

Filed: San Mateo County, May 24, 2004

Geragos & Geragos

Case No. SC55500  
(Stan. Co. 1056770)

NOTICE OF MOTION AND MOTION FOR SANCTIONS

[California v. Trombetta (1984) 467 U.S.; Arizona v. Youngblood (1988) 488 U.S. 51]

DATE: TBA

TIME: 9:30 a.m.

PLACE: Dept. 2M

TO: STANISLAUS COUNTY DISTRICT ATTORNEY; and

TO: CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on a date to be set by the court at the hour of 9:30 a.m., or as soon thereafter as counsel can be heard, Defendant Scott Lee Peterson ("Mr. Peterson"), through counsel Mark J. Geragos, will move this Court for an order (1) permitting the defense to call hypnotized witness Diane Jackson, or (2) permitting the defense to offer into evidence all pre-hypnosis accounts by Ms. Jackson of the relevant events including the statements that were obtained by the defense to any so-called hypnosis.

The motion will be made on the grounds that sanctions must be imposed pursuant to *California v. Trombetta* (1984) 467 U.S. 479 and *Arizona v. Youngblood* (1988) 488 U.S. 51 since: (1) Ms. Jackson's testimony is exculpatory; and (2) the prosecution acted in bad faith by attempting to "destroy" the testimony by flagrantly disregarding the strict requirements of Evidence Code section 795; and (3) Ms. Jackson's testimony is of a nature such that Mr. Peterson cannot obtain comparable evidence by other reasonably available means.

Additionally, the requested relief is necessary to ensure that Mr. Peterson's Sixth Amendment right to compulsory process of favorable witnesses is not rendered meaningless by the prosecution's hypnosis of Ms. Jackson - - a percipient witness whose testimony supports Mr. Peterson's factual innocence of the charged crimes.

The motion will be based on this notice, the attached memorandum of points and authorities, the pleadings and records on file herein, and upon such other and further argument as may be presented to the Court at the hearing of this matter.

Dated: May 24, 2004

Respectfully submitted,  
Geragos & Geragos

By: Mark J. Geragos  
Attorney for Defendant  
SCOTT LEE PETERSON

## MOTION

Defendant Scott Lee Peterson, by and through counsel, hereby moves the Court for an order directing one or more of the following:

1. Permitting the defense to call hypnotized witness Diane Jackson; or
2. Permitting the defense to offer into evidence all pre-hypnosis accounts by Ms. Jackson of the relevant events; and
3. Granting any other relief the Court deems necessary and appropriate to further the ends of justice.

Dated: May 24, 2004

Respectfully submitted,  
GERAGOS & GERAGOS

By: Mark J. Geragos  
Attorney for the Defendant  
SCOTT LEE PETERSON

## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

On or about February 17, 2004, this Court granted Mr. Peterson's motion to exclude the testimony of hypnotized witness Kristen Dempewolf. Based on that ruling it is apparent to the defense that the Court may be inclined to exclude the testimony of hypnotized witness Diane Jackson as well. We submit that exclusion of Ms. Jackson's testimony would be reversible error since the violation of Evidence Code section 795 was the inevitable result of the prosecution's bad faith utilization of Dale Pennington. \* Specifically, by having Dale Pennington conduct the hypnosis the prosecution failed to comply with the requirement that the hypnosis performed by a properly licensed professional who is independent of law enforcement. (Evidence Code section 795(a)(3)(D).) As the prosecution must be presumed to have been aware, failure to comply with any of the requirements of Section 795 renders a witness's testimony inadmissible.

Consequently, the prosecution committed outrageous misconduct by having Dale Pennington, a virtual agent of law enforcement who is not even licensed in California,

conduct the hypnosis. This was misconduct since Evidence Code section 795 renders any witness that was hypnotized by Pennington technically unavailable. However, the Court has the authority to remedy this situation by granting the relief requested.

Simply put, to prevent the defense from calling Ms. Jackson to testify in this death penalty case would reward the prosecution for its egregious violation of Mr. Peterson's Sixth Amendment right to compulsory process of favorable witnesses.

\*Used herein the term "prosecution" applies to both the Office of the District Attorney and the Modesto Police Department.

## I. THE COURT MAY IMPOSE SANCTIONS AS PUNISHMENT FOR PROSECUTORIAL MISCONDUCT

The power of the Court to impose sanctions as a result of prosecutorial misconduct is well-established. For example, in *Boulas v Superior Court* (1987) the Court of Appeal for the Second Appellate District noted:

When conduct on the part of the authorities is so outrageous as to interfere with an accused's right of due process of law, proceedings against the accused are thereby rendered improper. <long list of citations>. Dismissal is, on occasion, used by courts to discourage flagrant and shocking misconduct by overzealous government officials in subsequent cases. <another list of citations>

(*Boulas v. Superior Court, supra*, 188 Cal.App.3d at 429.)

