"We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. . . ." Id., 517-18.

The court did, however, leave open the possibility that such a showing might be made in some future case. Id., 520(n.18).

This Court, subsequent to Witherspoon and several months prior to appellant's trial, denied the petitioners' motion for an evidentiary hearing regarding the foregoing claim in In re Anderson, supra, 69 Cal. 2d 613, noting that the pending studies were of a "'sociological or psychological nature'" and that therefore the "'prospect is remote'" that pending studies "'will yield views of human behavior of such incontestable, eternal truth that existing constitutional doctrines will have to retreat before them. Such studies hold too little promise to warrant what would amount to an indeterminate stay of the judicial process in a critical area.'" Id., 621.

Respondent would add moreover that by their very nature as sociological assertions, appellant's arguments would more properly be directed to the Legislature than to the courts.

Significantly, the evidence proffered by appellant was before the United States Supreme Court in Witherspoon and was rejected as insufficient to establish the point presently urged. Appellant's offer of proof was that "the testimony of this witness Zeisel would be in substance as is set forth in the document that I now hold in my hand . . . . The document is entitled, "'Some Data on Juror Attitudes Toward Capital Punishment."'" (Rep. Tr. p. 8970.) The described study was marked as Defendant's Exhibit VV for identification. (Rep. Tr. p. 8971.) At page vi of the Introduction to the study, it is stated that an earlier draft "was used by defense counsel in their briefs in Witherspoon v. Illinois and Bumper v. North Carolina, both now awaiting hearing in the United States Supreme Court." At page vii it is stated that the study "has been expedited in its publication in the hope that it may prove useful to the litigants in the two Supreme Court cases referred to." Moreover the study's

references, perhaps somewhat out-of-date, are to California Polls and Gallup Polls of 1960, 1965, and 1966, and a California Poll of 1967. (Exh. VV, pp. 12, 14-15, 17, 21-23.)

See Witherspoon v. Illinois, supra at 517(n.10).

Respondent submits that the passing of time has not endowed the foregoing material with any more persuasiveness than it had in 1968, when its conclusions were rejected by the United States Supreme Court in Witherspoon.

See also Bumper v. North Carolina, supra, 391 U.S. 543, 545;

People v. Terry, 2 Cal. 3d 362, 382;

In re Eli, 71 Cal. 2d 214, 218, cert. denied, 396 U.S. 1020;

In re Arguello, 71 Cal. 2d 13, 16-17;

People v. Beivelman, 70 Cal. 2d 60, 78-80;

People v. Gonzales, 66 Cal. 2d 482, 498-99;

People v. Nicolaus, supra, 65 Cal. 2d 866, 882.

VII

APPELLANT'S PUNISHMENT WAS NOT FIXED AT DEATH BY A JURY FROM WHICH PROSPECTIVE JURORS WERE IMPROPERLY EXCLUDED BECAUSE OF THEIR VIEWS ON CAPITAL PUNISHMENT

Appellant contends that he is entitled to a new trial on the matter of penalty because his punishment was fixed at death by a jury from which prospective jurors were improperly excluded because of their views on capital punishment. Appellant bases his claim of error on the trial court's excusal for cause of one prospective juror and five prospective alternate jurors[35/] in alleged violation of the principles set forth in Witherspoon v. Illinois, supra, 391 U.S. 510, 522-23 (App. Op. Br. pp. 553, 555-56), and on the "prosecution's use of peremptory challenges to remove veniremen who under Witherspoon would be improperly excused for cause." (App. Op. Br. p. 570.)

Respondent submits that examination of the

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35/ The excusal of alternates must be considered since two alternates ultimately served on the jury which convicted appellant and fixed his punishment. (Rep. Tr. pp. 7369-70, 8719-20, 8739, 8840-41.) See People v. Bandhauer, 1 Cal. 3d 609, 617-18.

voir dire of the prospective juror and alternates in question establishes that appellant's contentions are without merit.

