

October 2, 2015

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Please reply to the Encino Office

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Re: *People v. Raymond Jennings*, LASC No. MA033712, Court of Appeal No. B222959

Dear Mr. Lynch:

I represent Sergeant Raymond Jennings, an Iraq-war veteran who has so far served 10 years of a life sentence for a murder he did not commit. On the night of the murder, Jennings was moonlighting as a security guard while studying to become a U.S. Marshal. As he was patrolling a park-and-ride lot in the Antelope Valley, he heard gunfire, took cover, and frantically radioed that shots were being fired. He would later learn that someone had murdered an aspiring actress, Michelle O'Keefe, as she sat inside the new car that her parents had just given her for her 18th birthday.

The unsolved murder of the popular teenager dominated local headlines, but all the evidence pointed away from Jennings: his clothes tested negative for gunshot residue, and his DNA did not match the blood found under the victim's fingernails. In a candid email, one crime-laboratory technician lamented that detectives "had no real evidence."

For years, tabloid-style media coverage portrayed Jennings as a craven killer, but the District Attorney's Office declined to pursue the case. Then, five years after O'Keefe's death, her father requested a meeting with Deputy District Attorney Robert Foltz, where he made a presentation that consisted of edited video clips of Jennings answering questions about O'Keefe's murder.

Before the meeting, Mr. Foltz did not believe there was sufficient evidence to charge Jennings, but he changed his mind after witnessing the presentation. "I can't put my finger on precisely what the difference is," Foltz told the Daily News, "but it was clear we had a fileable case."

At the trial in downtown Los Angeles, the jury hung 9-3. Prosecutors chose to retry Jennings, and once again jurors were unable to reach a verdict. The judge agreed to let the State try Jennings a third time — and to move the trial back to the community where the murder occurred — but warned prosecutors there would be no fourth trial.

Knowing that this was his final chance to obtain a conviction, Deputy District Attorney Michael Blake told jurors that a defendant's presence when a victim dies creates a *presumption of guilt*:

What I do want you to understand is, if two people go into a room, [and] they are in there alone; no one knows what's happening between them. One of them walks out, and the other is inside dead. *Without knowing anything else, the law presumes that to be a second degree murder.* That's an important concept in your law. The killing is presumed to be malicious and is *presumed to be murder, again, without knowing more.* (20 RT 7246:8-15.)

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Neither the trial judge nor Jennings' counsel corrected this erroneous explanation of the law. This statement was particularly prejudicial to Jennings because it provided the jury with a way to overlook the flaws in the State's case. According to the prosecutor, all they needed to know to convict Jennings was that he was in the parking lot when O'Keefe was shot.

Not only was there no physical evidence to tie Jennings to the murder, the physical evidence was actually exculpatory, since it showed that Jennings had neither fired a gun on the night of the murder, nor had any physical contact with O'Keefe. Mr. Blake told the jury that Jennings must have washed the clothes before they were submitted for testing. But this was false. The crime lab notes described the clothes as worn and dirty. Unfortunately, those notes were not brought to the jury's attention. And Mr. Blake suggested that the blood could have gotten under Ms. O'Keefe's nail from "incidental contact" with a drinking fountain or a door handle.

There was no reason to think that Jennings was a criminal, much less a killer. He was a seven-year veteran of the National Guard and held a "secret" security clearance. He was a married father of four, with no criminal record. The core of the State's theory was that Jennings volunteered information about the crime that the investigators had deliberately held back — details that "only the killer could know." If true, this would be powerful evidence. But this method of proof can only work if three basic conditions are met:

- The details of the crime related by the suspect must be accurate. If the suspect gets some details right and others wrong, it negates the idea that he has special knowledge.
- The suspect must actually know the information. Information that the suspect can easily guess, or that is imparted by the investigators through suggestive questions does not establish the suspect's "knowledge." And,
- There must be no way that the knowledge could be acquired through innocent means.

The State's case against Jennings failed each of these basic attributes. He got myriad details of the crime wrong. The investigators repeatedly attributed "knowledge" to Jennings based on his agreement with the premise of their questions (such was whether it sounded like all the shots came from the same gun). And since Jennings heard the shots fired and saw the crime scene, he was able to draw reasonable inferences from what he observed. For example, he could tell that O'Keefe had been shot at close range because he saw the powder burns on her torso.

In the pages that follow, I will first describe the evidence that proves Jennings' innocence. I will then address in detail the flaws in the State's case. As you will see, I have sought to support every factual assertion with a citation to the record. For your convenience, I have compiled all of the cited material into a consecutively-paginated appendix.

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FACTUAL SUMMARY

The shooting occurred on the night of February 22, 2000, in a park-and-ride lot in Palmdale. Earlier that day, Michelle O’Keefe, an 18-year old college student, had left her car in the lot and had driven to Los Angeles with her friend, Jennifer Peterson, to work as extras in a music video.¹ They returned from the video shoot around 9:20 p.m. Peterson dropped O’Keefe off next to her car, a blue Ford Mustang.² O’Keefe planned to change out of the “club attire” she wore in the video — a small tube top, knee-length skirt, and a leather jacket — and into an outfit more suitable to attend a college class that night.³ The Mustang had been parked under a light post.⁴ Evidently seeking a less well-lit location to change her clothes, O’Keefe moved the car to a darker area in the north portion of the lot.⁵

At the same time that O’Keefe returned to the lot, Victoria Richardson was sitting with three other people in a car parked in the lot.⁶ They were smoking marijuana and listening to music.⁷ Richardson and her friends would regularly go to the parking lot to “party” because the security was lax.⁸

February 22, 2000, was Ray Jennings’ second day on the job as an unarmed security guard for All Valley Security.⁹ He was assigned to the park-and-ride lot.¹⁰ Jennings was 25 years old, married, with four children. He had enlisted at age 17 in the National Guard.¹¹ He had never been arrested or convicted of any crime.¹² He held a “secret” security clearance, and he was studying to be a U.S. Marshal.¹³ He owned a .380 pistol, which was properly registered.¹⁴ He did not bring the gun to work because All Valley Security did not allow its guards to carry guns.¹⁵ The company told

¹ 5RT 2107-2108, 2111, 2113 (RLJ1-RLJ4); the RLJ page numbers following the citations to the record are to the Bates stamped number in the center of the pages that are part of the Compendium of Exhibits accompanying this letter.

² 5RT 2136, 2110 (RLJ5-RLJ6).

³ 5RT 2112, 2139 (RLJ7-RLJ8).

⁴ 5RT 2116 (RLJ9).

⁵ 17RT 6413-6414 (RLJ10-RLJ11).

⁶ 6RT 2405-2406 (RLJ12-RLJ13).

⁷ 6RT 2408-2409, 2436 (RLJ14-RLJ15).

⁸ 6RT 2410 (RLJ17).

⁹ Jennings Depo., Vol. 1, 6 (RLJ18).

¹⁰ *Id.*

¹¹ Jennings Depo., Vol. 1, 278 (RLJ19).

¹² *Id.*, 29, 282 (RLJ20-RLJ21).

¹³ Jennings Depo., Vol. 2, 334; 15RT 5790-5791 (RLJ23-RLJ25).

¹⁴ 8RT 3654-3655 (RLJ26-RLJ27).

¹⁵ Jennings Depo., Vol. 1, 286; 5RT 2169 (RLJ28-RLJ29).

him that guards who brought guns to work would be fired, and that it conducted random searches to ensure that the no-guns rule was followed.

Jennings spent most of his shift in his car, although he also walked around the lot on patrol.¹⁶ At roughly 9:30 p.m., he heard a car- alarm go off and then heard a gunshot. He ducked down behind his car, and then about 10 seconds later he heard several more shots in quick succession.¹⁷ He peered over the hood of his car and saw a blue Mustang about 400 feet away in a dark area of the lot.¹⁸ It was rolling backwards, and came to rest in a planter. He was unable to get a glimpse of the shooter, who was shielded from view by a commuter van.¹⁹

Jennings had a radio, but not a phone.²⁰ He radioed his supervisor that he heard gunshots, and was patched through on his radio to the Sheriff's Department dispatcher.²¹ He spoke to the officers and directed them to the correct parking lot.²²

Jennings supervisor, Iris Malone, arrived in the lot about ten minutes later.²³ She told Jennings to get into her car and accompany her to the Mustang.²⁴ Jennings refused, fearing that the shooter might still be on the scene.²⁵ Malone then drove to the Mustang and illuminated it with her headlights and a spotlight. Malone saw O'Keefe's leg and foot outside the open driver's door.²⁶ She peered into the car with her flashlight, saw that O'Keefe was dead, and told Jennings to join her at the scene.²⁷

Jennings walked to the Mustang.²⁸ As he approached it his foot kicked a shell casing, which he bent down to examine.²⁹ He saw that the driver's door was open and a woman was inside, slumped in the drivers' seat.³⁰ She had been shot in the lower chest and several times in the

¹⁶ 8RT 3636 (RLJ30).

¹⁷ 8RT 3638; 15RT 5742 (RLJ31-RLJ32).

¹⁸ 9RT 3929-3930 (RLJ33-RLJ34).

¹⁹ 9RT 3920; Cognitive Interview, pp. 1289, 1320 (RLJ35-RLJ37).

²⁰ 8RT 3717 (RLJ38).

²¹ 5RT 2164-2165, 2167 (RLJ39-RLJ41).

²² 5RT 2236, 2237 (RLJ42-RLJ43).

²³ 5RT 2166 (RLJ44).

