# CASE MATERIALS FROM PEOPLE v. ANGELA DAVIS

Angela Y. Davis, a philosophy professor at the University of California, Los Angeles, was indicted, along with Ruchell Magee, for the murder of a Marin County, California, Superior Court judge. Ms. Davis was an avowed member of the Communist Party, and was under attack from the Board of Regents for her politics. She had publicly supported a group of prison inmates known as the Soledad Brothers, including George Jackson. George's brother Jonathan was involved in the shootout that resulted in the judge's death.

These materials are copied from the case file. They include a memorandum in support of a motion to dismiss based on the alleged insufficiency of the evidence before the grand jury (a procedure available in California under Cal. Pen. C. § 995). The case was argued in early 1971. The motions were denied, but Ms. Davis was eventually acquitted of the charges against her.

To put matters somewhat more in perspective, you should know that the crimes of which Ms. Davis was accused carried the death penalty at the time these motions were argued.

PEOPLE v. ANGELA DAVIS

§ 995 MEMORANDUM

INTRODUCTION

The motion in support of which this memorandum is filed seeks dismissal of the indictment because it is founded not upon relevant evidence which establishes probable cause, but upon irrelevant and probably illegal evidence which even if true, admissible and given all the weight which the most exuberant prosecutor could claim for it, establishes no more than a set of innocent acts.

The Marin County Grand Jury returned an indictment against Angela Y. Davis and Ruchell Magee on November 10, 1970, charging kidnapping (Penal Code § 209), murder (Penal Code § 187) and conspiracy (Penal Code § 182) to commit: kidnapping, murder, aiding by force or violence the escape of a prisoner from lawful custody (Penal Code § 4530(a)) and the rescue of a prisoner from lawful custody (Penal Code § 4550). 1/

The facts from which the charges grew are essentially these: on August 7, 1970, in the courtroom of Judge Harold Haley, Department 3, Marin County Superior Court at the Marin County Hall of Justice, a criminal case was in progress against James McClain. (Tr. 5-6). At approximately 11:00 a.m., while Ruchell Magee was testifying on behalf of McClain, the proceedings were interrupted. (Tr. 6). Jonathan Jackson entered the courtroom (Tr. 7) and along with Ruchell Magee, James McClain and Willie Christmas, another inmate testifying at the trial, removed Judge Haley, Assistant District Attorney Gary W. Thomas, and three female jurors from the courtroom to a yellow Ford van (Tr. 15). Someone, presumably a law officer, opened fire on the van. A gun battle ensued in which Willie Christmas, Jonathan Jackson, James McClain and Harold Haley met their deaths. (Tr. 16).

The State apparently contends that Angela Davis in some manner aided Jackson, McClain, Christmas and Magee

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1/ Magee is charged with an additional offense and a prior conviction.

and as a consequence is guilty as a principal. The following is the State's evidence: Angela Davis had for some time advocated the lawful release of the "Soledad Brothers," George Jackson, Fleeta Drumgo and John Clutchette. These men, prisoners in California's Soledad Prison, were charged with the murder of a guard. Miss Davis believed the charges without foundation (Tr. 79-83). Several times, Miss Davis attempted to visit George Jackson at Soledad and later at San Quentin, sometimes accompanied by Jackson's younger brother, Jonathan (Tr. 27-28, 74, 75-76). The State apparently contends that this association with Jonathan Jackson, and concern for the life of his brother George, in some way points towards her guilt of a murder and kidnapping assertedly committed in the service of George's release.

On four separate occasions, Angela Davis lawfully purchased and lawfully registered four weapons: January 12, 1968, a pistol, Caliber 380, Serial Number 595071 (Tr. 84-91); April 7, 1969, a rifle, Model, Carbine 30-caliber, Serial Number 18514, manufactured by Plainfield (Tr. 92-96); July 25, 1970, a rifle, M-1 carbine, 30 caliber, serial number 18052, manufactured by Plainfield (Tr. 99-107); and, August 5, 1970, a shotgun, 12 gauge, serial number 67297, manufacturer, Spanish (Tr. 115-26). It is alleged that these four weapons were used in the commission of the crimes arising out of the raid on the Marin County Courthouse on August 7, 1970.

The State also contends that on the 6th of August, 1970, the day before the courthouse incident, Angela Davis, accompanied by Jonathan Jackson, was in the immediate vicinity of the courthouse in a yellow Ford van.

Further, there is evidence that on the afternoon of August 7, 1970, Angela Davis bought a ticket on P.S.A. Flight 422 at San Francisco International Airport and departed to Los Angeles. (Tr. 36-37) Defendant was not again seen in public until her arrest in New York City on October 13, 1970. (Tr. 138).

This brief review of the evidence presented to the grand jury shows the inherent weakness of that evidence. Assuming all the evidence presented to the grand jury to be true, relevant and lawful, it is insufficient to sustain the indictment. It will become clear that neither close association by the accused with the obviously guilty, nor presence by the accused at the scene of the crime, nor the use of instrumentalities owned by the accused in the commission of a crime, nor all of these combined raise the State's evidence to the level of "probable cause".

ARGUMENT

I. THE EVIDENCE PRESENTED TO THE GRAND JURY TO THE EXTENT THAT IT IS RELEVANT AT ALL IS OF HIGHLY QUESTIONABLE VALUE.

Much of the evidence in this case, when viewed in proper perspective, is of so little value to omit comment on it would amount almost to misleading the court.

In support of the charge that Defendant conspired to bring about the rescue from custody of the "Soledad Brothers," the State alleges that Angela Davis, along with Jonathan P. Jackson, brother of George Jackson, one of the Soledad Brothers, participated in a rally on June 19, 1970 at the State Building in Los Angeles. (Indict., First Overt Act). Miss Davis has spoken at many rallies, making known her view that the Soledad Brothers are targets of political harassment. It is also true that Miss Davis was engaged in a campaign to raise funds for the legal defense of the three inmates. Yet it is not so much as suggested by the witness John Baker (Tr. 79-83) who testified to the grand jury concerning that rally at the State Building that Defendant at any time advocated that unlawful means should be used to effect their release.

To have even introduced such evidence before the grand jury reveals the prosecutor's Orwellian turn of mind. To transmute Angela Davis' advocacy of legal defense for the Soledad Brothers into proof of guilt in a conspiracy forcibly to release them turns the matter on its head. As we show below, the law is clear that only "relevant" evidence before the grand jury is to be considered in support of the indictment. The fact of "relevance" is the tendency of an item of evidence to prove a fact in issue. Evidence Code § 350, 352. If advocacy of legal defense proves anything at all, it proves a disinclination to use extralegal means. Moreover, such advocacy, being protected by the First Amendment, is not admissible in any case in support of a prosecution for conspiracy. See United States v. Spock, 416 F.2d 165 (1st Cir. 1969); Castro v. Superior Court, 9 Cal. App. 3d 675 (1970).

A second major focus of the State's case is the lawful purchase and lawful registration of four guns by Angela Davis over a period of two and one-half years. The

claim of this evidence to relevance is the implied assertion that these four weapons were the ones in fact used during the raid on the courthouse. At the outset, we note that the chain of custody for each of the weapons which was assertedly picked up at the scene was broken at least once prior to its being marked for identification and presented as evidence to the grand jury.

People's Exhibit 31 is the shotgun, serial number 67297, which Miss Davis purchased on August 5, 1970. Eugene R. Fontaine, assistant coroner of Marin County, testified before the grand jury that he took a sawed-off shotgun from the hands of Ruchell Magee inside the Ford van. (Tr. 41). There is no evidence that Mr. Fontaine made any note of the serial number of the shotgun or in any other way marked it so that he could later identify it as the one that he, in fact, took from the scene. He gave this gun to Inspector Retana, of the Sheriff's Office. (Tr. 42).

Ronald A. Retana, police inspector for the Sheriff's Department testified that he received a shotgun "similar to this one". (Tr. 44). But he refused to identify People's Exhibit 31 as the shotgun he received from Assistant Coroner Fontaine...As he admitted, "I didn't mark it." (Tr. 44). Inspector Retana then handed the weapon to Inspector Bridges of the Sheriff's Department. (Tr. 44).

Bowen A. Bridges, Jr., Criminal Investigator for the Marin County Sheriff's Department then testified that he received People's Exhibit 31 from Inspector Retana and placed it in the trunk of his County undercover car. (Tr. 46). He subsequently gave the keys to his trunk to Lt. Earl Cummesky, Lieutenant in Charge of Identification Records for the Marin County Sheriff's Office. (Tr. 47). Lt. Cummesky testified that he took a shotgun that "appear[ed] to be the same weapon" from Bridges' trunk. He then gave the weapon to Edward F. Klementovich, assistant supervisor of the Identification Bureau (Tr. 49). It was at this point that the weapon was first marked. (Tr. 50). And this was the first time that the serial number of the weapon was noted. (Tr. 50).

From the time that the shotgun was removed from the van at the scene of the incident, to the time that it was marked for identification, several hours had passed and the weapon passed through the hands of five different men. Not until the last man received the weapon was any attempt made to identify it. Of the four men that possessed the sawed off shotgun that day, three of the four specifically refused to identify People's Exhibit 31 as the weapon that

they received on the day of the incident. The fourth (Inspector Bridges) was not specifically asked the question. It seems clear that the chain of custody on the weapon that was originally taken from the hands of Ruchell Magee was broken a sufficient number of times to raise a serious question whether the gun that was originally taken from Magee by Mr. Fontaine was in fact the gun that was later marked as People's Exhibit 31.

The same "chain" of custody was proven with respect to People's Exhibit 32, a pistol, Serial number 595071, purchased by Miss Davis on January 12, 1968. Assistant Coroner Fontaine took a "small black automatic laying on the floor of the van." (Tr. 42). He does not state the People's Exhibit 32 is the same weapon that he took from the scene. He handed the weapon to Inspector Retana who testified that he received a weapon "similar to this." (Tr. 45). He also could not say that People's Exhibit 32 was the same weapon that he took from the coroner. He gave the weapon to Bridges who put it in his trunk and gave the keys to Lt. Cummesky. (Tr. 46). Cummesky took what looked like People's Exhibit 32 (Tr. 48) and gave it to Inspector Klementovich, who for the first time, marked the weapon, and noted its serial number. (Tr. 51-52).

Again, the weapon went through the hands of five men before it was ever marked. Three men could not identify with certainty People's Exhibit 32 as the weapon that they in fact had on the day in question. The only evidence presented to the grand jury that these weapons were the ones used on August 7, 1970 was the testimony of these five police officers.

People's Exhibit 33 is a rifle, caliber .30 M-1, serial number 18052, purchased by Miss Davis on July 25, 1970. Joseph J. Murphey, a San Quentin State Prison guard, removed a rifle from the Ford van following the killings. (Tr. 55). At the time, Sergeant Murphey was attempting to remove Mr. Thomas from the van and was just getting the gun out of the way. He picked it up and handed it back over his head to a person he never saw. (Tr. 55-56).

