

No. 19-6064

# ORIGINAL

IN THE

Supreme Court, U.S.  
FILED

SEP 17 2019

**OFFICE OF THE CLERK**

TOMMY COLE — PETITIONER  
(Your Name)

vs.

XAVIER BECERRA " et al," RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Tommy Cole

(Your Name)

Folsom State Prison, P.O. Box 950

(Address)

Represa, CA 95671

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1.) THE COURT ERRED, A kelly hearing was required to test the reliability of the process used to create the videotape of still photographs originally recorded on a signle VHS tape.
- 2.) THE COURT ERRED, The Court erred in allowing Detective Doster testimony because doster had no experience,training, or education in videographs or forensic videographs, no experience in calcolating the time between still photographs and no knowledge of the camera system that had taken and recorded the VHS tape.
- 3.) TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL: Here Counsel failed to object to Doster's estimate time, Counsel's failed to call expert witness, present evidence deprived Cole of effective assistance of counsel, Cole was denied the rights guaranteed to him by the Sixth Amendment and by Article 15 of the California Constitution.

## LIST OF PARTIES

[  ] All parties appear in the caption of the case on the cover page.

[  ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- 1.) Deputy Attorney General, Nima Razfar
- 2.) Deputy Attorney General, E. Carlos Domingues

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	5
STATEMENT OF THE CASE .....	6, 7
REASONS FOR GRANTING THE WRIT .....	8
CONCLUSION.....	15

## INDEX TO APPENDICES

APPENDIX A UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX B UNITED STATES DISTRICT COURT, CENTRAL DISTRICT

APPENDIX C THE SUPREME COURT OF CALIFORNIA

APPENDIX D COURT OF APPEALS OF THE STATE OF CALIFORNIA CENTRAL DISTRICT

APPENDIX E STATE TRIAL COURT

APPENDIX F

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Chambers v. Mississippi (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297].....	14
Davis v. Alaska (1974) 415 U.S. 38 [94 S.Ct. 1105, 39 L.Ed.2d 347].....	14
Delaware v. Van Arsdall (1986) 475 U.S. 673 [106 S.Ct. 1431, 89 L.Ed.2d 674].....	14
Frye v. United States (D.C. Cir. 1923) 293 F. 1013.....	9
Strickland v. Washington (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674].....	13
STATUTES AND RULES	
Evidence Code section 720.....	12, 13
Evidence Code section 720, subdivision(a).....	13
Evidence Code section 801.....	9
Evidence Code section 801, subdivision (b).....	9
Evidence Code section 803.....	9
Penal Code section 187, subdivision (a).....	6
Penal Code section 190.....	7
Penal Code section 296.....	7
Penal Code section 1202.4.....	7
Penal Code section 1202.4, subdivision (f).....	7
Penal Code section 1202.45.....	7
OTHER	
Law Enforcement & Emergency Services Video Association International, Inc. LEVA certification program available online at, <a href="https://leva.org/index.php/certification">https://leva.org/index.php/certification</a> [accessed 1-4-2015..	10

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

1	Penal Code section 1237.....	4
2	Penal Code section 1465.8, subdivision(a)(1).....	7
3	Penal Code section 12022.53, subdivision (d)(2) .....	6
4	Penal Code section 12022.53, subdivision (c),and(3).....	6
5	Penal Code section 12022.53, subdivision (b).....	6
6	Penal Code section 12022.53, subdivision (d).....	7

OTHER

10	Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic
11	Structure of Scientific Testimony (1988-1989) 67 N.C.L. Rev.1. 12

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

The opinion of the California Second Appellate District court appears at Appendix D to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 05/22/2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 07/22/2019, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including 07/22/19 (date) on 09/22/19 (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 01/13/16. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Article I, section 1 of the California Constitution.....	11,14
Article I, section 7 of the California Constitution.....	11,14
Article I, section 15 of the California Constitution.....	11,14
Fifth Amendment to the Constitution of the United States.....	11,14
Sixth Amendment to the Constitution of the United States.....	11,14
Fourteenth Amendment of the Constitution of the United States.....	11,14

