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Motion Date: Sep. 4, 2009

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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By *Y. Hernandez* Deputy

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA
9

10 THE PEOPLE OF THE STATE OF CALIFORNIA,)

11 v.)

12)
13 JOHANNES MEHSERLE,

14 Defendant.)

No. 161210

Dept: 10

15 MEMORANDUM OF POINTS AND AUTHORITIES
16 IN OPPOSITION TO DEFENDANT'S MOTION
17 UNDER PENAL CODE SECTION 995

18 STATEMENT OF FACTS

19 Dr. Thomas Rogers performed an autopsy on the body of Oscar Grant. He found
20 an entrance gunshot wound in the victim's left back. The bullet traveled through his
21 body and into the skin of the right front chest area. (RT 68.) Dr. Rogers concluded
22 that the victim died from a gunshot wound to the torso. (RT 71.)

23 In the early morning hours of January 1, 2009, Karina Vargas, Margarita Carazo,
24 Tommy Cross, Daniel Liu, Dennis Zafiratos, David Horowitch and Alika Rogers, each
25 traveling separately on a crowded BART train from San Francisco to the East Bay. Also
26 on the train were Jamil Dewar, Michael Greer, Fernando Anicete and Oscar Grant who
27 were traveling together with some other friends. (RT 12-13; 108-09; 141-42; 186-87;
28 213-16; 291-92; 329-30; 336.)

1 The reported 242: A scuffle or fight broke out on the train. Mr. Dewar said
2 that the fight was between Mr. Grant and a man later identified as Mr. Horowitch. The
3 struggle was nothing more than a wrestling match that broke out when someone made
4 remarks about Mr. Horowitch's son, David. Mr. Dewar said that he and his friends
5 broke up the fight. (RT 218-20; 240-43, 245.)

6 Mr. Zafiratos saw that a scuffle broke out in one of the cars as it was headed to
7 the East Bay. He saw 10-12 black males involved. They were pushing and punching.
8 The fighting continued for several stops. He noticed in particular a white male, Mr.
9 Horowitch fighting a black male (Mr. Grant). Both were wrestling and throwing
10 punches. Mr. Zafiratos moved into an adjacent car. (RT 297, 334.) Mr. Zafiratos used
11 the train's intercom to tell the driver about the fight. (RT 313.)

12 Mr. Dewar. Mr. Dewar and their friends got off the train and walked on to the
13 Fruitvale platform. As they got off the train, Mr. Dewar saw a BART police officer
14 speed-walking or running towards them. (RT 218-20; 240-43, 245.) Mr. Dewar and
15 his friend, Mr. Greer, got back on the train. Officer Pirone stood at the door to the
16 train and pointed a Taser in their direction. He said, "Get the fuck off the car" in an
17 angry voice. When Mr. Greer took a step forward, the officer grabbed him by the wrist
18 and the back of his neck or hair, then pushed Mr. Greer out to the platform. (RT 222,
19 226, 229.) Out on the platform, two officers were pushing Mr. Greer down. (RT 227.)

20 Mr. Dewar got off the train and video-recorded the confrontation with his cell
21 phone. (RT 227.) As he looked around the platform, he saw that Mr. Grant and two
22 other friends, Jack and Nigel, were sitting near a wall on the platform. (RT 229.) Mr.
23 Dewar was filming an officer who tackled one of his friends when he heard a shot. After
24 the shooting, he got back onto the train, and the train departed. (RT 233.)

25 Ms. Vargas. Ms. Vargas could see passenger Oscar Grant in the car next to hers.
26 She saw two officers, a male and a female. The male officer pointed at Mr. Grant and
27 his friends and told them to "get the fuck" off the train in a loud and angry voice. (RT
28 13-14.) Oscar Grant and four other men got off the train, and the officer directed them

1 | to line up against the wall. (RT 14.) Ms. Vargas thought the men looked nervous, but
2 | calm. The crowd on the train seemed curious. (RT 31.)

3 | The officers began to search the men, and it appeared to Ms. Vargas that not
4 | much was going to happen, so she returned to the BART car. She heard yelling again.
5 | She went out on to the platform, turned on her camera and watched. (RT 17-19.) She
6 | got within five to ten feet of Oscar Grant. (RT 20.) By this time there were 9-12
7 | officers on scene. (RT 21.) She saw red laser lights pointed at the men in Mr. Grant's
8 | company. She associated the lasers with Tasers. (RT 20-21.)

9 | Ms. Vargas saw one of Mr. Grant's companion say something to the female
10 | officer. Mr. Grant put his hands on his friend's chest. The male officer grabbed Mr.
11 | Grant by the back of the neck or by the collar and threw him against the wall. Mr.
12 | Grant's back was to the wall, and he slid down the wall to a squatting position. His
13 | hands were at his shoulders and his palms faced out. People on the train started
14 | screaming and yelling. (RT 17-19.)

15 | The officers attempted to restrain Mr. Grant and his companions. Mr. Grant was
16 | face down on the floor, his hands behind his back. It seemed to Ms. Vargas that he was
17 | cooperative. (RT 19.) There were two officers attempting to control Mr. Grant. One
18 | had his knee on Mr. Grant's neck. The other stood behind Mr. Grant's feet. (RT 21.)

19 | Ms. Vargas thought that the crowd could start throwing things or even rioting.
20 | (RT 51.) One young man was tackled or thrown to the ground. Ms. Vargas turned her
21 | attention to that young man for a few seconds, when she heard a gunshot. She looked
22 | up and saw smoke but did not actually see a gun. (RT 24-25)

23 | The officer who had been standing at Mr. Grant's feet put his hands to his head.
24 | To Ms. Vargas he looked dumbfounded and shocked. They turned Mr. Grant over as if
25 | to check on him. (RT 26, 59.) Ms. Vargas was shocked; she turned and ran back on to
26 | the train. (RT 27.) After the shot she saw only one young man throw something at
27 | the officers. (RT 38.) Others with cameras who also went on to the train. (RT 28.)

28 |

1 The officer who looked shocked had not been acting in an aggressive manner. He
2 appeared to handle Mr. Grant a little roughly while trying to handcuff him, but he did
3 not appear to be angry. (RT 60.)

4 Ms. Carazo. Margarita Carazo saw the officers pull Mr. Grant off the train and
5 she began to film the encounter with her camera because she thought what she was
6 seeing was wrong. (RT 113-15.)

7 Mr. Cross. Mr. Cross testified that after the train opened its doors at Fruitvale
8 Station, he heard a BART officer yell, "Get off the train, motherfucker" in a hostile
9 tone. (RT 143.) Mr. Cross saw the Officer force Mr. Grant off the train. (RT 143-44.)
10 The officer took him towards a wall on the platform, roughly 14 feet from the train, and
11 forced him to the ground. The man appeared to be cooperating. (RT147-48.) Officer
12 Pirone kned Mr. Grant before taking him to the ground. After Mr. Grant was seated
13 on the ground, he looked at a cell phone, and after he closed the cell phone, Officer
14 Pirone appeared to knee Mr. Grant again. (RT 179.)

