirhan, and Sirhan alone, fired shots in the pantry.

Petitioner requests an evidentiary hearing at which he can discover the date of the secret report's preparation, the circumstances surrounding its concealment and its contents. Petitioner requests that the prosecution be ordered to immediately turn over a copy of this report to Petitioner.

IX

THE PROSECUTION VIOLATED DUE PROCESS BY DESTROYING MASSIVE NUMBERS OF PHOTOGRAPHS, AND BY SUPPRESSING PHOTOGRAPHS TAKEN DURING OR SHORTLY FOLLOWING THE ASSASSINATION AT THE CRIME SCENE.

On October 21, 1968, less than two months following the assassination of Robert Kennedy, two LAPD officers carried out a mass incineration of 2,410 S.U.S. ("Special Unit Senator") photographs. This amazing act is documented in a short memo from LAPD officers H. R. Shiells and T. J. Miller addressed to Lt. Roy Keene, SUS Homicide Division. The Memo (Exhibit 90) reads:

"Sir:

Upon your order of 8-21-68 at 9:30 AM, Officers Shiells, E.R. S/N 12382 and Miller, T.J. S/N 11152 (S.U.S. Unit), transported two thousand four hundred and ten (2,410) S.U.S. Unit photographs without code numbers to County General Hospital and deposited these photographs in the hospital incinerator and witnessed their destruction.

The remaining photos in S.U.S. files are equipped with code numbers with the exception of non-L.A.P.D. photos." (Exhibit 90).

Long before the disclosure of a damning autopsy report, LAPD commanders took the extraordinary step of incinerating over 2,410 uncatalogued photographs. There is no way to determine what these photographs depicted. As with the other violations of Petitioner's constitutional rights described herein, the Due Process violation described in this cryptic memo commands the issuance of the writ requested in this petition.

As is clear from the attached record from SUS files, (Ex. 91), Jamie Scott Enyart photographed the events taking place in the hotel pantry during the time of the assassination. An SUS document confirms LAPD's receipt of Enyart's photographs in the following language:

"Subject was in Embassy Room taking pictures of Kennedy's speech. As Kennedy left podium, subject went to hallway outside kitchen. Subject got up on a table to take pictures. Subject believed at that time he may have

gotten pictures of shooting. Subject turned undeveloped pictures over to police." (id).

Accompanying this report is a business card in the name of "Scott Ewnyart Studios." The document is dated June 5, 1968.

It has already been pointed out that Scott Enyart's photographs are nowhere to be found in the Property Report. However, that Report describes the receipt of photographs from one "George Clayton." Was this description yet another attempt to hide evidence in manner reminiscent of the alleged discovery of spent bullets in the Sirhan car?

In 1988, Mr. Enyart asked for the return of his films from the LAPD. Deputy Chief Parks replied by letter dated July 1, 1988 and informed Mr. Enyart that "everything that was in the possession of the Los Angeles Police Department concerning the Kennedy investigation has been delivered to the custody of the State of California." (Ex. 92, letter of July 1, 1988 from Bernard C. Parks to Jamie Scott Enyart). By letter dated October 11, 1988, Mr. Enyart was informed by Laren Metzger of the California State Archives that his photographs could not be found in the Archives collection as received from the LAPD. Mr. Metzger wrote, "Although similar photographs are present in the files, your exact images are missing. As a result, I can only conclude that your photographs were among the 2,400 images destroyed by LAPD in August 1968."

Mr. Enyart later sued the City of Los Angeles and various officers for the conversion of his photographs and recovered a substantial award of damages in 1996. The verdict is now on appeal. It is understood that the parties are awaiting the preparation of the Reporter's Transcript on appeal. Petitioner requests that an evidentiary hearing be held on this and all other matters addressed in this petition and shall seek leave of court to file a supplemental brief addressing the Enyart photographs in detail once the trial transcripts become available.