Prospective Juror Alvidrez was asked, "Are you telling me that it is impossible for you to think of any set of facts that would, in accordance with your conscience, enable you to vote for a guilty verdict wherein you knew there was a possibility that a death verdict might follow?" She responded, "A guilty verdict, yes, a penalty, no." Asked, "But you could not vote for a death penalty in the penalty phase of a trial?", she responded that she "could not." She responded further that she could "conceive of no set of facts" enabling her to do so and that "there is no possible crime of murder where [she] could ever vote for a verdict of death" "under any circumstances at all."[36/]

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36/ The five prospective alternates likewise were properly excluded under Witherspoon. Prospective alternate Lewis would be unable to find a defendant guilty even if the evidence justified a finding of guilt. She would "automatically refuse to impose" the death penalty "regardless of any evidence that might be developed during the trial." (Rep. Tr. pp. 2495-97.) Prospective alternate Katrenich "automatically" could not "inflict the death penalty" "[r]egardless of the evidence" and under "no set of facts and under no circumstances, no matter how horrible." (Rep. Tr. p. 2532.) Prospective alternate Lipson stated he

(Rep. Tr. pp. 903-05.)

The trial court, in the course of jury voir dire conducted several months after Witherspoon, properly excused the juror and prospective jurors in question after they "made unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial

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would "automatically refuse to vote for a death penalty, . . . notwithstanding the evidence." He could "conceive of no case, no set of facts . . . so terrible" as to enable him to vote for the death penalty. (Rep. Tr. p. 2696.) Prospective alternate Hart stated her "strong reservations against the death penalty" and noted that she therefore could not vote for a guilty verdict. Then asked, "No matter how terrible the facts are, how horrendous they are, how awful they are, you could not under any circumstances vote for guilt?", she responded, "I have strong convictions." (Rep. Tr. pp. 2767-68.) Prospective alternate Acuma was asked, "do you entertain such conscientious opinions concerning the death penalty that you would be unable to find a defendant guilty if the evidence should justify such a finding of guilty." He replied, "I wouldn't be able to, with a clear conscience, to find a guilty verdict," "no matter what the facts were, no matter how terrible, how horrendous." Mr. Acuma then stated that he could sit on the first phase of the trial but that he did not "believe" there were any "circumstances under which [he] could conceivably vote the death penalty." (Rep. Tr. pp. 2788-89.)

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of the case before them." (Emphasis by the court.)

Witherspoon v. Illinois, supra at 522(n.21).

See also People v. Terry, supra, 2 Cal. 3d 362, 379-80;

People v. Floyd, 1 Cal. 3d 694, 723-27;

People v. Miller, 71 Cal. 2d 459, 468-71;

People v. Mabry, 71 Cal. 2d 430, 444-45;

People v. Tolbert, 70 Cal. 2d 790, 808-11;

People v. Hill, 70 Cal. 2d 678, 701 & n.3.

Appellant's contention that the prosecution was not free to exercise its peremptory challenges as it saw fit is clearly without merit. This Court will not "engage in conjecture regarding the prosecutor's reasons for exercising some of his peremptory challenges to excuse some jurors who had reservations concerning the death penalty."

People v. Floyd, supra, 1 Cal. 3d 694, 727.

The United States Supreme Court also expressed a similar conclusion in Swain v. Alabama, supra, 380 U.S. 202, refusing to

". . . hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any

particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court. . . ." Id., 222. See also Groppi v. Wisconsin, 400 U.S. 505, 510.

## VIII

### THE TRIAL COURT DID NOT ERR IN EXCLUDING, AT THE PENALTY PHASE, TESTIMONY CONCERNING THE ARAB-ISRAELI CONFLICT

Appellant contends that the trial court erred in excluding testimony "relative to the social, historical, economic, and political dimensions of the Arab-Israeli conflict during the Sirhan childhood in Palestine." (App. Op. Br. p. 636; see Rep. Tr. pp. 8856-58, 8873-75.)

Respondent submits that the offered evidence was totally irrelevant to the jury's determination of penalty in the present proceedings because, as defense counsel conceded at trial, it in no way involved appellant's personal experience. (Rep. Tr. p. 8874.) To be contrasted is the abundant evidence of appellant's life in Jerusalem which was put in evidence by

the defense at the guilt phase and never controverted by the prosecution.