Timothy A. Miller of the California Highway Patrol of Marin County testified that he received a rifle that looked similar to People's Exhibit 33 from a "correctional officer" from San Quentin. (Tr. 57). He then took the gun, along with a California Highway Patrol shotgun and laid them down on the sidewalk in the courthouse parking lot and went away to give first aid to one

of the female jurors. (Tr. 57-58). Miller later asked Theodore E. McGuire, traffic officer for the California Highway Patrol, to inspect the weapon that he previously laid on the sidewalk. (Tr. 58). Miller never say McGuire pick up the rifle. (Tr. 58).

McGuire picked up a weapon off of the sidewalk that looked like People's Exhibit 33, examined it, and then laid it back down on the sidewalk. (Tr. 6). McGuire saw that this gun was later picked up by Richard P. O'Brien of the California Highway Patrol (Tr. 61).

O'Brien picked up the weapon from the ground and handed it to Captain Harvey E. Teague of the Marin County Sheriff's Department (Tr. 64). Teague took the weapon to the Sheriff's office and locked it in the armory over the weekend. (Tr. 65). He removed the weapon from the armory on Monday, the 10th of August and at that point, for the first time, tagged it and gave it to Inspector Klementovich (Tr. 65).

The chain of custody for People's Exhibit 33 is even weaker than that for People's Exhibits 31 and 32. Not only did the weapon go through six hands before it was ever marked for identification, but three days had passed, one unknown person had possession of the gun, and on two separate occasions the weapon was left unattended on the sidewalk.

People's Exhibit 34 is the carbine rifle, serial number 18514, assertedly purchased by Miss Davis on April 7, 1969. A weapon which "appears to be the same weapon" was removed from the front of the van on August 7th by Harry E. Bock, Inspector for the Marin County Sheriff's office. (Tr. 68). After having picked up the weapon, Inspector Bock placed it on the sidewalk approximately six to eight feet from the van. (Tr. 68). Some time later, Inspector Klementovich picked up a rifle from the parking lot in the van and marked it for identification. (Tr. 71). That was the first time that any identifying marks were put on the weapon.

Again, the weapon which was removed from the van lay unattended on the sidewalk for an unspecified period of time before anyone took the trouble to make an identifying mark on it.

This recital of the evidence before the grand jury points up an essential flaw in the State's evidence:

all four of the weapons upon which the State has placed so much reliance in the press and elsewhere came into evidence through a broken chain of custody. Not one of these weapons was positively identified by the person who removed the weapon from the scene as the weapon that he in fact removed. This utter want of positive identification and the great opportunity for tampering gives ground to doubt the relevance of these weapons. They simply are not connected with the August 7th killings by reliable evidence. An object, such as a gun, is mute; it tells nothing about an event. It has relevance or evidential value only when some testifier or live witness connects it to an event in issue. Absent this vital connection, the object is "irrelevant," see Calif. Evidence Code §§ 350, 352, in the sense that it does not help establish a disputed fact. The want of any foundation for the admission of these guns into evidence makes them valueless to the State on the issue of Miss Davis' alleged guilt.

An even more questionable aspect of State's evidence is testimony in support of the allegation that Miss Davis, along with Jonathan Jackson, was physically present at the Marin County Courthouse on August 6, 1970, the day before the killings (Indict. Eighth Overt Act). The only evidence to substantiate this allegation is the highly equivocal testimony of Peter D. Fleming, attendant at Fleming Mobil Service, across the street from the Civil Center. (Tr. 127-129). According to Fleming, on August 6, 1970, around 10:30 in the morning, a male and female asked help with their vehicle. (Tr. 130). The male was a tall, light skinned Black man with a "natural" hair style, blond on top. (Tr. 131). The woman was "sort of attractive," wearing a minidress, with Afro style hair, sunglasses, and, the witness said, an excellent build. (Tr. 131). The witness was then shown a number of photographs of Miss Davis and Jonathan Jackson. The most he could say was that the people in the photographs looked like those who came into his station on August 6th. (Tr. 132-33). It is to be noted that on the photographs of Miss Davis, the witness drew attention to the fact that the Defendant had a "distinctive" gap between her two front teeth. (Tr. 133). The witness is unable to remember that characteristic from his personal encounter with the individual on August 6th.

It is not even necessary to say that the identification by the witness is valueless. The only traits he could remember with any certainty were a well built Black woman with a natural hairstyle. The one distinctive characteristic about Miss Davis which might identify her

from thousands of others was never noticed by the witness. To suggest that this evidence is sufficient to place the defendant at the scene of the crime is ludicrous.

Moreover, the purported eyewitness identification, based upon Fleming being shown a few photographs of the defendant either alone or with a few other persons different in appearance is so tainted by its suggestive character as to be excludable on that ground alone. We have filed a motion to suppress on this point, and demanded a hearing. At that hearing, the legality of eyewitness identifications such as that tentatively made by Peter Fleming will be tested. Whatever the result of that hearing, however, People v. Citrino, 11 Cal. App. 3d 778, 90 Cal. Rptr. 80 (1970), compells the conclusion that Fleming's testimony is of marginal value.

The above review of the evidence before the grand jury demonstrates that most of it is so weak as to be inadmissible in any trial as irrelevant. Evidence Code §§ 350, 352. 2/ And it need hardly be said that the grand

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2/ The F.B.I. agent who testified to Miss Davis' arrest in New York City is far from clear. If "flight and concealment" is the issue to which this witness was thought to speak, a brief comment is in order: This Court may take judicial notice of the hostile publicity which has surrounded Miss Davis for some time, and of the efforts by countless state, local and federal officials to harass and intimidate her and drive down obloquy upon her. Kingman Brewster, President of Yale University, has publicly doubted whether any Black revolutionary can get a fair trial in America. For Miss Davis to have been absent for two months from her usual place of work is as rational and consistent with innocence as the flight of Dr. Thomas Fuller from England to escape a prosecution for treason. As Fuller said to the jury upon his acquittal:

> "And if any tax me, as Laban taxed Jacob, 'Wherefore didst thou flee away secretly without taking solemn leave?' I say with Jacob to Laban, 'Because I was afraid.' And that plain dealing patriarch, who could not be accused for purloining a shoe latchet of other men's goods, confessed himself guilty of that awful felony that he 'stole away' for his own safety; seeing truth may sometimes seek corners, not as fearing her cause, but as suspecting her judge." Quoted in Hickory v. United States, 160 U.S. 408, (1895). See also Cooper v. United States, 218 F.2d 39, 41 (D.C. Cir. 1954).

(Footnote continued next page)

jury, in returning an indictment, must use admissible and relevant evidence to support the finding of probable cause. People v. Crosby, 58 Cal. 2d 713, 25 Cal. Rptr. 847, 855 (1962); People v. Byars, 188 Cal. App. 2d 794, 10 Cal. Rptr. 677 (1961); People v. Flanders, 140 Cal. App. 2d 765, 296 P.2d 13 (1956); People v. Schuber, 71 Cal. App. 2d 773, 775, 163 P.2d 498, 499 (1945).

The quantity of evidence is, as we show below, not sufficient to withstand a motion to set aside. But nonsense is nonsense, by the ounce or by the sackful; the above discussions shows that the State's evidence, which lies behind this capital charge, is nonsense.

## II. INDULGING EVERY INFERENCE CONSISTENT WITH GUILT FROM THE STATE'S EVIDENCE, THERE IS NO REASONABLE OR PROBABLE CAUSE.

The previous discussion has concentrated on the inherent weakness of the government's evidence. The ensuing discussion will assume for the purposes of this memorandum that which we deny: we assume all of the evidence presented to the grand jury to be true. That is to say, we will assume that the four weapons that were lawfully purchased and lawfully registered by Angela Davis were, in fact, the weapons used in the events at the Marin County courthouse. Further, it will be assumed that Miss Davis was in fact associated with Jonathan Jackson and that they were in the vicinity of the Hall of Justice on August 6, 1970. Considering these factors separately and as a union, it will become clear that they do not constitute sufficient evidence to uphold the indictment.

### A. There Is No Evidence Of Criminal Intent

Every crime is the union of an unlawful act and a criminal intent. Penal Code § 20. The California Supreme Court has often insisted in the most vigorous

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(Footnote continued)

Flight is not indicative of guilt absent some additional evidence showing the accused's intention in fleeing. See Wong Sun v. United States, 371 U.S. 471, 483 n.10 (1963). Compare, People v. Landry, 230 Cal. App. 2d 775, 41 Cal. Rptr. 202 (1964) ("Jesus Christ, the fucking cops" is evidence of guilty knowledge). Wong Sun and Landry are relevant here because both are search and seizure cases in which the question, as here, is "reasonable and probable cause."

terms that specific criminal intent be shown, as against a State claim that general intent or a species of negligence was enough. E.g., People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361 (1964); People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956).

So it is in this case: the State seeks to have us believe that Angela Davis participated in a murder, a kidnapping, and a conspiracy. This assertion simply cannot be entertained without evidence which shows that, in addition to "acts," in themselves innocent, Miss Davis acted with the specific intent to accomplish a murder, a kidnapping, an escape and a rescue. See, e.g., People v. Butts, 236 Cal. App. 2d 817, 836, 46 Cal. Rptr. 362 (1965), which insists not only that the accused accomplice not only act "with knowledge of the [principal's] unlawful purpose," but that he "share . . . the criminal intent." See also Lavine v. Superior Court, 238 Cal. App. 2d 540, 544, 58 Cal. Rptr. 8 (1965), Pinell v. Superior Court, 232 Cal. App. 2d. 284, 287, 42 Cal. Rptr. 676 (1965).

The law of principal and accessory and of conspiracy is in California the same as the federal law. The Supreme Court of the United States has held, that "conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." Ingram v. United States, 360 U.S. 672, 678 (1959). The Court has been quite clear that circumstantial involvement in a crime does not amount to conspiracy to commit the crime unless the defendant has "knowledge" of the illegal activities and "intent" to further those ends. "Without the knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal." Direct Sale Co. v. United States, 319 U.S. 703, 711 (1943). (Emphasis supplied) See also, United States v. Falcone, 311 U.S. 205 (1940). And it is irrelevant how many people may comprise the conspiracy, no one individual may be convicted of conspiracy unless the evidence against him proves the "unlawful combination". Brannon v. United States, 156 U.S. 464, 468 (1895). 3/

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3/ The federal authority is important not only for its probative weight. It is a principle of federal constitutional law that due process is offended by creation of a crime without requiring proof of criminal intent. Robenson v. California, 370 U.S. 660 (1962). And where, as here, the State has chosen to charge constitutionally protected speech as criminal conduct, it must show criminal intent with a high degree of clarity and overwhelming proof. United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

It is the obligation of the government to prove the knowledge of the illegal scheme and the intent to participate in it. Dennis v. United States, 302 F.2d 5 (C.C.A. Colo. 1962); United States v. Gisehaltz, 278 F. Supp. 434 (D.C.N.Y. 1967).