X

THE PROSECUTION HAS VIOLATED DUE PROCESS
BY FAILING TO TURN OVER THE SHERIFF'S
DEPARTMENT'S FILE ON THIS CASE
BY CONTINUING TO FALSELY ASSERT
THAT SUCH MATERIAL DOES NOT EXIST.

After Petitioner's trial and the publication of his book, RFK Must Die, defense investigator Robert Blair Kaiser was shown a file drawer of material at office of the Undersheriff, Los Angeles County Sheriff's Department. (Ex. 100, Declaration of Robert Blair Kaiser).

Since that time, Petitioner's current counsel has attempted to obtain a copy of the Sheriff's Department file. (Ex. 36, Declaration of Lawrence Teeter). Representatives of the Sheriff's Department have responded by denying that such a file exists except for court documents pertaining to Petitioner's custody and transportation to and from court during his trial. (id). Sheriff's Department personnel asserted that there is no reason for their Department to have ever maintained file material on the Robert Kennedy Assassination case because the matter was handled by the LAPD. (id).

Such a denial is clearly inaccurate in light of Robert Blair Kaiser's observation of the file shortly following the conclusion of Petitioner's trial. As Kaiser recollects, some of the file material he was allowed to view concerned an investigation into meetings of

so-called disgruntled Arabs at the Green Hotel in Pasadena which were supposedly attend by Sirhan Sirhan. (Ex. 100). Also included in these materials was a file on Jerry Owen. (id). In his declaration, Mr. Kaiser attests that none of this material was made available to the defense either before or during the trial. (id). In fact, Mr. Kaiser, who had primary responsibility for reviewing documents received from the prosecution for defense counsel in this case, "was unaware of any Sheriff's Department files on this case until after the trial had concluded." (id). Kaiser points out, "Had such material been made available to the defense by the prosecution prior to or during the trial, I would have known about it." (id).

Furthermore, photographs of holes in the pantry which have been described as bullet holes in FBI documents show initials near some of the circle marks around the holes. Author Dan Moldea has written in The Killing of Robert, An Investigation of Means, Motive and Opportunity that some of the circle marks are accompanied by the initials of Los Angeles County Deputy Sheriff Walter Tew, badge number 723. (Ex. 99, id., pp. 233-234).¹ This confirms the presence of at least one LA County Sheriff's Deputy at the crime scene shortly following the assassination. Logically, files should and would have been prepared documenting the presence of such deputies at the scene of the most historically important murder in California history. Author Dan Moldea has written as follows:

"Tew's commander that night was Lieutenant Beto Kienast. When I asked Kienast whether he remembered receiving reports that bullet holes had been discovered by his men at the crime scene, he replied, 'I vaguely recall that, yes.' He added that after marking the bullet holes, Tew would have jotted his actions down in his deputy's notebook. He would then have reported the discovery to Kienast, who in turn would have added the information to the report he later sent to the commander of his division. All of the sheriff's office reports from the evening would eventually be combined, according to Kienast, and turned over to the LAPD." (Ex. 99, Moldea, pp. 234-235).

The claim that such files do not exist because the LAPD handled the investigation staggers credulity. The FBI generated a substantial volume of its own through its parallel investigation of the crime. Many such documents are included as exhibits to this petition. Furthermore, even the Sheriff's Department was initially interested in this case. This is confirmed not only by Defense investigator Kaiser's observation of a substantial volume of case-related file material originating with the Sheriff's Department but also by the fact that Los Angeles County Sheriff Peter H. Pitchess wrote to LAPD Chief Tom Reddin and offered the services of the Sheriff's Department crime lab in independently analyzing ballistics evidence. (Ex. 41, Letter of Sheriff Pitchess to Chief Reddin dated February 14, 1969). Chief Reddin rejected the Sheriff's Department offer of assistance by letter dated March 5, 1969. (id). What this exchange of correspondence establishes is not simply the LAPD's determination to monopolize the evaluation of ballistics evidence but also the Sheriff's Department's initial interest in the case. Would the Sheriff's Department really have failed to maintain a file on this case under such circumstances, particularly in view of Deputy Tew's presence at the crime scene?