15 Because he felt the officer was using excessive force, Mr. Cross decided to record
16 the scene with his video camera. (RT 149.) As he was videotaping, Mr. Cross heard a
17 shot. Prior to hearing that shot, he never saw the victim, Mr. Grant, struggle with the
18 officers. Mr. Cross did not see him strike or resist the officers. Prior to the shot, Mr.
19 Cross thought that Mr. Grant's hands were cuffed behind his back. He did not see any
20 officers with drawn guns except for the officer that shot Mr. Grant. (RT 162-63.) He
21 did not see any civilian with a weapon. (RT 169.)

22 At the time of the shooting, there were three officers close to Mr. Grant. Officer
23 Pirone had his knee on Mr. Grant's back. Defendant was standing behind the victim,
24 trying to restrain him. There was a third officer standing to the left. (RT 163-64.)

25 The defendant tried to restrain the victim. He then reached for his firearm,
26 pulled it out and extended both arms, then fired a shot. Mr. Cross yelled, "He shot
27 him." Immediately after the gun was fired, the train went dead silent. (RT 164-65.)

28 Mr. Cross heard defendant say, "Oh my God. Oh my God." (RT 184.)

1 Mr. Liu. When the train arrived at Fruitvale, Mr. Liu saw “a slight struggle”
2 between Officer Pirone and some of the men on the platform. He saw Officer Pirone
3 punching the men. He began to videotape the incident. (RT 189-90, 202.) He
4 stopped filming, and after he stopped, more officers arrived on the platform, including
5 defendant. (RT 202-03.) The men on the platform appeared to be complying with the
6 officers. (RT 204.) Two or three people got off the train and walked towards the exit.
7 The officers pointed at the wall and told them to get against it. (RT 204-05.) He
8 began filming again. (RT 202-03.)

9 He saw Mr. Grant seated on the platform. Mr. Grant got up on one knee.
10 Officer Pirone stood in front of Mr. Grant; defendant was off to the side. Defendant
11 took Mr. Grant’s hands and put them behind Mr. Grant’s back. Mr. Grant was on his
12 chest. Mr. Grant did not appear to be resisting, but he did move his left arm up and
13 down. (RT 207-12.) Mr. Liu thought that Mr. Grant’s right arm was cuffed. (RT
14 212.) Defendant was on his knees on top of Mr. Grant. Defendant reached to his right
15 side, and pulled out a pistol. He then stood up directly over Mr. Grant, moved back
16 slightly, pulled the gun to waist level and fired using both hands. (RT 208.) Mr. Liu
17 thought that defendant’s face looked surprised and shocked. (RT 210.)

18 Mr. Anicete’s stipulated testimony. Mr. Anicete told the District Attorney’s
19 Office that he saw a white man arguing with Mr. Grant. The two began to push and
20 wrestle each other, and to throw punches. None of the members of his group were
21 involved. After getting out of the BART car at the Fruitvale platform, he told the
22 officers to stop shoving and cursing at the men detained by the wall. He was tackled.
23 He did not throw a phone before being tackled. After the shooting, the officer with the
24 gun in his hand had an expression like, “I can’t believe I shot him.” (RT 326-27.)

25 Mr. Horowitch. Mr. Horowitch knew Mr. Grant when the two were
26 incarcerated at Santa Rita. At the time of his testimony, Mr. Horowitch was on parole
27 for drug sales. (RT 330-31.) He denied being involved in a fight with Mr. Grant on
28 January 1. (RT 333.)

1 Ms. Rogers. When the train reached Fruitvale, Ms. Rogers heard an officer yell
2 at some people to move off the train. (RT 338.) The officer came in to her car. and
3 left the car holding a man by the shirt at the back of his neck. He pushed the man
4 onto the platform. (RT 340.) The man wore dreadlocks. The officer pushed the man
5 towards a wall where there were four or five others lined up. There were two other
6 officers on the platform as well. (RT 343.) She saw the first officer punch one of the
7 detained men, the one with dreadlocks. The same officer kneed Mr. Grant. Some of
8 the passengers complained about police brutality. (RT 344, 365.) Some of the men
9 stayed at the wall, others tried to walk away. (RT 345-46.) In her opinion, Mr. Grant
10 was mouthing off and resisting. (RT 347.) Many people came off the train and were
11 yelling and screaming and swearing at the police that they were unhappy about what
12 was happening. (RT 348.) Ms. Rogers was afraid that the crowd might riot. (RT 349.)

13 When the first officer kneed Mr. Grant, Ms. Rogers turned away. When she
14 looked back, she saw that the officers had thrown Mr. Grant face down to the ground.
15 The first officer was kneeling on Mr. Grant's neck or shoulder. Defendant appeared to
16 be standing above Mr. Grant, possibly with his foot on Mr. Grant. It appeared that the
17 officers were trying to cuff Mr. Grant, but they were unsuccessful. (RT 350.) She did
18 not see defendant draw a weapon, but as looked up she saw him standing over Mr.
19 Grant. She saw him fire the gun at Mr. Grant's back. He holstered the gun. He put
20 his hands to his forehead and he appeared to be saying, "Oh my God. Oh my God."
21 Mr. Grant went limp. (RT 351-53.)

22 At some point she heard people on the train saying, "Oh they're going to tase
23 him." She could not remember whether defendant or any other officers said anything
24 about tasing. (RT 374.)

25 Officer Jon Woffinden. Officer Jon Woffinden was defendant's partner. (RT
26 376.) On the night in question, he and defendant received a call that there was a fight
27 at the Fruitvale station and they responded accordingly. (RT 381.) As the officers
28 arrived at Fruitvale they could hear yelling and screaming. (RT 383.) As they reached

1 | the platform, Officer Woffinden saw the BART train, doors open and filled with people.
2 | He saw BART officers Pirone and Domenici talking to a group of four or five people
3 | sitting on the ground. He saw another group of four or five people on the platform
4 | yelling and screaming in the direction of the officers. This group appeared angry and
5 | confrontational. There were several hundred people on the train, but they did not
6 | threaten Officer Woffinden. Officer Woffinden removed his baton and stood between
7 | the two groups to protect the officers and the group seated on the ground from the
8 | group of screaming people. He faced the standing group. (RT 384-85, 391, 416.)
9 | Officer Woffinden heard both groups yelling obscenities and racial slurs such as "white
10 | devil." The yelling was continuous. (RT 387-88.)

11 | The group he was facing began to advance and Officer Woffinden shouted
12 | profanities at them to gain their attention. When that failed, he moved his baton to a
13 | ready position and that seemed to stop the group. Two other officers, including Officer
14 | Emory Knudtson, arrived to assist. (RT 389-90.) Someone in the group threw a cell
15 | phone in Officer Woffinden's direction. Officer Knudtson tackled the man. (RT 392.)

16 | Officer Woffinden heard a noise, and he turned around and saw Mr. Grant lying
17 | on his stomach, blood coming from his mouth. The group became more agitated, and
18 | he concentrated on keeping people away from the officers behind him. He called for
19 | more officers on the radio. (RT 394, 421.) Like all BART officers, Officer Woffinden
20 | had an emergency button that notifies BART officers of an emergency and calls for a
21 | quick response. Neither he nor any other BART officers used the emergency button
22 | that night. (RT 434.)

23 | Officer Woffinden had received department-wide training on Tasers a month
24 | earlier. Officer Woffinden did not have a Taser, but defendant did. (RT 385-86.)

