No. S026634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>PAUL SODOA WATKINS,<br><br>Defendant and Appellant. | L. A. Sup. Ct.<br>No. KA005658 |



# APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

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**APPELLANT'S OPENING BRIEF**

## I.

## INTRODUCTION

All murders are tragic. The death penalty, however, is to be reserved for the few "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) The killing in this case is not one of the most atrocious. The death penalty was imposed on appellant, Paul Sodoa Watkins (hereafter "Watkins"), for felony murder *simpliciter,* which is a capital crime in only six states including California.

Watkins and his codefendant were jointly tried and convicted of killing Raymond Shield during an attempted robbery. Watkins testified that he shot Raymond Shield accidentally, and only sheer speculation, unsupported by any solid evidence, suggests otherwise. Moreover, the

evidence is insufficient to prove the prosecution's theory of death-eligibility – i.e., that the killing occurred during an attempted robbery. In short, this homicide should not have been tried as a capital case.

The prosecution's case for death was far from overwhelming. Watkins was 21 years old and his codefendant was 18 years old at the time of the crimes. The prosecutor never argued for a death sentence against Watkins's codefendant, who was an accomplice in the felony murder and had committed a string of robberies with Watkins the day of the shooting. But the prosecutor vigorously sought death against Watkins. Watkins's criminal record did not warrant the death penalty. He had prior convictions for grand theft, possession of a controlled substance, and possession of a weapon by an ex-felon. At trial, Watkins admitted that he and his codefendant committed the charged robberies. The prosecution also introduced evidence that Watkins was part of three group brawls while confined in county jail before and during the trial in this case. Sensing that his case for death was not strong, the prosecutor played the "race card" at the penalty phase by eliciting evidence that erroneously and prejudicially suggested that Watkins, a black man, preyed on white and Hispanic people.

The defense presented evidence about Watkins's childhood in South Central Los Angeles in a family plagued with domestic violence, his parents' divorce, his mother's attempt to move her children to a better environment, and his trauma of being a victim of a drive-by shooting in which friends were killed and his sister was wounded. In addition, Watkins's mother, half-sister, uncle, friend and former teacher all implored the jury to be merciful and sentence Watkins to life without the possibility of parole.

After two days of deliberations, the jury reached a verdict of life

without the possibility of parole for Watkins's codefendant. At the same time, the jury announced that it was having difficulty reaching the penalty decision for Watkins. A day later, the jury returned a death verdict against him.

As shown in this appeal, the evidence is insufficient to establish Watkins's guilt of capital murder. Furthermore, prosecutorial misconduct, instructional errors, the erroneous exclusion of a prospective juror, and the unconstitutional use of felony murder *simpliciter* as a basis for capital punishment require reversal of Watkins's convictions and sentence of death.

## II.

## STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. (Pen. Code, § 1239(b); Cal. Rule of Court 13.)

## III.

## STATEMENT OF THE CASE

Watkins and his codefendant, Lucien Martin, were charged with committing six crimes on July 17, 1990: robbery of Anthony Orosco and Juan Gallegos in Riverside County, robbery of Jihad Muhammed in Claremont, Los Angeles County, attempted robbery and murder of Raymond Shield in West Covina, Los Angeles County, and robbery of Kyung Sun Lee in Gardena, Los Angeles County. (CT 312-318.)[1]

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[1] In this brief, Watkins abbreviates the citations to the record as follows: "RT" is the reporter's transcript on appeal; "CT" is the clerk's transcript on appeal; "CT Supp." is the clerk's supplemental transcript for which Watkins gives the volume number followed by the page number, e.g. "CT Supp. V: 123." The clerk's supplemental transcript includes CT Supp. II, volumes 1 and 1I (Arabic followed by Roman numerals used by the

(continued...)

The charges were initially filed in Riverside County and in different municipal court judicial districts in Los Angeles County. On July 19, 1990, a complaint was filed in the Los Angeles County Municipal Court in the South Bay Judicial District, case number YA004528, charging Watkins and Martin with the robbery of Kyung Sun Lee (Pen. Code, § 211). (CT Supp. V: 123.) On July 31, 1990, a preliminary hearing was held, and Watkins and Martin were held to answer on the charge. (*Ibid.*)

On September 28, 1990, a three-count complaint was filed in the Los Angeles County Municipal Court in the Citrus Judicial District, case number KA005658, charging Watkins and Martin with the attempted robbery and murder of Raymond Shield occurring in West Covina, as well as the robbery of Jihad Muhammed in Claremont. (CT 284.)

The preliminary hearing was held in the Citrus Judicial District case on November 8, 1990, and November 13, 1990. (CT 296.) On November 13, 1990, the prosecution moved to amend the information to include the robbery of Lee (Pen. Code, § 211). (CT 273-274.) The court granted that motion to conform to proof presented at the preliminary hearing. (*Ibid.*) The court found that there was sufficient evidence to hold both Watkins and Martin to answer to count 1, the murder of Shield (Pen. Code, § 187(a)); count 3, the robbery of Muhammed (Pen. Code, § 211); and count 4, the robbery of Lee (Pen. Code, § 211), as well as the firearms allegations (Pen. Code, § 12022(a)(1)) for both defendants and the personal use allegation

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[1] (...continued)
superior court clerk for volume numbers); CT Supp. II 1, volumes 1 and 11 (i.e., Roman numerals followed by Arabic numeral were used by the superior court clerk for transcript number and Arabic numerals were used for volume numbers); CT Supp. III, CT Supp. IV, CT Supp. V, CT Supp. VI, CT Supp. VI, volumes I through X, CT Supp. VI, CT Supp. IX .

attributed to Watkins (Pen. Code, § 1192.7(c)). (CT 281-282.) However, the court found there was insufficient evidence to hold either Watkins or Martin to answer as to either the robbery-murder special circumstance regarding Shield (Pen. Code, § 190.2(a)(17)) or to the attempted robbery of Shield (Pen. Code, § 664/211) charged in count 2. (*Ibid.*)

On November 27, 1990, by an amended information filed in Los Angeles County Superior Court, Watkins and Martin were charged with the Los Angeles counts, including those for which the municipal court found insufficient evidence to hold the defendants to answer, and Watkins was charged with having prior convictions (Pen. Code, § 667.5(b) & § 1203(e)(4)). (CT 307-311.) Watkins and Martin pleaded not guilty to the charges and denied all the allegations set forth in the information. (CT 322.)

On July 10, 1991, the superior court granted the prosecution's motion to amend the information (Pen. Code, § 1009) to add the Riverside robberies of Anthony Orosco and Juan Gallegos. (CT 312-318, 399.) This second amended information charged Watkins and Martin as follows: in count 1, the murder of Raymond Shield (Pen. Code, § 187(a)), with the special circumstance of being committed during an attempted robbery (Pen. Code, § 190.2(a)(17)), and with being armed with a handgun (Pen. Code, § 12022(a)(1); in count 2, the attempted second degree robbery of Raymond Shield (Pen. Code, § 664/211), and with being armed with a handgun (Pen. Code, § 12022(a)(1)); in count 3, the robbery of Jihad Muhammed (Pen. Code, § 211), and with being armed with a handgun (Pen. Code, §12022(a)(1)); in count 3, as to Watkins only, personal use of firearm (Pen. Code, § 1203.6(a)(1) & § 12022.5); in count 4, as to both Watkins and Martin, the robbery of Kyung Sun Lee, and with being armed with a

handgun (Pen. Code, § 12022(a)(1)); in count 5, as to both Watkins and Martin, the robbery of Anthony Orosco (Pen. Code, § 211), and with being armed with a handgun (Pen. Code, § 12022(a)), and as to Watkins, with the personal use of a firearm (Pen. Code, §§ 1203.06(a)(1) and 12022.5); in count 6, as to both Watkins and Martin, the robbery of Juan Gallegos (Pen. Code, § 211), with a principal being armed with a handgun (Pen. Code, § 12022(a)(a), and as to Watkins only, with personal use of a firearm (Pen. Code, §§ 1203.06(a)(1) and 12022.5).

The second amended information further alleged, as to both Watkins and Martin, that the offenses alleged in counts 1 through 6 were serious felonies (Pen. Code, § 1192.7(c)). The second amended information also alleged, as to Watkins only, that with regard to counts 1 through 4, on or about May 6, 1988, in Riverside County Superior Court case number CR-28529, Watkins had been convicted of grand theft (Pen. Code, § 487.2), had served a term for that offense (Pen. Code, § 667.5), and committed an offense resulting in a felony conviction within five years of the conclusion of that term ((Pen. Code, § 667.5(b)), which made him ineligible for probation (Pen. Code, § 1203(e)(4)). Finally, the second amended information alleged, as to Watkins only, that with regard to counts 1 through 4, on or about May 27, 1988, in Riverside County Superior Court case number CR-28991, Watkins was convicted of possession of a controlled substance (Health & Saf. Code, § 11350(a)) and on or about June 25, 1987, in Riverside County Superior Court case number CR-27073, Watkins was convicted of grand theft (Pen. Code, § 487.2), which made him ineligible for probation (Pen. Code, § 1203(e)(4).) (CT 312-317.)

On July 10, 1991, Watkins and Martin pleaded not guilty to the charges and denied all the allegations set forth in the second amended

information. (CT 399.)

On July 29, 1991, after the Public Defender's Office, which had been representing Watkins, declared a conflict of interest, the superior court granted Watkins's motion to proceed in propria persona. (CT 405; RT 146-147, 152.) On December 30, 1991, the superior court granted Watkins's motion to relinquish his pro per status and appointed Charles Uhalley to represent Watkins. (CT 607.)

On February 27, 1992, the joint trial of Watkins and Martin began with jury selection. (CT 637.) On March 2, 1992, the jurors and alternates were sworn. (CT 638.) On March 3, 1992, the guilt phase began. (CT 640.)

On March 5, 1992, the prosecution rested its case. (CT 642.) On March 6, 1992, the trial court denied Watkins's motion of acquittal (Pen. Code, §1118.1). (CT 643.) On that same day, Watkins presented his case and testified on his own behalf, and the trial court denied Watkins's motion for a mistrial based upon the prosecution's cross-examination of Watkins. (*Ibid.*)

On March 9, 1992, the prosecution presented its rebuttal, all parties rested their cases, and the prosecutor and both defense counsel presented their closing arguments. (CT 644.) On March 10, 1992, the jury deliberated for approximately five hours, and on March 11, 1992, the jury resumed its deliberations for approximately four hours before returning guilty verdicts as to all counts as to both Watkins and Martin and finding true the special circumstance and all enhancement allegations. (CT 663-667.)