In this case, the State seems to feel that a series of innocuous acts, perfectly legal in themselves, may be used as evidence to establish criminal intent. (Indict. Overt Acts 1, 2, 3, 4, 5, 6, 7, 8, and 13). It seems quite well settled that such "overt acts" are not enough. ". . . an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined in the agreement." Marino v. United States, 91 F.2d 691 (9th Cir. 1937). See also, Brannon v. United States, supra; Joplin Mercantile v. United States, 236 U.S. 531, 535 (1914); Terry v. United States, 7 F.2d 28, 29 (9th Cir. 1925); Weniger v. United States, 47 F.2d 692 (9th Cir. 1931); Heskett v. United States, 58 F.2d 897 (9th Cir. 1932); Craig v. United States, 81 F.2d 816, 822 (9th Cir. 1936); United States v. Hirsch, 100 U.S. 33, 34 (1879); Stack v. United States, 27 F.2d 16, 17 (9th Cir. 1928).

California decisions have also consistently held that without proof of criminal intent to join the conspiracy, there can be no prosecution. See Dong Haw v. Superior Court, 81 Cal. App. 2d 153, 183 P.2d 724 (1947); People v. Aday, 226 Cal. App. 2d 520, 38 Cal. Rptr. 199 (1964); People v. Long, 7 Cal. App. 27, 93 P. 387; Lavine v. Superior Court, 238 Cal. App. 2d 540, 48 Cal. Rptr. 8 (1965).

Nor is the law different with respect to complicity. To be guilty of aiding and abetting, the aider must share the criminal intent of the perpetrator of the crime. "To be an abettor, the accused must have instigated or advised the commission of the crime or be present for the purpose of assisting in its commission. He must share the criminal intent with which the crime was committed." People v. Villa, 156 Cal. App. 2d 128, 318 P.2d 828 (1957). For the same proposition see also People v. Durham, 70 Cal. 2d 17, 74 Cal. Rptr. 262, 449 P.2d 198 (1969), cert. den., 395 U.S. 968; People v. Frances, 71 Cal. 2d 66, 450 P.2d 591, 75 Cal. Rptr. 199 (1969).

To be guilty fo complicity, one must have knowledge of the criminal aims and share the criminal intent. People v. Blake, 214 Cal. App. 2d 705, 29 Cal. Rptr. 772 (1963); People v. Allen, 208 Cal. App. 2d 537, 25 Cal.

Rptr. 351 (1962); People v. Ellhamer, 199 Cal. App. 2d, 777, 18 Cal. Rptr. 905 (1962); and People v. Madison, 242 Cal. App. 2d 820, 51 Cal. Rptr. 851 (1966); see, People v. Ponce, 96 Cal. App. 2d 327, 215 P.2d 75 (1950).

This illustrative summary of federal and state case law demonstrates that without substantial proof that Miss Davis possessed the intent to carry out the crimes for which she is charged or the intent to aid in their being brought about, then the government is lacking in one necessary element of its case. It need not even be said that unless there is competent evidence of every necessary element of a crime, the indictment is invalid. Callan v. Superior Court, 204 Cal. App. 2d 652, 22 Cal. Rptr. 508, 514 (1962); People v. Minkowski, 204 Cal. App. 2d 832, 23 Cal. Rptr. 92, 97 (1962); People v. Olf, 195 Cal. App. 2d 97, 15 Cal. Rptr. 390 (1961).

There was no evidence at all before the grand jury bearing directly on the issue of intent. Can intent be inferred from the evidence that was presented? The following discussions shows why it cannot be.

B. Close Association With Even The Obviously Guilty Is Insufficient To Uphold An Indictment Or To Sustain A Conviction Based Thereon.

Angela Davis and Jonathan Jackson were, the evidence shows, acquainted. Miss Davis is gravely concerned about the fate of Jonathan's older brother, George. On a few occasions, Miss Davis, as well as Jonathan Jackson, sought to visit George Jackson at Soledad and at San Quentin. (Tr. 27-28, 74, 75-76). Jonathan Jackson and Miss Davis appeared together at rallies and shared the same speaking platform. (Tr. 80). But such association does not permit an inference of guilt.

The law is the same regarding both conspiracy and complicity. Close association will sustain neither an indictment nor a conviction. The court has stated the proposition well in People v. Aday, supra. "The essence of the crime of conspiracy is the evil or corrupt agreement to do an unlawful act. It is the evil intent that makes a combination criminally indictable. People v. Marsh, 58 Cal. 2d 732, 743 . . . conspiracy is a specific intent to do an unlawful act or to do a lawful act by unlawful means. People v. Bowman, 156 Cal. App. 2d 784. "Mere association does not establish a conspiracy, but there must be evidence of some participation or interest in the commission of the offense." (Emphasis supplied).

226 Cal. App. 2d at 533. For this same proposition see also Dong Haw v. Superior Court, supra; People v. Long, supra; People v. Griffin, 98 Cal. App. 2d 1, 39, 219 P.2d 519 (1950); People v. Massey, 151 Cal. App. 2d 651-652, 312 P.2d 365 (1957).

The California Supreme Court has quite clearly held that proof of close association will not support an inference of conspiracy. "Mere association or suspicion will not suffice to establish a conspiracy." People v. Robinson, 43 Cal. 2d 132, 271 P.2d 865, 868 (1954). See also 11 Cal. Jur. 2d 252 § 30; People v. Toledo-Corro, 174 Cal. App. 2d 812, 345 P.2d 529 (1959).

An indictment which bases its charge of conspiracy on association must be dismissed for lack of evidence. Boyd v. Superior Court, 113 Cal. App. 2d 443, 248 P.2d 106 (1952).

This California rule is also the law in the federal courts. United States v. Grimes, 332 F.2d 1014, 1017 (6th Cir. 1964); Evans v. United States, 257 F.2d 121 (9th Cir. 1958). Nor is association sufficient to establish that one has aided and abetted in the commission of a crime. United States v. Reigland, 375 F.2d 477 (2d Cir. 1967). And where the association is not only prima facie lawful but protected by the First Amendment, an inference of guilt is doubly wrong. United States v. Spock, supra.

C. Presence At The Scene Of The Crime Is Insufficient To Uphold An Indictment Or To Sustain A Conviction Based Thereon.

The government contends that Miss Davis was near the Marin County Courthouse on August 6, 1970. As was discussed earlier in this brief, the evidence which was presented before the grand jury to establish that fact is suspect at best. Nevertheless, for the purposes of this brief, we will assume that Miss Davis was, in fact, present at the courthouse on the day prior to the killings.

The law, both in California and in the federal courts, is clear in holding that presence at the scene of the crime, even in addition to a close association with the alleged perpetrator of the crime, is insufficient to make one guilty either of complicity or conspiracy. A recent California case makes this point best. In Lavine v. Superior Court, 238 Cal. App. 2d 540, 48 Cal. Rptr. 8 (1965), the defendant was indicted for conspiracy to

murder. The perpetrator of the crime was in the process of committing a robbery when the murder resulted. The defendant was a close associate of the perpetrator and was present at the scene, at the time of the attempted robbery. The court held that the indictment must be quashed as there was no evidence of knowledge by defendant of the illegal acts of the perpetrator nor any evidence of the intent of defendant to participate, conspire or aid and abet a crime. The court states that "to uphold the indictment against petitioners upon the theory of a conspiracy would be to sanction an indictment founded on mere speculation or conjecture." To infer the existence of conspiracy from mere presence at the scene "would be to announce a theory even less supportable than that of guilt by association or as stated in People v. Weber, 84 Cal. App. 2d 126, 131, 190 P.2d 46, to punish petitioners for 'general conditions.'"

"To be an abettor the accused must have instigated or advised the commission of the crime or been present for the purpose of assisting in its commission. He must share the criminal intent with which the crime was committed. The mere presence of the accused at the scene of the crime does not alone establish that the accused was an abettor." People v. Villa, 156 Cal. App. 2d 128, 133-34, 318 P.2d 828, 832-33.

For the proposition that presence at the scene by defendant is insufficient to make out a claim of conspiracy, see also United States v. Reigland, 375 F.2d 477 (2d Cir. 1967). As stated in Simmonds v. Superior Court, 245 Cal. App. 2d 704, 54 Cal. Rptr. 195 (1966): ". . . the law recognizes that mere association or mere presence cannot alone furnish the basis for a charge of co-conspiracy." See also Davis v. Superior Court, 175 Cal. App. 2d 8, 23, 345 P.2d 513 (1959); People v. Mata, 133 Cal. App. 2d 18, 22, 283 P.2d 372 (1955).

The law appears to be equally well settled in the field of complicity. As the court holds in People v. Villa, 156 Cal. App. 2d 128, 318 P.2d 828 (1957): "The mere presence of the accused at the scene of the crime does not alone establish that the accused was an abettor." See also People v. Hill, 77 Cal. App. 2d 287, 175 P.2d 45 (1946); People v. Boddie, 274 Cal. App. 2d 408, 80 Cal. Rptr. 83 (1969); People v. Van Syoc, 269 Cal. App. 2d 370, 75 Cal. Rptr. 490 (1969); People v. Barnett, 118 Cal. App. 2d 336, 257 P.2d 1041 (1953); and People v. Foster, 115 Cal. App. 2d 866, 253 P.2d 50 (1953).

Again, the point is clear. In order to be guilty of either conspiracy or complicity, the accused must share in the "criminal intent" and have "knowledge" of the illegal ends. Such intent and knowledge may not be inferred from such innocuous facts as association with the perpetrator of the crime or happenstance presence at the scene of the crime.

D. Ownership Of Instrumentalities Used In The Commission Of A Crime Is Insufficient To Uphold An Indictment Or To Sustain A Conviction Based Thereon.

Although there is substantial question that the weapons which were marked and later presented to the Grand Jury were the same weapons that were picked up at the scene, for the purpose of this brief we will assume this to be the case. If this assumption be true, the guns were lawfully registered to Angela Davis. The State apparently contends that ownership, entirely legal in itself, is in some way indicative of defendant's guilt for crimes in which these weapons may have been used. This contention is absurd.

In Dong Haw v. Superior Court, 81 Cal. App. 2d 153, 183 P.2d 724 (1947) to be discussed in greater detail below, defendant was charged with conspiracy to bribe a public official. The perpetrator of the crime used the defendant's car in going to see the official. Also, the goods to be given to the official as a bribe belonged to the defendant. The court held that without some evidence that the defendant had knowledge of the intended use of the goods and the car, and intent to share in the criminal scheme, that the indictment was insufficient as not based on probable cause. Such knowledge and intent could not, as a matter of law, be inferred from defendant's ownership of the instrumentalities used in the commission of the crime.

For a Ninth Circuit case in which a conviction was not allowed to stand based only on the use of an instrumentality owned by the defendant without some evidence of knowledge or intent, see Miller v. United States, 382 F.2d 583 (1967).