25 | Lydia Kierstead's stipulated testimony. Lydia Kierstead gave a statement that
26 | she was on the train, that she saw Mr. Grant and defendant struggle; that she could see
27 | defendant could not get Mr. Grant's arms from under him; and that she saw a look of
28 | shock on defendant's face after he shot Mr. Grant. (RT 923.)

1 Carlos Reyes's stipulated testimony. It was stipulated that Carlos Reyes,
2 who was detained on the platform with the other men, heard defendant say, "Oh, shit.
3 Oh, shit" after defendant shot Mr. Grant.

4 Michael Greer's stipulated testimony. It was stipulated that Michael Greer
5 gave a statement in which he testified that Mr. Grant resisted a little when he was being
6 placed on the ground to be arrested. (RT 924.)

7 Officer Emery Knudtson. Officer Knudtson and his partner, Officer Flores
8 arrived at the Fruitvale platform. Officer Knudtson saw several BART officers, and a
9 group of people taunting them. Mr. Anicete was standing near the officers. Mr. Anicete
10 made an overhand throwing motion with his right arm, then turned and ran. It seemed
11 as though Mr. Anicete had thrown something, but Officer Knudtson did not actually see
12 anything coming from Mr. Anicete's hands. (RT 512-13, 532.)

13 Officer Knudtson tackled and handcuffed Mr. Anicete. (RT 512-13, 532.)
14 Someone came off the train and threw something at Mr. Anicete that missed him by a
15 foot. (RT 515.) As Officer Knudtson was handcuffing Mr. Anicete, he heard what
16 sounded to him like a firecracker. (RT 516.)

17 Officer Knudtson moved Mr. Anicete to the wall. At that point, Mr. Reyes, who
18 had been seated by the wall, stood up and said, "I'm out of here." He stood up and
19 tried to leave, but was detained and handcuffed. (RT 516-17.)

20 Officer Marysol Domenici . Officer Domenici was working with Officer Pirone.
21 She heard a broadcast of a gun on a West Oakland BART train. A short while later, she
22 heard a broadcast that there was a fight on the same train as it headed to Fruitvale
23 station. Officer Pirone got to the platform first; she arrived moments later. By the time
24 Officer Domenici arrived on the platform, she saw that Officer Pirone was with four
25 subjects, and ran over to him. For officer safety reasons, she told the subjects to sit on
26 the ground, but they did not immediately comply. Mr. Grant simply kneeled, though
27 Officer Domenici told his multiple times to sit. (RT 575-84.)
28

1 Officer Pirone went onto the train to detain Mr. Greer. Though she was
2 concerned about safety, she did not continuously watch the four detainees or there
3 hands, and did not notice that one of the detainees took out a comb and began
4 brushing his hair. She turned to watch Officer Pirone as he removed Mr. Greer from
5 the train. (RT 648-52.) Mr. Grant attempted to get up as Officer Pirone was trying to
6 handcuff Mr. Greer. Officer Domenici told him not to interfere and pushed him back.
7 Officer Domenici also pushed Mr. J. Bryson back. She remembered after seeing the
8 video that while she was pushing Mr. J. Bryson, Mr. Grant grabbed her arm. Officer
9 Domenici heard people, including Mr. Grant, say the situation was "fucked up." She
10 heard people say that the BART police were fake, just security guards. (RT 589-91.)

11 At some point, Officer Domenici drew her Taser with her left hand. When the
12 Taser is pointed at someone, a red light comes on. The detainees could see the light
13 beam shining on their bodies. The detainees, including Mr. Grant, repeatedly said,
14 "Don't tase me." They began to obey Officer Domenici's commands. (RT 693-94.)

15 While Officer Domenici was dealing with the detainees, Mr. Anicete kept calling
16 her a "fucking bitch." He then threw a cell phone at her. The phone did not hit her.
17 Officer Domenici had her Taser in her left hand. When the phone missed her, she
18 moved the Taser to her right hand, though she never actually used it. (RT 602-04.)
19 Officer Domenici was trained a month earlier at BART police. She was trained to use
20 the Taser with her off hand (her left) in case the need arises to use a firearm. She
21 moved the Taser to her strong hand because she wanted to be sure that she hit Mr.
22 Anicete with the Taser. (RT 604-05.) As she pointed the Taser at him, she saw Officer
23 Knudtson run up. Officer Knudtson took Mr. Anicete to the ground, so she never fired
24 the Taser. (RT606-07.)

25 Officer Domenici pushed some of the passengers back on to the train, then
26 released the train so that it could depart. As she was pushing people she heard a
27 distinct pop, and could smell gun powder. The scene grew louder and more chaotic, so
28 that Officer Domenici felt the situation was similar to a riot. The doors closed, and the

1 train ultimately left. She pushed more people on to the train. (RT 609-13.) She never
2 saw defendant until after the shooting. (RT 614.)

3 After the shooting, it occurred to Officer Domenici that she only had two Taser
4 cartridges. The scene was chaotic, and people were not listening to her. She said to
5 herself, " I have two cartridges and that's all I have and then I'm going to have to go to
6 lethal force." She thought, "Jesus Christ, I'm going to have to – if I have to, I'm going
7 to have to kill somebody." (RT 702-03.) She thought that she would have to shoot
8 "the people that weren't paying attention—they were just coming at us." (RT 703-04.)

9 Officer Anthony Pirone. Officer Pirone heard the broadcast of a reported
10 battery on the lead car of a BART train approaching the Fruitvale BART station. The
11 suspects were reported to be five African American men wearing black. He went to the
12 Fruitvale platform and saw no evidence of a fight, but he did see a group of African
13 Americans—five men and a woman—on the platform at the front of the train. As he
14 approached they turned and walked towards him. Officer Pirone testified, "I saw that
15 this was a large number of people and I deployed my Taser." (RT 730-734.) He
16 directed the group to stand against a wall. (RT 736.) Three of them continued to
17 walk, but two ran on to the train. (RT 737.) Officer Pirone said to the three men, "Sit
18 down or I'm going to Tase you." They sat. (RT 739.)

19 Officer Pirone went back to the train in search of Mr. Grant and another suspect.
20 He told Mr. Grant to get off the train. Mr. Grant got off the train, and Officer Pirone
21 took him by the elbow and escorted him to the wall where the other three had been.
22 (RT 75-49.) While Officer Domenici watched the men at the wall, Officer Pirone went
23 back to the train and forcibly removed the last suspect, Mr. Greer. Officer Pirone
24 pulled Mr. Greer face-first to the ground by his hair. (RT 750-755.) As Officer Pirone
25 tried to handcuff Mr. Greer, Mr. Grant stood up. (RT 755.) Two of the other men
26 detained at the wall also stood up and all three began advancing at Officer Pirone. (RT
27 759.) Mr. Grant called him a "fake police bitch." Officer Domenici approached Mr.
28 Grant and Officer Pirone finished handcuffing Mr. Greer. (RT 760.)

1 As he finished handcuffing Mr. Greer Officer Pirone saw that Mr. Grant and the
2 other two were advancing towards Officer Domenici. (RT 761.) He testified that he
3 saw Mr. Grant strike Officer Domenici. He admitted that a videotape played in court
4 did not show Mr. Grant hitting Officer Domenici. (RT 871.)

