MICHAEL V. WHITE, (State Bar No. 58620)
1717 Fourth Street, Third Floor
Santa Monica, California 90401
Telephone: (310) 5786-6242
Facsimile: (310) 576-6244 (FAX)

MATTHEW STRUGAR (State Bar No. 232951)
RACHEL MEEROPOL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Telephone: (212) 614-6432

Attorneys for Defendant
KEVIN RICH OLLIFF

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>v.<br><br>KEVIN RICH OLLIFF<br><br>Defendant. | CASE NO. BA331988<br><br>POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE THE INDICTMENT |

Defendant submits the following points and authorities in support of the motion to set aside the indictment because of insufficient evidence.

# I

# THE EVIDENCE PRESENTED TO THE GRAND JURY PERTAINING TO KEVIN OLLIFF

## COUNTS 1 - 4

Counts 1 through 4 of the indictment allege Lynn Fairbanks as the victim. Ms Fairbanks was a focus of the animal rights movement because of her use of monkeys in research at UCLA. The alleged crimes against her occurred between April 24, 2006 and February 22, 2008.

Kevin Olliff's alleged personal involvement begins with his attendance at a public demonstration in broad daylight on the campus of UCLA on April 24, 2006. That protest was presented by video to the Grand Jury in Exhibits 80 and 81. He is seen holding a placard and participating in various chants. The chants include, "vivisection, lies and death, free the animals ALF;" "Hey Lynn Fairbanks, what do you say? How many animals did you kill today?" There were a number of UCLA police officers present. There is also a transcript of the demonstration presented to the jury in Exhibit 70. Ms. Fairbanks does not remember whether Mr. Olliff was at the demonstration.

There is only one other incident where Mr. Olliff is alleged to have been present. On July 15, 2006 there was a public demonstration on the sidewalk and public street in front of the home of Lynn Fairbanks. Exhibit 77 is an audiotape of the demonstration and Exhibit 78 is the tape of the demonstration with a transcription. It began at approximately 7:45 pm. Two UCLA police officers monitored the entire demonstration. Ms. Fairbanks had been forewarned of the demonstration. She arrived with her husband after it had begun and stayed approximately 15 minutes. When she arrived, she spoke with the two UCLA

police officers. Ms. Fairbanks heard the protestors chanting. Ramin Saber was leading the march and leading the chants as well as doing most of the calling out.

There is no other alleged personal involvement of Kevin Olliff in Counts 1 through 4.

COUNTS 5 - 8

Counts 5 through 8 of the indictment allege Dario Ringach as the victim. Mr. Ringach also was a focus of the animal rights movement because of his use of animals in research at UCLA. These alleged crimes against him occurred between January 1, 2006 and February 22, 2008.

Kevin Olliff's personal involvement in these counts also allegedly occurred on April 24, 2006 and July 15, 2006. On April 24, 2006, he participated in the same protest on the campus of UCLA alleged to have been aimed at Lynn Fairbanks in Counts 1-4. As stated above, Mr. Olliff carried a placard and participated in various chants. There is no evidence that Mr. Ringach was present at the protest.

Mr. Olliff is alleged to have participated in a demonstration at the home of Mr. Ringach on July 15, 2006. Derrick Lee Huckaby, an off duty police officer, was employed by UCLA to provide security at the Ringach house on that date. He videotaped the demonstration. He testified that he arrived at the location between 1:00 and 2:00 in the afternoon. There was no one there. At some point 15-20 people arrived. They were dressed normally. He was told there would be no one home. His instructions were to call the Culver City Police Department if protestors did appear. He did so. The demonstration lasted 35-45 minutes. The protestors engaged in various chants and made various statements. These are seen in Exhibits 79 and transcribed in Exhibit 103. Mr. Ringach was not present at this protest.

There is no other alleged personal involvement of Kevin Olliff in Counts 5 through 8.

COUNTS 9 - 10

Counts 9 and 10 of the indictment allege Scott Thewes as the victim. Mr. Thewes was an executive for POM Wonderful, a company that was a focus of the animal rights movement because of its use of animals in researching the benefit of pomegranate juice. The alleged crimes against him occurred between August 4, 2006 and December 15, 2006.

Mr. Olliff's alleged personal involvement in Count 9 begins on August 4, 2006 with his participation in a public protest by animal rights activists in broad daylight at the POM Wonderful Family Picnic in the Malibu Bluffs Park. The protestors engaged in various chants and made various statements. These were seen by the Grand Jury in a videotape, Exhibit 88, and in a transcribed version of the tape in Exhibit 89. The protest appeared to last approximately five minutes and there appeared to be four or five protesters along with a legal observer from the National Lawyers Guild. Mr. Olliff was dressed in a white shirt and tie, and used an amplifier. Mr. Thewes' name was mentioned twice in chants. A number of security guards were present and the protest ended after the protestors were told POM had rented the Park and they had to leave. Mr. Thewes did not attend the picnic but he later heard about the protest that took place. GJT 59-60.

