

1 TUESDAY, JANUARY 5, 2016

A.M. SESSION

2 P R O C E E D I N G S

3 THE COURT: We're on the record.

4 Mr. Millbrook is present. Both counsel are present.

5 We put this matter over from yesterday to today to,  
6 among other things, to deal with any issues that might need  
7 to be dealt with before we bring in the jurors tomorrow.  
8 And I understand, Mr. DuBois, there are three matters on  
9 which you would like to be heard at this time; is that  
10 right?

11 MR. DUBOIS: Yes, that's correct. And as to the  
12 first matter, at this point, I want to make a matter of  
13 record, the disposition in his appellate case as follows:  
14 Mr. Millbrook's convictions for assault are affirmed. His  
15 conviction for attempted murder is reversed. The People  
16 shall have 60 days, shall have, 60 days from the issuance  
17 of the remittitur to decide whether to retry him for  
18 attempted murder. If the People do not file a charge of  
19 attempted murder within that timeframe, the judgment shall  
20 be modified to reflect Millbrook's conviction for attempted  
21 voluntary manslaughter, instead of attempted murder, and to  
22 strike the enhancement under 12022.53 subdivision (d), as  
23 so modified, the judgment is affirmed.

24 It is the defense position, having had this part of the  
25 opinion called to my attention by my client just today,  
26 when he handed me the letter from the appellate attorney,  
27 not addressed to me, but to him, and now I've reviewed the  
28 opinion itself, that there was never a filing of a new

1 Complaint for attempted murder.

2 There was never -- as a matter of fact, there was never  
3 a filing of a charge of attempted murder after the  
4 remittitur, according to the record which I think the  
5 Court's reviewed prior to this hearing. So, the record is  
6 absolutely silent on that subject. There is no record of  
7 the district attorney even standing up and saying: We'd  
8 like the formerly heretofore filed Information to  
9 constitute a new charge of attempted murder.

10 There's never anything in the record whatsoever that  
11 there was a charge of attempted murder filed in this case  
12 after the remittitur, wherefore I suggest this Court has to  
13 follow the appellate court's directive, the self executing  
14 ruling that his conviction of attempted murder be reduced  
15 to manslaughter for failure of the district attorney to do  
16 what the appellate court has directed in the first place,  
17 which is to file the charge of attempted murder. No charge  
18 of attempted murder has ever been filed in this case, other  
19 than the original one, nothing was filed since the  
20 remittitur. And under those circumstances, I suggest the  
21 Court has to reduce it, and I would suggest the Court -- I  
22 know the Court has indicated tentatively that this request  
23 will be denied, but I would ask the Court to, as we go  
24 through the other proceedings in this case, assuming it  
25 goes and does deny this request, might take a look at the  
26 law on this subject, and I'm going to, because I just this  
27 morning come in, been made aware of this, and so I'm going  
28 to really research it as hard as I can between now and the

1 time the first witness is called in these proceedings. And  
2 I know this court is always attentive to the law, and I  
3 would suggest that the court also take a look, even though  
4 it has denied it, or maybe make its denial today tentative,  
5 and we'll go, all of us, take a little look at whether  
6 these circumstances of a completely silent record, let  
7 alone the fact that no new charge was filed.

8 I mean, it doesn't say that the D.A. shall make a  
9 decision of whether or not to retry him. It says: Shall  
10 file a charge of attempted murder. And there never was a  
11 charge of attempted murder filed. And so it seems to me  
12 that the opinion is self executing, and the court really  
13 has no choice but to reduce it under those circumstances,  
14 and I'll submit on that.

15 THE COURT: Mr. Ford, any response?

16 MR. FORD: Just briefly, your Honor. While I  
17 wasn't present in Hayward when the remittitur first came  
18 back, I am aware that I had a lengthy conversation with the  
19 supervising D.A.s down there who made the appearance when  
20 this case first came back and indicated clearly, as far as  
21 I know, that we were going to proceed with the retrial.

22 I will say that my direct interaction with Mr. DuBois,  
23 I believe happened on the, if not shortly, if not the same  
24 day Mr. DuBois was appointed, then certainly the next court  
25 date where me and Mr. DuBois specifically spoke about my  
26 position that this case was going forward to a retrial on  
27 the attempted murder.