²⁴ 5RT 2171 (RLJ45).

²⁵ 8RT 3639 (RLJ46).

²⁶ 5RT 2173 (RLJ47).

²⁷ 5RT 2173-2175 (RLJ48-RLJ50).

²⁸ 5RT 2177 (RLJ51).

²⁹ 5RT 2178-2180 (RLJ52-54).

³⁰ Cognitive Interview, p. 1260; crime scene photos (RLJ55-RLJ57).

face.³¹ He thought she might be about 30 years old, and based on the way she was dressed, he thought that she might have been a prostitute.³²

Before the police arrived, Richardson and her companions drove up to Jennings and Malone and asked Jennings what had happened.³³ Jennings told her that he did not know, and she drove away.³⁴

The first law-enforcement officer on the scene was Deputy Sheriff Billy Cox, who arrived at 9:49 p.m.³⁵ The Mustang's engine was running, the transmission was in neutral, and the emergency brake was disengaged.³⁶ The glove box was open.³⁷ O'Keefe's cell phone was missing and was never recovered.³⁸ O'Keefe had \$111 in cash in her wallet, which was found in the gap between the driver's seat and the center console.³⁹

The medical evidence established that O'Keefe had been struck in the forehead with some type of object.⁴⁰ The blow would have been sufficient to stun or daze her, but not to knock her unconscious.⁴¹ She had been shot once in the chest point-blank, and then once in the neck and twice in the face.⁴² Markings on her skin showed that these shots were fired from two-to-three feet away.⁴³

Detectives Diane Harris and Richard Longshore arrived on the scene around 12:35 AM, about three hours after the shooting.⁴⁴ Jennings had agreed to stay on the scene to give them a statement.⁴⁵ They discovered two expended bullets and four shell casings at the scene, and recovered three more bullets during O'Keefe's autopsy.⁴⁶

³¹ 3RT 1543-1544 (RLJ58-RLJ59).

³² Cognitive Interview, p. 1306 (RLJ60).

³³ 6RT 2423 (RLJ61).

³⁴ 6RT 2425 (RLJ62).

³⁵ 6RT 2482 (RLJ63).

³⁶ 6RT 2468; 9RT 3908, 3914 (RLJ64- RLJ66).

³⁷ 5RT 2225 (RLJ67).

³⁸ 7RT 3306 (RLJ68).

³⁹ 7RT 3430, 3433-3434 (RLJ69- RLJ71).

⁴⁰ 3RT 1544, 1554-1555 (RLJ72- RLJ74).

⁴¹ 3RT 1564 (RLJ75).

⁴² 3RT 1543-1544, 1587 (RLJ76- RLJ78).

⁴³ 4RT 1821 (RLJ79).

⁴⁴ 7RT 3356 (RLJ80).

⁴⁵ 5RT 5733 (RLJ81).

⁴⁶ 7RT 3428 (RLJ82).

None of the officers on the scene that night thought that anything about Jennings' behavior or demeanor was suspicious.⁴⁷ He was never searched and none of his clothing was taken for forensic testing.⁴⁸ He simply gave them a statement and answered their questions.

Jennings liked Mustangs, and he told the detectives that he had noticed the blue one in the lot as he made his patrols.⁴⁹ But he had forgotten that during the day it had been parked in a spot near the light pole, and not in the north part of the lot near the planter. It was this "inconsistency" that first made the detectives suspicious of Jennings.⁵⁰

A few weeks after the shooting, Victoria Richardson was arrested and held on juvenile charges.⁵¹ While in custody, she spoke to detectives, and told them that she had been in the parking lot the night of O'Keefe's murder and had asked the security guard what had happened.⁵² She also told them that immediately after the shooting she had seen a white male wearing a white t-shirt and a backwards red baseball cap flee the scene in a black Toyota Tercel.⁵³

About a month after the shooting, Detectives Longshore and Harris interviewed Jennings again in his home.⁵⁴ He told them that he did not remember anything beyond what he had told them the night of the shooting, and he reiterated that he did not recall seeing anyone leave the parking lot after the shooting.⁵⁵ The detectives then told him about Richardson's statement that she had briefly spoken to him that night; he immediately recalled the conversation and described Richardson and her companions.⁵⁶

Jennings had quit his job as a security guard three days after the shooting.⁵⁷ He turned in his uniform, which All Valley Security held.⁵⁸ Investigators later performed extensive forensic testing on it, but found no blood or gunshot residue whatsoever.⁵⁹ No hair or fibers recovered from his uniform matched O'Keefe or any of her possessions.⁶⁰ The lab technicians specifically

⁴⁷ 8RT 3750, 3751 (RLJ83- RLJ84).

⁴⁸ 3RT 1509 (RLJ85).

⁴⁹ 8RT 3636 (RLJ86).

⁵⁰ 8RT 3628, 3743; 9RT 3916 (RLJ87- RLJ89).

⁵¹ 6RT 2429-2430 (RLJ90- RLJ91).

⁵² 6RT 2435, 2423-2424 (RLJ92- RLJ94).

⁵³ 6RT 2439-2440 (RLJ95- RLJ96).

⁵⁴ 8RT 3624 (RLJ97).

⁵⁵ 8RT 3626-3628 (RLJ98- RLJ100).

⁵⁶ 8RT 3631-3632 (RLJ101- RLJ102).

⁵⁷ 8RT 3718-3720 (RLJ103- RLJ105).

⁵⁸ 8RT 3723-3725 (RLJ106- RLJ108).

⁵⁹ 11RT 4518-4520, 4533; LASD Doc 3 at 262, Doc 2 at 110-111 (RLJ109- RLJ115).

⁶⁰ 11RT 4661-4662 (RLJ116- RLJ117).

noted in their report that the uniform jacket, pants, and shirt were “worn and dirty” when they tested them.⁶¹

About six weeks after the shooting Jennings agreed to participate in an eight-hour “cognitive interview” with the detectives, to go over everything that he could recall or deduce about the shooting.⁶² These interviews are not designed for questioning suspects, but rather to help witnesses remember facts that they initially had forgotten.⁶³

When the detectives presented their case to Assistant District Attorney Robert Foltz, he felt that he had no way to prove that Jennings was guilty and declined to file any charges. The O’Keefe family then filed a civil wrongful-death suit against Jennings. They deposed him on videotape in the civil suit, where he appeared without counsel.⁶⁴ He was questioned extensively in the civil case about the night of the shooting. An edited version of his testimony, with the questions omitted, was presented to ADA Foltz.⁶⁵ Based on this presentation, Foltz agreed to file charges against Jennings in 2005, for first-degree murder.⁶⁶ This, despite the concession by technicians at the Sheriff’s crime lab that, “they [the detectives] have no real evidence.”⁶⁷ At trial, portions of the video of Jennings’ civil testimony were introduced against him.⁶⁸

The case was tried twice in Los Angeles, resulting in a hung jury both times.⁶⁹ Over Jennings’ objections, the case was moved back to the Antelope Valley for the third trial.⁷⁰

During his closing argument in that trial, the prosecutor, Blake, told the jury that, if two people went into a room and one walked out alive and the other was dead, and that was the only information available, it was “presumed” to be second-degree murder.⁷¹ Jurors initially felt there was reasonable doubt, but after almost of months of watching Jennings’ “interviews again, again, [and] again,” they convicted him of murder.⁷²

⁶¹ LASD Doc 2 at 110, 113-114 (RLJ118- RLJ120).

⁶² 15RT 5788 (RLJ121).

⁶³ 15RT 5781-5782 (RLJ122- RLJ123).

⁶⁴ 16RT 6012-6013 (RLJ124-125).

⁶⁵ Excerpt of transcript of interview with Foltz on NBC program *Dateline*; full transcript available at www.nbcnews.com/id/36920379/ns/dateline_nbc-crime_reports/t/girl-blue-mustang/#.Vg2PDvIVhBc (RLJ128- RLJ129).

⁶⁶ *Id.*

⁶⁷ 4/14/06 internal e-mail (RLJ130-RLJ130-10).

⁶⁸ 16RT 6012-6013 (RLJ126- RLJ127).

⁶⁹ *People v. Jennings*, B222959, 2011 WL 6318468, at *3 (RLJ150).

⁷⁰ 3CT 548-563; *People v. Jennings*, 2011 WL 6318468, at *3 (RLJ131- RLJ146, RLJ150).

⁷¹ 20RT 7246 (RLJ147).

⁷² RLJ147-1 to RLJ147-5.

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He was sentenced to life in prison with a minimum term of 40 years.⁷³ He has already spent 10 years behind bars, and he will not be eligible for parole until he is 70 years old.

The conviction was affirmed on appeal in December 2011 in an unpublished opinion.⁷⁴ Jennings filed a *pro se* federal habeas petition in June 2013, which has thus far not been considered. I only became involved in the case in May 2015. My motion to have the federal court stay the habeas petition is under submission, and I plan to file a new, more comprehensive petition in the state court shortly.

DIRECT PROOF OF JENNINGS' INNOCENCE

In addition to the lack of any direct evidence tying Jennings to the crime, his innocence can be demonstrated by four critical pieces of evidence.

A. Gunshot-residue testing proved that Jennings was not the shooter

The gunshot-residue testing is the single most important piece of evidence in this case because it definitely proves that Jennings did not shoot O'Keefe.