On March 16, 1992, the joint penalty phase began with the prosecution presenting its witnesses and Martin presenting his case. (CT

778-779.) On March 17, 1992, Watkins presented his case. (CT 780.)

On March 17, 1992, juror Qamar Chaudary was excused by stipulation and alternate juror Robert Williams took his place on the jury. (CT 780.)

On March 23, 1992, the prosecution introduced additional aggravating evidence. (CT 779, 783.)

On March 24, 1992, the jury deliberated for approximately an hour. (CT 784.) On March 25, 1992, the jury continued its penalty deliberations for approximately five hours. (CT 784, 790.) On March 26, 1992, the jurors deliberated for almost four hours before indicating that they had reached a verdict as to one defendant but were having difficulty in deciding the verdict as to the other. (CT 791.) The trial court took the one verdict – a verdict of life without possibility of parole for Martin. (*Ibid.*) The jury resumed deliberations about the penalty for Watkins. (CT 792.) On March 27, 1992, the jury deliberated for slightly more than two and one-half hours before announcing they had reached a verdict. (CT 793.) At 2:26 p.m., the verdict of death for Watkins was read. (*Ibid.*)

On May 11, 1992, the trial court denied Watkins's motion for a new trial and his motion for modification of sentence under Penal Code section 190.4(e). (CT 895-898.) The trial court sentenced Watkins to death on count 1 (murder of Raymond Shield). (CT 898.) In addition, Watkins was sentenced on the other convictions as follows: as to count 2 (attempted second degree robbery of Raymond Shield), two years with an additional year for the armed enhancement with the entire sentence being stayed (Pen. Code, § 654); as to count 3 (robbery of Jihad Muhammed), one year with an additional one year and four months on the use enhancement to be served consecutively to counts 4, 5, and 6; as to count 4 (robbery of Kyung Sun

counts 5 and 6; as to count 5 (robbery of Anthony Orosco), one year with an additional four years for the use enhancement and an additional one year for the armed enhancements with the sentences on both enhancements being stayed (Pen. Code, § 654); as to count 6 (robbery of Juan Gallegos), five years with an additional five years for the use enhancement and an additional one year for the armed enhancement with the sentence on the armed enhancement only being stayed (Pen. Code, § 654). The court also imposed a one-year sentence for the prior felony conviction (Pen. Code, § 667.5(b)) to be served consecutively to the sentences on Counts 2-6. The total non-stayed sentence was death plus 15 years and eight months. The sentences on counts 2-6 and the prior conviction were stayed pending the determination of Watkins's death sentence on count 1. (CT 898-899; RT 2206-2207.)

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## IV.

## STATEMENT OF THE FACTS

### A. Guilt Phase

#### 1. The Killing of Raymond Shield

##### a. Prosecution's Case

On July 17, 1990, some time after 5 a.m., Raymond Shield, age 62, drove his family to the Holiday Inn on Garvey Avenue in West Covina. (RT 1131.) The family included Raymond Shield's wife, Jeneane Shield, his grown daughter, Pamela Coryell, and his two grandchildren, Dereck Coryell and Jaimee Shield, both age 8. (RT 1130.) Except for Raymond Shield, the family was scheduled to take a shuttle bus from the Holiday Inn to the Los Angeles airport for a flight to Hawaii. (RT 1130.) Raymond Shield planned to join his family in their vacation the next week. (RT 1131.)

As Pamela Coryell recounted, Raymond Shield stopped the car in the drive-through area in front of the reception area of the Holiday Inn. (RT 1131-1132, 1625-1626.) The reception area had a glass wall looking to the drive-through and parking areas. (RT 1625-1626.) It was dark outside, but the drive-through area was lit by overhead lights. (RT 1142.) The family started to unload their luggage and place it on the sidewalk toward the back of the car. (RT 1133.) A black truck pulled up on the opposite side of the driveway and stopped in front the Shields' car. (RT 1133, 1134, 1136, 1137.) The back bumper of the truck was even with the front bumper of the Shields' car. (RT 1628.) When the truck arrived, Raymond Shield was unloading luggage. (RT 1134.) Pamela Coryell was sitting on suitcases which were about 36 or 40 inches off the ground. (RT 1136.) Her mother and the children were next to Coryell. (RT 1149.)

The windows of the truck were dark tinted, and the passenger

window was rolled up. Coryell could not see into the truck. (RT 1144, 1623.) Two black men simultaneously got out of the truck. (RT 1144.) Without stopping or saying anything to the Shield family, the men walked to the front of the truck and opened its hood. (RT 1145, 1147.) Coryell then noticed that Raymond Shield was at the front of the truck, but she did not see him walk over there. (RT 1145-1146.)

As Raymond Shield stood near the truck, Coryell had to move to see what was going on. (RT 1147.) Raymond Shield was at the front of the truck on the passenger side with his hands in his pockets. (RT 1148, 1150.) He leaned over the truck's hood as if he were looking at the engine. (RT 1148, 1150-1151.) Coryell could see her father's body, but not his head. (RT 1148.) With the truck's hood raised, Coryell could not see either of the two other men who were completely out of her view. (RT 1148-1149.) Coryell did not hear any conversation between Raymond Shield and the two men while they stood at the front of the truck. (RT 1151.) Raymond Shield remained at the front of the truck for about a minute. (*Ibid.*) He then walked back towards his family in big, hurried steps with his hands still in his pockets. (RT 1151-1152.)

As Raymond Shield turned to walk away, the two men lowered the hood of the truck and walked quickly back to its cab. (RT 1152-1153.) One entered the driver's side of the truck; the other entered the passenger's side. (RT 1153.) There was a single, loud bang coming from the truck. (RT 1155.) Raymond Shield took about four or five steps and fell forward. (RT 1155, 1624.) The right side of his body was next to the passenger side of the truck. (RT 1155.) The passenger door was still open when Raymond Shield fell. (*Ibid.*, RT 1624.) At the time of the loud bang, the passenger was seated with at least one of his feet hanging out of the door; his body

was turned as if to close the door. (RT 1155-1156, 1624-1625, 1629-1631.) The passenger door closed as the truck started to move. (RT 1624.) Coryell identified Watkins as the person in the passenger's seat. (RT 1160.) Coryell never saw a gun; she never saw a muzzle flash or anything come from the truck. (RT 1160, 1625, 1628-1629.)

Coryell and Jeneane Shield ran toward Raymond Shield. (RT 1156.) Jeneane Shield stayed with her husband, while Coryell ran after the truck. (RT 1157.) The truck left quickly with its tires screeching and leaving acceleration skid marks in the hotel's driveway. (RT 1156, 1180, 1183-1184.) Coryell then summoned help. (RT 1157-1158.) Paramedics found an expended bullet projectile between Raymond Shield's buttocks and his underpants. (RT 1174-1175.) Police found a single casing from an expended bullet in the driveway about five to seven feet from Raymond Shield's head. (RT 1176.) Raymond Shield died at a hospital from two wounds inflicted by a single bullet. (RT 1159, 1307-1309.) The bullet entered the back of his right forearm and came out the front of his forearm and then entered his abdomen just above his right hip and exited the front of his abdomen above his left hip. (RT 1307-1309.) The bullet hit two main blood vessels causing Raymond Shield to bleed to death. (*Ibid.*)

**b. Watkins's Testimony**

Watkins testified on his own behalf. (RT 1470-1604.) He acknowledged that he had twice been convicted of grand theft. (RT 1500.) Watkins and Martin are cousins, and Watkins has known Martin all of his life. Watkins lived in Moreno Valley in Riverside County. (RT 1471-1472.) On July 16, 1990, Watkins and Martin were together, helping Martin's mother who had mechanical problems with her car. (RT 1472-1473.) At some point, Watkins dropped off Martin at a friend's house. (RT 1474.)

When Watkins returned to pick up Martin later that day, Martin had a gun with him. (RT 1474.) The gun, which Watkins had not seen before, was big and scary. (RT 1475.) Watkins and Martin discussed the possibility of using the gun to rob someone. (RT 1476.)

Before dawn on July 17, 1990, Martin was driving, and Watkins was riding as passenger in, a stolen black truck on the freeway going from Ontario toward Los Angeles. They were looking for someone to rob. (RT 1479, 1481.) They took the freeway off-ramp right before the Holiday Inn in West Covina. (RT 1481-1482, 1539.) Watkins had the gun on his lap. (RT 1543.) Because there were several businesses in this particular area, Watkins believed that he and Martin would be able to find a person to rob. (RT 1482, 1540.) They pulled into the Holiday Inn because the road was about to end. (RT 1483, 1543.) They decided to go into the Holiday Inn and "try this place." (RT 1483.)

When they turned into the Holiday Inn, Watkins saw a family of three adults and two children who were unloading and sitting on luggage. (RT 1483-1484, 1547-1550.) Watkins did not see these people until he and Martin pulled into the hotel's driveway. (RT 1540.) Watkins thought the people were going into the hotel. (RT 1484-1485, 1556.) Martin stopped the truck to wait for someone to rob. (RT 1485, 1556.) Watkins and Martin did not intend to rob the family because the area was too well-lit, there were too many people, and children were present. (RT 1484, 1554, 1561.) They were going to wait for someone else to come along after the family had left. (RT 1556.)

After stopping, Watkins and Martin remained inside the truck for a short while. (RT 1485, 1550.) However, Watkins thought that sitting in the truck made them look suspicious. (RT 1550.) Watkins told Martin to lift

the hood of the truck, so they would not look suspicious. (RT 1485-1486.) Watkins stuck the gun in his pants, held by his belt and covered by his shirt. (RT 1490, 1551.) As they stood by the hood of the truck, Watkins expected the five people to walk into the hotel, but they never did. (RT 1486.) Raymond Shield looked at Watkins and Martin standing by the truck. (*Ibid.*) Because he kept looking at Watkins and Martin, Watkins waved, so they would not appear suspicious. (RT 1486-1487.)

Almost immediately, Raymond Shield walked over to the truck. (RT 1486-1487.) He asked Watkins and Martin if they needed any assistance; Watkins rudely responded "no." (RT 1487.) Watkins wanted Raymond Shield to leave, so they could find someone alone to rob. (RT 1487, 1554, 1560-1561.) Watkins noticed that Raymond Shield's facial expression changed, indicating confusion or offense that Watkins refused assistance when he and Martin appeared to need help. (RT 1488.) Raymond Shield was at the truck for about seven seconds. (RT 1567.) He started walking, almost running, back toward the Holiday Inn. (*Ibid.*) Other than rudely refusing Raymond Shield's offer of assistance, Watkins did not say anything to him. Watkins did not pull out his gun or attempt to rob Raymond Shield. (RT 1488.)