In an analogous situation this Court in People v. Nye, 71 Cal. 2d 356, upheld the trial court's refusal to admit in evidence a motion picture relating to the defendant's earlier years. The Court held,

> "Had the film been even to a partial degree an accurate portrayal of defendant's adolescent years, the trial court undoubtedly would have allowed it to be shown to the jury. However, . . . the film does not even attempt to portray defendant's activities at the ranch. Rather, it was a staged and contrived presentation, in which . . . defendant . . . plays the part of a boy at the ranch . . . . Under the circumstances, it was irrelevant and immaterial on the issue of penalty, and the trial court properly excluded it." Id., 371-72.

The Court in Nye "noted that the scope of admissible evidence under section 190.1 of the Penal Code is not so broad as to allow the introduction into evidence of anything no matter how

remote its relation to the defendant's background." Id., 372. The Court also upheld the exclusion of a portion of a court-martial report as inadmissible hearsay. Id.

See also People v. Mitchell, 63 Cal. 2d 805, 814-15, cert. denied, 384 U.S. 1007.

Respondent submits that the aforementioned evidence proffered by the defense at the penalty proceedings below was properly excluded as irrelevant and immaterial on the sole issue before the jury, the proper punishment to be imposed.[37/]

IX

THE ABSENCE OF FIXED STANDARDS TO GUIDE THE JURY ON THE MATTER OF PENALTY—IS NOT UNCONSTITUTIONAL

Appellant contends that the absence of fixed standards to guide the jury in deciding between the

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37/ The trial court's equitable position in ruling on the relevance of proffered evidence is illustrated by the court's also excluding from evidence (at the guilt phase) the prosecution's motion picture of Senator Kennedy's final speech delivered moments before the Senator was assassinated by appellant. (Rep. Tr. pp. 7355-61.)

death penalty and life imprisonment denied appellant due process of law and equal protection of the laws under the Fourteenth Amendment. (App. Op. Br. p. 607.)

The argument advanced by appellant was rejected by this Court in In re Anderson, supra, 69 Cal. 2d 613, 621-28, and this year by the United States Supreme Court in McGautha v. California, ___ U.S. ___, 39 U.S.L.W. ____ (decided May 3, 1971).

X

THE DEATH PENALTY IS NEITHER CRUEL NOR UNUSUAL PUNISHMENT

Appellant contends that "the death penalty is so fortuitous and unrelated to culpability that it offends the Eighth Amendment's proscription of cruel and unusual punishment." (App. Op. Br. p. 635.)

This argument has been rejected repeatedly by the courts, and appellant has advanced no argument or authority which could cause this Court to abandon its prior pronouncements on the subject.

In re Anderson, supra, 69 Cal. 2d 613, 629-32.
See also Trop v. Dulles, 356 U.S. 86, 99;
In re Kemmler, 136 U.S. 436, 447.

XI

THIS COURT SHOULD REFUSE, AS IT HAS IN ALL PAST CASES, TO RE-DETERMINE THE PUNISHMENT IN A CAPITAL CASE

Appellant contends that this Court should substitute its judgment for that of the trier of fact and reduce his punishment to life imprisonment. (App. Op. Br. p. 411.)

"This court has uniformly rejected requests to reduce the penalty from death to life imprisonment," People v. Lookadoo, 66 Cal. 2d 307, 327, holding that "it has no power to substitute its judgment as to choice of penalty for that of the trier of fact."

In re Anderson, supra, 69 Cal. 2d 613, 623.

Respondent submits that the aggravated circumstances of the present offense, involving as it does a calculated political assassination, lack of remorse on appellant's part, and appellant's superior educational and intellectual background, hardly suggest this case as a vehicle for abandoning this Court's commendable policy of deference to the decision of the trier of fact on the matter of punishment in a capital case. It is difficult to imagine a less deserving object of mercy than an assassin who has expressed his desire to be

"recorded by history" as the individual who "triggered" World War III. (Rep. Tr. pp. 4987-90.) The jury as trier of fact, and the trial court on motion for new trial and for reduction of punishment (Rep. Tr. p. 9048), determined that justice would best be served by imposition of the death penalty in this case, and respondent submits that there is no reason to disturb this determination.