¹ The Court is requested to take judicial notice of the Dan Moldea's book, particularly the attached pages.

The observations of Robert Blair Kaiser, the documented presence of Deputy Tew at the crime scene and the Sheriff's Departmental interest in the case clearly demonstrate that the Sheriff's Department maintained files on this case in addition to clerical records documenting Mr. Sirhan's custody and transit to and from court. Robert Blair Kaiser was shown some of these files after the trial. No files were disclosed prior to trial, and the existence of all files continues to be denied.

Walter Tew's observations of bullet holes in the pantry door frame constitute potentially exculpatory evidence tending to undermine the prosecution's single-shooter theory of the case. The suppression of this evidence violates Due Process.

Petitioner requests an evidentiary hearing at which to elicit testimony from Sheriff's Department and other officials on the subject of the suppressed Sheriff's Department files in the case.

XI
THE PROSECUTION VIOLATED
DUE PROCESS BY FAILING
DISCLOSE VAST QUANTITIES
OF EVIDENCE IN ITS POSSESSION.

According to Robert Blair Kaiser, who survives all of the defense attorneys representing Sirhan at trial, the materials turned over by the prosecution to the defense consisted of four to six boxes. (Exhibit 100, Declaration of Robert Blair Kaiser). The files disclosed to the State Archives by the LAPD consist of about 50,000 pages, and the files disclosed by the FBI under the Freedom of Information Act consist of another 35,000 pages. Since a box of fresh photocopy paper holds 5,000 closely packed sheets, the papers in the hands of the LAPD and the FBI would have filled an absolute minimum of 17 boxes, far more than what was provided to the defense.

Documents made available at the State Archives include many records that were not disclosed to the defense. Included in the Archives records is a Daily Summary of Activity dated October 31, 1968 which reveals that prosecution witness Alvin Clark had suffered "several prior arrests for ADW, burglary and Child Molesting and [that] this would help explain his abrasive attitude." (Ex. 101). According to Robert Blair Kaiser, this document was not made available to the defense and was not seen by Kaiser. (Ex. 100).

Professor Philip H. Melanson has provided a declaration (Ex 95) which presents an alarming picture of massive non-disclosure of evidence discovered following the LAPD's purported transfer of its case files to CSA in April of 1988. According to Professor Melanson, one LAPD document asserts that the "majority of interviews were taped[.]" (id., p. 2). Former Deputy Chief Houghton advised Professor Houghton that taping of interviews "was used across the board." (Ex. 95, p. 3). Yet although LAPD conducted 3,470 interviews during its original investigation, "only 211 witnesses and 301 interviews (some witnesses were interviewed more than once) were preserved on tape and released." (Ex. 95, p.2). Theodore Taylor, who co-authored a book on this case with Robert Houghton, estimated that he had access to about 3,000 hours of tapes. The Archives received about one tenth of this amount. (Ex. 95, p. 3). When did LAPD destroy or otherwise suppress 90% of its interview tapes? An evidentiary hearing is obviously appropriate.

XII
THE PROSECUTION DESTROYED CRITICAL EVIDENCE

OF SIRHAN SIRHAN'S BLOOD TEST RESULTS.

Defense counsel, conceding Defendant's guilt as the person who shot and killed Robert F. Kennedy, confined themselves to presenting a diminished capacity defense based upon the Defendant's consumption of several Tom Collins drinks at the Ambassador Hotel before the shooting. Defense attorney Grant Cooper requested production of a sample of the blood drawn from Mr. Sirhan shortly after his arrest. But according to a pretrial memo dated December 11, 1968 prepared by prosecutor David Fitts, the blood sample and the "jail card record" reflecting the test results had been destroyed. (Exhibit 96, Fitts Memo of 12/11/68.) Fitts' memo asserts Sirhan's blood was not even tested for alcohol or blood. One wonders what kind of tests were performed. It is common knowledge that blood tests are used to determine blood alcohol levels and the ingestion of drugs, and the California Vehicle Code. Fitts' memo does not explain why blood would have been drawn from Petitioner except for the purpose of alcohol and drug testing. Nor does he explain the circumstances surrounding this potentially crucial evidence's destruction. Instead, Fitts baldly calls the destruction "routine."