Mr. Olliff's other personal involvement alleged in Count 9 was on August 20, 2006 at a demonstration at the home of Scott Thewes. Exhibit 92 is a videotape of the protest and Exhibit 102 is a transcript of the tape. The videotape shows the demonstration was during the day and lasted approximately 15 minutes. There appeared to be approximately 10 demonstrators. A security guard employed by POM Wonderful was present at the time of the protest. GJT 97. Shortly after

the protest began Mr. Thewes told the protestors to get off his property and they promptly complied, showing their intention to avoid any violation of trespassing law. During the protest Mr. Thewes and his wife came through their side gate onto the front of their property and took pictures of the protestors. The Thousand Oaks Policed arrived 8 minutes after the protest began. They broke up the protest 7 minutes later. The chants and statements made by the protestors are reflected in Exhibit 102. They included "vivisection lies and death, free the animals ALF" and "what goes around comes around, burn the fucker to the ground." The latter was among a 15-minute litany of chants and lasted a matter of seconds. There were no arrests made at the protest.

There is no other alleged personal involvement of Kevin Olliff in Count 9.

In Count 10, conspiracy to commit the crime of stalking, the prosecution alleges three more overt acts in which Kevin Olliff was allegedly personally involved. They all occurred on August 20, 2006, the same day as the demonstration at the home of Scott Thewes. These acts were an animal rights demonstration at the home of POM Wonderful research doctor Mark Dreher, an animal rights demonstration at the home of POM Wonderful Vice President of Communications Fiona Posell and the drive from Mr. Dreher's home to Mr. Thewes' home.

## II

## THE STANDARD OF PROOF REQUIRED TO RETURN AN INDICTMENT IS PROBABLE CAUSE

Penal Code § 939.8 provides that "the grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a jury trial."

The courts, in construing this language, have reasoned that the standard of proof for returning an indictment is equivalent to the standard for dismissal of an indictment for lack of probable cause under § 995. An indictment under § 939.8 will not be set aside under § 995 unless the defendant "has been indicted without reasonable or probable cause." The Supreme Court reasoned that this was the same standard applicable to the dismissal of an information following a preliminary hearing. (Lorenson v. Superior Court, 35 Cal. 2d 49, 216 P.2d 859 (1950))

A magistrate conducting a preliminary examination must be convinced of a state of facts that would lead a person of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. (People v. Uhlemann, 9 Cal.3d 662, 108 Cal.Rptr. 657 (1973))

This line of reasoning has led our Supreme Court in Cummiskey v. Superior Court, 3 Cal.4th 1018, 1027, 1029, 13 Cal.Rptr.2d 551 (1992), to conclude "that the standard of proof under section 939.8 for returning an indictment is 'probable cause.'"

In our view, the grand jury's function in determining whether to return an indictment is analogous to that of a magistrate deciding whether to bind a defendant over to the superior court on a criminal complaint. Like the magistrate, the grand jury must determine whether sufficient evidence has been presented to support holding a defendant to answer on a criminal complaint. This is what section 939.8 means when it requires the grand jury to return an indictment when evidence would 'warrant a conviction by a trial jury.'

## III

## THE EVIDENCE PRESENTED TO THE GRAND JURY WAS INSUFFICIENT TO SUPPORT THE INDICTMENT ON ANY OF THE COUNTS ALLEGED AGAINST KEVIN OLLIFF

The evidence presented by the prosecution for counts 1, 3, 5, 7 and 9 consists of statements made at animal rights protests. Because these protests were constitutionally protected activity and the statements were constitutionally protected speech, they cannot be used to form the basis of sufficient evidence to support the return of an indictment on these counts of stalking and threatening a public official.

Counts 2, 4, 6, 8 and 10 allege conspiracies that include acts that arguably go beyond the constitutionally protected activity of the animal rights demonstrations. However, the evidence fails to establish the unlawful agreement necessary to prove a conspiracy. Mere association with others in the animal rights movement at public demonstrations is not evidence of an unlawful agreement to engage in illegal actions. Therefore, the conspiracy counts must be dismissed because of the failure to present evidence of an agreement. Furthermore, the agreement necessary to prove a conspiracy requires the specific intent to agree to commit the crime and the further specific intent to commit the crime. These conspiracy counts must also fail because there was no showing of any kind that Mr. Olliff had the specific intent to engage in the crime of stalking or the crime of threatening a school official. To the contrary, all of the evidence indicates that Mr. Olliff at all times believed that his activities were lawful First Amendment activities and attempted to conduct himself accordingly.

1. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE STALKING CHARGES IN COUNTS 1, 5, AND 9.