It is undisputed that Jennings was wearing his uniform the night of the murder and that, if he fired a gun, his jacket would have been covered in gunshot residue.⁷⁵ When Jennings dropped off his uniform at All Valley Security, homicide detectives immediately seized it for testing.⁷⁶ But the laboratory determined that there was no gunshot residue on Jennings' jacket, which proved that Jennings did not shoot O'Keefe.⁷⁷

At trial, the prosecutor argued that the gunshot residue must have been washed off of the jacket before it was tested. The State's own records show that was false. A technician at the crime lab wrote that the jacket "[d]id not look washed at the time [the] jacket was collected – per [Detective] Harris."⁷⁸ And when it was examined, the technician found that it was "worn and dirty."⁷⁹ Remarkably, Jennings' defense counsel did not present this evidence at trial. If any single fact likely accounts for Jennings' wrongful conviction, it was probably this failure.

⁷³ 7CT 1536 (RLJ148).

⁷⁴ *People v. Jennings*, 2011 WL 6318468 (RLJ149- RLJ156).

⁷⁵ 13RT 5116-5117 (RLJ157-158).

⁷⁶ 8RT 3726-3727 (RLJ159- RLJ160).

⁷⁷ 11RT 4518-4520, 4533; LASD Doc 3 at 262 (RLJ161- RLJ165).

⁷⁸ LASD Doc 3 at 252 (RLJ166).

⁷⁹ LASD Doc 2 at 110 (RLJ167).

B. DNA testing proved that another man's blood was beneath the victim's fingernail

There is also DNA evidence that shows Jennings was not the killer. There was blood found beneath one of O'Keefe's fingernails, and DNA testing proved it could not have come from Jennings.⁸⁰

The State brushed aside the DNA evidence by lying to the jury. The prosecutor said there was "[n]o blood belonging to someone else" beneath O'Keefe's fingernails — just a fragment of DNA, which could have drifted underneath her finger earlier in the day.⁸¹ The prosecution claimed that O'Keefe probably picked up the DNA from incidental contact with something like a drinking fountain or dusty door handle.⁸²

None of this was true. There *was* visible blood under O'Keefe's fingernail and that blood *was* subjected to DNA-testing, which showed that the blood came from an unidentified male and excluded Jennings as a possible match.⁸³ This is an objective, extensively documented fact. And it is a fact that eliminates the State's explanation for the DNA, because a man's blood does not randomly appear beneath a woman's fingernails. The obvious explanation is that O'Keefe scratched her killer.

If Jennings' blood had been found underneath O'Keefe's fingernail, the State would have treated that as conclusive evidence that Jennings was the man who attacked her. Logically, the presence of a different man's blood should be treated as equally strong evidence that she was attacked by a man other than Jennings.

C. The bullets the killer fired were the wrong caliber for Jennings' pistol

The killer's use of a 9mm pistol further demonstrates Jennings' innocence.⁸⁴ Jennings was the lawfully registered owner of only one firearm: a .380 pistol.⁸⁵ When police searched his home, they found no evidence that Jennings had ever owned another firearm.⁸⁶

This created a huge inconsistency in the State's theory of the case: If Jennings legally owned a .380 pistol, why would he illegally acquire a 9mm gun and then bring that firearm to work?⁸⁷

The State was never able to answer that question. It could not argue that Jennings obtained an untraceable firearm in order to commit a crime, because the prosecution conceded that, before

⁸⁰ LASD Doc 1 at 48; 11RT 4556-4557, 4564-4565 (RLJ168- RLJ172).

⁸¹ 3RT 1521 (RLJ173).

⁸² *Id.*

⁸³ LASD Doc 1 at 48; 11RT 4556-4557, 4564-4565 (RLJ175- RLJ179).

⁸⁴ 12RT 4911-4912; LASD Doc 3 at 249 ((RLJ180-RLJ182).

⁸⁵ 8RT 3654-3655 (RLJ183- RLJ184).

⁸⁶ 14RT 5416, 5431-5432 (RLJ185- RLJ187).

⁸⁷ 3RT 1525 (RLJ188).

seeing O'Keefe, Jennings had no plans to do anything illegal.⁸⁸ So the prosecution took the position that Jennings must have chosen to carry a gun for self-defense, just as he had done when he lived in North Carolina. Yet Jennings was aware that it was illegal to carry an unregistered firearm in California.⁸⁹

But the gun Jennings always carried for self-defense in North Carolina was his .380 pistol — the only firearm he owned. He was not permitted to carry it or any other gun while on duty as a security guard.⁹⁰ If he *had* brought a gun for protection, it would have been his .380 pistol. There was no conceivable reason for him to instead commit a felony by illegally procuring and carrying an unregistered 9mm pistol.

D. An eyewitness saw a different man flee the scene of the shooting

If Jennings had been the only potential suspect, it might have been easier to understand why the police focused on him. But he was not: Victoria Richardson — who was also a stranger to Jennings — testified that after she heard the gunshots, she saw a white male drive away in a black Toyota Tercel, wearing a white t-shirt and a backwards red baseball cap.⁹¹

Inexplicably, investigators failed to follow up on this lead. They did not even interview the other three people in the car with Richardson — any one of whom might have remembered more details about the black Toyota and the man in the red baseball cap.⁹²

At trial, the prosecutor claimed that the man Richardson saw had nothing to do with the shooting. The only evidence he offered in support of that position was the fact that the man drove out of the parking lot's eastern exit, when it would have been more efficient to use the western exit.⁹³ According to the prosecutor, the real killer would have been in a hurry to flee the scene as quickly as possible.

The assumption about the exits is dubious. They are practically equidistant, and the panicked killer probably drove towards whichever one he saw first. But the prosecutor's assumption about the murderer is valid: the killer certainly would not have hung around the victim he'd just murdered, waiting for police to arrive and arrest him.

But Jennings made no attempt to flee. He reported that shots were being fired, he helped police arrive sooner by guiding them over the radio, and he voluntarily stayed at the scene with them for hours. These are not the actions of a killer.

⁸⁸ 3RT 1522 (RLJ189).

⁸⁹ Cognitive Interview, p. 1426 (RLJ190).

⁹⁰ 5RT 2169; Jennings Depo., Vol. 1, 286 (RLJ191- RLJ192).

⁹¹ 6RT 2439-2440 (RLJ193- RLJ194).

⁹² 17RT 6335 (RLJ195).

⁹³ 6RT 2448-2449; 20RT 7322 (RLJ196- RLJ198).

The person who acted like a killer was the man in the red baseball cap. He was in the parking lot at the time of the shooting, so he must have heard the gunfire. But he drove away without calling 9-1-1 to report the shots. And he never came forward to speak with police, despite a high-profile media campaign pleading for help from anyone who saw or heard something that night.⁹⁴

The straightforward explanation for the man's behavior is that he killed Michelle O'Keefe.

THE PROSECUTION'S FLAWED CASE

In order to overcome the lack of evidence that tied Jennings to the crime, as well as the evidence that affirmatively excluded him as the killer, the State relied on circumstantial evidence that can be grouped into four categories:

- Evidence that Jennings purportedly implicated himself by revealing details of the murder that only the killer could have known;
- Evidence that the *modus operandi* of the shooting demonstrated firearms skills indicative of military training;
- Evidence that the murder was a sexual crime committed by someone who worked at the Park-and-Ride; and
- Evidence that Jennings attempted to deceive the police by lying about what he witnessed before, during, and after the shooting.

Each of these pillars crumbles when the evidence is examined. The record shows that —

- Jennings had no special insight into the crime; his information was consistent with what he had observed or been told by the investigators, and he was wrong about many of the basic details of the crime. Any fact he was wrong about was simply ignored.
- The circumstances of the shooting were not indicative of military training. In fact, the killer appeared to be a novice with no firearms training. Jennings' military training should have been viewed as exculpatory, not incriminating.
- There was no evidence of a sexual assault and overwhelming evidence of a robbery. The profiler who testified for the State made up facts to support his theory and ignored any facts that did not implicate Jennings.
- The only "lies" Jennings told the police were exaggerations of his accomplishments and experiences, which had nothing to do with the murder. Even the State has admitted in its briefing that Jennings exaggerated because he wanted to impress the detectives.⁹⁵

⁹⁴ 15RT 5771 (RLJ200).

⁹⁵ Respondents' brief in *People v. Jennings*, at 51 (RLJ201).

A. The evidence established that Jennings did *not* have special knowledge of the crime

The prosecution claimed that Jennings knew details about the murder that only the killer would know. This can be a powerful form of evidence in many cases, particularly where the accused would be unlikely to know anything about the crime other than the details that the police had released to the media.

But this case is not like that. Jennings was a witness who heard the shooting, inspected the crime scene, and spent hours undergoing suggestive questioning by the investigators. The majority of his allegedly incriminating statements were his simple observations about the physical evidence. Others were inaccurate beliefs about the crime, which showed a *lack* of knowledge. And the rest were nonexistent statements the prosecution falsely attributed to him.

1. Statements that were merely Jennings' observations as a witness

a. Jennings logically assumed he had heard only one gun

Prosecution Claim: Jennings should not have known that each bullet was fired by the same gun, because detectives only determined that through ballistics testing.⁹⁶

Fact: Detectives prompted Jennings for his opinion about whether it appeared the shots had all been fired by one gun, and he responded, "Yeah. To me it did."⁹⁷ This was nothing but a reasonable assumption, strengthened by the fact that he had seen the uniform appearance of the shell casings at the scene.