The law is the same with regard to complicity. For the proposition that furnishing the instrumentality of the crime does not make one an abettor unless he has knowledge of the illegal purpose for which the instrumentality

is to be used, see People v. Wood, 56 Cal. App. 431, 205 P. 698 (1922). 4/

Again, the key element to be proven is that Angela Davis had knowledge that the weapons were to be used in the commission of a crime; that it was her intent that they be so used. As a matter of law, that intent may not be inferred from ownership.

E. All Of The Above Factors, Combined, Are Insufficient To Uphold An Indictment Or To Sustain A Conviction Based Thereon.

So far, we have examined each element of the State's case. Most of the cases which were cited did, in fact, contain more than the single element discussed. Nevertheless, at this point, it is necessary to combine all of the elements of the State's case, as presented to the grand jury, and to inquire whether as a unit, as a picture, the evidence is sufficient to uphold an indictment. It will become clear that it is not.

A very similar situation to the case at bar was presented in Dong Haw v. Superior Court, cited several times above. The charge was conspiracy to bribe. The defendant was the father of the admitted perpetrator of the bribe. The father owned a building which he had rented out to third parties who used it as a club. The defendant received rent from the proprietors of the club. The public offical involved in the case had recently closed down the club. In attempting to persuade the official to change his mind, the son of defendant took a quantity of liquor to the official. The stamps on the liquor bottles were later traced to an establishment which was owned by the defendants. Further, the son used his father's car to make the delivery. The issue was whether there was sufficient evidence against the father to establish probable cause.

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4/ For an example of what would be sufficient evidence to sustain a finding of knowledge and intent see People v. Hailey, 308 P.2d 517 (1957). In that case, defendant loaned his car to the perpetrator of the robbery. Although the loaning of the car, in itself, is not sufficient to make a claim in complicity, here the defendant had made verbal admissions that he had knowledge of the fact that his car was to be used in the commission of a robbery. Also, the fact that the perpetrator of the robbery paid an unreasonably high rental for the short period of use of the car was a corroborating fact to defendant's admission.

The court held that there was not. "Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense." 81 Cal. App. 2d at 158, 183 P.2d at 727.

In Dong Haw, the State argued that the Supreme Court, in Greenberg v. Superior Court, 19 Cal. 2d 319, 121 P.2d 713 (1942), put forth a test of "some evidence". It contended that although the evidence might not be conclusive, it was certainly "some evidence". The court disagreed. "By the use of the phrase 'some evidence' the Supreme Court could not have meant 'any evidence,' whether incompetent, irrelevant or otherwise. We take it to mean valid evidence, not evidence of no probative value but evidence such as that referred to in § 921 of the Penal Code which, if unexplained or uncontradicted, would in the minds of the members of the grand jury warrant a conviction by a trial jury." 81 Cal. App. 2d at 158-59, 183 P.2d at 727.

In this case, there is even less evidence than in Dong Haw. But the parallel is obvious. In Dong Haw, the defendant was intimately associated with the perpetrator of the crime. The defendant was directly affected by the action taken by the public official and certainly had an interest in seeing that the club was allowed to reopen. And the instrumentalities used by the son in the commission of the crime all belonged to the defendant. Taken together, the court said they were insufficient, as a matter of law, to prove defendant's criminal intent to commit the crime or his knowledge that instrumentalities owned by him were being used in the commission of a crime, and as a consequence, the indictment was not supported by sufficient evidence. A conspiracy cannot be determined by conjecture, guesswork, or wishful thinking. People v. Mata, 133 Cal. App. 2d 18, 283 P.2d 372 (1955).

A case paralleling this one came before the Ninth Circuit Court of Appeals in Ong Way Jong v. United States, 245 F.2d 392 (9th Cir. 1956). The charge was conspiracy to sell, conceal and transport narcotics. Wee, the perpetrator of the crime, was convicted of selling narcotics to a government agent. During the course of the transaction, Wee constantly associated with the defendant. And as the bartering between the government agent and Wee took place, defendant was under constant surveillance. During the period of time, Wee never

associated with anyone else but defendant. And it was defendant's car that was used by Wee in carrying out the illegal transaction. On the basis of this evidence, defendant was convicted. The Court of Appeals reversed, holding that the evidence raised only a suspicion and that there was no evidence of defendant's criminal intent or knowledge of the illegal activities of Wee sufficient to put him to his defense. The court held that there was no evidence "which definitely proves that Ong [the defendant] was here engaged in any criminal activity." Guilt by association cannot be a basis. There was no proof of any connection between defendant and the "substantive offense." "There is not a scintilla of evidence that defendant was guilty of conspiracy to sell narcotics." . . . "The overt acts alleged in the indictment are entirely innocuous." . . . "Defendant owned Cadillac cars, but there is no suggestion in the record that he used them to transport narcotics."

Consider also Miller v. United States, 382 F.2d 583 (9th Cir. 1967). Defendant permitted the perpetrator of the crime to use her car. The two parties were very closely associated. In fact, defendant even rode with the perpetrator to the scene where the crime was committed. The Circuit Court reversed the conviction as there was not evidence that defendant knew of the illegal purpose of the friend. The court pointed out that there were two possible inferences: one, that defendant let her friend use the car with the knowledge that the friend was going to commit a felony. Or there was the possible inference that defendant knew nothing about the illegal intent of her friend. "Where both inferences are equally valid, the defendant is entitled to the one which favors her." For this same proposition, see Chavez v. United States, 275 F.2d 813, 817 (9th Cir. 1960).

The test for what is sufficient to constitute knowledge is exemplified in People v. Simpson, 66 Cal. App. 2d 319, 152 P.2d 319 (1944). The defendant's wife bought a gun which was later used by her husband in the commission of a robbery. The wife claimed she had bought the gun for protection. The court stated "If that had been her sole motive, she would have been entitled to an acquittal. Her presence with her co-defendants during the commission of the crimes would not have constituted guilt in the absence of any act or conduct by which she aided and abetted in their commission. But if, when she purchased the gun or when she later carried it in her purse, she was conscious of the fact that her co-defendants intended to use it in the perpetration of robberies, she aided and abetted them in their plans in a most substantial way." 66 Cal. App. 2d at 326, 152 P.2d at 343.

In Simpson, unlike this case, there was substantial evidence that the husband had discussed with the wife his intent to use the gun in the commission of robberies. And from the evidence of the discussions between them, it was reasonable to conclude that at the time she voluntarily gave the gun to her husband, she knew he was going to use it to commit a crime.

However, absent the evidence of the discussions between defendant and her husband, there would not have been sufficient evidence to establish the wife's knowledge or intent, even though the perpetrator was her husband, she was present at the scene of the crime and she had bought the gun which was later used in the commission of the crime.

Thus, the evidence before the grand jury, taken as a whole, does not establish probable cause, even assuming it to be lawful and indulging every inference favorable to the State. Of course, this conclusion is strengthened when irrelevant and illegally obtained evidence is excluded. (See Motion to Suppress, filed this day.)

## CONCLUSION

Angela Davis is a Black woman and a Communist. She has advocated the release of the Soledad Brothers. She has lived her life as scholar, teacher, activist, and advocate in the glare of hostile publicity. Now the State seeks her life, and struggles to turn against her the open and honest way she has carried out her political goals: speaking out when she was concerned, caring for the lives of others, and buying guns when she had reason to be fearful for her safety and indeed for her life. But these things are not crimes. If they can be made crimes by the exuberance of prosecutors and the acquiescence of judges, the freedom of none of us is safe. The indictment should be set aside.

15 THE COURT: Thank you. With that understanding,
16 Mr. Tigar, you may continue, sir.
17 MR. TIGAR: I
18 intend in this argument to analyze the evidence and show
19 why the Grand Jury's conclusion was unreasonable. To ana-
20 lyze not only the testimony of the witnesses that Mr. Harris
21 and Mr. Dales produced before the Grand Jury, but in asking
22 your Honor to evaluate the worth of that testimony I will
23 comment on questions not asked of witnesses who were there,
24 other witnesses who might very easily and readily have been
25 called, and by this to show that this indictment is, under
26 the law, as we have claimed, a sham and a fraud, and that
27 this case is a frameup.
28 Indeed, it is our purpose to show that with Albert

1 Harris as the engineer, the Marin County Grand Jury is
2 America's only working railroad.
3 Then I would propose, if the Court please, to deal
4 with why this case is a political case, and what the meaning
5 is of the political overtones which have been injected here
6 not by the defense, but by the Attorney General's office,
7 beginning with the very words of the indictment right down
8 to the present day.
9 The indictment charges, in Count III, a conspiracy,
10 which the law defines as an agreement of two or more persons,
11 with an unlawful object, to commit any crime, and then
12 there is the requirement that there be some overt act com-
13 mitted during the conspiracy and to effect its object. As
14 to each alleged conspirator there must be reasonable cause
15 on this motion to find that he or she joined the agreement,
16 and had the intention to join it, the specific intent to
17 act out the alleged unlawful purpose.
18 The significance of these requirements will appear
19 as we take a look at this transcript.
20 The prosecution's second theory, since it does not
21 allege any direct participation by Miss Davis, is that with
22 respect to Count I and II she is an aider and abettor.
23 That takes us to Section 31 of the Penal Code, because
24 even Section 209 of the Penal Code, which contains its own
25 aiding-and-abetting section, is under the case law referred
26 to the general definition of Penal Code Section 31. Being
27 an aider and abettor one must participate in a planning and
28 execution of an offense. There must of course be the

commission of a criminal offense by the principal, and the alleged aider and abettor must have knowledge of the principal's unlawful purpose and the specific intent to further it.

Murder is charged in the indictment, the unlawful killing of a human being with express or implied malice aforethought, and to be first-degree murder there must be willful, deliberate premeditated conduct.

Finally there is a kidnaping charge, kidnaping or carrying away, to hold for ransom, reward or extortion.

Then, of course, there is the intent requirement, as there is in all offenses in the Penal Code, under Section 20 of the Code.

The alleged conspiracy embraces not only kidnaping and murder, but an escape. There must be a prisoner, an escape or attempt; there must be force or violence, and there must be the intent to escape.

Finally the conspiracy also embraces what is known as rescue. That is not my word, although the draftsmen of the Penal Code could not conceivably have had in mind the conditions in California's prisons; there must be a rescue or attempt to rescue any prisoner from prison, and the intent to rescue.

Now, what are the standards that your Honor is supposed to apply in judging whether or not there was reasonable cause here to believe that an offense or offenses have been committed, and that Miss Davis committed them? There must be substantial evidence, says the Theil (sic) case. There must be some evidence, valid evidence, which if

1 unexplained would warrant conviction. That is the case of
2 Dong Haw (sic) versus Superior Court, which we cite at page
3 25 of our memorandum. By the use of the phrase "some
4 evidence," the Supreme Court could not have meant any evidence,
5 whether incompetent, irrelevant or otherwise. We take it
6 to mean valid evidence, not evidence of no probative value,
7 but evidence such as that referred to in Section 921 of the
8 Penal Code, which, if unexplained or uncontradicted would
9 in the minds of the members of the Grand Jury warrant a
10 conviction by a trial jury.