28 I haven't reviewed the court file, so I can't direct

1 the court to specific dates or anything of that nature as  
2 far as when these appearances took place, but it's my  
3 position that the D.A.'s office has made it clear  
4 throughout the entirety of the proceeding since it's come  
5 back on remittitur that we were proceeding with the  
6 original charge.

7 MR. DUBOIS: That would have been in June, Judge,  
8 as I remember the court reviewing this, which was the  
9 first -- my first serious appearance in this matter.

10 THE COURT: Actually, let me help everybody.  
11 First of all, the remittitur was issued, according to my  
12 review of the file here, on March 11th of 2014, by the  
13 District Court of Appeal. It was filed in Alameda County  
14 Superior Court on March 18th of 2014.

15 On March 21st, Judge Murphy in Department 518, the  
16 department in which the case had originally been tried, and  
17 presumably, therefore, the department to which the  
18 remittitur was directed, he issued an order that his clerk  
19 memorialized in the minutes, there was nobody present, and  
20 it wasn't reported. And the order basically directed that  
21 the case be calendared in Department 513 for the district  
22 attorney to decide how they're going to proceed based on  
23 the reading of the District Court's opinion, and it was  
24 calendared on March 26th.

25 On March 24th, the district attorney's office obtained  
26 a removal order from Judge Grimmer, it appears, in  
27 Department 513 for the removal of Mr. Millbrook from the  
28 Department of Corrections facility where he was located to

1 appear in court. He was finally -- he didn't appear on the  
2 26th. There wasn't enough time. So, it went over to April  
3 7th, at which time Mr. Millbrook did appear, and he was  
4 represented at that point by the public defender, at least  
5 a public defender appeared at that time with him. It was  
6 indicated that the time was not waived for trial.

7 Actually, there's no notation one way or another, so it was  
8 computed that time would run on May 19th.

9 MR. DUBOIS: Okay.

10 THE COURT: It was put over to April 10th.

11 On April 10th, a public defender appeared, the  
12 defendant waived time for trial.

13 MR. DUBOIS: What day was that?

14 THE COURT: That was on April 10th.

15 MR. DUBOIS: Uh-huh.

16 THE COURT: And it was put over to May 1st for,  
17 quote, hearing, of some kind. On May 1st, a public  
18 defender indicated they may have a conflict. It was put  
19 over to May 6th. On May 6th, Mr. DuBois was appointed.  
20 The public defender having actually filed a conflict.

21 At that time, it was noted that time continues to be  
22 waived. It was put over to June 6th for hearing and to  
23 set. And on June 6th, he was continued to July 18th for  
24 D&S. And as we all know, "D&S" is another term for  
25 pretrial conference, basically. It's disposition and  
26 setting.

27 I do note that in these last few court appearances, the  
28 district attorney who appeared for the people was Tom

1 Burke. I don't know this, but I believe that he may have  
2 been the calendar deputy in Department 513 at that time.

3 MR. DUBOIS: That's correct.

4 THE COURT: So he was -- whenever there's no  
5 assigned D.A. appearing, Mr. Burke is the person, I think  
6 we can all agree, who appears for the People.

7 MR. FORD: Yes.

8 THE COURT: Unless there's an assigned trial  
9 deputy who's appearing, and then the matter proceeded from  
10 there.

11 Okay. So that puts some things in context.

12 Now we've got some specific dates on which things  
13 happened.

14 MR. DUBOIS: Right, and if I could just add one  
15 last leg to my request.

16 THE COURT: Right.

17 MR. DUBOIS: Our position is effectively double  
18 jeopardy. Our position is, although unknown to me when I  
19 picked up the case, there was a self executing order, which  
20 went into effect no later than, what, the 18th of May,  
21 which if the district attorney didn't file a new charge,  
22 this case was reduced by the self executing order of the  
23 appellate court to attempted involuntary manslaughter,  
24 period. So, that means that he stands convicted as of that  
25 time, because the district attorney didn't file a new  
26 charge, didn't file any charge, whatsoever, really, treated  
27 it like some kind of a mistrial after a hung jury. And so  
28 they obviously didn't read the opinion, or they decided not

1 to file.