If the destruction of defendant blood test samples prior to trial is routine, then the D.A.'s office routinely violates Due Process in Los Angeles County. For the destruction of potentially exculpatory material evidence violates Due Process, even if the destruction is only negligent or even inadvertent. While intentional destruction raises an inference that the destroyed evidence was favorable to the defense, proof of a due process violation does not require a showing of bad faith.

In this case, the inference of bad faith is compelling, however. First, Fitts' memo, incredibly asserts that pretrial destruction of blood samples is routine. This assertion smacks of an attempt to concoct an innocuous explanation for official conduct which was far more sinister. Secondly, Fitts makes the equally incredible assertion that Sirhan's blood was never tested for either alcohol or drugs. For what reason was the blood extracted in the first place? Fitts is silent on this subject. The blood was tested for something, because test results were recorded on a card. But the card was itself destroyed as well. Was this also routine? Even Fitts does not so allege. The Fitts memo appears to have been part of a cynically-concocted paper trail designed to rationalize a blatant Due Process violation.

The materiality of blood test results in this case is undeniable. Had the test results confirmed the presence of alcohol in Petitioner's blood, the diminished capacity defense developed by trial counsel would have been strengthened, particularly if the blood alcohol level had been high. If drugs had been found in Sirhan's blood, this would have been of obvious benefit as well, given Sirhan's testimony that he did not recall the shooting or the events immediately surrounding it. Such test results could have provided physiological support for a claim of unconsciousness.

Defense counsel never moved for dismissal, an obviously appropriate sanction under such circumstances. Nor did defense counsel seek any other sanctions such as an order precluding the prosecution from introducing evidence in rebuttal to a claim of intoxication by alcohol or drugs. Again, defense counsel was undeniably--and inexplicably--ineffective. The prejudice to Petitioner flowing from this particular instance of ineffective assistance is obvious. Such a motion would have been meritorious and should have been granted had it been made. The prosecution's conduct in destroying both the blood sample and records of blood test results constitutes yet another suppression of potentially exculpatory material evidence, mandating imposition of the strongest sanctions.

XIII
PETITIONER SUFFERED A DENIAL
OF HIS RIGHT TO EFFECTIVE ASSISTANCE
OF COUNSEL AT TRIAL.

A claim of ineffective assistance of counsel under the sixth and Fourteenth Amendment to the United States Constitution is governed by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

For one thing, the defense was ineffective in failing to introduce evidence challenging the prosecution's testimony that handwriting pertaining to Kennedy located in notebooks found at the Sirhan residence was in fact Sirhan's handwriting. Ex. 97 show that the LAPD's own expert could not reach any such conclusion to an adequate level of certainty.

The autopsy report was turned over to defense counsel, albeit belatedly. Defense counsel were present during the testimony of Thomas Noguchi and thus heard all of the relevant medical evidence. They therefore had an opportunity to demonstrate the physical impossibility of Sirhan's having fired a single shot which struck Kennedy. They could have moved for a mistrial as a result of the surprise created by the prosecutions' failure to turn over the autopsy report at a meaningful time. Their failure to do so prejudiced the fairness of Petitioner's trial. To the extent that defense counsel's decision was the product of a desire to avoid changing strategies in mid-stream, such a decision was the result of the prosecution's above-described tactic of delaying the disclosure of the autopsy report until the last possible moment, after trial had already begun.