Detectives then asked if it sounded like only one gun had been firing, and Jennings responded, "Oh yeah. Definitely."⁹⁸ That was a reasonable conclusion for a military veteran to draw after hearing a sequence of non-overlapping shots, fired in quick succession.⁹⁹ (This was also the most likely assumption for *anyone* to make about the crime, since the alternative would have required either two assailants or one who wielded a gun in each hand.)

b. Jennings could infer that the murder weapon had been fired at close range because he saw the powder burns on the victim's body

Prosecution Claim: Jennings should not have known that the murder weapon was fired at point blank range, because detectives only found a shell casing inside the vehicle after O'Keefe's body had been removed from the car.¹⁰⁰

⁹⁶ 16RT 6051; 12RT 4912-4913 (RLJ202- RLJ204).

⁹⁷ Cognitive Interview, p. 1274 (RLJ205).

⁹⁸ *Id.*

⁹⁹ 8RT 3638; 15RT 5742 (RLJ207- RLJ208).

¹⁰⁰ 20RT 7264 (RLJ209).

Fact: Jennings did not know about the shell casing inside the vehicle. Rather, he recognized that the gun had been fired at close range because he saw powder burns around the gunshot wound in O'Keefe's chest.¹⁰¹ These wounds are clearly visible in a photo of the crime-scene.¹⁰²

The charring and powder burns on O'Keefe's wound are a clear indication that the weapon was fired at close range.¹⁰³ The first law-enforcement officer on the scene, Deputy Cox, also noticed these burns on O'Keefe when he arrived.¹⁰⁴

c. Jennings logically assumed that the victim could not have been shot in the head before starting her car

Prosecution Claim: Jennings accurately described the sequence of bullets fired into the victim, yet investigators were only able to determine that information after the medical examiner had conducted an autopsy.¹⁰⁵

Fact: The only opinion Jennings offered was that the very first shot he heard had probably been the one fired into the victim's chest, because she would not have been able to start the car if she had already been shot in the head.¹⁰⁶

Jennings' guess was wrong. The shot he heard before the car started had actually been fired into the ground.¹⁰⁷ O'Keefe started her car *before* she was shot in the chest. Jennings did not know that, because he was not the killer.

d. Jennings inferred that the victim had not been raped

Prosecution Claim: Jennings should not have known that O'Keefe was not sexually assaulted, because detectives only determined that after receiving the results of her rape kit.¹⁰⁸

Fact: Jennings said that he initially thought that O'Keefe might have been raped because when he first saw her in the car, a portion of one of her breasts was slightly exposed.¹⁰⁹ Then he saw that she was wearing the rest of her clothing, so he assumed she had not been raped.¹¹⁰ Neither of those observations demonstrated any incriminating knowledge about the crime.

¹⁰¹ 6RT 2471, Cognitive Interview, p. 1274 (RLJ210-211).

¹⁰² Cropped crime-scene photo (RLJ212).

¹⁰³ 3RT 1587 (RLJ213).

¹⁰⁴ 6RT 2471 (RLJ214).

¹⁰⁵ 20RT 7284 (RLJ215).

¹⁰⁶ Cognitive Interview, p. 1264 (RLJ216).

¹⁰⁷ 20RT 7284; 15RT 5742, 5778 (RLJ215, RLJ217-RLJ218).

¹⁰⁸ 20RT 7256 (RLJ219).

¹⁰⁹ 17RT 6307 Cognitive Interview, p. 1264 (RLJ220- RLJ221).

¹¹⁰ *Id.*

2. Statements falsely attributed to Jennings by the prosecution

a. Jennings did not know the caliber of the murder weapon

Prosecution Claim: Without looking at the shell casings, Jennings knew that the murder weapon was a 9mm pistol.

Fact: Jennings' supervisor, Iris Malone, testified that he closely inspected a shell casing with her flashlight, but she could not remember which caliber he said that he thought it was.¹¹¹ Jennings filed a written report about the incident for All Valley Security the night of the shooting, which incorrectly said the casing were from a .45.¹¹² And Deputy Cox testified that Jennings asked him about the caliber of the murder weapon, and he told Jennings the shell casing appeared to come from a 9mm pistol.¹¹³

b. Jennings did not know the trajectory of the bullets

Prosecution Claim: Jennings was able to instantly determine the trajectories of the bullets, something that investigators only learned after months of exhaustive forensic analysis.¹¹⁴

Fact: Jennings never opined about the trajectories of individual bullets. He simply pointed out the obvious — that the killer must have been standing in front of the driver's side door, firing through the gap in the window.¹¹⁵

Jennings knew the shooter must have been standing towards the front of the car, because he witnessed the shots being fired as the Mustang rolled backwards, and he saw that all the bullet wounds were to the front of O'Keefe's body.¹¹⁶

He also saw that there were no bullet holes in the Mustang's windshield or door, so he logically assumed that the killer had been shooting through the rolled-down window. It did not take a crime-scene expert to make this deduction.

¹¹¹ 5RT 2184-2185, 2235, 2237 (RLJ222- RLJ225).

¹¹² All Valley Security incident report completed by Jennings on the night of the murder (RLJ226- RLJ227).

¹¹³ 6RT 2488-2489 (RLJ228-229).

¹¹⁴ 20RT 7265, 7285, 7555 (RLJ230- RLJ232).

¹¹⁵ Cognitive Interview, pp. 1267, 1304 (RLJ233- RLJ234).

¹¹⁶ 15RT 5742 (RLJ235).

c. Jennings did not see the gouge mark in the asphalt

Prosecution Claim: Jennings should not have known that there was a mark in the asphalt from a bullet impact, because detectives had to scour the scene before noticing it.¹¹⁷

Fact: Jennings did *not* notice the mark in the pavement. He spotted a deformed *bullet* sitting on the asphalt and told detectives that he thought it had been fired into the ground, because he did not think it would have bounced off the Mustang.¹¹⁸

At trial, Sgt. Longshore testified that Jennings never mentioned the gouge mark.¹¹⁹ Yet the prosecution repeated the gouge-mark claim in closing argument, and the Court of Appeal listed it as one of the facts that proved Jennings' guilt.¹²⁰

d. Jennings did not know when O'Keefe was dropped off

Prosecution Claim: Jennings knew that O'Keefe arrived at the park-and-ride between 9:20 and 9:25, which proves that he saw her alive.¹²¹

Fact: When detectives interviewed Jennings after the shooting, he did not even know that O'Keefe had been dropped off — much less the time that event occurred.¹²² All of his answers wrongly assumed that O'Keefe had been sitting in her Mustang during his entire shift, causing him to puzzle over why he did not see her earlier when he walked by the vehicle.¹²³

Jennings later learned about O'Keefe's arrival from the investigators, although he was not clear which one told him.¹²⁴ Although he could not reliably remember which officer mentioned the information to him, it was probably Detective Harris or Longshore — who visited Jennings at his home to address the inconsistency between his memory of the Mustang's location and the fact that O'Keefe had moved the vehicle after being dropped off around 9:25.¹²⁵ Jennings was not a suspect, so detectives spoke to him for an hour without recording their conversation.¹²⁶

¹¹⁷ 20RT 7262 (RLJ236).

¹¹⁸ 8RT 3639-3640; Cognitive Interview, p. 1266 (RLJ237- RLJ239).

¹¹⁹ 16RT 6020 (RLJ240).

¹²⁰ 20RT 7313; *People v. Jennings*, 2011 WL 6318468 at *8 (RLJ241; RLJ153).

¹²¹ 20RT 7302 (RLJ242).

¹²² Cognitive Interview, p. 1391 (RLJ243).

¹²³ 15RT 5739; 8RT 3636-3637 (RLJ244- RLJ246).

¹²⁴ 20 RT 7302 (RLJ247).

¹²⁵ 8RT 3628, 3743 (RLJ248- RLJ249).

¹²⁶ 8RT 3628 (RLJ248).

3. Statements that demonstrated Jennings' ignorance of the crime

The contention that Jennings "knew too much" also ignored observations by Jennings about the crime scene that were wholly incorrect. These errors confirmed Jennings' innocence, because he was unaware of basic information that the killer would have known.

a. He mistook the blunt-force trauma for a fatal gunshot wound

Jennings incorrectly identified the wound on O'Keefe's forehead as a fatal gunshot wound, and told investigators that he thought he had seen brain matter from the wound inside the Mustang.¹²⁷ In reality, the wound was not a gunshot wound at all; it was caused by blunt-force trauma.¹²⁸ And Jennings was also wrong about brain matter. There was none in the Mustang.¹²⁹

This exposed another problem with the State's theory of the case: How could Jennings have been wrong about the basic nature of the wound if he had been the assailant who inflicted it? The prosecution's theory was that, when O'Keefe stepped out of the Mustang, Jennings pistol-whipped her and *mistakenly* believed that he felt the gun go off against her forehead.¹³⁰

This theory required the jury to believe that a seven-year veteran of the U.S. military *imagined* that his gun fired — even though there was no sound of a gunshot, no recoil, no muzzle flash, no movement of the slide, and no ejection of the spent casing.¹³¹ And once the killer saw O'Keefe reenter the Mustang and begin driving away, he would have been instantly disabused of the notion that he had just accidentally shot her in the forehead.

b. He described twitching and a pulse, which were medically impossible

A related contention is that Jennings told the investigators that when he first saw O'Keefe in the car, he thought he saw a faint pulse and her hands twitching.¹³² The prosecution's theory was that Jennings could not have seen these things when he first looked into the car roughly fifteen minutes after the shooting. Hence, he was inadvertently describing what he had seen when he had supposedly fired the shots.¹³³

This claim is inconsistent with both the prosecution's timeline of the shooting and with the medical evidence that the prosecution introduced. It was undisputed that the first shot was fired into the ground. The second shot was fired into the chest, and the rest into the victim's head and neck.¹³⁴ Jennings stated that he heard the first shot (i.e., the one fired into the ground), and then

¹²⁷ 17RT 6306-6307 (RLJ250- RLJ251).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ 20RT 7263 (RLJ252).