5 Officer Pirone stepped in front of Mr. Grant. Mr. Grant took a swing at Officer
6 Pirone. Officer Pirone testified that he stepped into Mr. Grant and pushed him back
7 against the wall. (RT 761.) Officer Pirone stated that in subsequent statements, he
8 never told investigators that he had to push Mr. Grant. (RT 872.) Officer Pirone told
9 Mr. Grant to sit down against the wall. Officer Pirone testified that Mr. Grant
10 attempted to knee Officer Pirone in the groin once and actually either kicked or kneed
11 him in the groin once. (RT 762-63, 874.) He admitted that a videotape played in
12 court did not show Mr. Grant kneeling or attempting to knee Officer Pirone in the groin.
13 (RT 875.) He stated that he did not tell BART investigators about the kick to the groin
14 in early January, but later remembered the incident and told investigators about it in a
15 subsequent statement. (RT 878, 892.) Officer Pirone took him by the arm and by the
16 back of his head and bent him over. Officer Pirone drew his Taser with his left hand, as
17 is his practice, and told him to sit down. (RT 762-63, 765.) Mr. Grant and the other
18 two men sat down. (RT 766.)

19 Though Officer Pirone testified that Mr. Grant was coming at him and cursing
20 while Officer Pirone was handcuffing Mr. Greer, he admitted that this conduct was not
21 visible in one of the videotapes played in court, and that in fact the video did not even
22 show Officer Pirone looking at Mr. Grant. (RT 870.)

23 Officer Pirone noticed that some people were coming off the train and coming
24 towards him and Officer Domenici. He called for more officers. He did not deploy his
25 emergency button. He looked up and saw Officer Woffinden, Officer Guerra, and
26 defendant coming towards him. (RT 767-68.) Officer Pirone asked the newly arrived
27 officers to watch the detainees while he went over to the train operator to talk about the
28 reported battery. She said that the five men were the ones who had caused the problem

1 on the train, but she did not see what actually happened and no one had come forward
2 to make a complaint or to ask for medical attention. (RT 769-70.) He told the
3 operator he would release the train soon. When there is an incident on a BART train,
4 BART protocol requires the operator to hold the train at the station until BART officers
5 release it. (RT 770.)

6 People came off the train and yelled expletives at Officer Pirone, asking why he
7 had detained their cousin. Since he found no evidence of injured victims, Officer Pirone
8 released the train. He returned to the detained men and told the backup officers that
9 he was arresting Mr. Greer and Mr. Grant for obstructing the police under Penal Code
10 section 148. (RT 771-73.) Though he had testified that Mr. Grant struck Officer
11 Domenici and kicked or kneed him in the groin, Officer Pirone did not tell the officers
12 that Mr. Grant would be arrested for assaulting a police officer. He could not remember
13 why he did not tell the officers about the assault charge. (RT 893-94.) Mr. Grant
14 started to stand up. He put his hand in his right front pants pocket. Officer Pirone
15 yelled at him to take his hands out of his pockets and sit down. (RT 775-76.) Officer
16 Pirone testified that he could not remember precisely what happened, but he believes
17 that he pushed Mr. Grant down. Mr. Grant called Officer Pirone a "bitch ass nigger."
18 (RT 778.) Officer Pirone was "in shock" upon hearing this and may have shouted
19 something in reply. (RT 779-82.)

20 Defendant approached Mr. Grant. After seeing the video, Officer Pirone note
21 that at this point, defendant took Mr. Grant to the ground. (RT 782.) Officer Pirone
22 went to Mr. Grant's upper back and head and held him down, first with his hands and
23 then with his knee. Defendant straddled Mr. Grant's lower body area. Mr. Grant was
24 squirming and struggling. Defendant was tugging at Mr. Grant's arms. Both officers
25 told Mr. Grant to put his hands behind his back. (RT 783-87.) Officer Pirone never
26 saw Mr. Grant put his hands behind his back. (RT 787.) Officer Pirone testified that
27 defendant said, "His hands are in his waistband. ... I can't get his hands." (RT 790.)
28 Officer Pirone never heard defendant say anything about a gun prior to the shooting.

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1 (RT 936-37.) Officer Pirone testified that Mr. Grant did not make a motion with is
2 arms or hand that led Officer Pirone to believe that Mr. Grant was going for his
3 waistband, but his arms were "in a fashion where the hands would be at his waistband."
4 (RT 910.) In a prior statement to investigators, Officer Pirone testified that Mr. Grant
5 put both hands into his waistband, "if not down into the groin area, and that's generally
6 where weapons are kept." (RT 907-09.) Officer Pirone testified that he heard
7 defendant say, "I'm going to tase him. I'm going to tase him." (RT 788.) Officer
8 Pirone testified that he heard defendant say, "Get back. Get back. Tony, Tony." (RT
9 790.) Officer Pirone testified that he got up, though he had no idea why he was getting
10 up. (RT 791.) He stood up. He heard a gunshot. He saw defendant with a gun in his
11 hand. Defendant briefly held the gun in a two handed grip. (RT 939.) The gun was
12 pointed at Mr. Grant's back. There was a dark hole in Mr. Grant's back. (RT 792-93.)
13 Defendant had a shocked look on his face. Officer Pirone called for an ambulance. (RT
14 794.) Mr. Grant started to get up and Officer Pirone told him to get back down.
15 Officer Pirone told defendant to handcuff Mr. Grant. Officer Pirone testified that he
16 did not know whether Mr. Grant had a weapon. (RT 795.) Defendant handcuffed Mr.
17 Grant after shooting him. (RT 796.)

18 Officer Pirone testified that Mr. Grant never stopped squirming and moving until
19 defendant shot him and that Mr. Grant's hands were not behind Mr. Grant before the
20 shooting. (RT 795.) Upon reviewing videotape in court, Officer Pirone testified that he
21 saw Mr. Grant's two hands behind his back in "cuffing position." (RT 804.)

22 The train left. Officer Pirone called for a supervisor and detectives because of the
23 officer-involved shooting. (RT 797.) Officer Pirone testified that defendant approached
24 him and said, "Tony, I thought he was going for a gun." (RT 798.)

25 The officers removed the handcuffs from Mr. Grant and rolled him over. They
26 attempted to administer first aid. (RT 799.) The ambulance crew removed Mr. Grant
27 on a board. He was still conscious at the time they took him from the station. (RT
28 800.)

1 Officer Pirone had been trained with a Taser a few weeks or a month earlier. It
2 was his understanding that there was more than one way that BART officers would
3 carry Tasers. Some wore them so that they could be drawn with their off hand, others
4 with their stronger hand. (RT 734.) Officer Pirone testified that the Taser should be
5 drawn by the non-firing hand so that the firing hand would be free to draw a gun if
6 necessary. (RT 735.) Officer Pirone wears his Taser on the right side of his belt, in
7 front of his firearm, so that he can "cross-draw" the weapon with his left. (RT 763-64.)
8 In order to remove the model of Taser carried by defendant, the user would have to
9 release it from the holster by pushing with a thumb the snap on the side of the Taser.
10 An additional movement is also required. The thumb movement required to remove a
11 Taser is different from the movement to draw a firearm. (RT 972-73.) Officer Pirone
12 testified that the video of defendant gripping a firearm showed that the thumb was up
13 in the same motion that is required to draw a Taser. (RT 973-74.)