Additionally, the prosecution, not Mr. Peterson, must establish that the prosecution's misconduct in connection with the improper hypnosis does not warrant sanction because the defendant was not prejudiced:

"Where . . . [as here] the state has engaged in misconduct, the burden falls upon the People to prove, by a preponderance of the evidence, that sanctions are not warranted because the defendant was not prejudiced by the misconduct. <long list of citations>. Although not expressly so stated in *Zapien, supra*, the People also have the burden to show that there was no substantial threat of demonstrable prejudice. (See, *post*, pp. 1260-1261.)

(*Morrow v. Superior Court* (1995) 30 Cal.App.4<sup>th</sup> 1252, 1258.)

Since Ms. Jackson was the only percipient witness to exculpatory events, exclusion of her testimony will necessarily be prejudicial. Hence, the prosecution will be unable to carry its burden and sanctions should be imposed.

## II. THE TROMBETAT/YOUNGBLOOD TEST

The defense is unaware of any case addressing the questions raised here:

*Must sanctions be imposed when the prosecution hypnotizes an exculpatory percipient witness to a capital crime knowing that in so doing, she will become technically unavailable?*

However, the “*Trombetta/Youngblood*” factors provide guidance:

Considered together, *Trombetta* [*California v. Trombetta* (1984) 457 U.S. 479] and *Youngblood* [*Arizona v. Youngblood* (1988) 488 U.S. 51] establish three criteria that must be met to establish a violation of a defendant’s right to due process of law when exculpatory evidence has been destroyed by the prosecution. First, the evidence destroyed must possess “exculpatory value that was apparent before the evidence was destroyed.” (*Trombetta, supra*, 467 U.S. at p. 489, 104 S.Ct. at p. 2534.) Second, the defendant must show bad faith on the part of the prosecution. (*Youngblood, supra*, 488 U.S. at p. 58, 109 S. Ct. at p. 337.) Third, the evidence must be “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” (*Trombetta, supra*, 467 U.S. at p. 489, 104 S.Ct. at p. 2534.)

(*People v. Zapien* (1993) 4 Cal.4<sup>th</sup> 929, 1008-1009, Kennard, J, dissenting op.)

Although the seminal cases of *Trombetta* and *Youngblood* dealt with destruction of physical evidence, their teaching are apropos. The prosecution’s improper utilization of Dale Pennington is tantamount to the destruction of evidence because it has rendered a key percipient witness technically unavailable to Mr. Peterson. As set forth in Sections III and IV, the *Trombetta/Youngblood* factors are satisfied in this case.

### III. MS. JACKSON’S EXCULPATORY TESTIMONY

#### A. Statement to Modesto Police.

On or about December 27, 2002 Modesto Police Detective Stough spoke telephonically with Diane Jackson. The detective reported the following:

I called [a] telephone number at 1830 hours and spoke with Diane Jackson. She told me that on 1140 hrs. on Tuesday, 12/24/02, she was driving down Covena towards her house. As she drove by the (V) residence at 516 Covena she saw three short of stature, dark skinned but not African American guys in the front yard of the residence. She stated as she drove by the guys turned and looked at her and that they were standing near a van. When asked to further describe the individuals she stated that that’s all she could remember as she wasn’t thinking about that and hadn’t thought about that until she called the police. I asked her if she believed that she would be able to identify any of these subjects if she saw them again and she stated she didn’t know but she doubted it. I then asked her if she them (sic) at the back of the van or in the yard. She told me that the van was parked on the street in front of the house and not in the driveway. She stated that

two of the individuals were standing at the back of the van and one was standing in the front yard near the van. She thought it unusual that they looked because she initially thought that they were landscapers and that landscapers normally continue working, they don't stop and look at traffic going by. She stated that she first told the officers she believed the van was white but upon thinking of it more she thought darker. I asked the (W) to attempt to remember back as she was driving by and see if she could visualize the van in her mind. At this point she said she thought darker, either a tan or a brown colored van. She stated that I was an older van and that it had a door or both doors that opened to the rear but she didn't remember anything else about it.

(December 27, 2002 report of MPD Detective Stough, Bates no. 2091.)