¹³¹ 12RT 4892-4893 (RLJ253- RLJ253-1).

¹³² Cognitive Interview, pp. 1269-1270, 1310 (RLJ254- RLJ256).

¹³³ 20RT 7288-7289 (RLJ257- RLJ258).

¹³⁴ LASD Doc 3 at 256 (RLJ259).

about 10 seconds later heard the rest of the shots fired in quick succession.¹³⁵ The medical testimony indicated that the shots to the head and neck severed the spinal cord, paralyzing O'Keefe from the neck down.¹³⁶ She would not have shown any visible pulse and movement in her arms would have been impossible, much less her hands.¹³⁷

In short, because of the speed in which the shots were fired after the first shot was made into the ground, whoever fired them would not have seen a pulse or any twitching. Jennings' statement that he thought he saw a faint pulse or a twitching was simply wrong, and not indicative of some kind of "guilty knowledge." Nor was Jennings alone in making this mistake. The EMT on the scene also incorrectly thought that he saw a faint pulse.¹³⁸

This point illustrates how the prosecution would ascribe conduct by Jennings as incriminating, and yet would not draw the same inference when other people exhibited the identical conduct. When Jennings thought he saw a faint pulse, it meant he was the killer; when the EMT thought *she* saw a pulse, the prosecution called that "wishful thinking."¹³⁹

c. He was wrong about the victim's age

Jennings told the investigators that he thought the victim in the car was about 25 to 30 years old.¹⁴⁰ This is consistent with the fact that the only time that he saw O'Keefe was after she had suffered multiple gunshot wounds in the face, so he was unable to ascertain how young she was.

The real killer would have seen her before the shooting, and therefore known that she was a teenager.

d. He was wrong about the victim's height

Jennings was puzzled by his failure to notice O'Keefe's silhouette during his patrol, so he incorrectly opined that she must have been extremely short.¹⁴¹ (In reality, the Mustang had been empty when he walked by it.)

The killer would have known that O'Keefe was 5'6'' — slightly above average for a woman — because she stepped out of the car after her assailant approached her door.¹⁴² Jennings' false belief about her height confirmed that he had never seen her standing up.

¹³⁵ 8RT 3638; 15RT 5742 (RLJ260- RLJ261).

¹³⁶ 13RT 5197-5198 (RLJ262- RLJ263).

¹³⁷ 13RT 5202-5204 (RLJ264- RLJ266).

¹³⁸ 6RT 2562-2563 (RLJ267- RLJ268).

¹³⁹ 20 RT 7289 (RLJ269).

¹⁴⁰ 20RT 7256 (RLJ270).

¹⁴¹ 8RT 3637 (RLJ271).

¹⁴² 4RT 1887 (RLJ272).

B. The evidence indicated that the crime was *not* a sexual assault

1. All of the evidence suggested a robbery — not a sexual assault

The prosecution's theory that Jennings had attempted to sexually assault O'Keefe was based on the testimony of Mark Safarik, a retired FBI profiler. According to the Court of Appeal, Safarik's testimony was "crucial to the prosecution's case because, *without it, there was no evidence* from which the jury might infer the motive or the perpetrator's intent in killing O'Keefe." (*People v. Jennings, supra*, B222959, 2011 WL 6318468, at *11, emphasis added.)

Unfortunately, Safarik's opinion had no evidentiary value, because it was based on "facts" that were untrue:

- Safarik excluded robbery as a motive, because O'Keefe's wallet had not been taken.¹⁴³ In reality, the wallet had fallen into the gap between the right side of the driver's seat and the center console, and therefore would have been very difficult to see in the dark car.¹⁴⁴ And it appeared that the killer had been searching for the wallet, since the glove compartment was open.¹⁴⁵
- Safarik theorized that the crime started as a sexual battery, because he thought that O'Keefe's tube top was pulled down.¹⁴⁶ In reality, the low-cut top was in place, with a portion of her right breast only slightly peeking out.¹⁴⁷ It was so clear that the top had not been pulled down that the prosecution was forced to argue in closing argument that O'Keefe *pulled it back up* to preserve her dignity.¹⁴⁸
- Safarik said that the park-and-ride was not a location where anyone came to hang out or loiter. In reality, Victoria Richardson testified that she and her friends were hanging out in the parking lot, smoking marijuana and listening to music, because security guards rarely patrolled the area.¹⁴⁹
- Safarik claimed no one was seen leaving the scene of the shooting.¹⁵⁰ In reality, Victoria Richardson testified that she saw a white male flee the scene in a black Toyota Tercel, wearing a white t-shirt and a backwards red baseball cap.¹⁵¹

¹⁴³ 17RT 6406-6407 (RLJ273- RLJ274).

¹⁴⁴ 7RT 3433-3434 (RLJ275- RLJ276).

¹⁴⁵ 7RT 3407 (RLJ277).

¹⁴⁶ 17RT 6407-6408 (RLJ278- RLJ279).

¹⁴⁷ 5RT 2226-2227 (RLJ280- RLJ281).

¹⁴⁸ 20RT 7287 (RLJ282).

¹⁴⁹ 6RT 2410(RLJ283).

¹⁵⁰ 17RT 6429 (RLJ284).

¹⁵¹ 6RT 2439-2440 (RLJ285- RLJ286).

Safarik also ignored the most important evidence of motive — i.e., the fact that the suspect stole O’Keefe’s cell phone. Common sense dictates that a perpetrator who steals something of value is a robber or thief — not a rapist.

But if the crime were a robbery, it would have been difficult to pin on Jennings. So the prosecution strained to invent explanations for the missing phone: maybe the victim threw it at her attacker, maybe the killer inadvertently touched it, or maybe it was taken as a trophy.¹⁵²

Safarik worked equally hard to explain the absence of evidence to support his theory. O’Keefe had not been raped, nor was there any evidence of physical contact with Jennings — no saliva or other bodily fluids, no blood, no hair, and no clothing fibers.¹⁵³ Safarik theorized that O’Keefe had resisted, so no intimate physical contact occurred.¹⁵⁴ But there were no defensive wounds on her body, so Safarik opined that O’Keefe must have successfully used “passive resistance” to end the sexual battery.¹⁵⁵

It is clear that Safarik started with his conclusion and then worked backwards to account for the evidence. His theory directly contravened the Crime Classification Manual, a text developed by supervisory special agents at the FBI’s National Center for the Analysis of Violent Crime, which sets forth the standard diagnostic criteria used by criminal profilers.

In court, Safarik testified under oath that there were no characteristics of the crime scene that suggested a robbery — especially because the victim’s money was not taken.¹⁵⁶ In reality, the Crime Classification Manual says that money left behind at a crime scene indicates a situational felony murder — i.e., a robbery in which the offender panics, kills the victim, and then flees.¹⁵⁷

The Manual says other indications of that scenario include:

- Blunt force trauma;
- Contact or near-contact wounds from a firearm; and
- An alarm sounding or some other outside trigger for the killing.¹⁵⁸

All of those factors are present in this case, which strongly suggests a situational felony murder. According to the Manual, the typical offenders would be:

¹⁵² 20RT 7250 (RLJ287).

¹⁵³ *People v. Jennings*, 2011 WL 6318468 at *3 (RLJ150- RLJ151).

¹⁵⁴ 17RT 6439 (RLJ289).

¹⁵⁵ 17RT 6440 (RLJ290).

¹⁵⁶ 17RT 6406 (RLJ291).

¹⁵⁷ Crime Classification Manual (Second Ed.) § 108.02, *Crime Scene Indicators Frequently Noted* (RLJ293).

¹⁵⁸ *Id.*, *Common Forensic Findings* (RLJ293)

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- Youthful and inexperienced;
- In the earlier stages of their criminal career; and
- Abusers of drugs or alcohol.¹⁵⁹

Victoria Richardson and her friends certainly matched those criteria, given that she was a 17-year-old with a criminal record who was getting high in a car with three other people, barely 30 yards from the crime scene.¹⁶⁰ In her social-media posts after the incident, Richardson identifies herself as interested in wanting to date only members of the “Bloods” gang.¹⁶¹ At the time of Jennings’ third trial, she was serving time on weapons possession charges, and she is now serving a new prison term for assault with a deadly weapon.¹⁶²

Safarik himself testified, “it would be incumbent upon the police to go and interview all of the adults that were in that vehicle.”¹⁶³ Yet investigators never even interviewed the other people in her car, despite Safarik admitting that their statements would have been important to his analysis.¹⁶⁴

Richardson’s gang affiliation and criminal record certainly made her and the people in her car at the time of the shooting more plausible suspects than Jennings. The prosecution’s focus on Jennings to the exclusion of Richardson and her passengers is a stark example of investigative tunnel vision — the tendency of investigators to seize on an early piece of evidence that appears to implicate the defendant, and to hold on to their belief in his guilt even as other evidence points to his innocence.

In its chapter on wrongful convictions, the Crime Classification Manual explains investigators can make mistakes in investigations, leading to wrongful convictions, when “when they become afflicted with tunnel vision on one theory of the case and may ignore cautions about the procedures they use.” (Crime Classification Manual (2d Ed. 2006) p. 498.) As I am sure you are aware, social-science research suggests that tunnel vision is a pervasive cause of wrongful convictions. (See, e.g. Findley & Scott, *Tunnel Vision*, Univ. of Wis. Law Rev. (2006).