Raymond Shield suddenly seemed suspicious of Watkins and Martin. (*Ibid.*) The change in Raymond Shield's behavior – both his expression and his rapid departure from the truck – made Watkins think that he would call the police. (RT 1489.) Watkins sensed that Raymond Shield "knew something wasn't right about us." (*Ibid.*) Watkins told Martin they should leave. (*Ibid.*) Watkins slammed the hood of the truck and ran back towards the passenger's seat. (RT 1489-1490.) Martin returned to the driver's seat. (RT 1489.)

Watkins wanted to get away before Raymond Shield reached the Holiday Inn. (RT 1490.) Watkins opened the truck door and tried to sit down but the gun, which was in his crotch area, got in his way. (RT 1490-1491, 1492.) He moved the gun in order to sit down. (RT 1492.) At this point, Martin already had started the ignition, so Watkins was in a hurry to get seated. (*Ibid.*)

Watkins, who is left-handed, had placed the gun in his waistband with his left hand. (RT 1558, 1570-1571.) In his hurry, however, he pulled out the gun with his right hand, placing his left hand on the seat for support. (RT 1572-1573.) He situated the gun in his right hand so he would not drop it. (RT 1575.) The barrel pointed straight down toward the ground. (RT 1574.) With the gun in his right hand, Watkins put his right hand on the top of the door over the unrolled window. (RT 1493, 1581.) Watkins used the back of his right hand over the window sill to pull the door closed. (RT 1574, 1581.) Watkins was seated, and his left hand was still on the seat. (RT 1573, 1576.)

As Watkins closed the door, the gun went off accidentally. (RT 1493, 1581.) Watkins did not pull or intend to pull the trigger. (RT 1493-1494, 1500.) He could not believe that the gun went off. (RT 1494.) He saw Raymond Shield, who was about 15 feet away, fall. (RT 1494, 1581.) Watkins felt the gun discharge, but he could not believe that he had shot Raymond Shield. (RT 1494-1496.) Martin asked, "What the fuck you doing?" (RT 1495.) Watkins was incredulous, since he did not try to shoot Raymond Shield. (RT 1495-1496.) Watkins never intended to pull the trigger or to hurt anyone. (RT 1500.) Martin drove the truck away from the Holiday Inn toward Los Angeles. (RT 1495, 1497.) After his arrest, Watkins learned of Raymond Shield's death from a police detective. (RT

1498.)

### 2. Robberies of Orsoco, Gallegos, Muhammed, and Lee

In the hours before Raymond Shield was killed, Watkins and Martin had robbed Anthony Orsoco and Juan Gallegos in Home Gardens (Riverside County) and had robbed Jihad Muhammed in Claremont (Los Angeles County). A few hours after Raymond Shield was killed, Watkins and Martin robbed Kyung Sun Lee in Gardena (Los Angeles County). In his testimony at trial, Watkins admitted these robberies and essentially corroborated the prosecution's evidence. (RT 1476-1477 [Orosco and Gallegos]; RT 1480-1481 [Muhammed]; RT 1497-1498 [Lee].)

#### a. The Riverside Robbery of Orosco and Gallegos

On July 17, 1990, between 3:00 and 3:30 a.m., Anthony Orosco and his friend, Juan Gallegos, were parked at the AM-PM Mini Market near the corner of McKinley and Magnolia in the Home Gardens area of Riverside County. (RT 1038-1039.) They were sitting in Orosco's new, black truck and sharing soda and candy they had just purchased. (RT 1039-1040, 1072, 1086.) Orosco was in the driver's seat, while Gallegos was in the passenger's seat. (RT 1040, 1060, 1073.)

Orosco saw a black man, whom he identified as Watkins, approach the truck and pull a gun from his pants. (RT 1075, 1078.) Watkins commanded Orosco to "Get the fuck out of the truck" (RT 1040-1041), while Orsoco felt a gun at his left temple. (RT 1041.) Watkins opened the truck door, and Orosco got out. (RT 1042.) Orosco stood face-to-face with Watkins who held the gun a few inches away from Orosco's chest. (RT 1043, 1057.) The gun was small, black, and had round holes in the barrel.

(RT 1042, 1043, 1052-53, 1078.) Watkins told Orosco to turn around; he complied. (RT 1044.) Noticing that the back of Orosco's shirt read "Fresno," Watkins remarked that people from Fresno were wimps and that "we're from L.A." (RT 1044.) Watkins told Orosco to turn around, to take three steps, and to "'get the hell out of here.'" (*Ibid.*) Orosco obeyed. Before leaving, Orosco looked back and saw Watkins jump into the bed of the truck. (RT 1044, 1064, 1068.) Orosco then jogged away. (RT 1044.)

Another black man was with Watkins, and he approached Gallegos's side of the truck. (RT 1045.) The man, whom Gallegos was unable to identify, did not say anything. (RT 1078-1079, 1082.) Gallegos got out of the truck because he was frightened and assumed he was being robbed. (RT 1079-1080.) The man took Gallegos's wallet and chain with a heart containing an engraved star. (RT 1080.) Gallegos saw this man get into the driver's seat and saw Watkins jump into the bed of the truck. (RT 1092.)

Both Orosco and Gallegos heard the truck start but did not see the truck until it reached the street and headed in the direction of the 91 freeway. (RT 1046, 1067-1068, 1090, 1091.)

**b. The Claremont Robbery of Jihad Muhammed**

On July 17, 1990, at approximately 5:00 a.m., Jihad Muhammed was at the Greyhound Bus Station on Indian Hill, just South of the 10 Freeway in Claremont, waiting for a bus to New York. (RT 1095-1096.) He was standing on the curb when a black truck pulled up and stopped about six feet away from him. (RT 1101.) Muhammed saw two black men in the cab the truck. (RT 1101-1102.) He identified Watkins as the passenger and

Martin as the driver. (RT 1110.)[2]

Watkins asked Muhammed where he was going and remarked, "[t]hen you must have some money." (RT 1103.) Watkins raised his hand which held a gun. (*Ibid.*) Muhammed, a former security officer trained in firearms, described this gun as a nine millimeter semiautomatic loaded with a magazine. (RT 1103-1104.) Muhammed unzipped a pocket in his jacket sleeve. (RT 1105.) Watkins told him, "'Give it up, throw it in the truck.'" (*Ibid.*) Muhammed threw approximately 10 or 12 dollars into the truck and commented, "I don't know why you all do this to brothers." (RT 1105.) Watkins responded, "'Fuck a brother.'" (RT 1105-1106.)

The truck pulled out of the bus station and onto the street, heading north toward the 10 freeway. (RT 1106.) Muhammed called the police. (*Ibid.*) Watkins and Martin drove toward Los Angeles leaving the freeway near the Holiday Inn in West Covina, where Watkins shot Raymond Shield. (RT 1481-1482, 1493.)

### c. The Gardena Robbery of Kyung Sun Lee

After the shooting, Watkins and Martin intended to go back to Gardena and return the gun, but they decided to do one final robbery. (RT 1497.) They went to Steve's Market located on West 135th Street in Gardena. (RT 1497, 1220.) Between 8:45 a.m. and 8:55 a.m. on July 17, 1990, Kyung Sun Lee, the owner of Steve's Market, was working in his

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[2] Muhammed initially told police that he did not recognize anyone in the photo lineups he was shown, even though he recognized Watkins and codefendant Martin. (RT 1111-1112.) He lied about not being able to identify the men, because he wanted to avoid having to return to California to testify. (RT 1112.)

store.[3] (RT 1220.) A black man entered and asked to purchase cigarettes. (RT 1220, 1223.) At trial, Lee identified codefendant Martin as this man (RT 1241), but Lee admitted that at the preliminary hearing he had identified Watkins as this person. (RT 1244-1245.)[4] Lee said that the cigarettes cost $1.95, and he placed a pack of cigarettes, along with a book of matches and a nickel, on the counter. (RT 1224.) The man indicated that he only had one dollar with him and that he would be right back. (RT 1225.)

The man went outside to a black truck parked in front of the market. (RT 1227.) Another black man, who was sitting in the driver's seat of the truck, inserted a magazine into a gun. (*Ibid.*) At trial, Lee identified Watkins as the man with the gun (RT 1238, 1408), but at the preliminary hearing he had identified Martin as the man with the gun. (RT 1243-1245.)[5] Lee was able to observe the men through the store window despite there being bars across the window. (RT 1223-1224, 1237.) Both men walked toward the door of the market. (RT 1228.) Lee hid behind the market's delicatessen area. (*Ibid.*) The man with the gun entered, stood at the front of the store, and pointed to the cash register with his gun. (*Ibid.*) The other man went to the cash register, opened it, and took some money, along with the cigarettes which were lying on the counter. (RT 1229.)

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[3] Lee testified in court in this case through a Korean interpreter (see RT 1220), but he also testified that he understood sufficient English to operate his market and to deal with his customers. (RT 1224.)

[4] Watkins testified that he was the person who entered the store and asked for cigarettes. (RT 1498.)

[5] Watkins testified that Martin was the person with the gun. (RT 1497.)

When the cash register was being opened, Lee fired a single shot from a .38 Smith and Wesson that he was carrying for protection. (RT 1229-1230.) Both men ran from the store and headed in opposite directions. (RT 1230-1231.) They did not take the truck. (RT 1231.)

Lee called the police once the men left. (RT 1231.) When the police arrived at the market, the black truck still was parked in front of the store. (RT 1232.) The police found a magazine, or clip, lying on the floor of the store. (*Ibid.*, RT 1323, 1363.) The police set up a perimeter to search for the two men, who were believed to be traveling on foot. (RT 1402.) Within two hours, both Watkins and Martin were located and arrested in the area. (RT 1392, 1393.) Gallegos's gold chain and locket were found in the pocket of Martin's pants. (RT 1394-1395.)

### 3. The Physical Evidence: Ballistics Evidence and Fingerprint Analysis

Shortly after the robbery at Steve's Market, a real estate appraiser found a gun without a magazine in a chipped-out portion of a brick wall in an alley near 135th Street in Gardena. (RT 1301-1304, 1402-1403.) The gun was an Infield nine millimeter semi-automatic pistol. (RT 1322.) The magazine found on the floor of Steve's Market fit into this gun. (RT 1323.)