2 But whatever happened, since they didn't comply with  
3 the order of the court, the case was reduced by operation  
4 of law as of the 18th of -- what do you call it -- of the  
5 18th of May, and he stood convicted at that time based on  
6 the trial that he's already had of attempted voluntary  
7 manslaughter. So to retry him now on something that he's  
8 already been convicted of would be double jeopardy, place  
9 him in double jeopardy.

10 So I assert there's a bar to these proceedings that  
11 he's already been convicted of attempted voluntary  
12 manslaughter by operation of the court's order, because the  
13 district attorney never filed new charges or never filed  
14 any charges after the remittitur. He just continued on, as  
15 though it's just going to be handed over, you know -- I  
16 don't know. There's no representation of the district  
17 attorney that we read the opinion of the appellate court,  
18 and this is what we're going to do in any of the minutes.

19 So, short of getting the court reporter's notes for  
20 some of those proceedings, now there's only a couple of  
21 them and they shouldn't be long, if the court wish to bring  
22 them up and maybe the district attorney stood up and said,  
23 oh, yes, we're electing -- pursuant to the order, we elect  
24 to go forward, we're going to let the former charge stand  
25 as our -- be treated as filing a new charge as we were  
26 directed to do by the appellate court. Something like that  
27 might have been said in court, but I never heard it since  
28 I've been in the case. My appearances were very brief.

1 One's to accept, and then to get another date for me to  
2 familiarize myself.

3 THE COURT: Sure. So I have a question of the  
4 two of you. Mr. Ford has represented that at or shortly  
5 after the time you got appointed, he had a conversation  
6 with you in which he told you, we're going to retry the  
7 case. Now that I've given you these dates: Appointed on  
8 May 6th, Tom Burke appeared, went over to June 6th, at  
9 which time, Tom Burke appeared; Mr. Ford, does that help  
10 you in identifying about when it was that this conversation  
11 took place with Mr. DuBois?

12 MR. FORD: Given the dates that the Court has  
13 given me, I in fact believed that the conversation happened  
14 even before myself and Mr. DuBois -- and I'll ask  
15 Mr. DuBois this since I don't have Mr. Golde present. Matt  
16 Golde from my office called me and said: The case is  
17 coming back, Bill DuBois is going to get appointed.

18 And I said to Matt Golde: Let him know we're going to  
19 retry the case.

20 So, Matt Golde then told me he had talked to  
21 Mr. DuBois. I don't know the dates. And like I said, I'm  
22 happy to contact Mr. Golde, but certainly was -- either  
23 certainly right around the first day that Mr. DuBois came  
24 in since we knew -- I knew it was going to be a public  
25 defender conflict, because that's what had occurred before.  
26 I believe at some point there was some indication of that,  
27 but I can't say that for sure, but I am positive that when  
28 this case came back, I was actually informed by the court



1 that the remittitur had come down and then spoke to  
2 Mr. Golde, because I was at a different assignment prior to  
3 Mr. DuBois coming. And then I spoke to Mr. Golde after  
4 Mr. DuBois came in, and then I contacted both Mr. DuBois  
5 and Mr. Ikuma, who was in his office at the time, to  
6 indicate we are going to trial on the attempted murder,  
7 that's what we're doing. Obviously that would not be  
8 reflected in the record.

9 THE COURT: Sure.

10 MR. FORD: I know Mr. DuBois. Mr. DuBois hasn't  
11 said he and I did not speak. I know we spoke shortly after  
12 his first appearance, and I spoke to both him and Mr. Ikuma  
13 about this particular case because of the way in which it  
14 came back.

15 THE COURT: Mr. DuBois, is there anything you can  
16 add or would like to add?

17 MR. DUBOIS: Yeah. I don't have any recollection  
18 of the conversation which someone said to me we're going to  
19 retry the case, I'm appointed for trial. I mean, they  
20 don't have to say to me -- that's what seems so artificial  
21 about this -- no one said to me that I recall: We're going  
22 to retry the case.