¹⁵⁹ *Id.*, *Investigative Considerations* (RLJ293- RLJ294).

¹⁶⁰ 6RT 2436, 2410, 2407-2408 (RLJ295- RLJ298).

¹⁶¹ Screen capture from Victoria Richardson Myspace page (RLJ299).

¹⁶² California Criminal Records search for Victoria Richardson (RLJ300- RLJ300-3).

¹⁶³ 17RT 6450 (RLJ301).

¹⁶⁴ 17RT 6365, 6445 (RLJ302- RLJ303).

2. None of Jennings' statements supported the sexual-assault theory
a. There was nothing incriminating about Jennings' theory that the murder arose from prostitution

Investigators tried to tie Jennings to the alleged sexual assault based on the fact that he said he thought O'Keefe was a prostitute.¹⁶⁵ At trial, the prosecution portrayed this as a virtual confession from Jennings that he assaulted O'Keefe because he thought she was a prostitute.¹⁶⁶

In reality, Jennings had simply made a logical observation about the crime scene. When the detectives asked him to speculate about the killer's motive Jennings said that when he approached the car and saw the victim's provocative clothing he assumed that she was a prostitute who had been murdered by one of her clients.¹⁶⁷

Jennings' comment was textbook criminal profiling — not a confession. In fact, Safarik testified that profilers consider whether a victim was a prostitute because prostitutes are often murdered.¹⁶⁸ And he recognized that O'Keefe's outfit could be mistaken for the clothing worn by a prostitute.¹⁶⁹ There was nothing incriminating about Jennings making similar observations at the behest of investigators.

b. Nothing Jennings said demonstrated that he had seen O'Keefe without her clothing

In a civil deposition two years after the murder, Jennings said that he thought that O'Keefe's breasts and shoulders had been exposed when he arrived at the crime scene.¹⁷⁰ In reality, they had been covered — so the prosecution argued that Jennings must have seen them when he was sexually assaulting O'Keefe.¹⁷¹

This theory would have made sense if Jennings had described some feature of O'Keefe's body that only her attacker could have seen, such as a tattoo or a birthmark. But Jennings never mentioned any such incriminating details. He simply misremembered the crime scene, which he had seen two years earlier.

Jennings specifically said that his memory had faded, and he encouraged the lawyers to consult his original interviews if they wanted accurate information.¹⁷² The statements that prosecutors

¹⁶⁵ Cognitive Interview, pp. 1264, 1306 (RLJ304- RLJ305).

¹⁶⁶ 20RT 7244, 7256 (RLJ306- RLJ307).

¹⁶⁷ Cognitive Interview, p. 1306 (RLJ308).

¹⁶⁸ 17RT 6378, 6412 (RLJ309- RLJ310).

¹⁶⁹ 17RT 6438 (RLJ311).

¹⁷⁰ 20RT 7287-7288 (RLJ312- RLJ313).

¹⁷¹ *Id.*

¹⁷² Cognitive Interview, p. 1377 (RLJ314).

relied on were not even about Jennings' independent recollection of the crime scene, but rather his memory of the photos of O'Keefe's body that he had been shown by detectives.¹⁷³

C. The evidence indicated that the killer did *not* have military training

The prosecution claimed that the murder was committed in a manner indicative of military training. In reality, the evidence indicated that the killer was probably an amateur who lacked any skill or training with firearms.

1. The killer accidentally shot the first bullet into the ground

The prosecution argued that the shooting was committed by someone who was highly skilled with firearms, such as someone like Jennings, who had years of military training.¹⁷⁴ Yet the killer accidentally discharged his pistol while it was pointed at the ground. This lack of "trigger discipline" is the hallmark of amateurs who lack firearms training. They instinctively place their index finger on the trigger of the gun, and then something causes them to feel tense and tighten their grip — which pulls the trigger back and fires the weapon.¹⁷⁵

This was not a mistake that Jennings would have made. At the time of the shooting, he was a seven-year veteran of the U.S. military¹⁷⁶ who had extensive experience carrying a pistol.¹⁷⁷ Soldiers are specifically taught to avoid negligent discharges by keeping their index fingers outside of their weapon's trigger guard until they are ready to fire. Whoever killed O'Keefe clearly lacked that training.

2. The way the ammunition was loaded did not suggest military training

The prosecution asserted that the killer's use of two different kinds of ammunition demonstrated military training.¹⁷⁸ In reality, it showed that the killer was someone who lacked the resources or expertise to properly load his pistol.

The first two rounds in the magazine were hollow-point rounds — which flare upon impact.¹⁷⁹ The other three were full-metal-jacket rounds — which have less stopping power.¹⁸⁰ The prosecution claimed that Jennings had learned to use this combination of ammunition in the military for maximum tactical effectiveness.¹⁸¹ But the firearms examiner from the Sheriff's

¹⁷³ 16RT 6043-6044 (RLJ315- RLJ316).

¹⁷⁴ 20RT 7560 (RLJ317).

¹⁷⁵ "Trigger discipline" is one of the fundamental skills taught in basic firearms safety courses.

See, e.g., NRA Basic Pistol Shooting course, <http://shootingsafellc.com/basic-pistol.php>.

¹⁷⁶ 4RT 1514, 1515 (RLJ318- RLJ319).

¹⁷⁷ 18RT 6641-6642, 8RT 3641-3642 (RLJ320- RLJ323).

¹⁷⁸ 20RT 7284 (RLJ324).

¹⁷⁹ 12RT 4904-4905 (RLJ325-RLJ326).

¹⁸⁰ *Id.*; 13RT 5135-5136 (RLJ327, RLJ329).

¹⁸¹ 20RT 7284-7285 (RLJ231, RLJ328).

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Department testified that he regularly sees a mix of ammunitions recovered from a crime scene.¹⁸² Furthermore, the military did not teach soldiers to load a combination of hollow-point and jacketed rounds because, until 2015, the military did not use hollow-point rounds. They were outlawed by the Hague Convention of 1899. (Declaration (IV, 3) concerning Expanding Bullets, The Hague, 29 July 1899.) This ban was lifted only this year.

Nor did the testimony from the prosecution's firearms expert support this theory. He testified that he would only use full-metal-jacket ammunition for teaching and grading shooting proficiency, and referred to them as "practice rounds."¹⁸³

The prosecution tried to obscure this fact by asking the firearms expert a hypothetical: *If* he only had two hollow-point rounds and three full-metal-jacket rounds, what order would he load them in? The expert said he would load the full-metal jacket rounds at the bottom of the magazine, because in a firefight the only ammunition he would want to use was hollow-point.¹⁸⁴

If the killer had tactical training, he would have loaded the entire magazine with hollow-point ammunition. In California, anyone who is over 18-years-old can walk into a store and purchase a box of hollow-point rounds. The fact that the killer had to mix in full-metal-jacket rounds suggests a juvenile with limited access to ammunition.

The same theory was used to solve the 1997 murder of pizza deliveryman Robert Lexa in Palm Beach, Florida. The killer had fired both hollow-point and full-metal-jacket rounds from the same gun, so FBI-trained criminal profiler Dayle Hinman accurately surmised that the murderer was a juvenile. She explained, "The fact that there were two different kinds of bullets in the gun suggested that the killer was either youthful or that he had randomly obtained bullets from any source that he could." She was proved correct when a 15-year-old confessed to the murder.¹⁸⁵

Hinman's success illustrates a deeper flaw in the prosecution's theory. If the *same evidence* can relied on to suggest either that the killer was highly skilled, *or* an untrained amateur, that evidence cannot reliably show at trial that a particular defendant committed the crime.

¹⁸² 13RT 5136-5137 (RLJ329- RLJ330).

¹⁸³ 14RT 5481 (RLJ331).

¹⁸⁴ 14RT 5483, 5484 (RLJ332- RLJ333).

¹⁸⁵ Hinman's work on the Lexa murder was detailed in her television show, *Body of Evidence: From the Case Files of Dayle Hinman*, air date: March 15, 2010. A transcript of the show, including Hinman's explanation of the significance of the ammunition, is available at http://tv.ark.com/transcript/body_of_evidence__from_the_case_files_of_dayle_hinman-%28deadly_delivery%29/5712/TRUTVP/Monday_March_15_2010/250514/.

3. The shots were fired from point-blank range, so they did not require great skill

The prosecution claimed that training and practice was required to inflict the head wounds that O'Keefe suffered because she was a moving target as the Mustang rolled backwards. But the prosecution's own medical experts testified that the shots were fired from less than 3 feet away.¹⁸⁶ And the prosecution's firearms expert conceded that someone who had never fired a gun before could have made the shots.¹⁸⁷

4. The location of O'Keefe's wounds did not indicate military training

The prosecution claimed that the sequence of one shot into the torso and three in the head demonstrated tactical proficiency consistent with military training. But once again, the actual testimony of their firearms expert did not support that theory.

The expert was never asked whether he believed that the sequence of shots suggested some degree of tactical expertise. Instead, he provided an abstract description of where on the human body soldiers are taught to aim their pistols. He said that the head is known to be the most lethal target, but that it is difficult to hit from a distance, so soldiers are taught to aim at the torso.¹⁸⁸ They are only supposed to aim for the head if their adversary is wearing body armor that makes the initial shots to the torso ineffective.¹⁸⁹

O'Keefe's killer did not employ those tactical principles. After firing the first shot into the ground, the next shot was fired with the weapon pressed against her body.¹⁹⁰ At point-blank range, a trained soldier would have known to fire into the head for maximal lethality.¹⁹¹ Instead, the killer stuck the weapon into the victim's torso, inflicting a potentially survivable wound. And O'Keefe obviously was not wearing body armor, so the progression from torso to head did not demonstrate any tactical insight.