The entirety of the evidence presented against Mr. Olliff is words alone—specifically, chants and speeches at public animal rights protests. While under certain carefully defined conditions mere words may occasion criminal liability,

the Supreme Court has insisted that those conditions be determined with the greatest precision to safeguard protected expression. *See Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969). The need for such care is especially acute where, as is the case here, the targeted speech concerns volatile topics of public and political debate. *See Watts v. United States*, 394 U.S. 705,708 (1969).

While it is well settled that not all forms of words are fully protected by the First Amendment, words must fall within a First Amendment exception to form the basis of criminal liability. Both the stalking statute (Penal Code section 646.9) and the threatening a school employee statute (Penal Code section 71), to the extent they proscribe speech, only proscribe speech that meets the 'true threats' exception to the First Amendment. People v. Borrelli, 77 Cal. App. 4th 703, 715-16 (Cal. App. 5th Dist. 2000) (stalking); People v. Zendejas, 196 Cal. App. 3d 367, 376-77 (Cal. App. 6th Dist. 1987) (threats to school employee).

"'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359 (U.S. 2003). "What is a threat must be distinguished from what is constitutionally protected speech." Watts v. United States, 394 U.S. 705, 707 (1969). In applying that precept in Watts, the Court found the First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp attacks" as well as language that is "vituperative, abusive, and inexact." Id. at 708. Further, the First Amendment protects such speech even when it is designed to embarrass or otherwise coerce another into action. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909-10 (1982); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Thus, "threats of vilification or social ostracism" are protected by the First Amendment. Claiborne Hardware at 910.

Within this framework, the facts of the Supreme Court's true threats cases are particularly instructive for separating threats from political hyperbole. In *Watts*,

a young man speaking to an anti-war rally said that, if drafted and given a rifle, "the first man I want to get in my sights is [the President]." Watts at 706. The Supreme Court found Watts speech was political hyperbole and not a true threat. Id. at 708.

Similarly, Claiborne Hardware involved statements of NAACP organizer Charles Evers who, in the midst of a boycott of white businesses, publicly proclaimed that boycott violators "would be watched[,]" *id.* at 900 n.28, "would be *answerable to him*[,]" *id.*, and "would be 'disciplined' by their own people[.]" *Id.* at 902. Evers "warned that the Sheriff could not sleep with boycott violators at night," and told his audience, "'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'" *Id.* at 902. Despite the charged rhetoric, the Court found Evers' "'threats' of vilification or social ostracism… [were] constitutionally protected", *id*. at 926, and specifically found his statements did not constitute a true threat. *Id*. at 928 n.71.

More recently, in a factual setting similar to the one at issue here, the Court of Appeals in City of Los Angeles v. Animal Defense League, found:

> Demonstrations, leafleting and publication of articles on the Internet to criticize government policy regarding the alleged mistreatment of animals at City-run animal shelters -- the activities in which [defendants] engaged -- constitute a classic exercise of the constitutional rights of petition and free speech in connection with a public issue or an issue of public interest…

135 Cal.App.4th 606, 37 Cal.Rptr.3d 632 (2nd Dist. 2006).

Counts 1, 5 and 9 allege stalking in violation of Penal Code section 646.9(a). The elements of stalking are: (1) harassment of another person, (2) a credible threat with intent to place the person in reasonable fear for their safety or the safety of their family and (3) the defendant's conduct was not constitutionally protected. Harassing is a knowing and willful course of conduct that seriously alarms, annoys, torments or terrorizes … and that serves no legitimate purpose. California Penal Code section 646.9(e). A course of conduct requires two or more acts.

California Penal Code section 646.9(f). A credible threat is one that causes the target of the threat to reasonably fear for their safety and one that the maker of the threat appears to be able to carry out. California Penal Code section 646.9(g). The stalking statute expressly excludes constitutionally protected activity from its coverage. California Penal Code sections 646.9(f) and (g).

The fatal flaw in the prosecution's case is that in each count at least one of those alleged acts, if not both, is constitutionally protected activity, and thus specifically excluded from the coverage of the statute.

Count 1 is the alleged stalking of Lynn Fairbanks. The evidence introduced against Mr. Olliff is the April 24, 2006 campus demonstration and the July 15, 2006 home demonstration.

Stalking requires at least two acts to prove harassment. Exhibit 80, a videotape of the April 24, 2006 campus protest, reveals Mr. Olliff holding a placard and participating in various chants. The chants, including "vivisection, lies and death, free the animals ALF," and "Hey Lynn Fairbanks, what do you say? How many animals did you kill today?" are not threatening on their face and are clearly more innocuous than the speech the Court found to constitute political hyperbole in Watts and Claiborne Hardware. Chanting and holding a placard are quintessential, protected First Amendment activity, see Gregory v. City of Chicago, 394 U.S. 111, 112 (1969), and therefore it is not conduct proscribed by the stalking statute. Accordingly, the April 24, 2006 protest may not be used as one of the two acts required to prove "course of conduct." Therefore, Count 1 must fail because without the April 24 protest the prosecution is left with only one allegedly illegal act, the July 15 protest.