B. Statement to defense investigator the day before the prosecution's improper hypnosis.

On January 16, 2004 defense investigator Gary L. Ermoian interviewed Ms. Jackson. The following represents his account of her statement to him:\*

1-16-2003 Contact was made with Diane Jackson at her residence {address, telephone number}.

Mrs. Jackson stated that on December 24, 2002 at 11:40 A.M.A, she was driving home from [an appointment]. She said that she droved [sic] down Coven Ave. toward Edgebrook Drive. Mrs. Jackson said that as [she] drove past the residence at 516 Coven, she observed three short, darkskinned males standing near a tan/beige van. Mrs. Jackson said that the males were dark skinned; however they were not African American. She said that the van was parked on the street in front of 516 Coven.

Mrs. Jackson said that the back of the van had 2 doors. The left door was open and the right door was closed. Mrs. Jackson said that she could not see inside the van. Mrs. Jackson said that one male was standing on one side of the open door, and another male subject was standing on the other side of the open door. Mrs. Jackson said that the third male was standing on the grass about 5 feet away.

Mrs. Jackson stated that she at first thought that they were landscapers, however she did not observe any tools. Mrs. Jackson said that as she past [sic], they all turned and looked at her as she passed. Mrs. Jackson said that she found this unusual. Mrs. Jackson said that she had the feeling that they were up to no

\*This information was previously provided to the prosecution

good.

Mrs. Jackson said that she is sure of her time because as she drove home from the [appointment], she knew that her husband would be home at 12:00 P.M. for lunch. She said that when she pulled into her driveway, she looked at her watch and it was 11:40 A.M. She said that she made a mental note to herself that she would have time to fix her husband lunch.

Mrs. Stated that when she heard that the [owner's] home at 516 Covena was burglarized on the Friday after Christmas, she telephoned the police to tell them what she saw.

Mrs. Jackson said that tomorrow (1-17-2003) she is scheduled for hypnosis at the Modesto Police Department, in an attempt for her to remember more about what she saw.

Mrs. Jackson said that she would call if she remembered any further information.

From the two statements given by Mrs. Jackson prior to the hypnosis, it is clear that Ms. Jackson's testimony possessed exculpatory value. Hence, the first prong of *Trombetta/Youngblood* is satisfied. Moreover, since Ms. Jackson was the only percipient witness with information about the events she described, the evidence is of such a nature that Mr. Peterson will be unable to obtain comparable evidence by other reasonably available means – satisfying the third *Trombetta/Youngblood* prong.

#### IV. THE PROSECUTION'S BAD FAITH

When read as a whole, the following chronology reveals the prosecution's bad faith conduct:

- On December 27, 2002 the prosecution, which had already focused solely on Mr. Peterson, learned that Mrs. Jackson had potentially witnessed the crime and that her testimony clearly implicated persons other than Mr. Peterson.
- By January 10, 2003 the prosecution realized it had no direct evidence of Mr. Peterson's having been involved in the disappearance of his wife. This fact must be presumed since the prosecution, by applying for wiretaps, swore under oath that traditional investigative techniques had failed to provide any direct evidence implicating Mr. Peterson. Since there was no direct evidence against Mr. Peterson, Mrs. Jackson's exculpatory testimony would clearly gut any circumstantial case the prosecution might be able to lay out.
- On January 17, 2003 the prosecution utilized Dale Pennington, an unqualified hypnotist who teaches PSOT training classes to law enforcement, to hypnotize, and thereby disqualify Mrs. Jackson.
- On February 17, 2004 the prosecution claimed it did not know Pennington was unqualified:\*

MR. DISTASO: Your Honor, actually, I'm inclined to submit it. I do want the court to be aware of one thing that I – that I learned in the last day or two when I was doing some research to prepare for this argument.



compulsory process. The Court should remedy this situation by granting the relief requested.

\*Even if the Court concludes the prosecution's failure to comply with Evidence Code section 795 was entirely innocent, Mr. Peterson must be afforded a remedy since this is a capital case and Ms. Jackson is a key percipient witness.

\*\*This is not the first time this prosecution team has set out to deny discovery to a capital defendant. (See *Dustin v. Superior Court* (2002) 99 Cal.App.4<sup>th</sup> 1311, 1323.)

## CONCLUSION

Wherefore, in light of the foregoing, Mr. Peterson respectfully requests that the relief prayed for herein be granted.

Dated: May 24, 2004

Respectfully submitted  
GERAGOS & GERAGOS  
By: MARK J. GERAGOS  
Attorney for Defendant  
SCOTT LEE PETERSON