23 I just assumed they were going to retry the case,  
24 because I'm appointed to the case for trial. I came into  
25 this case thinking everything was in order. What I didn't  
26 know was everything wasn't in order. According to this  
27 opinion, there's supposed to be -- they may want to retry  
28 the case, that's one thing when they express themselves and

1 what they want, it's another thing is what they do what the  
2 law requires, which in this case would have been to file a  
3 new charge. And, presumably, from what this is saying  
4 here, I mean, we might have asked for a new preliminary  
5 hearing. But whatever it is, it says file a new charge.

6 When I come in, I think whatever is supposed to have  
7 been done has been done. It turns out I was wrong.

8 Everything that's supposed to have been done hasn't been  
9 done. And what Mr. Ford's intention is is not reflected in  
10 the opinion of the appellate court. It doesn't say: If  
11 the district attorney intends to retry the case. That's  
12 fine, that's all they have to do is intend to retry it, and  
13 then this reduction will not go into effect.

14 It says: They will file a new charge. They never did  
15 it, whatever their intent was. Their intent is not the  
16 operative -- in my view, it's not the operative of fact.  
17 The operative fact is whether they filed, and they didn't  
18 file. That automatically reduced this offense, unknownst  
19 to me at the time, when I accepted this appointment, 12  
20 days later, the charge -- there was nothing for me to  
21 defend, and I should have withdrawn. It was reduced by  
22 operation of law because no new charges had been filed.  
23 And that's why I assert -- I have to assert double jeopardy  
24 here, because he's already been convicted.

25 My position is, my client has been convicted by  
26 operation of this opinion of attempted voluntary  
27 manslaughter because the district attorney never filed a  
28 new charge. That's it.

1 MR. FORD: Judge, if I can. To be clear, I have  
2 a specific recollection of talking to Mr. DuBois and  
3 Mr. Ikuma about retrying the case as an attempted murder  
4 because of the way the opinion was written. There's no  
5 doubt in my mind that that conversation happened.

6 Mr. DuBois is saying he doesn't recall that is different  
7 from saying that never happened.

8 THE COURT: I think Mr. DuBois's point is, that  
9 given the language of the final paragraph, final section  
10 and the order of the court of opinion decision, something  
11 more than just a conversation was required or an expression  
12 of intent, but rather --

13 MR. DUBOIS: That is exactly my point, your  
14 Honor.

15 THE COURT: -- filing.

16 MR. DUBOIS: I don't dispute what Butch -- what  
17 Mr. Ford has said about having a conversation, I just don't  
18 remember it. But it doesn't have anything to do with what  
19 the opinion says.

20 THE COURT: Right. Okay. And I understand  
21 exactly what you're asking. Whether we want to call it  
22 jeopardy or whether this court even has jurisdiction to do  
23 anything more than sentence the defendant on a charge of  
24 attempted voluntary manslaughter. I know exactly what  
25 you're asking. You're asking for basically a decision that  
26 this trial will not go forward, but instead that I sentence  
27 him on a charge of attempted voluntary manslaughter, that  
28 basically the attempted murder charge is gone. That's

1 pretty much what you're asking for, right?

2 MR. DUBOIS: Right, for failure to file a new  
3 charge.

4 THE COURT: I understand.

5 Okay. Matter submitted?

6 MR. FORD: Yes.

7 THE COURT: Mr. DuBois?

8 MR. DUBOIS: Yes, your Honor.

9 THE COURT: Okay. The request is denied, and I'm  
10 going to explain my thinking here.

11 Number one. It's a general proposition when a person  
12 is -- when there's a reversal of a conviction following a  
13 jury trial, a new Information isn't filed or a new  
14 Complaint. The case comes back. The Information, which  
15 was on file, is the operative document. What's being  
16 reversed is the conviction that resulted from a trial that  
17 took place following the filing of that Information.

18 The one time that I can really see where it might be  
19 necessary to file a new pleading if there's going to be a  
20 retrial is if the defendant is not convicted for the charge  
21 for which he's been charged of a lesser included offense,  
22 for example. Let's say, for example, he was convicted at  
23 trial of attempted voluntary manslaughter and for some  
24 reason that got reversed, and it was ordered back for a  
25 retrial. If the Information says "murder" and the only  
26 thing he could be tried for -- an attempted murder, and the  
27 only thing he could be tried for is attempted voluntary  
28 manslaughter, it makes sense to me that that may

1 necessitate the filing of an amended Information.