## CONCLUSION

For the foregoing reasons the judgment should be affirmed in its entirety.

Respectfully submitted,

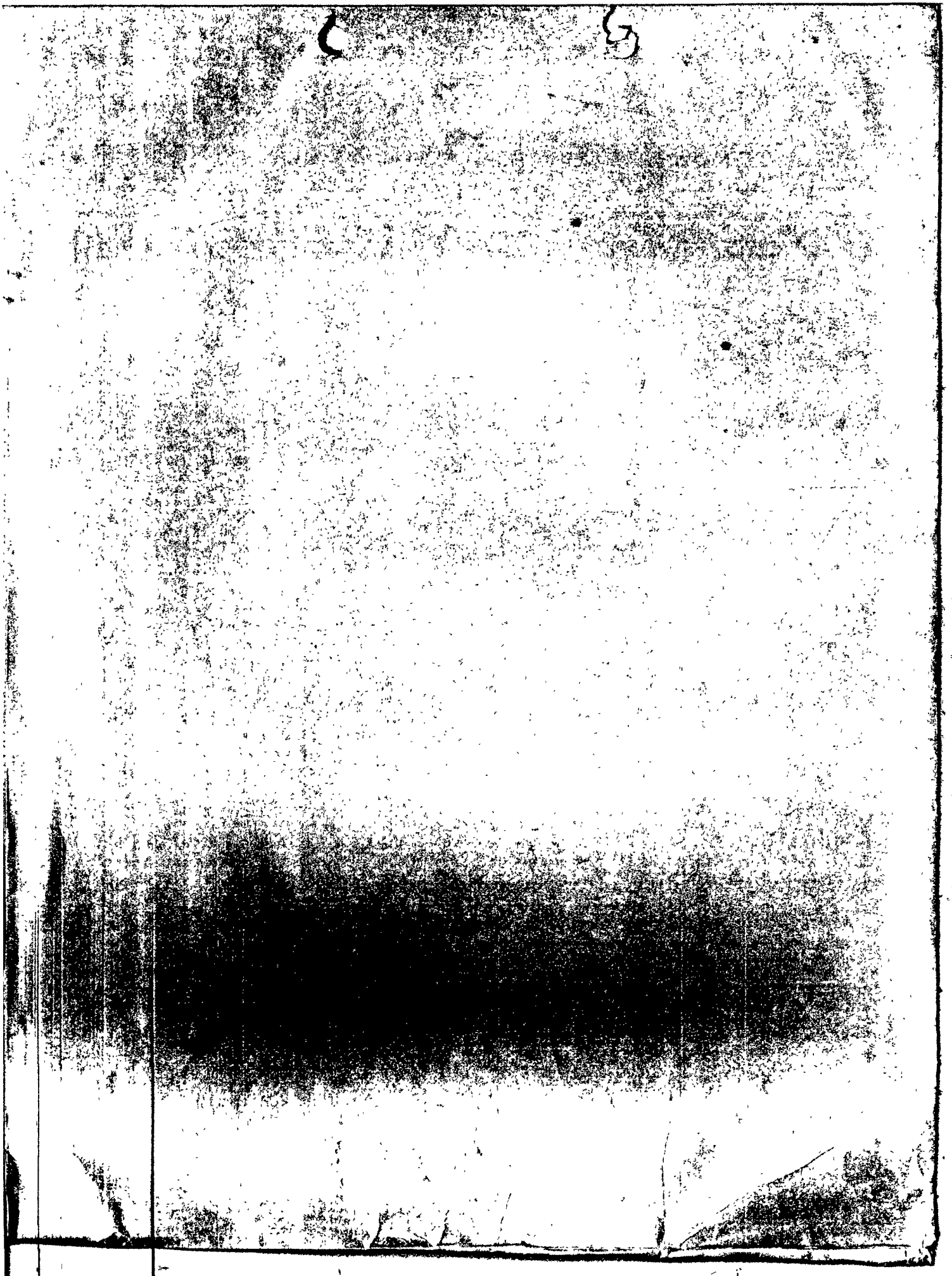
EVELLE J. YOUNGER, Attorney General

WILLIAM E. JAMES,
Assistant Attorney General

RONALD M. GEORGE,
Deputy Attorney General

Attorneys for Respondent

RMG:SCM:cw
5/4/71
27 CR LA
69-2993



UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

Los Angeles, California

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*In Reply, Please Refer to File No.*

SIRHAN BISHARA SIRHAN

On May 5, 1969, Pete Noyes, Managing Editor, KNXT-TV, a CBS affiliation, 6121 Sunset Boulevard, Hollywood, California, advised that he had learned information from an extremely confidential source who he characterized as the "ex-head" of the Black Panthers in Los Angeles. He stated that his source was present at a Black Panther meeting on Central Avenue in Los Angeles, one month prior to the assassination of Robert F. Kennedy. According to Noyes, his source told him that Sirhan was present at the meeting. The source specifically stated to Noyes that he recalled Sirhan because Sirhan gave his name at that time as "Sirhan Sirhan", which the source thought was unusual. Noyes further characterized the former Black Panther member as a college graduate who is in hiding because of suspected reprisals he believes will befall him by his former Black Panther associates. Noyes has attempted to obtain employment for his source at the KNXT studio but has been unsuccessful in doing so.

On May 12, 1969, Noyes again telephonically advised on an extremely confidential basis that he had spoken with Robert Kaiser, an investigator for the defense team who represented Sirhan Bishara Sirhan. Kaiser is also writing a book concerning the assassination and has advised Noyes that he has seven reasons which he considers valid to suspect that a conspiracy actually did exist in the assassination. Noyes proposed to Kaiser that Kaiser contact Sirhan and specifically ask him whether he, Sirhan, had actually attended a meeting of the Black Panthers in Los Angeles prior to the assassination of the late Robert F. Kennedy on June 5, 1968.