14 Michael Schott. Michael Schott testified that "forensic image analysis" is "the
15 application of subject matter expertise and image science to interpret the content of an
16 image or sometimes the image itself in legal analysis." "Forensic video analysis" is a
17 subset of "forensic image analysis." (RT 981-82.) Mr. Schott collected copies of the
18 various videos of the scene from the District Attorney's Office. He attempted to
19 synchronize them by running them so that the same basic movements in the different
20 videos are shown at approximately the same time. (RT 999-1000.) The synchronized
21 videos were played for the court, and Mr. Schott described the events taking place on
22 the camera. (RT 1002-1025.) The court interrupted and said, "Counsel, I've already
23 seen this, and I know what it is, because he went through it and we saw it in the video.
24 Educate me and do what you guys said you would do. I understand." (RT 1008.) Mr.
25 Schott explained that one of the videos showed Mr. Grant's right knee come up off the
26 floor and towards Officer Pirone, and then his left knee. (RT 1009.) Defense counsel
27 asked Mr. Schott if Officer Pirone ever used his fists to strike Mr. Grant. The court
28 sustained the prosecutor's objection, observing that the witness was just "a guy looking

1 at the video, telling the Court what he thinks he sees.” (RT 1011.) Mr. Schott testified
2 that some of the videos showed that Mr. Grant’s torso rose off the floor while he was
3 being pinned to the ground. (RT 1020.) The video continued to roll, and defense
4 counsel asked if it appeared that Mr. Grant’s left shoulder came off the ground. The
5 court sustained the prosecutor’s objection, saying, “I can see the video ... and [the
6 witness] can’t tell me what I’m seeing.” The court then allowed the witness to testify
7 that he saw Mr. Grant move his left arm and hand and his shoulder coming off the
8 platform. (RT 1023-24.) The video continued to roll during the time that the shooting
9 took place. Mr. Schott testified that 1/10 of a second after the shot Mr. Grant’s hand
10 was up and not at his back. (RT 1025.) The court precluded the defense from asking
11 further questions on direct examination, saying that none of the testimony was relevant.
12 “Nothing is new to this analysis. I’ve seen these videos over and over. This witness
13 can’t testify as to what happened. ... He can give me some imaging on how he did a
14 comparison analysis; that doesn’t give the court information that it needs to make this
15 decision.” The court then gave the prosecutor five to seven minutes for cross -
16 examination, but the prosecutor had no questions. (RT 1026.) The defense rested.
17 (RT 1027.)

18 Officer Terry Foreman. Officer Terry Foreman was defendant’s friend. He
19 arrived on the night of the shooting while defendant was in an interview room in order
20 to give him support, and stayed with defendant for about five-and-a-half hours.
21 Defendant said that he thought the victim had a gun and was going for his pocket.
22 Officer Foremen stopped him, and said that he was there for support and did not want
23 defendant to go into the details. Defendant never said that he meant to use his Taser
24 on Mr. Grant. (RT 1030-33.) Officer Foreman continued to speak to defendant on a
25 daily basis in the days following the homicide. On some of those occasions, defendant
26 repeated that he thought the victim had a gun and was reaching for his pocket. He
27 never said that the shooting was accidental or that he meant to use his Taser. (RT
28 1034.)

1 ARGUMENT

2 I. THERE IS MORE THAN ENOUGH EVIDENCE TO SUPPORT THE
3 MAGISTRATE'S STRONG SUSPICION THAT DEFENDANT IS GUILTY OF
4 MURDER.

5 A. The Probable Cause Standard Applies at Preliminary Examination.

6 Penal Code section 872 requires that a magistrate hearing a preliminary hearing
7 hold the defendant over for trial "it appears from the [preliminary] examination that a
8 public offense has been committed and there is sufficient cause to believe that the
9 defendant is guilty" (Penal Code § 872(a).) This "sufficient cause" standard of
10 proof "is generally equivalent to that 'reasonable or probable cause'" (*People v.*
11 *Casillas* (2001) 92 Cal.App.4th 171, 178.) "Reasonable cause ' is a well-established
12 legal standard, 'defined as that state of facts as would lead a man of ordinary care and
13 prudence to believe and conscientiously entertain an honest and strong suspicion that
14 the person is guilty of a crime.'" (*People v. Adair* (2003) 29 Cal.4th 895, 904; *People v.*
15 *Arjon* (2004) 119 Cal.App.4th 185, 193.) Thus, the magistrate's role is to determine
16 "whether a reasonable person could harbor a strong suspicion of the defendant's guilt,
17 i.e., whether such a person could reasonably weigh the evidence, resolve conflicts, and
18 give or withhold credence to particular witnesses in favor of harboring such a suspicion."
19 (*Roman v. Superior Court* (2007) 113 Cal.App.4th 27, 32.)

20 In reviewing a magistrate's determination of probable cause pursuant to a motion
21 under Penal Code section 995, the trial court should set aside the information only if
22 the defendant has been committed without reasonable or probable cause. (*People v.*
23 *Mower* (2002) 28 Cal.4th 457,473.) There may be sufficient evidence to withstand a
24 challenge under section 995 even though there may be room for doubt. (*Ibid.*) The
25 information should not be set aside if there is some rational ground for assuming the
26 possibility that an offense has been committed and the accused is guilty of it. (*People v.*
27 *Uhlemann* (1973) 9 Cal.3d 662, 667; *People v. Plengsangtip* (2007) 148 Cal.App.4th
28 825, 835.) The factfinding power and determination of witness credibility rest with the
magistrate. (*People v. Molina* (1994) 25 Cal.App.4th 1038, 1041.)

1 Relying on a jury instruction, defendant argues that where circumstantial
2 evidence is susceptible to two interpretations, one pointing to guilt and one to
3 innocence, that the magistrate would be required to accept the explanation that leads to
4 innocence. That is true at trial, but not at a preliminary examination. At a preliminary
5 examination, where more than one reasonable inference may be drawn from the
6 evidence, every legitimate inference must be drawn in favor of the determination of
7 probable cause. (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474; *People v.*
8 *Plengsangtip, supra*, 148 Cal.App.4th at 835.)

9
10 **B. The Evidence Supports the Magistrate's Strong Suspicion That Defendant Murdered Oscar Grant.**

11 Murder is the unlawful killing of a human being with malice aforethought.
12 (Penal Code § 187.) "When the killing is proved to have been committed by the
13 defendant, and nothing further is shown, the presumption of law is that it was malicious
14 and an act of murder; but in such a case the verdict should be murder of the second
15 degree" (*People v. Lewis* (1969) 1 Cal.App.3d 698, 701.) "Malice is implied when
16 the killing results from an intentional act, the natural consequences of which are
17 dangerous to life, which was deliberately performed by a person who knows that his
18 conduct endangers the life of another and who acts with conscious disregard for life."
19 (*People v. Superior Court (Smart)* (1986) 179 Cal.App.3d 860, 865 (citations and
20 quotations omitted).)

21 Once a prima facie case of murder is established, "the burden of producing
22 evidence negating malice falls to the defendant who is, needless to say, in the best
23 position to produce such evidence." (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155;
24 see Penal Code § 189.5.) Unless the prosecution evidence raises a reasonable doubt as
25 to whether the killing was malicious, the defendant bears the burden of raising the issue.
26 If such evidence is nonexistent, however, the prosecution's burden is met. (*Frye, supra*,
27 7 Cal.App.4th at 1155.)