Count 5 is the alleged stalking of Dario Ringach. The evidence introduced against Mr. Olliff is the same April 24 campus protest and the July 15 demonstration at the home of Mr. Ringach.

Therefore, it fails for the same reason count 1 does. The April 24 campus protest is clearly constitutionally protected activity. Thus, at most, the prosecution is left with only one allegedly illegal act, which cannot support a stalking charge.

Count 9 is the alleged stalking of Scott Thewes. The evidence introduced against Mr. Olliff is the August 4, 2006 protest at the POM Wonderful picnic and the August 20, 2006 demonstration at the Thewes' residence.

The August 4 protest at a public park as described above was constitutionally protected activity and therefore it is not conduct proscribed by the stalking statute. The protest speech—which included "We're here to make your life hell and we will keep returning again and again," "We will not let you live. How many sleepless nights and migraines will you force yourself to go through before we're fucking through with you?" and "We will… pull your names off the internet… you'll have to look over your shoulder when you open the door to go home at night"—was inflamed and impolitic, but it does not meet the true threats definition. In fact, the speech parallels nearly word for word Charles Evers' overheated rhetoric that boycott violators "would be watched[,]" that "the Sheriff could not sleep with boycott violators at night," and that boycott violators were caught, "we're gonna break your damn neck," that the Supreme Court found to be protected speech. As with Ever's speech, the public nature of the utterance, and the context—a public demonstration with many witnesses, including law enforcement—distinguish it from a direct or true threat.

Thus, count 9 fails because the prosecution is left with only one allegedly illegal act and "course of conduct" requires two acts.

Because Counts 1, 5 & 9 have, at most, one allegedly illegal act, all three stalking counts fail to properly charge a course of conduct involving two or more acts.

2. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THREATENING A SCHOOL EMPLOYEE IN COUNTS 3 AND 7.

Counts 3 and 7 allege threatening a public officer or school employee in violation of Penal Code section 71. The elements are: (1) person threatens to inflict an unlawful injury on any person or property, (2) threat directly communicated to any employee of any public institution, (3) threat made to influence the employees official duties and (4) the recipient reasonably believed the threat could be carried out.

Lynn Fairbanks is the alleged victim of count 3. As stated above, the evidence introduced against Mr. Olliff is the April 24, 2006 campus protest and the July 15, 2006 protest at the Fairbanks' home. Unlike the stalking statute, a single act is sufficient to prove this charge. The April 24 campus protest has already been shown to involve only protected speech. Analysis of the July 15 protest demands the same conclusion.

The July 15 protest was a public demonstration on the sidewalk and public street in front of the home of Lynn Fairbanks. Exhibit 77 is an audiotape of that demonstration presented to the Grand Jury. Exhibit 78 is the tape of the demonstration with a transcription. Ms. Fairbanks had been forewarned of the demonstration. She arrived with her husband after it had begun and stayed approximately 15 minutes. When she arrived, two UCLA police officers monitoring the demonstration spoke to her. Ms. Fairbanks heard the protestors chant something like "burn the fucker down." She heard them call out "ALF." Ramin Saber was leading the march and leading the chants as well as doing most of the calling out.

Sergeant Maureen O'Connell was one of the UCLA police officers monitoring the protest. She testified she had worked a lot of animal rights protests in the past. GJT 170-171. She testified people began arriving 15-20 minutes after she arrived. She testified in answer to Grand Juror questions that they did not call for back up, no arrests were made and there was no attempt to disperse the crowd during the protest. She further testified their posture was one of documentation, and failing a serious violent felony they were not going to take action. GJT180-181. It was Sgt. O'Connell who made the tape recording of the protest, Exhibits 77 and 78. She used her tape recorder to "document the really inflammatory language." GJT 173. She identified Ramin Saber as being present and leading the "burn the house down" chants. GJT 172,182. She also identified Lindy Greene as being present and saying many things. GJT 173,182. She did not identify Kevin Olliff as being present. The only evidence of Mr. Olliff's alleged presence came from Detective Scott Scheffler, a UCLA police officer assigned to investigate animal rights activity in Los Angeles but who was not present at Lynn Fairbanks' house. He testified he has seen Kevin Olliff "a number of times." GJT514. Detective Scheffler identified Mr. Olliff's voice at one minute and six seconds of Exhibit 77 yelling "forty activists." GJT 526.