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Kaiser subsequently contacted Noyes and advised that he had interviewed Sirhan, which interview was recorded on tape. When Kaiser asked Sirhan whether he had ever attended a Black Panther meeting, Sirhan became considerably upset; denied he had ever attended such a meeting, but told Kaiser that he had in fact visited the Black Muslim Temple in Los Angeles.

On May 5, 1969, Kaiser furnished information which he alleged came from a source whom he described as a former officer in the Black Panther organization in Los Angeles. That information was to the effect that Sirhan had been observed by the aforementioned former member of the Black Panther Party (BPP) at a meeting of that organization approximately one month prior to June 5, 1968. Pete Noyes advised on May 12, 1969, again on a confidential basis, that his former Black Panther source is Shermont Banks. He stated that Banks is no longer affiliated with the BPP because he refused to use a gun on one previous occasion. Noyes alleges that Banks is currently "hiding out" in the CBS facility in fear of his life. Noyes explained he could make Banks available for interview by FBI Agents.

On May 16, 1969, Shermont Banks was interviewed at 6162 Sunset Boulevard, Hollywood, California, by representatives of the Los Angeles Office of the FBI.

Banks explained that on one occasion prior to the assassination of the late Senator Robert F. Kennedy he, Banks, was in attendance at a meeting of the Black Congress (BC), which was opened to the public. During the course of that meeting, which was held at 7228 South Broadway, and which he recalls took place sometime in April or May 1968, a man who bore a strong resemblance to Sirhan and who was accompanied by two other individuals came into the meeting. Banks specifically recalls that he heard a "commotion" during the course of the meeting, which was attended by approximately 50 to 60 people. Just prior to the commotion, Alprentice ("Bunchy") Carter (now deceased) had been speaking. The individual whom Banks felt resembled Sirhan got up and spoke about the "Muslims" somewhat in opposition to Carter's remarks.