1 “Although it is a requirement of due process that the prosecution prove every
2 fact necessary to constitute the charged offense [citation], the Constitution does not
3 require the prosecution to prove that an affirmative defense is inapplicable.” (1 Witkin,
4 California Evidence (4th Ed.) Burden of Proof and Presumptions §26 at p. 177.) In any
5 affirmative defense, however the defendant bears at the very least the duty to raise it.
6 (See *People v. Figueroa* (1986) 41 Cal.3d 714, 722 (noting that “[u]nless the Legislature
7 provides otherwise, the defendant’s burden of proof is merely to raise a reasonable
8 doubt” as to the existence of a fact supporting an affirmative defense.) To prevail in a
9 motion under section 995 on the basis of an affirmative defense, the defendant must
10 show “in light of the evidence presented to the ... magistrate” that the affirmative
11 defense negates the magistrate’s probable cause to believe in defendant’s guilt. (*People*
12 *v. Mower* (2002) 28 Cal.4th 457,473.)

13 In *People v. Lewis*, the Court of Appeal noted that once the prosecution
14 establishes that a defendant has committed a homicide in a homicide trial, the
15 defendant bears the burden of going forward (not the burden of persuasion) with
16 evidence of mitigating circumstances. “It follows, therefore, that to require the People
17 to present specific proof of malice aforethought at the preliminary hearing over and
18 above its fundamental showing of the killing of the victim by the defendant would, in
19 effect, place a greater burden on the prosecution at the accusatory stage than the trial
20 itself.” (*Ibid.*)

21 In *People v. McKee*, evidence presented at the preliminary hearing showed that
22 the defendant shot the victim in the head during a hunting trip. The defendant claimed
23 the shooting was accidental. The magistrate held the defendant to answer for
24 involuntary manslaughter. The District Attorney filed an information charging
25 defendant with murder. The defendant filed a motion under 995, and the superior
26 court ordered the prosecutor to file an amended information charging involuntary
27 manslaughter, thereby impliedly granting the 995 and dismissing the murder charges.
28 (*People v. McKee* (1968) 267 Cal.App.2d 509, 510-13.) The Court of Appeal reversed:

1 We conclude that the court erred when it dismissed the information
2 charging ... murder. The evidence adduced at the preliminary hearing
3 leads to the inescapable conclusion ... that [the victim] was killed by a shot
4 fired by respondent from respondent's hunting rifle. Then, having cleared
5 this essential hurdle of the corpus delicti, the evidence in this case raises a
6 clear and distinct inference that the shooting was not accidental but
7 intentional and, hence (since no justifying or mitigating circumstances
8 were shown), that the killing was with malice aforethought.
9 (*Id.* at 515.)

6 In the instant case, the evidence is uncontradicted that defendant shot Oscar
7 Grant in the back at close range as Mr. Grant lay face down on the BART platform.
8 This is prima facie evidence that the killing was malicious and an act of murder.
9 Defendant's claim of justification or excuse are unsupported and unconvincing.

10 *1. Defendant's claim of justifiable homicide.*

11 Defendant argues that there must be proof that the killing was unjustified,
12 suggesting that as an officer he could resort to the privilege to use deadly force to effect
13 his duty or to apprehend a felon resisting arrest. However, an officer's use of deadly
14 force is reasonable only if the officer has probable cause to believe that the suspect poses
15 a significant threat of death or serious physical injury to the officer or others. (*Munoz*
16 *v. City of Union City* (2004) 120 Cal.App.4th 1077, 1103.) The evidence is
17 undisputed that Mr. Grant was unarmed. The evidence is undisputed that Mr. Grant
18 was not charged with a felony. The evidence is undisputed that Mr. Grant was fleeing.
19 There was some conflict in the evidence and to what extent defendant was resisting.
20 Many witnesses testified that he was cooperating, many that he was resisting and
21 struggling. The evidence was clear however, that he was in prone position and that his
22 arms were behind his back at the moment that defendant killed him. Whatever struggle
23 there may have been, it was not sufficient to justify a killing.

24 *2. Defendant's claim of accident.*

25 There is no evidence whatsoever that defendant's shooting of the victim was
26 accidental. All witnesses agree that defendant pulled out his service weapon. Aimed it
27 with two hands at the back of a prone man, shot the victim, then reholstered his
28 weapon. There is no possible scenario under which the shooting could be accidental

1 and thus noncriminal. There is no direct evidence that defendant mistook his gun for
2 his Taser. There was some evidence to the effect that defendant said he was going to
3 tase the victim before the actual shooting took place, but that evidence is offset by other
4 evidence. The process of unholstering a firearm is different than the process of
5 unholstering a Taser. The Taser is to be fired from the off hand; defendant fired with
6 both hands. Defendant never told anyone that he mistook the gun for a Taser. In
7 weighing this evidence the magistrate was entitled to conclude, as he did for the record,
8 that defendant knew full well that he was shooting the victim with his firearm.

9 Even if the magistrate had accepted defendant's assertion of mistake, however,
10 defendant would not be absolved of criminal liability. There can be no doubt that
11 shooting someone with a gun instead of a Taser is an act of criminal negligence.

12 3. *Defendant's Claim of Imperfect Self Defense.*

13 Defendant claims that if the defendant did in fact deliberately shoot the victim in
14 the mistaken but unreasonable belief that the victim was reaching for a weapon, he
15 would be entitled to a claim of imperfect self defense. The only real evidence in support
16 of this claim is defendant's self-serving statements after the shooting that he thought
17 the victim was reaching for a gun. The testimony of Officers Pirone and Domenici show
18 that they saw nothing that led them to believe that the victim was armed. Officer
19 Pirone did not see the victim reaching for a weapon. Many of the witnesses testify that
20 Mr. Grant was cooperative, and the videotaped evidence of a struggle was marginal at
21 best. Indeed the videotaped evidence shows the victims hands behind his back at the
22 time of the shooting. The magistrate was entitled to reject defendant's claim and
23 conclude that defendant did not believe that Mr. Grant was reaching for a weapon.

24 **II. DEFENDANT WAS NOT DENIED A SUBSTANTIAL RIGHT.**

25 **A. Defendant Bears the Burden of Showing That He Was Denied a 26 Substantial Right.**

27 A defendant may move to dismiss an information on the grounds that he was
28 denied a substantial right at the preliminary examination. (*People v. Duncan* (2000) 78

1 Cal.App.4th 765, 772.) As in any motion, the moving party bears the burden of proof.
2 (Evid. Code § 500; *People v. Lopez* (1997) 52 Cal.App.4th 233, 251.) “Although the
3 prosecution bears the ultimate burden at trial, in a pretrial motion to dismiss the
4 accusatory pleading, the defendant is seeking the extraordinary relief of dismissal
5 without trial and consequently bears the burden of establishing his entitlement to that
6 relief.” (*Ibid.*) In seeking that relief, the defendant must prove the existence or non-
7 existence of any fact necessary to establish his claim. (*Ibid.*)

8 “The standard of the review is the same under either the statutory
9 or nonstatutory motion to set aside the information. ... ‘Upon review of a
10 motion to set aside an information, [the reviewing] court disregards the
11 superior court’s ruling and directly examines that of the magistrate. ...
12 [T]he superior court, must draw every legitimate inference in favor of the
13 magistrate’s ruling and cannot substitute [its] judgment on the credibility
14 of witnesses or weight of the evidence.’ ... A reviewing court cannot disturb
15 an exercise of discretion unless it is ‘arbitrary, capricious, or patently
16 absurd.’”