## STATEMENT OF THE CASE

An information charged Tommy Cole with the murder of Antwine Brown in violation of Penal Code section 187, subdivision(a)(countone). (CT 4) The information alleged Cole: (1) personally and intentionally discharged a firearm causing great bodily injury to Brown as prohibited by section 12022.53, subdivision (d) (2) personally and intentionally discharged a firearm as prohibited by section 12022.53, subdivision (c), and (3) personally used a firearm as prohibited by section 12022.53, subdivision (b). (CT 4)

A jury found Cole guilty of second-degree murder of Brown and found all gun allegations true. (CT 4)

The Court denied Cole's motion for a new trial and sentenced him to serve 40 years to life in prison. (CT 4)

Cole appealed his conviction and his sentence. (CT 4)

The Court of Appeal of California, Second Appellate District, Division One reversed the judgment of conviction and remanded the case for retrial. (CT 2-17,19)

Cole was retried in October 2012. The jury could not reach a unanimous decision, and the court declared a mistrial. (CT 59, 107-108, 3AUG-RT 2106-2110)

Cole was again retried in January 2013. The Court declared a mistrial on the third day of trial after the prosecutor produced a new piece of evidence: A videotape of selected still photographs extracted from a VHS tape that included 120 hours of still photographs. The VHS contained the output of five cameras mounted on a business near the shooting site. (CT 135, 2RT A2-A5, 3AUG-RT 3021)

## REASONS FOR GRANTING THE PETITION

I. 1.) THE COURT ERRED, A Kelly hearing was required to test the reliability of the process used to create the video tape of still photographs originally recorded on a single VHS tape.

After the first retrial the jury could not reach a unanimous verdict, the prosecutor asked the investigating officer to reassess the evidence. Because of that reassessment, the prosecutor learned a VHS tape containing the output of five still cameras had been recovered from a business close to the Black Silk Social Club. (3AUG-RT 3021, 2RT A2-A3) Each of the five cameras took undated, untimed, still photographs and the photographs from all of the cameras were recorded on a single VHS tape. (2RT A3-A4) The VHS included 120 hours of photographs. (2RT A3) Because of the manner in which the photographs were recorded, the VHS was "gibberish". (2RT B2)

Shawn Khacherian, a technician in the Scientific Investigation Division, took the VHS photographs apart, recreated the photographs put the individual photographs into some order, and created a videotape of the newly created material.

The time that elapsed between each photographs was unknown. To link the newly created videotape to the date and time of Brown shooting, Detective Doster developed an ad hoc estimate of the time lapse between each individual photograph on the VHS. (3RT 1013-1015) This newly-created videotape was presented at trial, and Jackson-Whitaker, Falley, and Det. Doster were permitted to offer lay opinions about the identity of the figures that appears on the videotape. (2RT-644-645, 646-647, 710, 711-712, 714-717)

1 Cole was retried a thrid time in July 2013. The jury found him  
2 guilty of secound-degree murder and found the section-12022.53-sub-  
3 division-(d) allegation true. (CT 173, 189, 4RT 1502-1503)

4 The court denied Cole's motion for a new trial and again sentenced  
5 him to a term of 40 years to life. His sentence includes a 15 to life  
6 term as required by section 190 and a consecutive 25-years to life  
7 term as required by section 12022.53, subdivision (d). (CT 218-219,  
8 4RT 2105-2106,2107)

9 The court order Cole to pay 280 dollars restitution fine under  
10 section 1202.4, imposed and stayed a parole-revocation fine in the  
11 same amount under section 1202.45, imposed a 40 dollar security sur-  
12 charge under section 1465.8, subdivision (a)(1), imposed a 30 dollar  
13 criminal conviction assessment under Goverment Code section 70373,  
14 and ordered Cole to pay 7,499.99 dollars to the State Victim  
15 Compensation Board under section 1202.4, subdivision (f). (CT 218-  
16 219, 4RT 2108)

17 The court also order Cole to submit the biologic specimens re-  
18 quired by section 296. (CT 219, 4RT 2109)

The science of forensic videographs is a new field. The test for the admissibility of expert testimony based upon a new or novel scientific testimony is the three-prong test described in *People v. Kelly*, *supra*, 17 Cal.3d 24. *Kelly* rests on a 90-year old approach to scientific evidence first announced in *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 that seeks to ensure that juries are not overwhelmed by scientific evidence. see Evidence Code 801,801 (b).