11 Now, the prosecution attacks the Dong Haw case at
12 page 27 of its memorandum. Therefore a word is perhaps
13 appropriate saying that they say the standard there applied
14 is a little too rigorous; more leeway or latitude should be
15 given to the Grand Jury, but in light of the citation, with
16 approval of the Dong Haw case, and such cases as Lawrenson
17 (sic) versus Superior Court, 35 Cal.(2d), where the case is
18 discussed with approval by both the majority and the dissent,
19 I think that the prosecution's objection can be regarded
20 as frivolous.

21 Finally, in this rather technical introduction,
22 I want to call your Honor's attention to the provisions of
23 Section 939.7 of the Penal Code, which requires that a Grand
24 Jury order evidence produced to explain other evidence before
25 it.

26 Now, I will throughout this argument take the
27 position that Albert Harris and Bruce Dales are the eyes and
28 ears of the Grand Jury; that they direct its deliberations.

1 Indeed, in considering, if the Court please, whether or not
2 this indictment should stand or fall, it has to be taken
3 in mind that this is not a case in which there was a prelimi-
4 nary examination. This is not a case in which the defense
5 had any opportunity to cross-examine witnesses tendered by
6 the State, or in which the defense had the opportunity to
7 call any witnesses of its own, or even to suggest that
8 witnesses be called. The Grand Jury is Albert Harris's
9 ball park. It is the place where he can call any witnesses
10 he chooses, interrogate that witness at leisure or briefly,
11 as he wishes, and ask precisely and only the questions that
12 he wants to ask to elicit the answers which he expects to get.
13 So, what is the evidence that the Attorney General
14 has come forth with in an attempt to make its contention that
15 Angela Davis should be held now in custody to answer for
16 this offense?
17 First, the guns. The guns. There are four of
18 them, two rifles, a Browning automatic, a shotgun. In
19 evaluating the significance that those guns have I would call
20 your Honor's attention to the case of <u>People versus McCall</u>,
21 <u>10 Cal. App.(2d), 503, at page 507</u>, in which the Court warns
22 against "giving undue significance to circumstances that are
23 but the ordinary incidents of everyday life. The fact that
24 the very existence of a prosecution tends to throw suspicion
25 upon every act of the accused and to cause trifles 'light as
26 air' to assume the appearance of 'confirmations strong as
27 proofs of holy writ' should give pause to any heedless
28 imprudence in the admission in evidence of circumstances that

1 are barren of incriminating significance."

2 What about these guns? There was a time, and I'm
3 sure the Court remembers it, when it was proposed drastically
4 to limit the right of any citizen to own guns. That was a
5 time in the wake of some assassinations with which the
6 Court is familiar. But, there were other voices in this
7 state, I believe the voice of our present governor among
8 them, who said, "No," that that would be an interference
9 with the right of the citizen, and so we wrote into our
10 penal code not a prohibition, a general prohibition on the
11 possession of firearms, but rather words such as those in
12 Penal Code Section 12031, which provides, even:

13 "Nothing in this Section shall prevent any
14 person from having a loaded weapon, if it is other-
15 wise lawful, at his place of residence, including
16 any temporary residence or campsite,"

17 And Subsection (h), which provides that:

18 "Nothing in this Section is intended to
19 preclude the carrying of any loaded firearm,
20 under circumstances where it would otherwise be
21 lawful, by a person who reasonably believes that
22 the person or property of himself or another is
23 in immediate danger and that the carrying of such
24 weapon is necessary for the preservation of such
25 person or property."

26 Angela Davis lawfully purchased and lawfully
27 registered four guns. That is a fact which is before
28 the Grand Jury. And what can we make of it? But when we were

1 here last -- when we were last here on this argument the
2 Attorney General wheeled into the room a cardboard box which
3 contained some weapons that he didn't get a chance to refer
4 to, and he said at that time that he wanted to display the
5 weapons to the Court, presumably because displaying them
6 would somehow lend credence to the view that the mere posses-
7 sion of these guns, as opposed to some other kind of guns,
8 would tend to point in the direction of guilt.

9 Well, if that contention is made again today, as
10 I believe it will be, your Honor ought to evaluate it. Mr.
11 Harris had before him in the Grand Jury Mr. Plimpton, who
12 manages the Brass Rail Gun Shop where Miss Davis purchased
13 the Browning automatic. Mr. Plimpton was Mr. Harris's
14 witness there before the Grand Jury, and Mr. Plimpton wasn't
15 asked a very simple question: "How many Browning automatics
16 are sold, even by that one store, in the course of a year;
17 is it a common or an uncommon weapon?" I would like now to
18 serve upon the Attorney General, and tender to the Court for
19 filing an affidavit --

20 THE COURT: It may be handed to the clerk for filing.

21 MR. TIGAR: -- which recounts that within the
22 experience of one salesman at the Brass Rail Gun Shop, prior
23 to December 16th, 1968, 10 to 15 of this very kind of gun
24 were sold in a year by that one gun shop (handing document
25 to clerk).

26 MR. HARRIS: Your Honor -- excuse me, Mr. Tigar --
27 I'm going to object to any reference to this affidavit, and
28 move to strike it from the record. The law is so fundamental

that this argument under 995 is limited to and based upon the Grand Jury transcript, that I think any word would be -- any extensive argument would be a waste of time.

THE COURT: Do you wish to counter?

MR. TIGAR: We are not supplementing the record before the Grand Jury. What we are doing is asking your Honor to do what the law requires you to do, and that is to evaluate the evidence before that Grand Jury in the light of common experience and the light of things which people know to be the case. I don't think we ought to be hampered in attempting to get a fair evaluation of the evidence.

Maybe Mr. Harris would like to explain now or at some appropriate time why it is he didn't ask that question of Mr. Plimpton.

THE COURT: I apologize. The affidavit has been presented, and it is a part of the record.

MR. TIGAR: Well, I can understand Mr. Harris's reluctance, if the Court please, because there was another question that Mr. Plimpton didn't get asked before the Grand Jury. He didn't get asked, for example, whether he had any conversation with Angela Davis at the time the gun was purchased. Why wasn't that question asked, which might have shed a little light upon what Mr. Harris wanted the Grand Jury to hear; might have permitted the Grand Jurors to evaluate the evidence.

Maybe the reason was that Mr. Harris had every reason to know at the time that he had Mr. Plimpton on the stand as a witness, beginning at page 83 of the Grand Jury,

1 that Mr. Plimpton had given an interview to the Los Angeles
2 Times on August the 12th, saying that Miss Davis wanted to
3 buy a gun for her own protection. That is the Los Angeles
4 Times, August 13th, page 33.
5 But he didn't want to ask Mr. Plimpton that
6 question.
7 There is a final point here, your Honor. There is
8 a final point. The prosecutor being the eyes and ears of
9 the Grand Jury, he is really more than an ordinary party to
10 a controversy as the Supreme Court said in the Burger (sic)
11 case a long time ago. He has the opportunity -- he has the
12 obligation, rather, to deal with the Grand Jury fairly, not
13 to withhold or to conceal, and yet at the very time that Mr.
14 Harris was presenting to the Grand Jury the evidence that
15 all of these guns had been lawfully purchased and lawfully
16 registered, he didn't choose to tell the Grand Jury that
17 the records of the Los Angeles Police Department, which he
18 had publicly acknowledged prior to the convening of the
19 Grand Jury, were in existence, would have shown that Angela
20 Davis was not the last person who possessed at least one
21 of these weapons; that somebody else was the last person,
22 so far as the authorities knew, to have possessed one of
23 these weapons. I think that's important, Judge. I don't
24 think that is going outside the record. I think it is
25 important in evaluating what weight you are going to give to
26 the conclusion of this Grand Jury.
27 But even if you want to take at face value the
28 lawful possession and lawful registering of four guns, there

is the fact to consider as a matter of common experience as to how many of our citizens have guns, and as to the attitude and views toward self-protection that are much maligned, often threatened, controversial public fears that such a person might have in an increasingly violent society for her own safety, and that is not a matter of looking at anything except into your own mind, and the things that you know to be true.

But even if you don't do that, the State's case with respect to the guns hinges upon an allegation of the indictment that Angela Davis furnished the guns to Jonathan Jackson with the purpose of aiding him in carrying out certain criminal offenses, and for that there is not one scintilla of evidence in the Grand Jury transcript. There just isn't any.

I will come back to that question in a moment, but that logical leap the prosecutor asks you to take I would like to reserve for now, as we pass on to another contention of the State.

There isn't even any evidence, if the Court please, that there was a conspiracy here; isn't any evidence. How can I make that statement? What evidence does the prosecution have that there was a conspiracy? There is some evidence of association, but what is their theory of the case? The theory of the case is that when Jonathan Jackson stood in the rear of the courtroom in this building, that it was his intention to commit kidnaping and murder, escape and rescue. That is one end. The other end of the State's case which

1 I will analyze in a moment is Miss Davis's interest in the
2 freedom of three men, George Jackson, Fleeta Drumgo and
3 John Clutchette. The sole item of evidence which the State
4 presented at the Grand Jury to bring these two disparate
5 elements together is the alleged hearsay declaration of
6 James McClain, in the corridor of this building, "Free the
7 Soledad Prisoners by 12:30 or they all die."
8 That is the thread upon which the State's case
9 hangs. How is it that the State can come here and say that
10 that statement should somehow even be admissible to show
11 participation by, or the intent of, Angela Davis? How is it?
12 And that, of course, is the test, because if the statement
13 isn't admissible, because it is irrelevant or for some
14 other reason, then it goes out, because only lawful evidence
15 before the Grand Jury can be considered.
16 Let's look at that a moment. Let's look at that
17 statement by McClain. First the statement is ambiguous:
18 "Free the Soledad Brothers by 12:30 or they all die." Mr.
19 Harris makes a giant assumption, that is, that the Soledad
20 Brothers are the same people that McClain was referring to,
21 the same people in whose liberty, in whose lawful release
22 from unlawful custody Angela Davis had been concerned were
23 the same people he was referring to, but that isn't true
24 necessarily. Clutchette, Jackson and Drumgo are not the
25 only Soledad Brothers. In Case No. CR-2725, People versus
26 Jesse Phillips, James Wagner and Roosevelt Williams, now
27 pending in Monterey County, a case in which your Honor can
28 take judicial notice, the record of which your Honor can take

1 judicial notice, in a motion for change of venue on the
2 question of prejudicial pretrial publicity, Lawrence Horan,
3 a Monterey County attorney, reported to the Court the result
4 of a survey showing that the term "Soledad Brothers" was
5 believed by the residents of Monterey County to refer to
6 Phillips, Wagner and Williams, and there is no evidence before
7 the Grand Jury as to Miss Davis's concern about that case,
8 which had commenced -- yes, Mr. Harris -- July 23rd, 1970.
9 So, the first problem is one problem that the
10 evidence case books refer you to always, when you are looking
11 at hearsay statements, what did the declarant mean, and we
12 don't know what the declarant meant. In the mind of a
13 careful person accumstomed to examine every statement for
14 all that it might be worth rather than for what it could add
15 to a predetermined outcome, there might have been some further
16 questions asked about that statement.
17 Is there some evidence that McClain and Jackson,
18 Clutchette and Drumgo have been associated? Not in this
19 transcript, surely. Well, there was some evidence on that
20 score, that Mr. Harris, I assume, could have put before the
21 Grand Jury. Associate Warden Park had been quoted in all the
22 newspapers as saying that -- for instance, the San Francisco
23 Examiner -- that there had been no contact between McClain
24 and Jackson, so far as he knew, and further that all this
25 talk about this being some kind of conspiracy to free the
26 Soledad Brothers was nonsense. That was his conclusion as
27 an informed prison official.
28 Now, that testimony would have been admissible

1 before the Grand Jury. The first item of it would have
2 been admissible if Mr. Harris had chosen to put it in as an
3 item of negative evidence, and the second item would have been
4 admissible before the Grand Jury as the conclusion of a known
5 expert witness with respect to a fact as to which he has
6 testified, which might help the trier of fact to evaluate the
7 significance of what he said.