17 (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 740-41.)

18 “[A] defendant is denied a substantial right affecting the legality of the
19 commitment when he or she is subjected to prejudicial error, that is, error that
20 reasonably might have affected the outcome” (*People v. Konow* (2004) 32 Cal.4th
21 995, 1024.) This does not mean “that the defendant must demonstrate that it is
22 reasonably probable he or she would not have been held to answer in the absence of the
23 error. Rather, the defendant’s substantial rights are violated when the error is not minor
24 but ‘reasonably might have affected the outcome’ in the particular case.” (*People v.*
25 *Standish, supra*, 38 Cal.4th at 882.)

26 B. Evidence of the Victim’s Character.

27 Under Evidence Code section 1103, a defendant in a criminal action may offer
28 evidence of the victim’s character to prove his conduct at the time of the charged crime.
(Evid. Code § 1103(a); *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-47.)

29 Thus, in a homicide or an assaultive crime where self defense is raised, evidence of the
30 violent character of the victim is admissible to show that the victim was the aggressor.
(*Ibid.*) Admission of this evidence may still be limited under section 352 of the

1 Evidence Code where the probative value of the evidence is outweighed by the undue
2 consumption of time or of the prejudicial effect of the evidence. (*Id.* at 448.)

3 In the instant case defendant made an offer of proof that defendant had
4 previously been arrested for resisting arrest and felon-in-possession as proof of his
5 character for violence. The prosecutor noted that admission of the evidence would be
6 subject to Evidence Code section 352. Although he did not specifically articulate a 352
7 analysis, the magistrate ultimately ruled that he would not allow the evidence to come
8 in unless the defendant testified.

9 The magistrate's analysis is consistent with section 352. The evidence is
10 admissible as proof that the victim acted in a violent manner, however its probative
11 value was weak. First, the conduct ascribed to the victim does not show evidence of
12 violent felony conduct. Second the evidence was cumulative. There was already
13 evidence that tended to show that defendant had previously been incarcerated and that
14 he had been involved in a fight. Third the evidence was negligible in comparison to the
15 mountain of witness testimony and video taped testimony of the actual contact.
16 Finally, there is no evidence that defendant was aware of the defendant's character, so it
17 would not be admissible as proof of defendant's fear of the victim. That the magistrate
18 understood this is underscored by his decision to allow the evidence only if defendant
19 testified and demonstrated a fear of the victim based on his knowledge of the victim's
20 character. On the other hand, there was the potential that presentation of the evidence
21 would have been unduly time-consuming. The defendant's proffer was that the victim
22 had been arrested, not convicted. It is likely that arrest records and police reports
23 would contain substantial amounts of inadmissible hearsay. Thus, proof of the victim's
24 character would very likely have required the calling of additional witnesses to a
25 preliminary hearing already unusual for the large number of defense witnesses called.
26 The magistrate's decision is thus justified under section 352.

27 Even assuming that the magistrate erred, however, it would be inappropriate to
28 set aside the indictment. The magistrate would have reached no different conclusion

1 even if he had received the evidence. The proffered evidence adds no more weight to
2 the videotapes and witness testimony than a flea would add to a dog. Since the absence
3 of this evidence would not have affected the outcome, defendant was not denied a
4 substantial right.

5 C. Limitations on Witness Testimony.

6 At the outset, the People note that the magistrate showed extraordinary patience
7 in allowing the preliminary hearing to go on as long as it did. The prosecution called 9
8 witnesses and a rebuttal witness. The defense called 9 witnesses and added additional
9 testimony by way of stipulation. The case consumed 7 separate court days and 6
10 volumes spanning over 1,000 pages of testimony.

11 In considering the length of the case, it is well to keep in mind the purpose of a
12 preliminary hearing. As the California Supreme Court noted in *People v. Green*:

13 [T]he purpose of a preliminary hearing is not a full exploration of the
14 merits of a cause or of the testimony of the witnesses. It is designed and
15 adapted solely to answer the far narrower preliminary question of whether
16 probable cause exists for a subsequent trial . . .

(*People v. Green* (1969) 70 Cal.2d 654, 663 (overruled on other grounds in
California v. Green (1970) 399 U.S. 149.)

17 Since *Green* was decided, the purpose of the preliminary hearing has been further
18 narrowed. The purpose is to establish whether there is probable cause to believe that
19 the defendant has committed a felony; the preliminary examination "shall not be used
20 for purposes of discovery." (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1081,
21 (citing Penal Code § 866.)

22 1. *The Court Properly Excluded the Testimony of Mr. Bryson.*

23 Under Penal Code section 866(a), the prosecution may request an offer of proof
24 before the calling of a defense witness. The magistrate "shall not" permit the calling of
25 the defense witness unless, at *his or her sound discretion*, he determines that the witness
26 testimony would be likely to establish an affirmative defense, negate an element, or
27 impeach the testimony of a prosecution witness. (See *People v. Eid* (1994) 31
28 Cal.App.4th 114, 126-128.)

1 A magistrate's determination regarding a defendant's offer of proof under section
2 866 is reviewed for abuse of discretion. (*People v. Erwin* (1993) 20 Cal.App.4th 1542,
3 1549; *Eid, supra*, 31 Cal.App.4th at 125-127.) An "optimistic expectation" that a
4 proposed defense witness will defeat a holding order is not sufficient to satisfy the offer
5 of proof requirement in section 866. (*Eid, supra*, 31 Cal.App.4th at p. 127.)

6 Here the defense claims that Mr. Bryson would have testified that Mr. Grant
7 resisted, that defendant announced that he was going to tase the victim, and that Mr.
8 Bryson thought that defendant looked shocked after shooting the victim. As the
9 magistrate noted, this evidence was already in the record. The magistrate properly
10 precluded defendant from calling the witness because the proposed testimony was
11 cumulative.

12 *2. The Court Did Not Unduly Restrict the Testimony.*

13 Defendant complains that Officer Pirone was unable to testify as to whether it
14 was appropriate to tase the victim given his "level of resistance." It is true that the
15 court sustained the prosecutor's objection to the evidence on foundational grounds.
16 (RT 971.) The People contend that the ruling was proper. It is unnecessary to decide
17 that issue, however, for counsel was able to elicit the information by simply reasking it
18 a few minutes later. Counsel asked, "If you think a suspect may be going for a gun, do
19 you have to meet that force with lethal force?" and the witness answered no. Counsel
20 asked, "It would be appropriate to meet that force with a Taser?" and the witness said,
21 "Every situation is going to be different, sir, yes." (RT 975.)

22 Defendant also complains that the court precluded testimony from Officer Pirone
23 and from the "video expert" explaining the significance of photographs and videos.
24 Defendant sought to have Officer Pirone testify that defendant was using the "Taser
25 release technique" on his gun and thus intended to tase Mr. Grant. This line of
26 questioning called for speculation, opinion and conclusion, and the magistrate properly
27 excluded it. In any event, the magistrate did permit Officer Pirone to testify as to the
28 "Taser release technique" and many images were admitted into evidence showing the

1 manner in which defendant held the gun. Defendant also sought testimony from the
2 video expert explaining the images that appeared on the screen. The magistrate
3 permitted the expert to play the images, and he tolerated a great deal of interpretative
4 testimony. Nevertheless he would not allow the expert to correlate the visual images
5 with defendant's state of mind.