According to Los Angeles County Firearms Examiner Dwight Van Horn, the bullet and shell casing found in Raymond Shield's clothing were fired from the semiautomatic gun found in the alley, to the exclusion of all other weapons. (RT 1327-1328.) As a semiautomatic pistol, the Infield MP9 must have its trigger pulled manually to fire each bullet, although the gun automatically presents another round of ammunition when fired. (RT 1322-23.) The trigger pull on this particular gun, i.e. the amount of force required to fire the gun, was 17.25 pounds, which, according to Van Horn,

would require a lot of finger pressure. (RT 1329-30.) The average nine millimeter pistol has a trigger pull between four and nine pounds. (RT 1330.)

The police were not able to identify any prints left on either the gun or the magazine. (RT 1193-1194.) Fingerprints lifted from the inside and outside of the black truck parked in front of Steve's Market were identified as belonging to both Watkins and Martin. (RT 1198, 1203-1204, 1212-1213.)

**B. Penalty Phase**

**1. The Evidence in Aggravation**

The prosecution's evidence in aggravation included victim-impact evidence presented through the testimony of Raymond Shield's widow, evidence regarding Watkins's involvement in three fights while confined in the county jail, and Watkins's prior convictions for theft, drug and firearm possession offenses.

**a. Victim-Impact Evidence**

Jeneane Shield was married to Raymond Shield for 39 years; they had four children and five grandchildren. (RT 1864.) Raymond Shield was an engineer and a consultant for several companies. (RT 1865.) Jeneane Shield and the rest of the family were behind their car when Raymond Shield was shot. (RT 1865.) She heard a loud bang and ran to Raymond as he fell. (RT 1866.) When Jeneane asked him what had happened, Raymond responded, "I've been shot." (*Ibid.*) As he lay on the pavement and Jeneane held his arm, Raymond said, "'I'm dead.'" (RT 1867.) Jeneane urged Raymond to hang on, hoping that he was only in shock. (RT 1867.) But his declaration was his last words to her. (RT 1870.) Jeneane recounted the arrival of the paramedics, their attempt to give her husband

aid, and the ambulance drive to the hospital. (RT 1868-70.) Jeneane showed the jury a photograph of Raymond Shield and herself on a Carribean cruise in December of 1989. (RT 1870.)

**b. The June 2, 1991 Fight**

Los Angeles County Deputy Sheriff Ricky Hampton testified about a fight on June 2, 1991, involving Watkins at the Pitchess Honor Ranch county jail facility, commonly known as Wayside. (RT 1877-1878.) Watkins was in pretrial custody on the charges in this case. At 10:20 p.m., Hampton received a radio call regarding a disturbance in the jail's "D" dorm of module one, and he went to the control room, which was separated from that dorm by a plate glass window. (RT 1878-1879.)

From the control room, Hampton observed a fight. (RT 1879.) Four inmates were fighting; two Hispanic men and two black men squared off, almost parallel to each other. (RT 1895.) Watkins, whom Hampton knew as Jeffrey Scott, was not among the initial four who were fighting. (RT 1881, 1896.) The group of four escalated to 40 or more inmates fighting – about 30-35 black inmates and 15 Hispanic inmates. (RT 1879, 1895, 1898.) Hampton saw Watkins striking inmates with his fists and kicking them when they fell to the ground. (RT 1882.) At some point, nine inmates, Hispanics and possibly a few whites, were backed into a corner and were being attacked by Watkins and other black inmates. (RT 1882-1883.) Watkins threw a metal, 55-cup coffee pot, which hit another inmate on the head and left him with a large gash above his eye. (RT 1883-1884.)

The sheriff's deputies ordered the inmates to stop fighting. (RT 1881.) Eventually, the majority of the inmates followed the command to return to their bunks, and a majority of the inmates who were being attacked were taken to the safety. (RT 1892-1893.) Watkins, who was involved in

the fight for 15 to 20 minutes, was one of the last inmates to remain in the corner attacking the Hispanic inmates. (RT 1890.)

**c. The June 30, 1991 Fight**

County jail inmate Kanoa Biondolillo testified about an altercation on June 30, 1991, also in the Wayside county jail facility. (RT 1871.) Biondolillo was housed in a dorm with approximately 100 inmates when a fight broke out around 11:30 p.m. (RT 1871-1872.) The fight was precipitated by Russell Cross, a white inmate, sitting on a bunk belonging to a black inmate. (RT 1873, 1876.) The man who claimed the bunk walked behind Cross and hit him on the back of his head. (RT 1874.) This man had told Cross several times before not to sit on his bunk. (RT 1876.)

The two men began to wrestle; a group of five other inmates, including Watkins, ran towards them and joined the fight. (RT 1873-1875.) All five of these inmates, including Watkins, hit Cross, who was knocked to the ground. (RT 1875-1876.) Biondolillo managed to bring Cross to the front of the room away from the other men. (RT 1874.)

**d. The March 16, 1992 Fight**

The prosecution also presented evidence about a jail fight on March 16, 1992, the first day of the penalty phase in this case. (See CT 778.)[6] At approximately 8:30 a.m., Los Angeles County Deputy Sheriff Ted Mossbarger had placed 35 to 40 inmates in the lock-up area for court. (RT 2027-2029.) As Mossbarger walked by the lock-up tank, he heard noises and saw three black inmates kicking and punching a fourth black inmate named Good, who was standing. (RT 2030-2031, 2034.)

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[6] This evidence was presented after Watkins's case in mitigation. (See RT 2021-2038.)

As Mossbarger opened the door to get inside, Good tried to move away from his assailants, but fell. (RT 2033-2034.) Two of the three black inmates stopped fighting. (RT 2033.) The third inmate, Watkins, continued to kick inmate Good, who had rolled into a fetal position to protect himself, in the back and the head. (RT 2034-2035.) Mossbarger ordered Watkins to stop, but Watkins continued to kick Good. (RT 2035-2036.) Other sheriff deputies opened the gate, and Good ran from the assault. (RT 2036.) This incident lasted about 20 to 30 seconds. (RT 2037.) During the entire altercation, Watkins was shackled with leg chains. (RT 2037-2038.)[7]

Los Angeles County Deputy Sheriff Eugene Lindsey, who was called as a witness by Watkins, testified that about 10 minutes after the altercation, Watkins said that the fight occurred because Good had raped the girlfriend of Watkins's friend. (RT 2050.)

**e. Watkins's Prior Convictions**

By a stipulation of the parties, the trial court read into evidence the four prior felony convictions suffered by Watkins: a June 25, 1987 conviction for grand theft (Pen. Code, § 487.2); a May 6, 1988 conviction for grand theft (Pen. Code, § 487.2); a May 27, 1988 conviction for possession of a controlled substance (Health & Saf. Code, § 11350); and a September 5, 1989 conviction for possession of a firearm by a felon (Pen. Code, § 12021.1). (RT 1899-1900, 2153.)

**2. The Evidence in Mitigation**

Codefendant Martin, who was 18 years old at the time of the crimes (RT 1899), and Watkins, who was 21 years old at the time of the crimes

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[7] An inmate, Franz Simmons, also testified about this fight. He saw two men using their fists to hit a third person, who was on the ground trying to protect himself by using his hands to cover his face. (RT 2022-2024.)

(RT 1955), presented separate cases in mitigation. Watkins presented the testimony of five people – his half-sister, his uncle, his mother, a former teacher, and a friend – who described Watkins's background and character and urged the jury to spare his life. The penalty defense was brief, consisting of only 48 pages of transcript including cross-examination. (See RT 1938-1974, 1986-1893, 2048-2050.)

**a. Renita Watkins**

Renita Watkins is Watkins's half-sister and is 10 years his senior. (RT 1939, 1942.) She and Watkins were reared together until Watkins was 13 years old, and then she saw him every other weekend. (RT 1939-1940.) She described Watkins as a shy, quiet boy who avoided confrontations. (RT 1940, 1943.) Renita Williams believed that the shooting was an accident and that Watkins could not take someone's life. (RT 1943.) She stated that Watkins has a beautiful personality and asked the jury to spare his life. (RT 1943-1944.)

**b. Edward Miller**

Edward Miller is Watkins's maternal uncle and has known Watkins since birth. (RT 1945.) Miller had close contact with Watkins until Watkins was about 13 years old, and thereafter they had only sporadical contact. (RT 1947.)

Miller testified about Watkins's life growing up. (RT 1945-1949.) Watkins's parents divorced when Watkins was six years old. (RT 1945-1946.)[8] Miller witnessed domestic violence, i.e., Watkins's father beat his mother, on a regular basis prior to the divorce. (RT 1953.) As a child,

[8] Watkins's mother, Betty Watkins, testified that she separated from her husband when Watkins was eight or nine years old. (RT 1955.)

Watkins had good manners and respected his elders. (RT 1946.)

Watkins grew up in South Central Los Angeles, which initially was a predominantly working class neighborhood, but changed dramatically with the increase of drugs and violence. (RT 1948-1949.) Miller asked the jury to consider how this may have influenced Watkins's life. (RT 1950.) Miller testified that Watkins is not a cold-blooded murderer and that Watkins is sorry for what happened. (RT 1951.) Miller asked the jury to spare Watkins's life. (RT 1951.)

**c. Betty Watkins**

Watkins's mother, Betty Watkins, was married to Watkins's father, Kenneth Watkins, for 13 years. (RT 1955.) Watkins, who was born on August 15, 1968, is 13 months younger than his sister Kimberly. (RT 1955, 1957.) Kenneth had a drug problem, and he often became violent with Betty when he took drugs. (RT 1958.) Kenneth beat Betty on a regular basis for about 11 of the 13 years of their marriage. (RT 1959.) Watkins witnessed this spousal abuse on a weekly basis. (*Ibid.*)

Betty left Kenneth when Watkins was eight or nine years old. (RT 1957.) She divorced Kenneth because she could no longer take his abuse. (RT 1960.) Betty worked two jobs to support her two children, purchased a home for them, and sent Watkins to parochial school. (RT 1960-1961.) When Watkins was in the sixth or seventh grade, however, Betty no longer could afford to send him to parochial school. (RT 1963.) Watkins, who was a studious and quiet child, did not adjust well to public school. (RT 1963.) He was exposed to, and frightened by, the growing gang activities. (RT 1963-1964.)