There was much evidence that could have been introduced by the defense on the subject of Sirhan Sirhan's position relative to that of Senator Kennedy. The same applies to evidence of multiple shooters. To the extent that any information was available to the defense pointing toward multiple assailants, extra bullets, bullet substitution, gun switching or the like, it was the duty of counsel to investigate its significance and present such evidence as tending to refute Sirhan Sirhan's status as the killer of Robert Kennedy. The defense never conducted its own firearms and ballistics investigation.

This case presents a classic example of induced ineffective assistance of counsel. By delaying the disclosure of the autopsy report, by destroying and suppressing evidence that multiple shooters were at work in the pantry and by suppressing evidence of their own gun-switching and bullet-switching, the prosecution created a situation that encouraged defense counsel to overlook the immense significance of Thane Eugene Cesar's statement to the Los Angeles Police Department on June 5, 1968. A transcript of this statement, (Exhibit 102 accompanying this petition), places Mr. Cesar, and armed security guard, in position and within range to have inflicted the wounds which Robert Kennedy suffered. Cesar described his journey through the pantry in Senator Kennedy's company as follows:

"A And at that time I was right behind him all the way down to where the steam table was.

Q Uh huh (yes).

A And then, just as he got to the steam table, I was up to him where I had ahold of his arm

here. I was pushing people away from the other arm.

Q You were on--

Q You were on which side of him?

A I was on his right side.

Q His right side?

A Yes.

Q Uh huh (yes).

A And at that moment when we got to the edge of the steam table, he had reached

out and sort of turned to shake hands with somebody.

Q Turned to his left.

A Well, he was walking this way and he turned just like this, just his body, because,

when he did, my hand broke loose, sort of broke loose, away from his arm, and, of

course, I grabbed it again because people were all over the place.

Q People were pressing in pretty close?

A Right. Now, at that time, I just happened to look up and that's when I seen--all I

could see was an arm and a gun.

Q Uh huh (yes).

A And I reached for mine, but it was too late. He had fired five shots and when he did,

I ducked because I was as close as Kennedy was, and from what I can remember,

from what I did, I grabbed for the center and fell back. . . . (Ex. 102, pp. 7-8).

Mr. Cesar's own statement establishes that he was in physical contact with Senator Kennedy when the shooting began. He was standing to the right rear of Senator Kennedy and, when the shooting started, pulled his gun and ducked to the floor. This places Cesar in a position to have inflicted gunshot wounds fired into Senator Kennedy at a steep upward angle and at contact range from the Senator's right rear--exactly the wounds described by the Autopsy Report (supra). Cesar was in position and within range to have inflicted the wounds which Senator Kennedy suffered. Sirhan was not in position and was not in range to have inflicted these wounds. But the defense, not having the Autopsy Report until too late to utilize it, was induced to overlook the significance of Cesar's statement as a damning admission.

Defense counsel who are in a position to implicate another suspect are surely ineffective in failing to do so. In this case, the prosecution did everything possible to prevent defense counsel from understanding the immense significance of Cesar's statement as proof that, unlike Sirhan Sirhan, someone else, armed with a gun, was in perfect position to have inflicted the exact wounds which Senator Kennedy suffered.

A writ should issue, whether the prosecution is entirely, largely or only partially responsible for sewing the seeds that led to the ineffectiveness of Petitioner's trial counsel.

CONCLUSION

In addition to the considering the foregoing arguments and the above referenced exhibits, the Court is asked to take judicial notice of the accompanying "Robert F. Kennedy/Sirhan Evidence Report written by Rose Lynn Mangan and Adel Sirhan submitted herewith as Exhibit 98. 7

For the foregoing reasons, it is respectfully requested that the court issue a writ commanding Petitioner's release from custody.

Because the conduct of the prosecution as detailed herein was intentional, it is further requested that the court order all charges dismissed.

Respectfully Submitted,

DATED: April 21, 1997

LAWRENCE TEETER
Attorney for Petitioner