The question is whether the words uttered were constitutionally protected. First, the words must be interpreted in the context in which they were made. Here, those words occurred in the course of public street demonstrations, as part of a responsive group chant or as some spontaneous statement shouted out by one or more of the protestors. Much like in Watts, where the antiwar speaker said that if given a rifle, "the first man I want to get into my sights is [the President]," Mr. Olliff's alleged statements were inflammatory, provocative statements of political hyperbole intended to have shock value and call public attention of the neighbors and passers-by to the research work Ms. Fairbanks was engaged with at UCLA and

the protestors' socio-political opposition to that work. Two UCLA police officers were present during the entire demonstration. They did not call for back up, no arrests were made and there was no attempt to disperse the protestors. In fact the officers can be heard saying at the 2:04 mark of the tape recording: "As long as everybody follows an orderly protest, there will be no problem." This is followed at 2:11 of the tape by: "It's all talk and no action." These statements are made immediately after the "burn the fucker to the ground" chant.

Under these circumstances the words spoken were constitutionally protected speech and therefore not proscribed by Penal Code section 71. [1]

Dario Ringach is the alleged victim of count 7. Again, the evidence introduced against Mr. Olliff is the April 24 campus protest and the July 15 protest at the Ringach home. Because the April 24 campus protest has already been shown to be protected speech, the issue of whether there is sufficient evidence to indict on this count depends upon an analysis of the July 15 demonstration. Evidence of that protest was presented to the Grand Jury in a videotape, Exhibit 79, and in a transcript, Exhibit 103. Derrick Lee Huckaby, an off duty police officer employed by UCLA to provide security at the Ringach house on that date, videotaped the demonstration. He testified that he arrived at the location between 1:00 and 2:00 in the afternoon. There was no one there. At some point 15-20 people arrived. They were dressed normally. He was told there would be no one home. His instructions were to call the Culver City Police Department if protestors

---

[1] The use of rhyming chants such as those used by the protestors in this case is a time-honored tradition in First Amendment protest settings. "*Hey, Lynn Fairbanks, what do you say? How many animals did you kill today?*" obviously echoes the famous anti-Vietnam Way chant "*Hey, hey, LBJ, how many kids did you kill today?*" Likewise, "*What goes around, comes around, burn the fucker to the ground!*", while intemperate, is a rhetorical slogan that has been widely used by a variety of protestors over the years and, as recognized by the comments of the police officers in this case observing the protests that they were being conducted in a peaceful manner, does not reflect an actual, literal intention of the protestors to get matches and start a fire.

did appear. He did so. Mr. Huckaby testified the demonstration lasted 35-45 minutes. The protestors engaged in various chants and made various statements as seen in Exhibits 79 and transcribed in Exhibit 103. They did not use the "burn the fucker to the ground" chant. The most aggressive chant used at the protest was "For the animals we will fight, we know where you sleep at night." Mr. Ringach was on vacation and not present at this protest. GJT 288.

This July 15 protest fails to provide sufficient evidence to indict Mr. Olliff for threatening a school employee because there was no threat to inflict an unlawful injury on the person or property of Mr. Ringach. The implied threat made by the protestors is that they will continue to protest at the home of Mr. Ringach until he stops using animals in his research. Such speech is, on its face, less threatening than Charles Evers' warnings "that the Sheriff could not sleep with boycott violators at night," and certainly unquestionably less threatening than Evers' threat to "break [boycott violators'] damn necks."

Count 7 fails because the chanting at the July 15 protest at the home of Dario Ringach did not constitute the kind of threat prohibited by Penal Code section 71 and was constitutionally protected activity

## IV

## THE EVIDENCE IS INSUFFICIENT TO PROVE CONSPIRACY IN COUNTS 2, 4, 6, 8 AND 10

### 1. THE CONSPIRACY COUNTS MUST BE DISMISSED BECAUSE THERE IS NO EVIDENCE OF AN AGREEMENT.

All of the conspiracy counts fail for the same reason: the prosecution does not provide any evidence of an unlawful agreement between Kevin Olliff and Lindy Greene.

A conspiracy requires proof of an agreement entered into between two or more persons with the specific intent to agree to commit the crime of stalking or threat of a public school employee and with the further specific intent to commit that crime. There is no evidence that Kevin Olliff had an agreement with anyone to commit either the crime of stalking or the crime of threatening a school official.

The only evidence presented to the Grand Jury was that Mr. Olliff and Ms. Greene were both present at various political demonstrations at the same time. As to the conspiracy allegedly targeting Lynn Fairbanks, counts 2 and 4, they were both at the April 24, 2006 UCLA campus demonstration and they were both allegedly present at the July 15, 2006 home demonstration, along with numerous other people. In counts 6 and 8, the conspiracy allegedly targeting Dario Ringach, they were both at the April 24 campus protest and the July 15 home demonstration, also along with numerous other people. As to count 10, the conspiracy allegedly targeting Scott Thewes, they were both at the August 4, 2006 protest at the POM Wonderful picnic and various home protests occurring on August 20 including in front of the home of Mr. Thewes.