In the first part of the 1980's, the family suffered multiple losses. In 1983, Betty's sister, Dorothy, was murdered. (RT 1965.) In 1984, Betty's

sister, Barbara, died of liver disease. (*Ibid.*) In late 1984 or early 1985, Watkins's paternal grandmother died. (*Ibid.*) She was the matriarch of the family and provided a stabilizing influence on the children. (RT 1966.) With the neighborhood changing and with the loss of the grandmother, Betty had difficulty protecting her family from the neighborhood influences. (*Ibid.*)

In 1984, five young people were killed in a drive-by shooting in the neighborhood. (RT 1968.) Watkins was with his sister, Kimberly, on the street at the time of the shooting. (RT 1967-1968.) Kimberly was wounded and was hospitalized for two to three weeks. (RT 1987-1988.) Watkins lost some very good friends in the shooting. (RT 1988.)

The drive-by shooting deeply affected Watkins. (RT 1968, 1973, 1988.) His behavior and whole personality changed. (RT 1968-1969.) Watkins, already shy, became even more withdrawn. (RT 1969.) He retreated to his room; he did not go to school. (*Ibid.*) Betty Watkins took her children to counseling for victims of violent crime, but the counseling was terminated after just a month because the program's funding ran out. (RT 1969-1970.) Betty Watkins worried about her son, because he needed help that she could not financially afford. (RT 1970.)

In 1986, Betty Watkins managed to move the family out of Los Angeles to Moreno Valley, hoping that their new home would be far enough away from the gangs and bad influences. (RT 1971.) Watkins had difficulty adjusting to the move and making friends. He began to act out. (RT 1971-1972.) Watkins was withdrawn but managed to get several jobs. (RT 1972.)

Betty Watkins testified that the presentation of Watkins in the trial as a vile, vicious murderer without a conscience is not who he truly is. (RT

1973.) She explained that Watkins felt bad for the Shield family. (RT 1974.) She urged the jury to spare her son's life. (*Ibid.*)

**d. Queenetta Green**

Queenetta Green was Watkins's algebra and geometry teacher. (RT 1990.) Watkins came into her class when he transferred from parochial school. (*Ibid.*) Green found Watkins to be enthusiastic, studious, helpful, well-mannered and obedient. (*Ibid.*) Watkins was very protective of his sister Kimberly. (*Ibid.*)

Green noticed a change in Watkins's behavior after a catastrophic drive-by shooting occurred in the neighborhood at 54th Street and Vermont in which Kimberly was shot and Watkins was grazed by a bullet. (RT 1991.) Watkins became more withdrawn and quiet, and he began to received more discipline referrals from the teachers stating that he was more sullen, disobedient and defiant. (*Ibid.*) There were visible behavioral and personality changes in Watkins after this shooting. (RT 1992.) The teachers, who met to discuss Watkins, were concerned that he was not getting the psychological counseling he needed. (RT 1991.) Green asked the jury to spare Watkins's life. (RT 1993.)

**e. Marsha Hightower**

Marsha Hightower, a mitigation witness called by codefendant Martin, had known Watkins and his family for about 12 years. (RT 1935.) She described Watkins as a shy and quiet boy who was helpful to his family and got along well with everybody. (RT 1936.) Hightower had no explanation for Watkins's behavior. (RT 1937.) However, she believed that Watkins has "a lot of good" in him, and she asked the jury to "find it in your hearts . . . to let him live." (RT 1936-1937.)

## V.

## THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT WATKINS'S CONVICTIONS OF FIRST DEGREE MURDER AND ATTEMPTED ROBBERY AND THE TRUE FINDING OF THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE

### A. Introduction

The attempted robbery charge was the centerpiece of the State's case on count 1 – the Shield murder. Robbery-murder was the only special circumstance alleged. Although the State charged Watkins with both premeditated murder and felony murder, the prosecutor downplayed the premeditation theory in favor of the argument that Watkins killed Raymond Shield during an attempted robbery. (See RT 1657-1661.) As the prosecutor conceded to the jury, there was no evidence that a robbery occurred. (RT 1660, 1697.) Proof of a robbery attempt was essential to the first degree murder conviction (count 1), the attempted robbery conviction (count 2), and the robbery-murder special circumstance finding found true as to count 1. Without an attempted robbery, there was no capital murder case against Watkins.

The municipal court judge who presided over the preliminary hearing in this case recognized the weakness of the prosecution's case for capital murder. The judge granted Watkins's motion to dismiss the attempted robbery and special circumstance charges, explaining that he did not "find any evidence of any attempted robbery in count 1 at the Holiday Inn. We just don't know what happened." (CT 275; see also CT 279-281.) Despite the dismissal order, the prosecution filed an information in the superior court alleging all the original counts including the stricken attempted robbery and robbery-murder special circumstance charges. (CT 307-311.) Watkins moved pursuant to Penal Code section 995 to set aside

both the attempted robbery charge (count 2) and the robbery-murder special circumstance. (CT 323-324.) The superior court, in a cursory ruling, denied Watkins's motion. (CT 351.)[9] Watkins also filed a motion for judgment of acquittal (Pen. Code, § 1118.1) at the close of the prosecution's case-in-chief, which the trial court denied. (CT 643.) After he was convicted and sentenced to death, Watkins moved for a new trial based on the ground that the evidence was insufficient to prove an attempted robbery. (CT 867; RT 2188-2189.) The trial court recognized that "the central issue in this case is the issue of whether or not the killing was during the course of an attempted robbery" and denied the motion. (RT 2191-2192; CT 895.)

As Watkins demonstrates below, the municipal court judge was right: there was no substantial evidence of a robbery attempt at the Holiday Inn. The trial record, whether judged solely on the prosecution's evidence (as on the motion for a judgment of acquittal) or the entire trial (as on the motion for a new trial), shows only that Watkins and Martin were preparing to rob someone; it does not prove that they attempted to rob Raymond Shield. The evidence also fails to establish the prosecution's alternative theory of first degree murder, i.e., that Watkins killed Shield with premeditation and deliberation. The evidence is insufficient to sustain all three verdicts on the Shield counts and those convictions should be reversed.

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[9] The trial court simply stated that the municipal court judge's comments were not factual findings under *Jones v. Superior Court* (1971) 4 Cal.3d 660, 666, but did not explain the basis for finding that there was probable cause on the attempted robbery count and robbery-murder special circumstance allegation. (RT 15.)

### B. The Applicable Legal Standards

A conviction that is not supported by sufficient evidence violates both the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of article I, section 15 of the California Constitution. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.) This rule flows from the requirement that the prosecution must prove beyond a reasonable doubt every element of the crime charged against the defendant. (*In re Winship* (1970) 397 U.S. 358, 364.) Under the federal due process clause, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted.) Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Id.* at p. 320.)

Under California law, the reviewing court similarly inquires whether a "'reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.'" (*People v. Memro* (1985) 38 Cal.3d 658, 694-695, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576.) The evidence supporting the conviction must be substantial, i.e., "reasonably inspires confidence" (*People v. Bassett* (1968) 69 Cal.2d 122, 139, cited with approval by (*People v. Morris* (1988) 46 Cal.3d 1, 19) and is of "credible and of solid value." (*People v. Green* (1980) 27 Cal.3d 1, 55; see *People v. Bolden* (2002) 29 Cal.4th 515, 533. Mere speculation cannot support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500.)

Although the evidence is viewed in the light most favorable to the judgment, the reviewing court "does not . . . limit its review to the evidence favorable to the respondent." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577, internal quotations omitted.) Instead, it "must resolve the issue in light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*Ibid.*, original italics; see *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319 ["*all of the evidence* is to be considered in the light most favorable to the prosecution"] original italics.) Finally, the rules governing the review of the sufficiency of evidence apply to challenges against a special circumstance finding. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496-497; *Green*, *supra*, 27 Cal.3d at p. 55.)

The same standard applies to a defendant's motion for a judgment of acquittal under Penal Code section 1118.1.[10] In considering a section 1118.1 motion, the trial court, like a reviewing court, must determine whether there is sufficient evidence to support a judgment of conviction. (See *People v. Hatch* (2000) 22 Cal.4th 260, 272; *People v. Trevino* (1985) 39 Cal.3d 667, 695.) Further, "[w]here the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point." (*Trevino*, *supra,* 39 Cal.3d at p. 695.)

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[10] Section 1118.1 provides in pertinent part that the trial court "on motion of the defendant . . . , at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

### C. The Trial Court's Erroneous Denial Of Watkins's Motion For Judgment Of Acquittal Of Attempted Robbery Requires Reversal Of That Conviction, The First Degree Felony Murder Conviction, And The Robbery-Murder Special Circumstance Finding

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) An attempt to commit a crime also is a punishable crime. (Pen. Code, § 664.) "'[T]o constitute an attempt, there must be (a) the specific intent to commit a particular crime, and (b) a direct but ineffectual act done towards its commission . . . . To amount to an attempt the act or acts must go further than mere *preparation*; they must be such as would ordinarily result in the crime except for the interruption.'" (*In re Smith* (1970) 3 Cal.3d 192, 200, quoting 1 Witkin, Cal.Crimes (1963) § 93, at p. 90, original italics.) Moreover, "the act must not be equivocal in nature." (*People v. Buffum* (1953) 40 Cal.2d 709, 718, overruled on other ground in *People v. Morante* (1999) 20 Cal.4th 403.)[11] Therefore, to convict Watkins of attempted robbery, the prosecution was required to prove beyond a

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[11] This Court long ago explained the importance of an unequivocal act showing that an appreciable fragment of the crime has been committed:

> It is that quality of being equivocal that must be lacking before the act becomes one which may be said to be a commencement of the commission of the crime, or an overt act, or before any fragment of the crime itself has been committed, and this is so for the reason that so long as the equivocal quality remains no one can say with certainty what the intent of the defendant is.

(*People v. Miller* (1935) 2 Cal.2d 527, 531-532.)

reasonable doubt that: (1) Watkins had a specific intent to rob Raymond Shield and (2) Watkins took a direct but ineffectual act, beyond mere preparation, toward robbing him. (Pen. Code, §§ 211/664; *People v. Dillon* (1983) 34 Cal.3d 441, 452.) To convict Watkins of first degree felony murder, the prosecution had to prove beyond a reasonable doubt that: (1) Watkins had the specific intent to rob Raymond Shield and (2) Watkins killed him during an attempt to perpetrate a robbery. (Pen. Code, § 189; *People v. Dillon*, *supra*, at p. 462; *People v. Sears* (1965) 62 Cal.2d 737, 744, overruled on other ground, *People v. Cahill* (1993) 5 Cal.4th 478.). To prove the robbery-murder special circumstance true, the prosecution had to prove beyond a reasonable doubt that: (1) Watkins attempted to rob Raymond Shield and (2) Watkins killed him while engaged in, or during the immediate flight after, the attempted robbery. (Former Pen. Code § 190.2(a)(17)(i); *People v. Morris*, *supra*, 46 Cal.3d at p. 19.)