6 Thus there was a factual basis for defendant to make the arguments; the
7 magistrate merely precluded the witnesses from making the argument instead.
8 Defendant suffered no prejudice.

9 *3. The Court Properly Excluded the Testimony of the Taser Expert.*

10 Defense counsel asked to call a defense expert to testify that "given the
11 circumstance of this case, given what we see in the video of this case, which he's
12 examined, given all of the factor he's examined in this case, Mr. Mehserle's drawing of
13 his weapon was an accident. He, in fact, intended to draw his taser; the video shows us
14 that; he'll explain that, and therefore there was no malice, because Mr. Meshlerle had
15 the right to use the Taser to take Mr. Grant into custody [because Mr. Grant] actively
16 resisted arrest." The court denied the request, noting that the proposed testimony was
17 speculative. (RT 922.)

18 The magistrate's ruling was proper. An expert's opinion may not invade the
19 province of the finder of fact to decide a case. (*People v. Killebrew* (2002) 103
20 Cal.App.4th 644, 651.)

21 Undoubtedly there is a kind of statement by the witness which amounts to
22 no more than an expression of his general belief as to how the case should
23 be decided.... There is no necessity for this kind of evidence; to receive it
24 would tend to suggest that the judge and jury may shift responsibility for
25 decision to the witnesses; and in any event it is wholly without value to
26 the trier of fact in reaching a decision.

27 (*Ibid.* quoting *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155,
28 1182-83.)

26 Here, the expert was to testify as to what defendant's intent was at the time that
27 he shot the victim. This was for the magistrate to decide. Further, the defense was
28 merely precluded from eliciting opinion, not fact. Through Officer Pirone, defendant

1 presented substantial testimony about Taser use and BART training and procedure
2 relating to Tasers. Defendant was free to argue the inferences that could be drawn from
3 those facts.

4 **III. THE MAGISTRATE WAS PROFESSIONAL, FAIR AND EVEN-HANDED.**

5 Defendant complains that the magistrate made "many factual mistakes and legal
6 errors." Defendant "suggests" that the magistrate was influenced by pressure from
7 outside sources. This is an outrageous suggestion.

8 The magistrate showed extraordinary patience in permitting defendant to call a
9 large number of witnesses, most of whose testimony was merely cumulative to the
10 testimony of prosecution witnesses. The magistrate placed reasonable limits on both
11 sides. In short the magistrate behaved in exemplary fashion.

12 The primary thrust of defendant's complaint is that the magistrate did not
13 abdicate his role by letting the defendant's expert decide the critical issue of the
14 defendant's state of mind. As the People have indicated above, the magistrate's rulings
15 were proper. The magistrate allowed defendant to present all of the *facts* he sought to
16 introduce in his defense, and limited only the admissibility of conclusions that the
17 defendant sought to draw from his witnesses. In so doing the magistrate made sure that
18 the question of probable cause was left in the hands of a neutral and detached
19 magistrate.

20 For the foregoing reasons, the People respectfully request that defendant's motion
21 be denied.

22

23 DATED: August 9, 2009

24

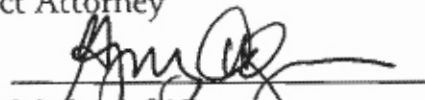
Respectfully Submitted,

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THOMAS J. ORLOFF
District Attorney

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by:


Michael O'Connor
Sr. Deputy District Attorney

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Office of the
District
Attorney
Alameda
County
California

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Motion Date: July 24, 2009

FILED
ALAMEDA COUNTY
JUL 21 2009
CLERK OF THE SUPERIOR COURT
By: _____

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,)

v.

JOHANNES MEHSERLE,

Defendant.)

No. 161210

Dept: 10

**MOTION TO CONTINUE DEFENDANTS'
PENAL CODE SECTION 995 AND NONSTATUTORY MOTION
PURSUANT TO PENAL CODE SECTION 1050**

Please take notice that on July 24, at 9:00 a.m. in Dept. 10, the People will move for to continue the 995 in the above-captioned matter for the following reason:

Owing to problems in locating the defendant's motion and due to the length of that motion and the underlying transcript, the People require additional time to file an opposition that is adequate, timely and responsive.

Dated: July 21, 2009

THOMAS J. ORLOFF
District Attorney

By: *Micheal O'Connor*
Micheal O'Connor
Sr. Deputy District Attorney

1 DECLARATION IN SUPPORT OF MOTION TO CONTINUE

2 The undersigned hereby declares:

3 I am a Senior Deputy District Attorney at the Alameda County District
4 Attorney's Office.

5 Through some mishap, I did not receive defendant's motion and supporting
6 documentation until July 21, after the People's opposition was due to be filed. The
7 transcript of the instant preliminary hearing exceeds a thousand pages. The defendant's
8 motion exceeds fifty pages, not including attachments. I will need more time in order
9 to prepare a response that is timely, legally adequate, and responsive to the motion.

10 I have spoken to the office of counsel for the defendant, Mr. Rains. It is my
11 understanding that Mr. Rains does not object to the continuance, but requests that the
12 matter be set in early to mid August.

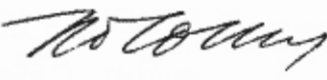
13 I will be out of the office for two weeks beginning August 10, and I will be out of
14 state on a pre-paid family vacation for much of that time, including August 14. I will
15 be back in the office on August 24. If absolutely necessary, I could return to the office
16 on August 21.

17 It is my understanding that the defendant has waived time in this matter and that
18 there have been no previous continuances of this motion.

19 I declare under the penalty of perjury that the foregoing is true and correct to
20 the best of my information and belief.

21 Dated: July 21, 2009

22 THOMAS J. ORLOFF
23 District Attorney

24 By: 
25 Micheal O'Connor
26 Sr. Deputy District Attorney

1 **AFFIDAVIT OF SERVICE BY MAIL**

2

3 The undersigned deposes and says:

4 That I am a citizen of the United States and a resident of the County of
5 Alameda; that I am over the age of eighteen years and not a party to the within
6 aforementioned action; that my business address is the Office of the District
7 Attorney, Alameda County Courthouse, 1225 Fallon Street, Oakland, California
8 94612-4292;

9 That I served a true copy of the attached:

10 **MOTION TO CONTINUE DEFENDANT'S**
11 **PENAL CODE SECTION 995 MOTION**
12 **PURSUANT TO PENAL CODE SECTION 1050, in the matter of**
13 **PEOPLE V. JOHANNES MEHSERLE, Alameda County No. 161210**

14 by delivering copies through the U.S. Mail to :

15 Michael L. Rains, Esq.
16 Rains, Lucia & Stern, PC
17 2300 Contra Costa Blvd., Suite 230
18 Pleasant Hill, CA 94523

19 and via email sent to: mrains@rlslawyers.com

20 on July 21, 2009 at Oakland, California.

21 I declare under penalty of perjury that the foregoing is true and correct.

22 **DATED:** July 21, 2009 at Oakland, California.

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