Kelly creates an aura of certainty by requiring a judicial answer to three questions:

1. Is the method generally accepted in the relevant scientific community?
2. Does the proponent witness have the training and background to testify about the method?
2. Did the proponent follow the accepted technical procedures in developing the evidence?

Kelly describes this test:

[A]dmissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) the reliability of the method must be established, usually by expert testimony and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. See evidence Code 801.

• Additionally, the proponent of the evidence must demonstrate that correct scientific procedures.

(People v. Kelly, *supra* 17 Cal.3d at p. 30)(Internal-citations omitted.)(*Italics in original.*)

1        The pivotal prong is the first prong. Unless the court finds  
2        the proposed scientific procedure is commonly accepted among the  
3        relevant professional community, there is no need to consider ei-  
4        ther the second or third prongs.

5        The first prong of Kelly requires a showing that the scientific  
6        method used to create the evidence are well-accepted in the relevant  
7        scientific community. In determining whether a technique, program, or  
8        procedure is accepted in the community, the courts often turn to  
9        articles sponsored by the relevant professional organization.

10       (People v. Law (1974) 40 Cal.App.3d 69,74-75) The relevant  
11       scientific community here is forensic video analysis. LEVA, the  
12       leading professional organization for forensic video analysts,  
13       acknowledges the field is new and untested:

14       Digital forensic video analysis and multimedia evidence  
15       proceeding are still relatively new when compared to the  
16       nearly century old tradition that still photographs has  
17       enjoyed in the courts....." As with all 'new' sciences,  
18       the courts must be satisfied that the science is tech-  
19       nically sound and that the witness using the science is  
20       properly qualified."

21       (Law Enforcement & Emergency Service Video Association  
22       International, Inc. LEVA certification program avail-  
23       able online at <https://leva.org/index.php/certification>  
24       [accessed 1-42015]

25       Although the first Kelly prong can be satisfied by reference to  
26       existing case law holding the method as one generally accepted in the  
27       scientific community, case law has recognized that the differences  
28       among forensic imaging procedures and programs requires that each  
      process or program be examined for acceptance and reliability.

1       Appellate counsel could not find a signal case in which  
2 the transfer and sequencing of material originally recorded  
3 on a VHS tape to a DVD tape has been considered by a court.

4       In McMahorter, a defense witness with experience in forensic  
5 imaging, created new images by enhancing portions of the still  
6 photographs taken at the crime scene. The court excluded the  
7 witness's newly-created images because the software program on  
8 which the witness had relied to create the new evidence was not  
9 identified and-absent identification of the program-the evidence  
10 was "inadmissible unless a proper foundation could be laid for  
11 the image-enhancing technique [the witness] had used."(Idatp.364)

12       As in McMahorter, the trial court was not provided with information  
13 regarding the procedure or computer program which Khach-  
14 herian utilized to create the new evidence. Without such information  
15 the court could not perform its gatekeeper function and  
16 unable to assure itself the videotape presented to the jury was  
17 a reliable recreation. The Court Erred when it allowed the prosecution  
18 to admitt videotape into trial.

19       The trial court ruling denied Cole the right to due process  
20 of law and a fair trial in violation of the Fifth, Sixth, and  
21 Fourteenth Amendment of the Constitution of the United States  
22 and their opposite numbers, Article I, section 1,7, and 15 of  
23 the California Constitution.

1           2.) THE COURT ERRED, Doster had no expertise which would  
2           allow him to conclude that the time between photographs on  
3           the VHS was five seconds.

4           The trial court erred in allowing this testimony because  
5           Doster had no experience, training, or education in videographs  
6           or forensic videographs, no experience in calculating the time  
7           between still photographs, and no knowledge of the camera sys-  
8           tem that had taken and recorded the photographs on the VHS.

9           Expert witnesses have long been pivotal fixtures in civil  
10          trials. In recent years, advances in the forensic sciences,  
11          most notably the discovery of the DNA-based identification  
12          process, have made the appearance of an expert witness almost  
13          as common in criminal trials as it is in civil trials.