Evidence of an unlawful agreement cannot depend on an individual's choice to associate himself with a political group or to participate in a protest accessible to the public. If it did, then the freedom of association and of assembly guaranteed by the First Amendment would mean very little. The prosecution's closing argument to the Grand Jury demonstrates this disconnect. Although he spent over six pages discussing the law of conspiracy and how it applies to this case, the Prosecutor's sole explanation to the jury of how responsibility for the communiqués posted by Lindy Greene on the NAALPO website could be extended to Kevin Olliff through the law of conspiracy is his statement that "*we have the two of them together as early as … April 24 of '06….*" GJT 718. The only evidence of the unlawful agreement argued to the Grand Jury is that they were both at public political

protests. The prosecutor did not miss something in his closing argument. There was, in fact, no evidence of an unlawful agreement presented to the jury beyond association at political protests. That is simply not sufficient to prove a conspiracy, even when the standard is probable cause. The mere fact that alleged co-conspirators knew each other or took some joint action does not by itself prove the existence of an agreement. (People v. Zoffel, 35 C.A.2d 215, 225, 95 P.2d 160(1939); People v. Drolet, 30 C.A.3d 207, 218, 105 C.R. 824; CALJIC (6th ed.), No. 6.13.) The fact that both Mr. Olliff and Lindy Greene were involved in the animal rights movement is not sufficient circumstantial evidence to prove an agreement to commit the crime of stalking or the crime of threatening a school official.

In 1970, a person could have been on the UCLA campus protesting the War in Vietnam, perhaps joining in anti-war chants and denouncing President Johnson and the U.S. war machine. Among fellow protestors might have been Bill Walton and Bill Ayers. The fact that they were there did not make other protestors present either a member of the UCLA basketball team conspiring to win another national championship or a member of the Weathermen conspiring to blow up government buildings.

Moreover, a conspiracy requires an agreement with the specific intent to commit the crime; here there is no proof that Kevin Olliff intended to commit the crime of stalking or the crime of threatening a school official. As discussed in more detail in the gang allegation section of this motion, the evidence fails to prove that Kevin Olliff was doing anything more than exercising what he believed to be his constitutional right to protest. This belief that was supported by the fact that police were present at all of the home protests shooting video and/or audio of the activity and no arrests were made. And the protests were often attended by legal observers from the National Lawyers Guild to assure that the protests remained

peaceful and legal– it strains credibility to suggest that criminal co-conspirators would bring along civil rights observers if they thought they were going to be engaging in criminal behavior. Furthermore, in the few instances on tape where a security official or a homeowner asked the protestors to move back away from the picnic area or to get off the homeowner's lawn, they promptly and willingly complied—evidencing their clear intention that the protest be conducted in a lawful manner and their belief that complying with such instructions regarding the place and manner of protest would avoid any legal violations.

It is also clear that mere support for a cause which includes other supporters who have committed violence in furtherance of the cause's objectives cannot be the basis for criminal prosecution. As stated in Claiborne Hardware, a "'blanket prohibition of association with a group having both legal and illegal aims would present 'a real danger that legitimate political expression or association would be impaired.'" 458 U.S. at 919, quoting Scales v. United States, 367 U.S. 203, 229. In order to punish an individual based on his/her association with a group, there must be clear proof that the defendant specifically intended to accomplish the aims of the group through violence.

As Justice Stevens noted in Claiborne Hardware, "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." 458 U.S. at 907.

As in Claiborne Hardware, the principles that govern the alleged conspiracy in this case must be tempered by the acknowledgement that prohibition of association with a group having both legal and illegal aims presents a real danger that legitimate political expression and association will be impaired. Here, the protest activity without doubt included lawful First Amendment activity, including protest signs, political rhetoric, and distribution of flyers on the subject of animal

testing. As the State perceives it, however, all "direct action" to end animal testing is illegal, and thus any person claiming affiliation with the A.L.F., or supporting its goal of ending animal testing, is thereby engaged in a criminal conspiracy.

## V

## THE GANG ALLEGATION

Each count of the indictment alleges a gang enhancement pursuant to Penal Code section 186.22(b)(1)(A). The prosecution alleges that the Animal Liberation Front, the ALF, is a "criminal street gang" and each offense was committed for the benefit of the ALF and with the specific intent to assist in any criminal conduct by gang members.

### 1. THE GANG ENHANCEMENT ALLEGATION AGAINST MR. OLLIFF ARE BASED UPON IMPROPER HYPOTHETICAL QUESTIONS.

The gang enhancement allegation is based on the testimony of Lt. Michael Beautz. The hypothetical's given Lt. Beautz, which form the basis of his expert testimony, are only proper as to Mr. Olliff if the court finds there was sufficient evidence to prove he was part of a conspiracy. Without a conspiracy, nine of the twelve parts of the first hypothetical are objectionable as to Mr. Olliff. Without a conspiracy, six of the nine parts of the second hypothetical are objectionable. And the question as to the second hypothetical asks the witness to assume the first hypothetical. Absent a conspiracy, four of the nine parts of the third hypothetical are objectionable. Accordingly, each hypothetical was improper and the expert opinions rendered by Lt. Beautz based on them must be stricken.