At the close of the prosecution's case, Watkins moved pursuant to Penal Code section 1118.1 to "dismiss the attempted robbery alleged in count 1" (RT 1457), and codefendant Martin moved to dismiss all counts and allegations. (RT 1458.) The parties offered no argument, and the trial court denied the motion without comment. (CT 643; RT 1458.) The trial court's ruling was in error, because the prosecution's evidence proved neither of the elements of attempted robbery beyond a reasonable doubt. There was insufficient evidence that Watkins took any action toward robbing Raymond Shield, and there was insufficient evidence that he intended to rob him.

### 1. The Evidence was Insufficient to Prove a Direct and Unequivocal Act Toward Robbing Raymond Shield

The prosecution presented two sources of evidence to establish that

Watkins took a direct and unequivocal act toward robbing Raymond Shield: (a) the testimony of Shield's adult daughter, Pamela Coryell, and (b) the evidence of the other robberies. This evidence, taken separately or together, does not prove the act required for attempted robbery.

### a. Coryell's Testimony

Pamela Coryell was the prosecution witness who testified about the events leading to Raymond Shield's death. Although the prosecutor presented no argument in response to Watkins's section 1118.1 motion, he later argued to the jury that her testimony established circumstantial evidence of an attempted robbery. (RT 1672.)[12] Her testimony, however, fails to establish that a robbery attempt occurred.

According to Coryell, a black truck drove up to the Holiday Inn while the Shield family was unloading luggage. (RT 1133.) Watkins and Martin left the truck and opened its hood. (RT 1145.) On his own initiative, Raymond Shield walked over to the truck and remained there for a minute. (RT 1145.) Shield peered over the hood with his hands in his pockets. (RT 1148, 1150.) He then walked hurriedly back toward his family with his hands still in his pockets. (RT 1151-1152.) Watkins and Martin walked quickly back to the truck. (RT 1152-1153.) Coryell heard the sound of Shield being shot. (RT 1155.) Coryell identified Watkins as the man who shot her father. (RT 1159-1160.)

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[12] In assessing the denial of the motion for entry of a judgment of acquittal, the prosecutor's explanation of his own evidence to the jury at the close of the trial helps understand the State's view of its own case. Because the prosecutor offered no argument in opposition to Watkins's section 1118.1 motion, Watkins here refers to the prosecutor's closing guilt phase argument to the extent that it bears on evidence presented in his case-in-chief.

This evidence is too thin to prove the overt act required to prove an attempted robbery. As this Court has instructed, "the act [must] be unequivocal." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 455.) There is no evidence that Watkins took any action toward robbing Raymond Shield. As Coryell's testimony establishes, Watkins did not seek out Shield, but rather Shield voluntarily approached Watkins. Coryell did not hear Watkins or Martin say anything to Shield, let alone a demand for money or property. (RT 1151.)[13] There is no evidence that Watkins displayed his gun or made any threatening gesture toward Shield.

While at the truck, Shield did not recoil or otherwise change his stance or expression in reaction to either Watkins or Martin. Shield's posture, with his hands remaining in his pockets the entire time, did not reveal fear or surprise. He did not call out to his family or in any way indicate that something was wrong, let alone that Watkins and Martin were trying to rob him. Moreover, Shield's hurried steps from the truck are entirely consistent with non-criminal inferences, e.g., that Watkins had snubbed or insulted Shield.[14]

In short, the State's equivocal evidence does not show that Watkins took an immediate step toward committing a robbery which would have been completed had Shield not walked away. (See *People v. Nguyen* (2000) 24 Cal.4th 756, 761 [insufficient evidence that any of the three robbers

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[13] The prosecutor's speculation that Watkins and Martin planned to make sure that no one could hear what they said to Shield is just that – rank speculation which cannot sustain a conviction.

[14] Indeed, in finding no probable cause for attempted robbery, the preliminary hearing judge noted that "[t]here could have been some racial epitaphs exchanged." (CT 279.)

made any attempt to take anything from particular victim]; *United States v. Harper* (9th Cir. 1994) 33 F.3d 1143, 1147-1148 [insufficient evidence to establish attempted robbery where defendant's act – leaving money in ATM machine causing a bill trap as part of his plan to bring service personnel to ATM machine whom he intended to rob – was too inchoate to constitute an attempt]; *United States v. Still* (9th Cir. 1988) 850 F.2d 607, 609 [evidence insufficient to establish that defendant, who admitted intent to rob bank, had taken action toward committing the robbery, where police found him sitting in his van, with the motor running, wearing a long blonde wig, and parked approximately 200 feet away from the bank he planned to rob]; *United States v. Buffington* (9th Cir. 1987) 815 F.2d 1292, 1301-1303 [evidence insufficient to constitute a substantial step toward robbing bank, where defendants, who were armed and wearing disguises, drove slowly by bank twice looking into it, drove to rear of bank, exited their car and stood facing the bank but did not take a single step toward bank or display their weapons]; *State v. Bright* (La. 2000) 776 So.2d 1134, 1141-1143 [evidence insufficient to sustain capital robbery-murder conviction where there was no evidence of a demand for money or anything of value, no declarations by assailants as to the purpose of shooting, and no observed attempt to take money from victim's pockets]; *Dejesus v. State* (Del. 1995) 655 A.2d 1180, 1202-1205 [reversing felony murder and attempted robbery convictions where evidence showed the killing occurred during a drug transaction but was insufficient to establish corpus delicti of attempted robbery].)[15]

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[15] In contrast, decisions upholding attempt convictions contain much more substantial evidence of an overt act. (See, e.g., *People v. Reed* (1996) 53 Cal.App.4th 389, 399 [evidence that, in police sting operation, defendant (continued...)

Nor can an overt act toward robbing Raymond Shield reasonably be inferred from the facts about what transpired at the Holiday Inn. Although inferences may constitute substantial evidence in support of a conviction, an inference must be the product of logic and reason. (*People v. Berti* (1960) 178 Cal.App.2d 872, 875-877; Evid. Code § 600, subd. (b).) "'An inference is not reasonable if it is based only on speculation.'" (*People v. Hughes* (2002) 27 Cal.4th 287, 365, quoting *People v. Holt* (1997) 15 Cal.4th 619, 669.) It is thus impermissible to infer guilt from an incriminating circumstance by piling conjecture upon conjecture. (*People v. Flores* (1943) 58 Cal.App.2d 764, 770.) As this Court has warned: "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755; accord, *People v. Thompson* (1980) 27 Cal.3d 303, 324.)

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[15] (...continued)
went to motel with sexual items to aid him in seducing and violating girls under the age of 14 and entered room that was supposed to hold the children he intended to sexually molest provided an unequivocal act for attempted sexual molestation conviction]; *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861-862 [evidence that defendant approached close to door of liquor store with rifle and attempted to hide on pathway immediately adjacent to liquor store when observed by customer was a sufficient overt act to support attempted robbery conviction]; *People v. Fields* (1976) 56 Cal.App.3d 954, 956 [evidence that defendant seized 13-year-old girl by hair and head, ordered her into automobile with the motor running, and threatened to strike her if she refused was sufficient act constitute attempted kidnapping]; *People v. Staples* (1970) 6 Cal.App.3d 61, 68 [evidence that defendant drilled partially through floor of office he had rented over bank mezzanine and directly above bank vault was "an unequivocal and direct step" that sustained attempted burglary conviction].)

The decision in *People v. Morris*, *supra*, 46 Cal.3d 1, is instructive here. In *Morris*, the nude victim was shot twice at close range in a public bathhouse. There was no evidence that any personal property was in the victim's possession at the time of the murder. A credit card that had been lent to the victim was later linked to the defendant. The only witness to the killing observed shots being fired and saw the shooter run from the scene to a waiting car. The defendant told an acquaintance that ". . . he go out there and make money, you know, with these homosexuals, you know, dates – he had to kill one." (*Id.* at p. 20.) This Court rejected the State's contentions (1) that the fact that the bathhouse where the murder occurred had been the scene of prior robberies permitted an inference that the defendant committed a robbery and (2) that the defendant's admission was sufficient to establish a robbery when it was equally consistent with prostitution. (*Id.* at pp. 20-22.) In reversing the robbery-murder special circumstance for insufficient evidence, this Court reiterated the admonition that convictions cannot be based on suspicion and speculation:

> We may *speculate* about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work."

(*Id.* at p. 21, citations omitted.)

In this case, as in *Morris*, the record is too sparse to prove the robbery predicate for the felony murder prosecution. There is nothing in the record about the events at the Holiday Inn from which it could be inferred that either Watkins or Martin attempted to rob Shield. The facts, actual or inferred, that are essential to the conviction "must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other

rational conclusion." (*People v. Bender* (1945) 27 Cal.2d 164, 175 overruled on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110; *People v. Towler* (1982) 31 Cal.3d 105, 118.) Here, an inference that Watkins and Martin attempted to rob Shield is inconsistent with the evidence about Shield's encounter with Watkins and Martin. On this record, an inference that Watkins must have taken steps to rob Shield is the type of sheer suspicion, speculation and surmise that *Morris* held is insufficient to sustain a conviction. The municipal court judge understood this point when he found there was not sufficient evidence to hold Watkins on the attempted robbery charge. As he stated, "I think it's pure speculation as to what went on there underneath the hood of the car . . . . I don't know what went on behind the hood of that car. No one ever will." (CT 279.) His comment applies with equal force to the prosecution's case at trial, which presented no new evidence about what happened behind the hood of the truck.

**b. The Other Robberies**

The trial court's finding, implicit in its section 1118.1 ruling, that the evidence was sufficient to establish a direct and unequivocal act toward robbing Shield is based solely on an inference from the other robberies. This was the crux of the State's case. The prosecutor made this position clear when he later asked the jury, "What tells you that that [Holiday Inn] crime was an attempted robbery?" (RT 1669.) His answer was the other robberies. (RT 1668-1673.)[16] The prosecutor argued that the Shield crime shared a similar "M-O" with the robberies of Orosco, Gallegos, Muhammed

[16] The prosecutor took the same position in arguing for a probable cause finding in municipal court (see CT 278) and in opposing Watkins's section 995 motion to dismiss in superior court. (See CT 348-350.)

and Lee. (RT 1668-1670.) The prosecutor noted the similarities among the crimes – all the locations were close to a freeway off-ramp, were lit, and offered a victim who was "an easy mark" – to argue that Watkins attempted to rob Shield. (RT 1668, 1672.) He argued that since the evidence proved Watkins and Martin robbed Orosco, Gallegos, Muhammed and Lee, they must have attempted to rob Shield. According to the prosecutor, it was the only reasonable inference that could be drawn from the record. (RT 1672-1673.)