14          In criminal trials, expert testimony has become "the back-  
15          bone or every [criminal] circumstantial evidence case." (Imwink-  
16          elried, The "Bases" of Expert Testimony: The Syllogistic Struc-  
17          ture of Scientific Testimony (1988-1989) 67 N.C.L.Rev. 1,1 cit-  
18          ing and quoting Clark, The Prosecutor's Deskbook (1971) Scien-  
19          tific Evidence 542.)

20          After People v. Gardeley (1997) 14 Cal.4th 605, 613. recog-  
21          nized that police officers who have acquired specialized know-  
22          ledge about the customs of criminal street gangs through their  
23          employment as gang officer could qualify as expert under Evid-  
24          ence Code section 720 and could testify as expert on the cult-  
25          ure and mores of those street gangs, seasoned police officers

1       routinely began appearing as experts in criminal trials.(see  
2       also People V. Gamez(1991) 235 Cal.App.3d 957,966; however,  
3       did not transmogrify police officers into universal expert  
4       witnesses-witnesses possessed of expertise in every field.  
5

6       Under Gardeley and under section 720, a police officer can  
7       only testify to those matters about which he or she has acq-  
8       uired "special knowledge, skill, experience, training, or ed-  
9       ucation sufficient to qualify him as an expert on the subject.  
10      "(Evidence Code 720.sub.(a)

11     II TRIAL COUNSEL WAS INEFFCTIVE ASSISTANCE OF COUNSEL:

12     Here counsel failed to object to Doster's estimate. how-  
13     ever, counsel's failed to object, call expert witnesses,present  
14     evidence deprived Cole of effective assistance of counsel, and  
15     cole was denied the rights guaranteed to him by the Sixth Amend-  
16     ment and by Article 15 of the California Constitution.

17     Counsel is constitutionally ineffective if his or her  
18     representation fell below an objective standard of reasonable-  
19     ness under prevailing professional norms and the defendant  
20     suffered prejudice.(Strickland v. Washington(1984) 466 U.S. 668  
21     694, People v. Carter(2003) 30 Cal.4th 1166,1211)

22     Prevailing professional norms require counsel to make  
23     appropriate objections to the admission or exclusion of testi-  
24     mony..

1 There can be no reason counsel would not object to the intro-  
2 duction of speculative testimony on an issue as pivotal to the  
3 case, counsel failure to call expert witness to rebuttal the  
4 states witness on the reliability of the videotape.

5 Trial counsel failure to render effective assistance resul-  
6 ted in adenial of his right to a fair trial and denied him due  
7 process of law in violation of the Fifth, Sixth, and Fourteenth  
8 Amendments of the Constitution of the United States and their  
9 opposite numbers, Article I, section 1,7, and 15 of the Cali-  
10 fornia Constitution. See Chambers v. Mississippi(1973) 410 U.S.  
11 284[93 S.Ct.1038,35 L.Ed.2b 297] Davis v. Alaska (1974) 415 U.S.  
12 308[94 S.Ct.1105,39 L.Ed.2d 347] Delaware v. Arsdall (1986) 475  
13 U.S.673[106 S.Ct. 1431,89 L.Ed.2d 674].

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,



---

TOMMY COLE

Date: 9-16-19

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

TOMMY COLE — PETITIONER  
(Your Name)

VS.

XAVIER BECERRA " et al, " RESPONDENT(S)

PROOF OF SERVICE

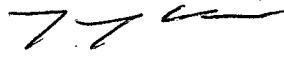
I, TOMMY COLE, do swear or declare that on this date,  
9-16, 2019, as required by Supreme Court Rule 29 I have  
served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*  
and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding  
or that party's counsel, and on every other person required to be served, by depositing  
an envelope containing the above documents in the United States mail properly addressed  
to each of them and with first-class postage prepaid, or by delivery to a third-party  
commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

ATTORNEY GENERAL XAVIER BECERRA, 300 South Spring Street, LA, CA  
90013. U.S. SUPREME COURT, WASHINGTON D.C. 20543

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

Executed on 9-16, 2019



(Signature)