The witness was asked the same question after each improper hypothetical, " in your opinion were these actions committed for the benefit of, in association

with, or at the direction of the ALF?" His answer each time was yes. These answers, which provide a necessary element of the gang allegation, must be stricken. Thus there is insufficient evidence to establish the gang enhancement.

2. THE EVIDENCE IS INSUFFICIENT TO PROVE A PATTERN OF CRIMINAL GANG ACTIVITY.

A "pattern of criminal gang activity" is defined as the commission of two or more enumerated offenses. People v. Godinez,17 Cal.App.4th 1363, 1369 22 Cal.Rptr.2d 164 (1993), holds that the predicate acts needed to establish the gang enhancement cannot occur after the crime for which the defendant is being charged. The court found that the use of acts occurring after the defendant's commission of the charged offenses would be a violation of due process because he would not have notice of the criminality and the consequences of his conduct. The indictment alleges counts 1 through 4 occurred on or between April 24, 2006 and February 22, 2008. If the court agrees with the defense and rejects the conspiracy counts, 2 and 4, Mr. Olliff's alleged involvement in counts 1 and 3 ends on July 15, 2006. Counts 5 through 8 allegedly occurred between January 1, 2006 and February 22, 2008. Again, if the court agrees with the defense and rejects the conspiracy counts, 6 and 8, Mr. Olliff's alleged involvement ends on July 15, 2006. Counts 9 and 10 allegedly occurred between August 4, 2006 and December 15, 2006.

Evidence was presented to the grand jury that Kevin Olliff suffered two commercial burglary convictions for acts occurring on October 6, 2007 and January 10, 2008. It was argued by the prosecution that if the grand jury believed he was a member of the ALF this would satisfy the two enumerated offenses necessary to prove the gang enhancement. However both of these offenses

occurred after his alleged commission of the offenses charged in the indictment and cannot be used.

Even if the court allows the conspiracy counts to stand, despite the February 22, 2008 date chosen by the prosecution, there is no evidence that either conspiracy lasted until October 6, 2007. The last overt act alleged occurred on February 14, 2007 and there is no evidence that the conspiracy lasted beyond that date. Therefore the two commercial burglaries again may not be used because they occurred after the charges alleged in the indictment.

The prosecution does claim two acts that occurred before the charged offenses. On April 21, 2005, there was a vandalism allegedly committed by the ALF and on June 30, 2006, there was an attempted arson two doors away from the home of Lynn Fairbanks allegedly committed by the ALF. In each instance the only evidence presented to prove the ALF committed these offenses are "Communiqués from ALF activists" claiming credit for the acts posted on the North American Animal Liberation Press Office website, Exhibits 10 and 11.

There is no evidence that these so called admissions were in fact made by members of the ALF. In fact, Lt. Beautz, the prosecution expert, acknowledged as much when he characterized these communiqués as "supposedly" direct communications written by underground people. GJT 577. While admissions may be admissible as a hearsay exception, they must be trustworthy. An admission by an anonymous person claiming to be an "ALF activist" does not satisfy that requirement.

In fact, the ALF is more ideology than it is an organization. Anyone can claim to be an "ALF activist" by simply subscribing to a broad set of ideas. As Lt. Beautz testified, these include "be[ing] either a vegetarian, or preferably a vegan" and "not causing violence to any human or animal." GJT 587. There is no actual organization, membership or affiliation beyond one's self-proclaimed socio-

political sympathies. Lt. Beautz recognized this, testifying that the ALF has a "very disorganized and informal membership[,]" GJT 570, and that there is no formal membership process but that "it's more about a way of living, an identity one accepts…" GJT 583. Just as "abolitionism" was an ideology in 1850s America, not all 1850s abolitionists were gang members in a criminal conspiracy with John Brown for his anti-slavery revolt in the raid at Harper's Ferry in 1859.

This is one of the problems with trying to fit the gang allegation into this case. In the prototypical street gang case, evidence of the predicate acts is provided by experts who testify that named, not anonymous, gang members committed the enumerated offenses. This is most often done by introducing convictions suffered by the named defendants who have been identified as members of the gang in question.

In People v. Gardeley, 14 Cal.4th 605, 59 Cal.Rptr.2d 356 (1997), the gang expert testified of other crimes committed by the Family Crip gang using documentary evidence to prove Mario Phipps, a Family Crip gang member, was convicted of shooting at an inhabited dwelling. The prosecution proved the second requisite predicate offense through evidence in the case in chief of the alleged attempted murder by the defendants, both Family Crip gang members.