D. Jennings' account of the incident was never discredited

1. Jennings' account of his movements remained consistent

The prosecution claimed that there were inconsistencies in Jennings' story that demonstrated he was lying.¹⁹² In reality, Jennings' story was remarkably consistent. But because he could not remember the *exact time* he finished his patrol, the prosecution branded him a liar.

¹⁸⁶ 4RT 1821, 1868 (RLJ334- RLJ335).

¹⁸⁷ 14RT 5490 (RLJ336).

¹⁸⁸ 14RT 5479-5480 (RLJ337- RLJ338).

¹⁸⁹ 14RT 5481 (RLJ339).

¹⁹⁰ 13RT 5188 (RLJ340).

¹⁹¹ 14RT 5480 (RLJ341).

¹⁹² 20RT 7317 (RLJ342).

When he was first interviewed, Jennings said that he began his patrol by walking around the south perimeter of the lot, then the west perimeter, and then once he reached the northernmost driveway he began walking eastbound, back in the direction of his vehicle.¹⁹³ He thought he remembered seeing the Mustang around 9:00 p.m. and then spent about 30 minutes slowly walking up the hill to his car.¹⁹⁴

At least, that was what detectives thought Jennings had told them. When they re-interviewed him two months later, he clarified that his estimate of “30 minutes” referred to his entire patrol — not merely the portion after he saw the Mustang.¹⁹⁵ Having learned that the vehicle was actually parked further east than he remembered, Jennings estimated that he passed it around 9:20 or 9:25.¹⁹⁶ Then two years later, during his civil deposition, Jennings estimated that he finished his patrol around 9:15.¹⁹⁷

Those are the “inconsistencies” the prosecution relied on to accuse Jennings of murder. Because he had been wearing a watch, the prosecutor argued that he should have known the exact times that things occurred.¹⁹⁸ That was not a reasonable demand, because human beings rarely have the ability to indefinitely recall the precise timing of traumatic events. Nothing about the minor variations in Jennings’ memory suggested that he was lying.

Nor did Victoria Richardson say anything that contradicted Jennings’ account of his movements. The Court of Appeal’s opinion says that Richardson testified that she saw Jennings walk by her car immediately before the shooting. This is inaccurate. Richardson struggled to remember her conversation with Detective Harris, and ultimately testified that she saw Jennings walk by at *some* point earlier in the evening.¹⁹⁹ That was consistent with the path that Jennings described to detectives. Nothing Richardson said placed Jennings near the Mustang at the time of the shooting.

2. The evidence supported Jennings’ claim that he could not see the shooter

One of the points that the prosecution pressed hardest was that Jennings should have seen the shooter because he had an unobstructed view of the parking lot.²⁰⁰ In other words, because he did not see the shooter, he must be the shooter.²⁰¹

¹⁹³ 15RT 5738 (RLJ343).

¹⁹⁴ 15RT 5739-5740 (RLJ344- RLJ345).

¹⁹⁵ Cognitive Interview 1312-1313 (RLJ346- RLJ347).

¹⁹⁶ *Id.*

¹⁹⁷ Jennings Depo. Vol. 1, p. 77 (RLJ348).

¹⁹⁸ 20RT 7300 (RLJ349).

¹⁹⁹ 6RT 2411-2412, 2449 (RLJ350- RLJ351, RLJ197).

²⁰⁰ 20RT 7314, 7315 (RLJ354- RLJ355).

²⁰¹ *Id.*, at 7315 (“The reason he didn’t see it is because he is shooting.”) (RLJ355).

This contention was illogical and at odds with the facts, because there were a host of reasons why Jennings might not have seen the shooter.

When Jennings heard the shots, the Mustang was in a dimly lit parking spot over 400 feet away.²⁰² Jennings' view was blocked by a large white passenger van, which was parked next to the Mustang.²⁰³ He said that he never saw the shooter, because the shooter never stepped out from behind the van.

The prosecution tried to show that the killer had walked into plain view. But it failed.

First, it called an expert in bullet trajectories, who was able to establish the position of the pistol relative to the Mustang.²⁰⁴ But that information was useless without knowing how far the Mustang had rolled when the shots were fired. On cross-examination, the expert admitted that she could not determine where in the parking lot the shooter had been standing.²⁰⁵

Second, the prosecutor argued that the jury should assume that when the shooting started, the killer was standing at the point where the gouge mark was left in the asphalt.²⁰⁶ That was an unreasonable assumption, because the killer probably did not shoot directly downwards into the spot between his feet. Without knowing the trajectory of the bullet that caused the gouge mark, it was impossible to use the mark to derive the shooter's position.

Even if the shooter momentarily stepped out from behind the van, Jennings easily could have missed him, because Jennings is near-sighted and had poor night vision.²⁰⁷ This was confirmed by the testimony at trial of his squad leader in Iraq, who testified that Jennings had to wear glasses or contact lenses on any combat-type mission.²⁰⁸ On the night of the shooting, Jennings was not wearing glasses or contacts.²⁰⁹

Moreover, when he first heard the shots Jennings crouched behind his car for cover, and then poked his head above the car later to see if he could get a glimpse of what was happening, while fumbling with his radio.²¹⁰ The whole series of events occurred in a matter of seconds, during which Jennings was understandably fearful and lost all sense of time.²¹¹

²⁰² 9RT 3929-3930 (RLJ356- RLJ357).

²⁰³ 9RT 3919-3920 (RLJ358- RLJ359).

²⁰⁴ 12RT 4844-4845 (RLJ360- RLJ361).

²⁰⁵ 12RT 4879 (RLJ362).

²⁰⁶ 20RT 7555-7556 (RLJ363- RLJ364).

²⁰⁷ Cognitive Interview, p. 1363 (RLJ365).

²⁰⁸ 18RT 6651-6652 (RLJ366- RLJ367).

²⁰⁹ 5RT 2180; Cognitive Interview, p. 1363 (RLJ368- RLJ369).

²¹⁰ 8RT 3638-3639 (RLJ370- RLJ371).

²¹¹ Cognitive Interview, pp. 1280-1282, 1365 (RLJ372- RLJ375).

Given these circumstances, the fact that Jennings did not report seeing a shooter supports only one reasonable inference: that he was not willing to make up a lie about seeing a shooter. This is an exculpatory fact, not one that incriminates Jennings.

By contrast, inferences about what a person “should” have seen in a given circumstance are necessarily speculative, given the well-documented frailties of human perception, particularly when under stress. Eyewitness testimony is frequently unreliable. An attempt to infer guilt from a witness’s failure to see something at a crime scene based on the assertion of what the person “should” have seen is, at best, highly speculative, and fails to satisfy the rigorous standard of CalCrim instruction 225 concerning the use of circumstantial evidence in criminal prosecutions.

3. Jennings knew the Mustang was running, because he heard it start

The prosecution argued that Jennings must have been close to the Mustang when the shooting occurred, because Jennings knew that the Mustang was running when Iris Malone arrived at the scene.²¹² The prosecutor claimed that it would have been impossible for Jennings to hear the Mustang running from his vantage point, based on testimony from detectives who stood at that position and were unable to hear a car idling at the scene of the shooting.²¹³

This test proved nothing, because Jennings heard O’Keefe *start* the Mustang — which obviously produces a louder sound than an idling engine. The fact that Jennings heard the roar of the engine suggests that O’Keefe slammed on the accelerator in her haste to escape her attacker, causing the engine to rev while the car was in neutral.²¹⁴ And even if Jennings had not heard the engine, he still would have been able to infer that the car had been started when the alarm stopped sounding at the same moment that the headlights turned on and the vehicle began to move out of the parking space.

4. Jennings’ behavior was consistent with his fear of the shooter

The prosecution argued that Jennings’ initial refusal to accompany Iris Malone to the scene of the shooting demonstrated that he murdered O’Keefe. It claimed that Jennings hung back because he was afraid that O’Keefe might still be alive and able to identify him as her killer.²¹⁵

In reality, Jennings did exactly what an unarmed security guard is supposed to do: observe, report, and wait for police.²¹⁶ The person who acted inappropriately was Malone, who made a terrible mistake by charging into the area where the armed killer was last seen. She was lucky to escape with her life, and Jennings cannot be faulted for his refusal to join in her reckless endeavor.

²¹² 20RT 7272 (RLJ376).

²¹³ 6RT 2468-2470; 15RT 5773 (RLJ377- RLJ380).

²¹⁴ Cognitive Interview, p. 1280 (RLJ372).

²¹⁵ 20RT 7308 (RLJ381).

²¹⁶ Cognitive Interview, p. 1423 (RLJ382).

The prosecution argued that Jennings could not really have been in fear for his life, because after Malone radioed him from the Mustang he walked to the crime scene without taking “tactical” action or cover.²¹⁷ But Jennings’ behavior made perfect sense. Before Malone reached the crime scene he was afraid the shooter might still be lurking near the Mustang. Once she drove down and illuminated the area with the spotlight on her vehicle, it was clear that the shooter had left, so Jennings agreed to walk to her location.²¹⁸

There are three flaws in the prosecution’s version of events. First, if Jennings was O’Keefe’s killer, he would have known that she was dead — because 10 minutes earlier she had been executed with three shots to the head. Second, if Jennings had been afraid that O’Keefe was alive, he would have tried to stop *anyone* from approaching the Mustang, because in order to implicate him O’Keefe merely needed to say “security guard.” Third, if Jennings was afraid of being identified, he would not have voluntarily walked down to the Mustang just five minutes after he initially declined to accompany Malone.