The prosecutor, however, was mistaken. The other robberies do not supply sufficient proof of the missing "direct but ineffectual act" toward robbing Shield. Even assuming, for the sake of this argument, that the joinder of the Orosco, Gallegos, Muhammed and Lee robbery charges with the Shield attempted robbery and murder charges was proper under Penal Code section 954, the joinder of the separate robbery and attempted robbery charges did not automatically determine that the evidence of the other offenses was cross-admissible. (*People v. Smallwood* (1986) 42 Cal.3d 415, 425-426, citing *Williams v. Superior Court* (1984) 36 Cal.3d 441, 448.) Joinder and cross-admissibility are separate questions. And a trial court's discretion to permit joinder under section 954 is broader than its discretion to admit evidence of uncharged crimes under Evidence Code section 1101. (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.)

Under Evidence Code section 1101(b), "[e]vidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2, original italics.) The degree of similarity required for other crimes evidence to prove a common design or plan is greater than is required to prove intent and lesser than required to prove identity. (*Id.* at p. 402.) To establish a

common design or plan, other crimes evidence must demonstrate "'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*Ibid.*, quoting 2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 304, p. 249.) The similarity between the Shield homicide and the robberies is too attenuated to prove that Watkins took a direct act toward robbing Shield.

As a preliminary matter, the Orosco, Gallegos, Muhammed and Lee robberies do not reveal the "marked similarity" necessary for a common plan or design. The only significant shared features of these crimes were that they occurred on the same day, were committed close to freeways and involved the use, but not the firing, of a gun.[17] The other facts cited by the prosecutor – i.e., that the robberies occurred in lit commercial areas and targeted victims who were not surrounded by other people – are hardly marked similarities. Common sense suggests that most commercial areas of Los Angeles are lit at night, and most robberies are not committed in the midst of groups of people.

More important, the differences among these robberies undercut any notion of a particular modus operandi. In the Orosco and Gallegos robberies, Watkins and Martin walked up to the victims, who were sitting in Orosco's truck behind a convenience store, forced them from the truck, and took property, including the truck, from them. The Muhammed robbery was essentially a "drive by" in which Watkins and Martin remained in the truck and demanded Muhammed's money. In the Lee robbery, which

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[17] The extensive network of freeway in the greater Los Angeles area undoubtedly facilitates such "rob and drive" crimes.

unlike the prior robberies occurred in broad daylight, Watkins and Martin parked the truck, and one of them surveyed the store before they both entered to commit the robbery. These three crimes simply do not share the same modus operandi.

But even assuming, arguendo, that the Orsoco, Gallegos, Muhammed and Lee robberies do show a common plan or design, the Shield crime does not fit into that common plan or design. In each of the robberies, Watkins and Martin targeted one or two people who were alone and not visible to people who might see and report the robbery, instigated contact with the victims by directly approaching them, and pointed a gun at each victim when demanding his money. With regard to Shield, Watkins and Martin parked the truck near the entire Shield family in front of a hotel lobby, did not approach anyone, did not demand money or property, and did not display a gun. In short, Watkins's conduct at the Holiday Inn diverged sharply from his so-called "M.O" during the other charged robberies. Furthermore, as the municipal court judge recognized in dismissing the attempted robbery charges, the Holiday Inn crime was unique in that Watkins fired the gun killing Shield, whereas the gun was not fired during any of the other robberies. (CT 279.) In this way, the Shield homicide shares neither a "similarity in results" nor "such occurrence of common features" with the robberies as would prove that Watkins went beyond mere preparation and took direct action to rob Raymond Shield. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.).[18]

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[18] The dissimilarity between the Shield crime and the robberies contrasts with the marked similarities in cases where other crimes evidence was found admissible to establish a common plan or design. (See, e.g., (continued...)

This Court has found that such common plan or design evidence is insufficient to sustain a conviction. In *People v. Johnson*, *supra*, 6 Cal.4th at pp. 38-42, a multiple-murder case, the Court held the evidence of rape or attempted rape as to one victim, Castro, was insufficient to establish an attempted rape of the other victim, Holmes. The only evidence of attempted rape of Holmes was her partially unclothed and beaten body and an inference that the defendant had raped Castro. Although"[s]ome physical evidence indicated that victim Holmes may have been sexually assaulted in the course of her murder[,]" (*id.* at p. 39), it was insufficient to prove rape or attempted rape. The evidence that defendant raped victim Castro did not transform this insufficient proof into substantial evidence. (*Id.* at pp. 41-42.)

Similarly, in *People v. Raley* (1992) 2 Cal.4th 870, this Court held the evidence insufficient to sustain a conviction for oral copulation of the murder victim in a capital case involving sexual assaults on two teenage girls held hostage at the same time. (*Id.* at pp. 881-883.) The surviving

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[18] (...continued)
*People v. Catlin* (2001) 26 Cal.4th 81, 111 [evidence of murder of defendant's fifth wife bore "distinctive common marks" with the murders of his mother and his fourth wife in that each victim was a close female relative of defendant; each victim died from rare paraquat poisoning; each wife had been healthy before suffering flu-like symptoms followed by respiratory collapse; and defendant stood to gain financially from the victim's death]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [in both uncharged and charged rapes, defendant, wearing dark clothing and a cap, sought out lone woman unknown to him in apartment complex in the early morning, gained control over her at gunpoint, initially professed only an intention to rob the victims, stole the victim's ATM card, obtained her personal identification number, then announced his intention to rape the victim, forcibly removed her clothing, committed a single act of intercourse, and escaped in the victim's car].)

victim testified that the defendant said the girls would have to "'fool around'" with him and led the murder victim away. The surviving victim heard the murder victim scream and described her as frightened when she returned. The defendant then orally copulated the surviving victim. Before the murder victim died, she told her rescuer that she had been sexually assaulted but not raped. (*Id.* at p. 890.) This Court found that the evidence was too insubstantial to sustain the oral copulation conviction. Emphasizing that an inference may not be based on "suspicion, speculation, supposition, surmise, conjecture, or guess work[,]" this Court found that "it is speculative to infer because defendant committed an oral copulation on one victim, he necessarily attempted the same crime on another victim." (*Id.* at p. 891.) As the Court concluded, "[w]e find these layers of inference far too speculative to support the conviction on this count." (*Id.* at p. 890.)

As in *Johnson* and *Raley*, the other crimes evidence here is inadequate to sustain the convictions. There is only speculation which does not "'reasonably inspire[] confidence'"about what happened between Watkins and Martin and Shield before the shooting. (*People v. Raley*, *supra*, at p. 891, quoting *People v. Morris*, *supra*, 46 Cal.3d at p. 19.) The evidence that Watkins and Martin robbed other people that same day does not convert this conjecture into the substantial evidence, required by the due process clauses of both the Fourteenth Amendment and article 1, section 15, that Watkins took a direct act toward robbing Shield.

### 2. The Evidence was Insufficient to Prove an Intent to Rob Raymond Shield

The prosecution's case-in-chief also was insufficient to prove that Watkins intended to rob Raymond Shield. This is not a case where criminal intent may be inferred from the defendant's actions at the scene of the

alleged attempt. (See, e.g., *People v. Fields*, *supra*, 56 Cal.App.3d at p. 956 [defendant's grabbing girl by hair and ordering her into his car proved intent to kidnap her]; *People v. Henderson* (1967) 255 Cal.App.2d 513, 517 [defendants' entering service station office and striking attendant on head with pistol proved intent to rob him].) Nothing about Watkins's or Martin's conduct toward Shield before the shooting suggests an intent to rob. Therefore, in an effort to prove intent, the prosecutor again relied on the robberies of Orosco, Gallegos, Muhammed, and Lee. (RT 1668-1673.)[19] As Watkins already has shown, the numerous dissimilarities between the Shield killing and the other charged robberies undercut this proof.

The prosecution's thinly-disguised propensity evidence is not enough to prove beyond a reasonable doubt that Watkins harbored an intent to rob Shield. This Court previously has held that a robbery conviction rested on insufficient evidence where the intent to rob was based solely on an inference drawn from another crime. In *People v. Marshall*, *supra*, 15 Cal.4th at pp. 34-35, this Court rejected the prosecution's argument that the defendant's intent to steal in a rape-murder case could be inferred from another sexual assault where defendant had taken a bus pass from the victim, showing that the defendant's modus operandi included a preexisting intent to acquire a memento from his victims. Reversing the robbery conviction, this Court held that the defendant's possession of a letter was not evidence of "sufficient 'solid value'" to prove that the defendant killed the victim so he could gain its possession. (*Id.* at p. 35.)

Moreover, in *People v. Thompson*, *supra*, 27 Cal.3d 303, a capital

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[19] As set forth in Argument VIII, *infra*, the trial court's instructions erroneously permitted the jury to find Watkins guilty of attempted robbery and first degree murder on the basis of motive alone.

robbery-murder prosecution, this Court held that evidence that the defendant later committed a robbery outside a restaurant was not admissible to prove that he had an intent to steal at the time of the killing. The probative force of the only similarity between the crimes – i.e., that the defendant demanded and took the victims' car keys – was significantly weakened by their dissimilarities. (*Id.* at p. 321.)[20] This Court held that the evidence that the defendant "intended to steal car keys on one occasion does not, by itself, substantially tend to prove that he intended to steal them on a second occasion. The only tendency it establishes is the impermissible inference that he has a 'disposition to commit' such crimes." (*Ibid.*)

Similarly, in *People v. Harvey* (1984) 163 Cal.App.3d 90, the Court of Appeal held that admission of a prior robbery, to which the defendant had pleaded guilty, to prove that he intended to rob the victim in a subsequent murder was prejudicial error. The dissimilarities between the prior robbery and the murder, which included the greater violence used in the murder, were deemed more significant that the several similarities. (*Id.* at pp. 102-103.)[21] The two crimes were not sufficiently similar to allow an

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[20] In the later robbery, the defendant accepted the victim's offer of his money and cocked the hammer but did not fire a pistol, whereas in the charged crime, the defendant refused the victim's offer of money and shot both victims. (*Thompson*, *supra*, 27 Cal.3d at pp. 312, 320-321.)