In People v. Villegas, 92 Cal.App.4th 1217, 113 Cal.Rptr.2d 1 (2001), the prosecution presented the testimony of two gang experts. They testified about the E.Y.C. gang, its documented membership, and the defendant's association with the gang. The two required predicate offenses included the current offense and an attempted murder that occurred in 1997. The defendant's brother and two other E.Y.C. members, Juan Fiero, and Miguel Flores committed the 1997 offense. One of the experts investigated that case and testified that both Fiero and Flores were members of the E.Y.C. at the time of the attempted murder, and that they were both convicted and sentenced to state prison for that offense.

In People v. Duran, 97 Cal.App.4th 1448, 119 Cal.Rptr.2d 272 (2002), one predicate offense was the charged offense of robbery. The second predicate offense was proved through a certified minute order documenting the conviction of Octavio Aldaco for the crime of possession of cocaine base for sale and the testimony of a gang expert that he was a Florencia 13 gang member.

These three cases are representative of the type of evidence typically used to prove the predicate offenses necessary to establish the gang allegation. No such evidence was presented in this case.

Finally, while the act alleged in the indictment can serve as a predicate offense, neither stalking nor threatening a school official are enumerated offenses.

3. THERE IS INSUFFICIENT EVIDENCE TO PROVE SPECIFC INTENT TO ASSIST IN CRIMINAL CONDUCT REQUIRED FOR A GANG ENHANCEMENT ALLEGATION.

The gang enhancement requires that each offense was committed for the benefit of the ALF and with *the specific intent to promote, further, or assist in any criminal conduct by gang members*. The specific intent requirement places Kevin Olliff's state of mind at the time of the alleged crime in issue. Even if the court finds sufficient evidence to indict on one or more of the 10 counts alleged in the indictment, the evidence does not prove that Kevin Olliff was doing anything more than exercising what he believed to be his constitutional right to protest.

In People v. Morales,112 Cal.App.4th 1176, 1198, 5 Cal.Rptr.3d 615 (2003), the defendant and two fellow gang members committed a robbery. On appeal, defendant argued there was insufficient evidence of the specific intent element for the gang finding. The court rejected his claim stating: "there was evidence that the defended *intended to commit robberies*, that he intended to commit them in

association with Flores and Moreno, and that he knew that Flores and Moreno were members of the gang…. It was fairly inferable that he intended to assist criminal conduct by his fellow gang members."

In People v. Romero, 140 Cal.App.4th 15, 20, 43 Cal.Rptr.3d 862 (2006), the defendant and a fellow gang member committed a murder and an attempted murder. The two defendants were members of Florencia 13. On appeal the defendant challenged the gang enhancement finding, arguing he lacked the requisite "specific intent to promote, further, or assist in any criminal conduct by gang members." The court stated: *"There was ample evidence that appellant intended to commit a crime, that he intended to help Moreno commit a crime*, and that he knew Moreno was a member of this gang. This evidence creates a reasonable inference that appellant possessed the specific intent to further Moreno's criminal conduct."

In order for Mr. Olliff to *intend to commit a crime* as required by Morales and Romero, he must believe that the conduct is criminal at the time of the alleged offense. For example, if the court finds that there is sufficient evidence to indict on Count 3, the threat of Lynn Fairbanks in violation of Penal Code section 71 based on the July 15, 2006 home demonstration, it must be shown that at the time of the demonstration Mr. Olliff knew it was a violation of Penal Code section 71 in order to find the requisite specific intent to *assist in criminal conduct* by gang members.

There is no such evidence. In fact, the evidence is to the contrary. The testimony describing the July 15 demonstration indicates the protestors were acting in a manner consistent with the belief that their actions were legal. There were two UCLA police officers present during the entire demonstration, one of them being Sergeant O'Connell. She testified there were approximately 30 protestors. They did not arrive all at once. They got out of various vehicles, assembled, conferred and started walking up and down the street, on the sidewalk and across the street.

They were chanting and handing out flyers to people walking and driving by the area. They marched back and forth within a span of two to four houses on either side of the Fairbanks' house. There was nothing noteworthy about the clothing worn by the demonstrators.

It is particularly significant in this regard that one of the officers can be heard stating on the audiotape that "As long as everybody follows an orderly protest, there will be no problem." This comment is made after the burn it down chant. And, in fact, the police did not call for back up, no arrests were made and there was no attempt to disperse the crowd during the protest. Thus, even if the court ultimately decides that this was not constitutionally protected activity, there is no evidence that Kevin Olliff believed he was engaging in criminal conduct and therefore the specific intent element has not been proven. Therefore the gang allegation fails.

There was testimony by numerous members of law enforcement making it clear they did not believe these types of public protests were violations of the law. The only arrests made were for municipal code violations such as excessive noise.

## VI

## CONCLUSION

It is respectfully submitted that the entire indictment should be set aside because of insufficient evidence.