8 You don't have to consider that. All you have to
9 consider is that the record is silent, and if you need to go
10 beyond that you can ask yourself what the silence says. And
11 what did McClain say, anyway? Did he say, "Free the Soledad
12 Brothers by 12:30 or they all die"? Only one witness before
13 the Grand Jury, your Honor, only one Police Chief Terzich,
14 with respect to what McClain said -- only one witness out of
15 a crowded corridor, many persons which had an opportunity to
16 hear what McClain said. Why only Terzich? Well, maybe that
17 was because Terzich was the only person in creation, apparent-
18 ly, that heard James McClain say that statement in that form.
19 The San Rafael Independent-Journal photographer, Mr. Keane,
20 heard the statement, "Free the Soledad Brothers by 12:30,"
21 or as reported in some versions, "Free the Soledad Brothers."
22 The "or they all die" part, however, Mr. Harris apparently
23 felt was necessary in the process of getting the Grand Jury
24 to vote this indictment, and of course, had somebody had an
25 opportunity to cross-examine Mr. Terzich before that Grand
26 Jury, which of course nobody did, that maybe could have been
27 brought out. But we will leave that.

28 Moreover, there is no evidence anywhere in that

1 transcript of any preparation by any person in any way to
2 get the Soledad Brothers -- even if we indulge for a moment
3 the assumption that the Soledad Brothers referred to were
4 Clutchette, Jackson and Drumgo -- free. No evidence of a
5 meeting place, no evidence of plans; nothing. There was
6 one lone statment by James McClain, but all that I have said
7 assumes that James McClain was on trial here, because giving
8 that statement every intendment and meaning in the direction
9 of guilt that the mind of the most ambitious prosecutor
10 could give it, the statement is nonetheless not admissible
11 as against Angela Davis.

12 What did the United States Court of Appeals for the
13 First Circuit say in the Spock case? "The specific intent
14 of one defendant in a case such as this is not ascertained
15 by reference to the conduct or statements of another, even
16 though he has knowledge thereof." "The specific intent of
17 one defendant is not ascertained by reference to the conduct
18 or statements of another, even though he has knowledge
19 thereof." I assume the use of the word, "he" would include
20 "she."

21 THE COURT: Was that cited in your brief, counsel?

22 MR. TIGAR: The Spock case was cited in our brief,
23 yes.

24 THE COURT: Thank you.

25 MR. TIGAR: I will give you the page. 416 Federal
26 (2d), at page 173.

27 THE COURT: Thank you.

28 MR. TIGAR: And the citation or the quotation that

1 I just read is cited with approval in Justice Kaus's opinion
2 in Castro versus Superior Court, 9 Cal. App.(3d), 675, at
3 page 685. That is also cited in our --
4 THE COURT: Yes, I have read that case.
5 MR. TIGAR: -- memorandum.
6 THE COURT: Thank you.
7 MR. TIGAR: The Spock case rests on a theory, Judge,
8 a theory that in conspiracy cases in which you have First-
9 Amendment-protected speech as a part of the allegations in
10 the indictment a different standard has to be applied. I
11 want to discuss that in detail toward the close of my argument,
12 but it seems to me important to avert to one aspect of it now.
13 The indictment in this case doesn't waste any time
14 getting around to the protected conduct. You get into
15 Count III, and go to the first overt act, we hear that,
16 "On or about June 19, 1970, Angela Davis
17 participated in a rally at the State Building in
18 Los Angeles and advocated the release from law-
19 ful custody of the said George Jackson, Fleeta
20 Drumgo and John Clutchette, also known as the
21 'Soledad Brothers.'"
22 So, if there is a conspiracy at all here, Judge,
23 it is a conspiracy that has to be dealt with under different
24 standards than would apply in a conspiracy to deal narcotics,
25 for example. The State has chosen to say that conduct,
26 speech, association, protected by the First Amendment, was
27 part and parcel of the unlawful design, so by the State's
28 own theory this is what the Spock court called a bifarious

1 conspiracy, consisting in part of protected conduct and part
2 of unprotected; indeed, unlawful conduct.
3 Now, it is made the more significant because the
4 McClain statement is the one thread, the gossamer that holds
5 these two elements together, but even under ordinary con-
6 spiracy law in order for that McClain statement to be charge-
7 able to Angela Davis there would have first to be shown
8 that there was a conspiracy on August the 7th, 1970; that it
9 had as its object the freeing of the Soledad Brothers, that
10 is to say, the Soledad Brothers referred to in the indictment,
11 Clutchette, Jackson and Drumgo; that McClain was a member of
12 the conspiracy on August the 7th, 1970; that Angela Davis
13 was a member of the conspiracy on August the 7th, 1970, and
14 that McClain uttered that statement in furtherance of the
15 conspiratorial design.
16 There is no extrinsic evidence; there is no evidence
17 other than McClain's statement of that, and so this declara-
18 tion by this person, now deceased, the State proposes to
19 use as a bootstrap hoist, the very kind of thing that has
20 been warned against in the conspiracy cases, and is the
21 reason why some thoughtful people think that the crime of
22 conspiracy ought to be abolished altogether, because it permits
23 the State to go rambling through hearsay declarations,
24 changing them over as against various defendants, even though
25 uttered by other defendants, and that that process simply
26 is dangerous to the liberty of citizens.
27 So, we would content that there isn't any evidence
28 of a conspiracy here, none that the Court can take account of,

1 and that the evidence there is has to be evaluted as I have
2 said.
3 Now then, there is another question here, a question
4 of what kind of offenses got committed by this alleged
5 criminal enterprise. I know that Mr. Graves, or Mr. Magee,
6 or both of them, are going to point out to the Court that
7 there is no any evidence in the transcript that would justify
8 a finding that Penal Code Section 209, kidnaping, was com-
9 mitted under the Daniel case; that is to say, no more movement
10 of persons that would have been required, or would have been
11 incident to -- logically incident to an escape and rescue,
12 so that has to be evaluated, and I know, too, that a portion
13 of the Grand Jury transcript was sealed, and so any dis-
14 cussion that I would have of the testimony of Gary Thomas
15 would necessarily have to be by indirection; but I think it
16 bears pointing out as to what is not in that part of the
17 transcript, and if Mr. Harris or Mr. Graves thinks I'm
18 trespassing on the sealed portion, then they should object;
19 but I don't think that I will.
20 Gary Thomas, your Honor will recall, is a most
21 crucial witness for the prosecution in this case. A most
22 crucial witness, and we are fortunate, perhaps, that his
23 statements, his descriptions of the events, were related to
24 the press, and to other law-enforcement officers, particularly
25 Inspector Retana, right in the aftermath of the August 7th,
26 1970 events.
27 Now, all you had to do was pick up the paper to
28 know that Gary Thomas was claiming to have shot three people --

1 MR. HARRIS: I'm going to object to this. This is
2 incredible to me. The testimony, the sworn testimony --
3 MR. TIGAR: This indictment is incredible to me.
4 THE COURT: Listen. Let's be polite. I will
5 listen to one at a time.
6 MR. HARRIS: Thank you, your Honor. The testimony
7 of Gary Thomas has been sealed by order of the Court, and
8 I intend to move to ask the Court to permit that testimony
9 to be re --
10 MR. TIGAR: I haven't mentioned the testimony.
11 MR. HARRIS: To bring in newspaper accounts of
12 things purportedly said by Mr. Thomas I think is totally
13 improper, your Honor, at this stage of the proceedings. It
14 has nothing to do with the basis in the Grand Jury evidence
15 supporting this indictment. It is totally incompetent. It
16 may be accurate or inaccurate, I don't know.
17 MR. TIGAR: Very well.
18 MR. HARRIS: If we go into that subject, I think
19 it is totally uncalled for.
20 MR. TIGAR: I would like to respond briefly to
21 that.
22 THE COURT: You may.
23 MR. TIGAR: What we have said is that you can't
24 evaluate this evidence without evaluating the conduct of the
25 man that put it in, and if Mr. Harris wants to claim, as he
26 has done just now, that it was, by implication, fair and
27 reasonable, what he did before that Grand Jury, and if we
28 want to claim, as I have done repeatedly here, that instead

3

1 of conducting the Grand Jury proceedings fairly and impartially
2 and using the things that he knew to be true to put questions
3 to witnesses, there is only one way to resolve that, your
4 Honor, and I would like to call Albert Harris as a witness
5 on behalf of the defendant right now, to testify about these
6 matters with respect to his conduct with the Grand Jury, and
7 I would like him to be sworn.

8 THE COURT: We are going to proceed with argument
9 at this time, not the testimony; and let me just indicate
10 a response to each of you now, that the order previously made
11 sealing portions of the transcript has not been changed. I
12 ask each of you in the dictates of your conscience and the
13 dictates of the profession that you abide by it.

14 MR. TIGAR: I have not referred to any of the
15 testimony that has been sealed, your Honor. Do I take it --

16 THE COURT: I didn't indicate you had, sir.

17 MR. TIGAR: Do I take it by your Honor's statement
18 that our application that Mr. Harris be summoned as a witness
19 is denied, or merely that you are deferring it to a later time?

20 THE COURT: At this juncture I am not permitting it.
21 This is the time set for argument of counsel.

22 MR. TIGAR: Very well. I will proceed, and through-
23 out my argument, even though Mr. Harris may object to it, I
24 may note places at which we would like to have a little light
25 shed --

26 THE COURT: You may.

27 MR. TIGAR: -- to get Mr. Harris under oath as to
28 the factual assertions he has made here in court today.

1 THE COURT: You may proceed.

2 MR. TIGAR: What was publicly known with respect
3 to Mr. Thomas were these statements that he made to Inspector
4 Retana. I don't wish to pursue this question further, your
5 Honor, because we didn't ask for the order sealing the
6 transcript; but I would like to refer you for your own in-
7 formation to the matters that we have already filed, that
8 you can take a look at.