2 But the charge here was -- in the Information was  
3 attempted murder, albeit with the additional allegation  
4 that it was willful, deliberate, and premeditated, which is  
5 a charge that is no longer a part of this, but the charge  
6 is attempted murder, and all the enhancement charges in  
7 which we anticipated we would be trying this case is part  
8 of that information. So, the general proposition is  
9 there's no new filing.

10 So, it puzzles me a little bit as to why the court  
11 would -- they say that: The People shall have 60 days from  
12 the issuance of the remittitur to decide whether to retry  
13 him for attempted murder. Then they go to a second  
14 paragraph that says: If the People don't file a charge of  
15 attempted murder within that timeframe -- and it goes on to  
16 say what the consequence would be.

17 The question is, do I read that literally and really  
18 exalt form over substance, or do I just look at this for  
19 what really happened? The case came back, the district  
20 attorney decided we want to retry this, it moves forward,  
21 everybody new that the district attorney's intention was to  
22 retry it, but what they didn't do was file, which I  
23 acknowledge and take notice of when I reviewed the file,  
24 they didn't file a document that said: We intend to retry  
25 this.

26 So, and I don't think that the Court of Appeal -- I  
27 think that they envisioned that the D.A. should be given  
28 certain options, they don't get to take forever to make a

1 decision, something should happen relatively soon. And  
2 interestingly enough, they say "60 days," which happens to  
3 be the speedy -- statutory speedy trial period. Basically,  
4 it's put up or shut up to the D.A.

5 But I don't think the district court really intended  
6 this to be about the formality of filing a particular piece  
7 of paper. It's about the district attorney making a  
8 decision: What do you want to do?

9 And I'm satisfied the district attorney made that  
10 decision in a timely fashion, and this case has proceeded  
11 since March or April, let's say April of 2014 with the idea  
12 it's going to trial. And I think that all things  
13 considered, to make this depend on whether the district  
14 attorney filed a piece of paper, which there is no  
15 procedural necessity for in the first place, I think would  
16 be exalting form over substance.

17 And then the second ground for denying it is the motion  
18 is untimely. It seems to me that this is a motion that  
19 should have been made long ago if it was going to be made  
20 at all. This decision by the Court of Appeal has read  
21 exactly the way it reads now for almost the last two years,  
22 and it seems to me that to make this on the day before  
23 we're going to start picking the jury is rather untimely.

24 Now, I also want to note this. This has nothing to do  
25 with you, Mr. DuBois. Since the day he arrived,  
26 Mr. Millbrook has been represented by counsel. So, it's  
27 not about a particular attorney. It's just that this is  
28 way too late to be making this. Everybody has been

1 operating on the assumption that this case is going to  
2 trial for a long time now, and I think that to entertain  
3 this motion at this time would not be in the interest of  
4 justice. And along those same lines, having noted that the  
5 60-day time period just happens to coincide with the speedy  
6 trial statutory 60-day period, I do note that time was  
7 waived for trial. And by implication, as far as I'm  
8 concerned, along with all the other reasons I've indicated,  
9 I think that it's fair to say that time having been waived  
10 for trial, it had the practical effect, if nothing else, of  
11 waiving the time within which the People needed to make a  
12 definitive decision.

13 MR. DUBOIS: That's when the public defender  
14 represented him in the first appearance.

15 THE COURT: And actually time continued to be  
16 waived when you got appointed, but I'm just indicating,  
17 these are all the things I'm taking into consideration in  
18 denying that motion. The motion having been denied, now we  
19 move to the next subject. You indicated there were three  
20 things that you wanted to talk about.

21 MR. DUBOIS: Yes, there is. One is calling the  
22 mother of the victim in this case, who has no knowledge of  
23 any of the facts surrounding the charges, but simply was  
24 called to engender sympathy on behalf of the victim, which  
25 was very effective in the first trial, and I'm going to  
26 move, and I did move now that she not be called, unless she  
27 had something relevant to say to something to the charges.

28 Thirdly --

Relfson went against the higher court's instructions - wire  
Constitutional Right violated (1st Amend. 1st Amend.)