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During the conversation, Banks did not recall that the name of Sirhan Sirhan was mentioned. In connection with the meeting at the BC, Banks stated that at no time did he hear the name Sirhan Sirhan. Subsequent to the assassination of the late Senator Kennedy, Banks alleged that he spoke with one Steve Bartholemew (now deceased) about the incident at the Black Panther meeting at the BC Hall. Banks indicated he expected that the FBI would contact him regarding the incident which allegedly occurred during the meeting.

Photographs of Sirhan were exhibited to Banks who said that they are now familiar because of the recent publicity given the case during the trial of Sirhan. He stated he could not be absolutely certain that the individual he saw at the meeting was Sirhan. He could only state that it resembled him.

Confidential source of the Los Angeles Office advised by way of background that the BC during the period from January to June of 1968, was composed of 44 named organizations. Some of these organizations were the Afro-American Cultural Association, Black Anti-Draft Union, Black Student Union Alliance, Black Youth Conference, Congress of Racial Equality, Los Angeles County Welfare Rights Commission, Urban League, Operation Bootstrap, Southwest Anti-Crime League, Police Malpractice Center, US (a black Nationalist organization led by Ron Karenga), and the BPP for Self-Defense). The names included are among the more well known groups that made up the BC. Walter Bremond, then Head of the BC, described the BC as a coalition of community organizations of many and varied political persuasions whose objective is to liberate black people from the shackles of oppression. Calif head of Black Congress

Additional confidential source of the Los Angeles Office of the FBI advised that on February 18, 1968, a black power rally was sponsored by the BC and held at the Los Angeles Sports Arena. The purpose of the rally was to raise funds for the defense of Huey P. Newton, who had been arrested in Oakland, California, and who was the leader of the BPP. Speakers at this rally represented many viewpoints and included James Foreman, Caesar Chavez,

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H. Rap Brown, Stokely Carmichael, Bobby Seale, and others. As a result of this rally, a dispute arose over the division of the funds collected. The BPP wanted all of the proceeds of the meeting and the BC wanted a portion of the proceeds. Bremond was quoted to have said that he would rather die than give the BPP all of the funds. The BPP believed that "US" had taken a portion of the funds and was attempting to control all of the black groups in the BC.

A source of the Los Angeles Office of the FBI advised that the arguments which evolved from this rally finally erupted on February 26, 1968, when BPP members and US members had an armed confrontation at the BC Office at 7228 South Broadway. No injuries occurred at this time; however, later that night a BPP member was shot by members of US. Following this, the tensions between these two groups ran high and they continued to the present time.

Following this, it was reported by a source of the Los Angeles Office of the FBI that BC meetings had been curtailed because of police interest about the BC and more security was established at the meetings which had become more irregular and were attended by fewer people.

Also at this time, the local BPP was undergoing a change in that the original BPP in Los Angeles was called the Black Panther Party for Self-Defense, Incorporated. This group was infiltrated by persons aligned with the Oakland based BPP. In March 1968, Shermont Banks became leader. Following the hostilities in February of 1968, the Los Angeles Office of the FBI and outside law enforcement agencies received no reports of the BPP holding meetings at the BC Office although it continued to be the mailing address for the BPP.

In late July 1968, the BPP officially moved into a building at 4115 South Central Avenue, where they remained until January 1, 1970.

Shermont Banks during his association with the BPP while it revolved around the BC Office also worked for American Airlines on the 11:00 p.m. to 7:00 a.m. shift.

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His last period of employment was from February 1967, to April 2, 1968. It is noted that in connection with another investigation being conducted by the Los Angeles Office of the FBI that Shermont Banks was interviewed by representatives of this office on August 13, 1968, and did not mention anything regarding Sirhan Sirhan. It is noted that at this time, there was still considerable public attention on the Sirhan case as the assassination had occurred on June 5, 1968.

During the period preceding the assassination of the late Senator Robert F. Kennedy, racial informants of the Los Angeles Police Department and Los Angeles County Sheriff's Office had no reports on any Black Panther meetings as such at the BC Office although organizational activity did occur. No public type meetings were known to be held as none were reported.

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