9 Take a look at the Los Angeles Times for August
10 9th, at page B-8; you can take a look at the San Francisco
11 Examiner for August the 12th, 1970, on page 1, and those were
12 matters of public knowledge at the time the Grand Jury was
13 sitting, as to which a careful lawyer would reasonably direct
14 attention. I believe that a review of those, supplemented
15 by the testimony under oath of Mr. Harris, would lay a basis
16 for excluding altogether the testimony of Gary Thomas on the
17 grounds stated in the Evidence Code, that he had no personal
18 knowledge of the matters as to which he testified.

19 Now then, the prosecutor also rests in this case
20 on the testimony of a man named Fleming, a service-station
21 attendant from across the road over here. That they should
22 choose to rely on Mr. Fleming's testimony, which begins at
23 page 127 of the Grand Jury transcript, I think is a little
24 short of amazing. Mr. Fleming, you will recall, was the man
25 that came across the road to help get a Ford van started,
26 that had stalled in the parking lot on August 6th, 1970.

27 Now, Mr. Fleming was fairly positive in identifying
28 a picture that was shown to him of Jonathan Jackson as being

one of the people he saw that day, but with respect to the female companion of the person he saw on that day he was, even under prodding by Mr. Harris, a great deal less than positive. Indeed, one thing that he remembered, one thing he noticed about the picture that was shown to him in front of the Grand Jury was that the person there depicted, according to the State's witness, Angela Davis had a gap between her front teeth, but he didn't remember that the woman he had seen on August the 6th, 1970 had a gap between her front teeth. We didn't bring that out on cross-examination, your Honor; we weren't there. That was what came out as Mr. Harris and Mr. Bales tried to pump this young fellow for all that he was worth.

But there is more than that, of course, your Honor. These pictures that were shown to witnesses before the Grand Jury, we have another motion with respect to those; but in evaluating what this evidence is worth, I think it is worthwhile to point out that these witnesses weren't shown four pictures of different people and asked to pick; these witnesses weren't shown six pictures, or a dozen; they were shown one picture, or maybe two or three pictures of the same person. There wasn't any fair kind of open-handed attempt to get a realistic witness identification. It was one of those sitting-duck situations as to which our courts in California, and the Supreme Court of the United States, in Wade, Stovall and Gilbert, has had occasion to point.

On the testimony of Peter Fleming, it seems to the defense it is really worthless as a practical matter, really

worthless.

The State also brings out evidence of what it chooses to call in the papers "flight," so I would like to spend a moment talking about flight.

Flight, in order to be relevant in a criminal case, has to consist of two things: going someplace and guilty knowledge. Well, I suppose the evidence did show that Angela Davis went someplace. Indeed, they had a witness come in all the way from the airport down in San Mateo County who says that she was at Gate 34 at the 2:00 o'clock PSA flight. She was in a hurry to make the flight, and wrote a check to pay for passage from San Francisco to Los Angeles. Well, I don't know whether you ever fly, Judge, and I don't know whether you fly PSA, or what airline you prefer; I don't think it is really proper to ask you, but it is a matter of common knowledge that those PSA pilots pride themselves on telling you that once they get you fastened to the airplane there, about one minute before the time scheduled, that they are going to close the door and pull away from the gate right on time, and they do.

The other thing, I suppose, in evaluating this evidence you have to look at is that it is kind of a madhouse down there at that gate on a busy afternoon, and so speed, or nervousness, writing a check, and trying to get on an airplane, that is not much evidence of flight; but there is something that is a little more significant, it seems to me here, in evaluating this evidence of flight, and I did refer to it in half of an argument on the 995 that we made here

several months ago. You have to consider, your Honor -- you have to consider in looking at the evidence, for instance, of the F.B.I. agent who testified about Miss Davis's arrest in October, that going someplace under these circumstances isn't at all indicative of guilty knowledge. It is indicative only of going someplace. You have to also consider that Angela Davis as a black woman and a Communist, as a part of a movement for social change, has in the course of her duties as a professor, in the course of her public statements, in the course of her acting and behaving as a political person in this society today, incurred the enmity of a great many powerful people.

I had occasion last time to read, and I will tax your Honor's patience with a bit of what Dr. Thomas Fuller said at the end of his treason trial with respect to his flight from England to escape the prosecution for treason:

> "And if any tax me, as Laben taxed Jacob, 'Wherefore didst thou flee away secretly without taking solemn leave,' I say with Jacob to Laben, 'Because I was afraid, and that plain dealing patriarch who could not be accused for purloining a shoe latchet of other men's goods confessed himself guilty of that awful felony that he stole away for his own safety, seeing truth may sometimes seek corners not as fearing her cause, but as suspecting her judge.'"

Well, Kingman Brewster, of Yale, doubted publicly whether a black revolutionary could get a fair trial anywhere

in the United States last year; maybe that holds true today. He made that statement at around the relevant time, and that should certainly be considered in evaluating this evidence.

You see, consider a case like Wong Sun versus United States. Remember that old search-and-seizure case? The officers knock on the door; the person that is going to be arrested flees after a little conversation at the door, and the Supreme Court of the United States, doubting at all the great probative force that flight has, says that in that case the flight didn't even establish reasonable cause for arrest, and that is what you are judging: reasonable cause. You needed something more. The something more is illustrated by another case that we cite in our memorandum, People versus Landry, in 230 Cal. App.(2d), in which, under almost identical facts to Wong Sun, a different result was reached. Why? Because there was a difference in Landry. The defendant there, as the police knocked on the door, you will recall, opened the door a bit, said, "Jesus Christ, fucking cops," and ran, showing, as the Court of Appeals said -- and they reproduced the language because it showed graphically the very thing that they were looking for, showing, as the Court of Appeals said, that consciousness of guilt, which is an essential element of flight, if flight is to be taken into account in establishing reasonable cause to break a door, or to interfere with liberty, or to send a defendant to her death.

But there is more, your Honor. You have to evaluate that evidence of going someplace not in light of

1 your own experience. You have got to look at that transcript
2 and from the evidence there presented try to put yourself
3 in the mind of Angela Davis. Not what you would think and
4 do under those circumstances, but what she might reasonably
5 have done under those circumstances. That is an important
6 distinction.
7 You remember People versus Adamson, your Honor,
8 which became Adamson versus California in the United States
9 Supreme Court, the stocking-top fetish murder? The California
10 Supreme Court affirmed that conviction over a claim that
11 certain stocking tops had been admitted into evidence in --
12 or, saying that the stocking tops were relevant because they
13 were nylon stockings, and some nylon stockings had been
14 found at the scene of the crime with the tops torn off, and
15 that the stocking tops showed that the defendant had some
16 use for stocking tops, permitting the jury to infer that the
17 defendant was a feticist, and had committed this crime to
18 satisfy the fetish involving stocking tops, and Adamson, I
19 believe, went to his death because the California Supreme Court
20 didn't know that black men, and particularly black working
21 men, have a use for stocking tops, or that sometimes you see
22 longshoremen wearing them to protect their hair when they
23 are working, particularly in the days before mechanization,
24 when big 2200-pound loose-sling loads would come off the
25 cargo ships. Because a great man, a great Justice, Justice
26 Traynor and all of his colleagues on the California Supreme
27 Court, simply couldn't put themselves in the mind of or the
28 place of a black man in this society today, Adamson went to

1 his death.

2 That is what we are talking about when we say that
3 on this issue of flight you, Judge, have to put yourself
4 in the place of Angela Davis and ask what this evidence is
5 worth, if you can do it.

6 Well, we are supported by some case law. I see
7 that you have there the transcript of the earlier arguments,
8 but even if you don't, there is a case or two that I think
9 ought to be drawn to your attention. We talked about last
10 time Boyd versus Superior Court, in 113 Cal.App.(2d), 443,
11 and there the evidence connecting the defendant with the
12 alleged crime was a great deal stronger, including possible
13 possession of some of the implements, instrumentalities, of
14 the commission of the crime, and yet a writ of prohibition
15 issued.

16 There is an old case you might want to look at
17 on this issue of association which I'm going to come to in
18 a moment, People versus Stevens, 68 Cal., 113, 1885.
19 Stevens goes to the question of association; association and
20 presence near the crime as indicative of guilt, and in
21 Stevens the Court doesn't rest itself with reversing the
22 conviction; they say that the evidence isn't even admissible,
23 doesn't even satisfy the minimal standards of relevancy.
24 That surely seems worth considering.

25 Well, I said that I would try to deal with this
26 question of conspiracy and the First Amendment at the end
27 of the argument. I put it at the end, Judge, because I don't
28 really think that we need to bring to First Amendment in here.

We don't think there is enough evidence here to hold Miss Davis, even tested by the standard that you would apply in any criminal case, and of course we didn't put the politics in this case, but they are here; so we might as well deal with them.

Overt Act No. 1. Miss Davis participated in a rally. She advocated the release from lawful custody of three men known as the Soledad Brothers, and there are some other things about conduct that reason -- could reasonably be related to concern about the legal defense of the so-called Soledad Brothers, that is, of Jackson, Crutchette and Drumgo.

It always makes you a little uncomfortable when the State uses conduct such as protected speech as the basis for an indictment for conspiracy. The reason that it makes me uncomfortable, anyway, is that there is always a danger when conduct that is protected by the First Amendment is used as a basis for a criminal prosecution that a lot of people will get the idea that it is dangerous to advocate social change; it is dangerous to get involved in controversial political issues; it is dangerous to call yourself a revolutionary or a Marxist; it is dangerous to be a Communist; it is dangerous to be Angela Davis, or to think like Angela Davis, and I guess this case up to now proves that it really is, unless this motion gets granted.

Of course, a lot of the damage will have been done already, but there is a possibility still in undoing some of it.

1 In that connection I would take a look again at
2 the Sect case, in 165 -- excuse me, in 416 Federal (2d), at
3 page 165, and I have also directed the Court's attention to
4 the case of Castro versus Superior Court. I know, as well as
5 Mr. Harris does, that this is a little hard, to count the
6 votes in the Castro case and try to figure out who subscribes
7 to whose opinion, and how many Justices concur in these views.
8 I don't think that makes a great deal of difference. The
9 part of the case I'm concerned with is that that begins on
10 page 681, Justice Kaus's opinion. It is concurred in by
11 Justice Stevens, as to the result, but not as to the dis-
12 cussion. In any event, whether or not you were a judge at
13 all, Justice Kaus's views would be worth of some credence here.
14 Let's be very careful what our agument is. We are
15 not saying that the conduct proscribed by the statutes dealing
16 with murder, kidnaping, escape and rescue is protected by
17 the First Amendment, but the prosecution has not charged
18 Angela Davis with doing any of that conduct. What they have
19 said is that her participation in various lawful activities
20 logically permit an inference that she had something to do
21 with the commission of those offenses. It is at that point
22 that the Kaus opinion in that Castro versus Superior Court be-
23 comes relevant:
24 "Given the proper setting, no rule can escape
25 First Amendment scrutiny by bearing an innocuous
26 label."
27 As the Court said in New York Times and Sullivan:
28 "We are compelled by neither precedent nor

policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of State law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business and the various other formulae for the repression of expression that have been challenged in this court, libel can claim no talismanic immunity from constitutional limitations."