5. Jennings never withheld information from investigators

The prosecution argued that it was significant that Jennings initially told the detectives that he did not see anyone leave the parking lot after the shooting, even though it was later established that a female driver in a sedan with three passengers briefly stopped and asked him what happened.²¹⁹ That woman was later identified as Victoria Richardson.

The prosecution theorized that Jennings’ deliberately withheld the information about the encounter with Richardson to hamper the investigation.²²⁰ But Malone also witnessed Richardson’s sedan exit the parking lot, and she failed to mention it to investigators.²²¹ This suggests that detectives were asking the wrong questions or that they misinterpreted Malone and Jennings’ answers.

One possibility is that Jennings was only talking about what he witnessed immediately after the shooting. During his recorded interviews and depositions, Jennings said multiple times that he did not see anyone leave the parking lot after the shooting — and in each instance, it is clear that he is only referencing the ten-minute period before Malone arrived.

Detectives probably misunderstood what Jennings meant when he said the same thing on the night of the shooting. They did not ask him to list everything that happened to him that night, so it is not as if he omitted the encounter from a narrative that he told them. As soon as they asked him about whether he talked to anyone in the parking lot, he gave them all the details about his

²¹⁷ 20RT 7309 (RLJ383).

²¹⁸ 5RT 2174-2175 (RLJ384- RLJ385).

²¹⁹ 18RT 7291-7292 (RLJ386- RLJ387).

²²⁰ *Id.*

²²¹ 5RT 2186-2187; 6RT 2517-2518 (RLJ388- RLJ391).

encounter with Richardson.²²² If he had been trying to hide something, he would not have been so forthcoming and cooperative.

6. Jennings did not fabricate suspects

Although the prosecution faulted Jennings for failing to mention his interaction with Richardson, it also faulted him when he did volunteer information.

A few days after the shooting, two men in a pickup truck approached him in the parking lot and asked him probing questions about the incident,²²³ Jennings felt uncomfortable, so he lied to the men and said another guard had been on duty when the shooting occurred.²²⁴ He radioed in the encounter, and spoke to a deputy, whom he provided with a partial license-plate number for the truck.²²⁵ Jennings said that the deputy later returned and told Jennings that his interrogators had just been some harmless, nosy kids.²²⁶

The prosecution argued that this entire account was a fiction, because there were no records of Jennings making a report to the Sheriff's Department.²²⁷ The prosecution theorized that Jennings fabricated the story to misdirect detectives into believing that the two males in the red pickup might have been involved in O'Keefe's murder.²²⁸

This accusation makes no sense: If Jennings wanted to give detectives a false lead to investigate, why would he tell them that the Sheriff's Department had already determined that the red pickup had nothing to do with the murder? And why would he lie about contacting the Sheriff's Department, instead of simply calling them and providing the false information?

The answer is that the encounter was real.

During his first two trials, Jennings was able to call a Sheriff's Department employee who corroborated his story. She explained that she had seen a "hot sheet" about the suspicious red pickup.²²⁹ At the third trial, Jennings' state-appointed counsel failed to call this witness, because he incorrectly believed that he would be permitted to elicit the same information from one of the Sheriff's detectives. The judge sustained a hearsay objection to that line of questioning, so the jury in the third trial never heard about the hot sheet.²³⁰

²²² 8RT 3631-3632; 9RT 3928 (RLJ392- RLJ394).

²²³ 15RT 5758; 16RT 6068 (RLJ395- RLJ396).

²²⁴ Cognitive Interview, p. 1419 (RLJ397).

²²⁵ Cognitive Interview, pp. 1379-1380 (RLJ398- RLJ399).

²²⁶ Cognitive Interview, p. 1399 (RLJ400).

²²⁷ 20RT 7316 (RLJ401).

²²⁸ 20RT 7294 (RLJ402).

²²⁹ 17RT 6358-6361 (RLJ403- RLJ406).

²³⁰ *Id.*

And if Jennings had actually wanted to mislead the investigators, he would have made up a generic description of the shooter.

7. Jennings' failure to carry his flashlight was not incriminating

Jennings was not carrying his flashlight when Malone arrived,²³¹ so the prosecution claimed that he used the flashlight to inflict the blunt-force wound on O'Keefe's forehead and was then forced to conceal the evidence.²³² There are numerous problems with this theory.

First, it is likely that O'Keefe was struck with the 9mm pistol used to shoot her — not a flashlight. The prosecutor admitted as much in closing argument when he said that Jennings must have thought his gun went off at the moment that he used it to strike O'Keefe in the forehead.²³³ The wound itself was consistent with being pistol whipped, and it was never clear why an assailant armed with a gun would resort to using a flashlight as a weapon. Only someone with three hands could hold the pistol and the flashlight while simultaneously pulling down O'Keefe's top, as the prosecution claimed.

It was normal for Jennings not to carry the flashlight on patrol. Guards were not even issued flashlights; Jennings had simply chosen to bring one from home.²³⁴ Most regions of the parking lot were fairly well lit, so he left the flashlight in his car.²³⁵ Nor was this a departure from his "habits," since it was only his second day of work at the parking lot.

8. Jennings' gloves did not tie him to the crime

The prosecution claimed that, after shooting O'Keefe, Jennings removed the outer shells of his gloves so that police would not test them for gunshot residue. There was no reliable evidence to support this theory.

Jennings said that he removed the exterior shells when he was sitting inside a warm police car with Deputy Cox, exposing the wool inserts he was wearing underneath.²³⁶ Cox said that he remembered Jennings wearing the wool inserts before he got in the cruiser.²³⁷ But Cox's recollection of that night was proven unreliable when he misremembered that Jennings was using a flashlight to examine the scene when he arrived. Specifically, Malone testified that the only time the Jennings used a flashlight at the scene was when he borrowed Malone's and then gave it back to her — which occurred before Cox arrived.²³⁸

²³¹ 5RT 2180 (RLJ407).

²³² 20RT 7295-7296 (RLJ408- RLJ409).

²³³ 20RT 7263 (RLJ410).

²³⁴ 5RT 2166 (RLJ411).

²³⁵ 9RT 3913; Cognitive Interview, p. 1318 (RLJ412- RLJ413).

²³⁶ Cognitive Interview, p. 1395 (RLJ414).

²³⁷ 6RT 2461 (RLJ414-1).

²³⁸ 5RT 2180, 2184; 2204 (RLJ415- RLJ417).

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At the time, Cox had no reason to focus on what kind of gloves Jennings was wearing. That issue was not even raised until years after the incident. No one other than Cox remembered anything about Jennings' gloves. It stretches credibility to believe that Cox remembered not just *that* Jennings had been wearing gloves, but *which material* the gloves were made of, as well as *precisely when* he saw them.

The prosecution's theory also involved unreasonable assumptions about the motivations for Jennings' behavior. Jennings was wearing his security jacket, so removing the exterior of his gloves would not have prevented police from detecting the presence of gunshot residue on his clothing. Of course, there was, in fact, no evidence of any gunshot residue.

CONCLUSION

The State's case against Ray Jennings was implausible from the start. It posited that a married family man who enlisted in the National Guard at 17, and who had no prior criminal history, would bring an illegal handgun to work and would try to accost a stranger because of how she was dressed. It required the jury to believe that Jennings panicked so severely when Michelle O'Keefe rebuffed him that he repeatedly shot her, and yet was preternaturally calm after the shooting as he called his supervisor and spoke to the investigating officers. It required the jury to ignore the absence of direct evidence to link Jennings to the crime, and to ignore physical evidence that proved he had not fired a gun on the night of the shooting. And it required the jury to accept strained web of circumstantial inferences, none of which had factual support, and all of which were contrary to the physical evidence.

The only way that Jennings's conviction makes sense is if the jury took Mr. Blake's misstatement of the law to heart, and presumed that Jennings was guilty simply because he was in the parking lot when Michelle O'Keefe was shot.

The Crime Classification Manual's chapter on Wrongful Convictions ends with this paragraph, which explains why conviction-integrity units are necessary:

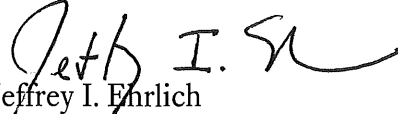
Sometimes law enforcement authorities, believing they have the right person, will do anything to obtain a conviction. In some of the cases cited in this chapter, as well as many other exoneration cases, authorities still maintain they had the right person in the face of overwhelming evidence to the contrary. But rationalizing, playing with the facts, or lying in the name of justice cannot be condoned and can lead to unintended consequences that may tarnish the name of law enforcement and the sanctity of the justice system. An innocent person imprisoned for a crime he or she did not commit used to be the stuff of novels and dramas. As technology advances, it is the reality of the twenty-first century, and it is up to law enforcement authorities to prevent it. (Crime Control Manual, p. 508.)

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Even in Los Angeles, innocent people are sometimes convicted of serious crimes, which is why the Conviction Review Unit was created. Ray Jennings is one of those people. Please, help him.

Respectfully yours,

THE EHRLICH LAW FIRM


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Counsel for Raymond Jennings