And this discussion was in the context of Justice Kaus's critique of the circumstantial-evidence rule in conspiracy cases which he said, as applied in that case, at any rate, fell foul of the First-Amendment standards, because it permitted too easy a running together of protected advocacy and allegations of unprotected conduct. Put quite simply, the State has evidence aplenty that Angela Davis did some things which, under our law, are reasonable and lawful, and as to most of them protected by the First Amendment guarantee of freedom of speech and association. Before you, your Honor, can sustain this indictment by concluding that those acts somehow are evidence of participation in an unlawful design, Spock and Justice Kaus's opinion counsel, as do the cases upon which the judges have decided these cases rely, counsel a long second and a long third look, because this case, this case, this indictment, can very well have, and up to now I suspect has had, an enormous chilling effect upon the exercise by millions of Californians of their First-Amendment rights, to be concerned

1 about the fate of men in California prisons, and what is
2 suggested by that is that in evaluating this evidence you
3 must consider more than that it does a disservice to Miss
4 Davis; more than that the State does a disservice to Miss
5 Davis by bringing this prosecution, but that it does a dis-
6 service to every thinking citizen by predicting an indict-
7 ment upon protected conduct.

1 THURSDAY, MAY 27, 1971 1:45 O'CLOCK P.M.

2 § § §

3 THE COURT: [redacted]

4 [redacted]

5 [redacted]

6 Mr. Tigar, do you have -- you have had a chance to
7 refresh yourself and compare your notes. You may continue
8 your argument, sir.

9 MR. TIGAR: Very briefly, Judge, it did occur to
10 me that I should say the following about this question of
11 flight: The only evidence in the Grand Jury transcript on
12 this issue is the testimony of the PSA ticket agent, and
13 of the FBI witness that the Attorney General subpoenaed
14 before the Grand Jury. That evidence establishes that on
15 August the 7th, 1970, someone resembling Miss Davis boarded
16 the PSA flight from San Francisco, to Los Angeles, and then
17 that in October of 1970 Miss Davis was arrested in New York.

18 Now, there isn't any evidence in the transcript,
19 no evidence at all, as to whether or not Miss Davis knew
20 of the events that had taken place in San Rafael on the
21 morning of August 7th, either at the time of the PSA flight
22 or thereafter. There isn't any evidence as to when she went
23 to New York, how she got there, how long she had been there,
24 where she came from; just isn't any.

25 So, even without regard to these arguments that I
26 made this morning about the evaluation one might give to some
27 evidence of going somewhere, the fact is that the Grand Jury
28 transcript is simply silent as to the sole important issue

1 that has to be raised in order to create any kind of
2 reasonable cause to believe that going someplace is relevant
3 here. If the evidence isn't relevant because it isn't tied
4 in to the allegations of the indictment, it is, under the
5 provisions of our Evidence Code, inadmissible. The Code is
6 quite clear about that. Only relevant evidence is admissible.
7 If the evidence is inadmissible, it is incompetent, and ought
8 not to have been before the Grand Jury, and we are back at
9 the same place we were.
10 This case has gone on a long time. We made this
11 motion in January of this year, this 995 motion that we are
12 arguing finally today, and so this is the first time that any
13 judicial officer gets a chance to look at the Grand Jury
14 transcript with an eye to doing something about it. It is
15 the first time that there is an adversary hearing with respect
16 to what went on before the Grand Jury, remembering again
17 that unlike the preliminary examination the Grand Jury was
18 Albert Harris's and Bruce Bales's to do with as they would
19 with respect to the introduction of evidence, and so our
20 argument comes down to this, Judge: that this indictment based
21 on this transcript of the Grand Jury hearing convened in an
22 election month, in an election year, is a monument to Albert
23 Harris and Ronald Reagan, a monument to the lengths to which
24 ambition will go when no sense of reason, justice or fairness
25 restrains it, and we think this indictment must be set aside.
26
27
28

## REPLY ARGUMENT

1
2 MR. TIGAR: We are very pleased that Mr. Harris is
3 apparently willing to submit the State's case on the Grand
4 Jury transcript, and go to trial in this case tomorrow
5 morning, and we accept that stipulation on his part, reserv-
6 ing the right to present additional evidence.
7 I approach this business of responding with a
8 little diffidence, because of my inexperience in these
9 matters, and I would hope that when Mr. Harris takes the
10 stand and testifies, that he could help us understand how
11 these witnesses came to make the eyewitness identifications
12 that they did, but I don't want to dwell on that.
13 I would like to begin with the four-legged argument
14 that Mr. Harris brought into the courtroom this afternoon.
15 Weapons is the first leg of the argument. How
16 many, for what purpose, where, were they ever furnished to
17 Jonathan Jackson? We cite some cases in our memorandum about
18 the standard that has to be applied in judging the question
19 of aiding and abetting, and I think that California Supreme
20 Court cases that we cite, the other authorities we marshall,
21 are persuasive on the issue that intent, not merely knowledge,
22 has to be shown before there can be aiding and abetting, but
23 that doesn't really matter a great deal in the outcome in
24 this case, Judge. I remember talking to Judge McMurray about
25 this question of guns. They sell pickup-truck gun holders
26 these days all over the place. I guess they sell them in
27 Los Angeles; I guess they sell them in Marin County, maybe
28 even Contra Costa County, and they hold four guns, four

1 rifles, shotguns, whatever. It is perfectly reasonable and
2 lawful and logical for any citizens of this state to have as
3 many guns as that person wants to have, subject to a lot of
4 federal and state laws that have been passed since the time
5 that we are talking about here.
6 But that isn't even important. The prosecutor
7 attempts to convince you by repeating over and over and over
8 and over again that there is some evidence that Angela Davis
9 gave guns to Jonathan Jackson. The fact is there isn't any
10 such evidence. There isn't a scintilla of evidence to that
11 effect. There is some evidence of association, a little bit.
12 A rally here, a couple of visits to a gun shop there, but
13 all that does is to establish that Jonathan Jackson might
14 have had an opportunity to get a hold of the guns whether or
15 not he had been given them, and let's stay a moment with
16 Jonathan Jackson as we go to the second leg of the four-legged
17 argument.
18 I know what Section 1241 of the Evidence Code says,
19 and I suppose if James McClain were on trial here we would
20 have Mr. Harris up, and Section 1241 of the Evidence Code
21 would help him get that statement out in the hallway against
22 James McClain, because it does say something about the
23 intention with which he does an act that he was engaged in
24 performing. Admitting for a moment, admitting for a moment
25 the question of whether he said it, is it admissible in
26 explaining Angela Davis's intent? Spock says no, and the
27 general conspiracy law says no to that. That statement is James
28 McClain's statement of what he thought he was doing; nothing

1 about what Angela's intent was. Indeed, it points to the
2 innocence of Angela Davis of this crime, if you will take a
3 moment to analyze the allegations of the indictment. There
4 is no evidence that Jonathan Jackson ever saw McClain prior
5 to August 7th, 1970; no evidence that Jonathan Jackson ever
6 heard of McClain prior to August 7th, 1970; no evidence that
7 George Jackson ever talked to McClain; no evidence of any
8 means by which Angela Davis and McClain could be connected,
9 even by a chain of the weakest and most insubstantial and
10 pallid circumstantial evidence. None.
11 And so for Mr. Harris to rely on James McClain's
12 statement is ludicrous, quite simply ludicrous. It tells us
13 nothing about this case. There isn't any evidence here in
14 court that there is a conspiracy that exists, and that is
15 what has to be shown prima facie before such a statement can
16 come in as having been made in furtherance. The only con-
17 spiracy is the one that Mr. Harris attempts to conjure up
18 out of things he can't seem to find in the transcript,
19 conspiracy that dwells in the backwaters of a mind apparently
20 more concerned about making up a case, about a possible leap
21 by a possible assailant, out of a conjectural dark corner,
22 and ignoring the skeleton in his own dead-certain cupboard
23 (sic).
24 Mr. Harris pointed out that he had been put on
25 trial here this morning. I think he has. We put on trial
26 the way that Grand Jury was conducted; we put on trial the
27 fact there was no cross-examination there; we put on trial
28 the fact that a Grand Jury is different from a preliminary

1 about what Angela's intent was. Indeed, it points to the
2 innocence of Angela Davis of this crime, if you will take a
3 moment to analyze the allegations of the indictment. There
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21 by a possible assailant, out of a conjectural dark corner,
22 and ignoring the skeleton in his own dead-certain cupboard
23 (sic).
24 Mr. Harris pointed out that he had been put on
25 trial here this morning. I think he has. We put on trial
26 the way that Grand Jury was conducted; we put on trial the
27 fact there was no cross-examination there; we put on trial
28 the fact that a Grand Jury is different from a preliminary

examination. Sure we did. We are not ashamed of it, and I think Mr. Harris's argument could charitably be characterized as a slow plea of guilty. What evidence that Angela Davis participated in the motive, or shared the motive? There is evidence of lawful advocacy. There is evidence of that, but that's all there is. For Mr. Harris to claim that evidence of concern about a social problem makes one a candidate for a conspiracy prosecution, dealing with a violent solution to that, or a violent attempted solution of that problem, for him to argue that, is for him to do precisely the thing that I tried to warn in my argument this morning could come out of this case if prosecutions like this weren't checked.

Now, the fourth leg of that argument, fugitivity; no evidence of fugitivity here. I didn't want to raise it before because I didn't think Mr. Harris would try to talk about the testimony of this F.B.I. agent, Lawrence Monroe, that was called before the Grand Jury, but all his testimony is hearsay and inadmissible; not based on personal knowledge, and ought to be stricken. Simply isn't admissible. If you read it, all of these conjectural conclusions about whose people's names are, and the relationship they bear to one another, that is all stuff he made up or got from somebody else who was either present there to be examined -- like the Fleming testimony on the eyewitness identification in which, after asking the same question on direct four times, and getting an unsatisfactory answer, Mr. Harris first attempts to lead the witness, and then gets up behind him and

1 practically attempts to bludgeon an answer out of him that
2 he saw Angela Davis on August the 6th, 1970, and still can't
3 get it.

4 No, if there is a conspiracy here, it certainly
5 isn't conspiracy that is charged in this indictment, because
6 there isn't any evidence here of preparation and planning
7 to free the Soledad Brothers; there isn't any evidence of
8 preparation and planning in which Angela Davis participated;
9 there isn't any evidence, in short, that the substantial
10 lengthy allegations of the indictment have got any substance
11 to them.

12 So, Judge, I'd like to ask this afternoon, since
13 we have spent a day talking about the transcript, and since
14 you have evinced some familiarity not only with it, but with
15 the prior argument that I had a half a chance to make, we
16 want you to dismiss this indictment now, right now, this
17 afternoon; get this phony prosecution over with, and let
18 Angela Davis go home.