[21] In *Harvey*, the similarities were that (1) the crimes occurred in the same area of the city; (2) a firearm was used; (3) the firearm was discharged into the ground; (4) the victims were young white men in a predominantly black neighborhood; and (5) the perpetrator fled the scene on foot. However, the dissimilarities relating to the time of the crimes, the number of perpetrators, the victims who were targeted, and the amount of violence involved were held to be more significant. (*People v. Harvey*, *supra*, 163 Cal.App.3d at pp. 102-103.)

inference that the defendant intended to rob his murder victim. (*Id.* at p. 105.) Finding the error prejudicial, the court concluded that absent the prior robbery evidence, there was no substantial evidence to support the jury's finding that the defendant was guilty beyond a reasonable doubt of attempted robbery, which was the basis of the felony-murder theory urged by the prosecutor. The court explained that "robbery is only one of several arguable explanations for [the defendant's] conduct." (*Id.* at p. 106.) But this was not enough. "Substantial evidence means more than simply one of several plausible explanations for an ambiguous event." (*Ibid.*) [22]

The same holds true here. The similarities between the Shield homicide and the robberies, when viewed in light of their differences, is "not evidence that 'reasonably inspires confidence'" that Watkins intended to rob Raymond Shield. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 35, quoting *People v. Morris*, *supra*, 46 Cal.3d at p. 19.) At the time of the section 1118.1 motion, the State had failed to present solid, credible evidence that Watkins intended to rob Shield. Contrary to the prosecutor's later argument to the jury (see RT 1681-1684), the fact that Watkins drove to the Holiday Inn and got out of the truck wearing a gun, considered with all the other evidence, does not establish this specific intent.[23]

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[22] The court in *Harvey* also concluded that there was no substantial evidence that the murder was premeditated or deliberated, a theory that, as in this case, was charged but not argued by the prosecutor. (*Id.* at pp. 105-107.)

[23] Decisions of this Court and the Court of Appeal holding that evidence of prior crimes was admissible to prove the intent to commit a particular crime in a subsequent case involve crimes of greater similarity than the robberies and killing in this case and, thus, at least indirectly highlight the insufficient evidence of an intent to rob here. (See, e.g.,

(continued...)

[23] (...continued)
*People v. Lewis* (2001) 25 Cal.4th 610, 637 [evidence of defendant's involvement in a fight several hours before murder was admissible to show intent to rob in capital felony-murder prosecution, where in both incidents the defendant overcame the victims by force, reached into the victims's back pocket to obtain their wallets and, after taking the victims' money, went to a particular apartment to buy methamphetamine]; *People v. Hayes* (1990) 52 Cal.3d 577, 617 [evidence of defendant's prior assault and robbery was admissible to show intent to rob in capital felony-murder prosecution, where on both occasions the "defendant assaulted a male victim in a motel room that defendant was occupying or visiting, the victim was bound with coat hangers, and another room at the motel was searched for property belonging to the victim"]; *People v. Gordon* (1990) 50 Cal.3d 1223 [evidence of prior robbery and murder was admissible to prove intent in subsequent robbery and murder where the victims were armored-car drivers who had just picked up receipts; the victims were robbed and killed in front of K-Mart stores; and a .38-caliber revolvers and 9-mm Lugar pistols were fired]; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1046-1047, 1049 [other crimes evidence was admissible to prove defendant's intent to rob in prosecution for kidnapping for robbery and robbery, where both the prior crimes and charged offense occurred in parking lots; the defendant approached the victim with a weapon at or near the victims' automobiles; the defendant told the victim to move into the passenger seats; and defendant delayed his inquiry about money]; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1021-1022 [evidence that defendant planned to commit a robbery against a different victim was admissible to prove intent to rob in felony-murder prosecution, where both the plan and actual crime were to obtain a car and money and involved catching the victims unaware, hitting them on the head, taking their wallets and car keys, and then escaping in the victim's car to Colorado]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1246-1247 [evidence of prior killing was admissible to show intent to rob and kill, where both victims were homosexual men of about the same age; both men met defendant in public places and accompanied him to more secluded locations where they were robbed and killed; both victims, who were killed close together in time, were rendered helpless and then were shot in their heads at close range by the same gun; both victims were robbed of their credit cards which the defendant immediately used to buy

(continued...)

### 3. The Trial Court's Erroneous Denial of Watkins's Motion for a Judgment of Acquittal Requires Reversal of the Attempted Robbery and First Degree Murder Convictions and the Robbery-Murder Special Circumstance Finding

The attempted robbery of Raymond Shield was at the heart of the prosecution's case. The attempted robbery formed the basis of the first-degree felony-murder conviction (count 1), the independent felony conviction (count 2), and the robbery-murder special circumstance finding which made Watkins eligible for the death penalty. The evidence at the close of the prosecution's case-in-chief failed to prove beyond a reasonable doubt that Watkins took a direct and unequivocal act toward robbing Shield and that he intended to rob Shield. Without substantial evidence of an attempted robbery, Watkins was entitled to a judgment of acquittal on the attempted robbery charge (count 2) as well as the first degree felony murder charge (count 1) and the robbery-murder special circumstance allegation, both of which were predicated upon the unproven robbery attempt. As set forth below in section E of this argument, there is no evidence that Watkins premeditated and deliberated the killing of Shield and, thus, there is no basis to sustain the first degree murder conviction. This Court should reverse all those convictions.

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[23] (...continued)
merchandise and obtain cash].) Even under the rule that "[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent[,]" *People v. Ewoldt* (1994) 7 Cal.4th 380, 402, these cases show significantly more similarity between crimes than is present in Watkins's case.

### D. The Evidence Remained Insufficient At The End Of The Guilt Phase To Sustain The Attempted Robbery Conviction, The First Degree Felony Murder Conviction, And The Robbery-Murder Special Circumstance Finding And, Therefore, The Trial Court Erroneously Denied Watkins's Motion For A New Trial

Watkins testified in his own defense at the guilt phase. His testimony did not provide the proof needed to sustain the attempted robbery, first degree felony murder or robbery-murder special circumstance verdicts. At the end of the trial, there still was no substantial evidence that Watkins took a direct and unequivocal act toward robbing Raymond Shield and that he had an intent to rob Shield. Denying Watkins's motion for a new trial, the trial court erroneously found that the evidence was sufficient to sustain the jury's finding that the killing occurred during the course of an attempted robbery. (RT 2191-2192.)

#### 1. The Evidence Remained Insufficient to Prove a Direct and Unequivocal Act Toward Robbing Raymond Shield

At trial, Watkins admitted that he robbed Orosco, Gallegos, Muhammed and Lee. (RT 1476-1478, 1480-1481, 1497-1498.) He also testified that he and Martin left the freeway and drove to the Holiday Inn area to look for someone to rob, but that he did not see the Shield family until he and Martin had pulled into the hotel's driveway. (RT 1482-1483, 1540.) Watkins thought the family, who was unloading luggage, was going into the hotel. (RT 1484-1485, 1556.) Martin stopped the truck to wait for someone to rob. (RT 1485, 1556.) Although Watkins and Martin were looking for someone to rob, Watkins did not intend to rob Shield because the area was too well-lit, there were too many people, and children were present. (RT 1484, 1554, 1561.)

After entering the hotel area, Watkins and Martin worried that they looked suspicious and, therefore, they got out of the truck and feigned mechanical trouble. (RT 1484-1486.) When Shield kept looking at Watkins, Watkins waved. (RT 1487.) Shield walked over and asked if Watkins and Martin needed assistance. (*Ibid.*) Intending to be rude so Shield would leave, Watkins refused the offer of help. (RT 1487-1488.) Watkins did not say anything further to Shield, did not pull out his gun, and did not attempt to rob Shield. (RT 1488.)

Watkins's testimony that he was rude to, but did not try to rob, Shield was completely consistent with Pamela Coryell's observations of what occurred when her father went to the front of the truck. The jury, of course, was not required to accept Watkins's testimony. (See *People v. Silva* (2001) 25 Cal.4th 345, 369.)[24] Nevertheless, even assuming that the jury rejected Watkins's testimony in its entirety, the record remains devoid of any solid, credible evidence that Watkins took any direct and unequivocal acts toward robbing Shield. Watkins's admission that he was looking for someone to rob does not permit an inference that he took any action toward robbing Shield, particularly since, as Watkins realized, being in front of a hotel entrance with two other adults and two children present

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[24] This case is unlike the situation in *Silva*, where the defendant's testimony was implausible. In *Silva*, the defendant admitted that he had "demanded that [the victim] show him her money, and reinforced the demand by brandishing his shotgun," but insisted that "he had no intent to take her money by force or intended to take only enough to reimburse himself for what he had spent for her food and clothing." (*Id.* at pp. 369-370.) Watkins's version of the facts was not implausible and was consistent with the prosecution's evidence. In contrast to *Silva*, there was no evidence that Watkins made any demand or brandished a weapon.

was not a propitious spot for a robbery.[25]

### 2. The Evidence Remained Insufficient to Prove an Intent to Rob Raymond Shield

Watkins's plan to rob some as-yet unidentified person was too insubstantial to prove the required mental state for an attempted robbery. Recognizing the dearth of evidence that Watkins intended to rob Raymond Shield, the prosecutor argued erroneously that it did not matter whether Shield was the intended victim because Watkins formulated an intent to rob someone prior killing Shield. (RT 1696.) The trial court also erroneously relied on Watkins's intent to continue his robbery spree to deny the new trial motion. (RT 2191.) A general plan to rob, however, is insufficient to support a finding of attempted robbery. (See *United States v. Buffington*, *supra*, 815 F.2d at p. 1302 [evidence insufficient to establish defendants intended to rob a particular bank, rather than a neighboring market or another bank, where defendants, who were armed and wearing or carrying disguises, reconnoitered but did not approach the bank].) Nor is it novel or irrational for those planning a robbery to scout but reject potential victims. (See, e.g.. *People v. Hayes* (1985) 169 Cal.App.3d 898, 903 [defendants who went looking for target to rob entered liquor store and bar but decided that neither was appropriate for robbing].) The evidence that Watkins was looking for someone to rob when he and Martin pulled into the Holiday Inn parking lot shows that Watkins and Martin were preparing to commit another robbery. However, contrary to the prosecutor's argument, the

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[25] In denying the new trial motion, the trial court could point only to Shield's act of "briskly walk[ing] away" from Watkins and Martin to establish a robbery attempt. (RT 2192.) As shown previously in section C.1 of this argument, that evidence is too meager to support the attempted robbery and capital murder convictions in this case.

record establishes only preparation. It is insufficient to prove that Watkins intended to rob Shield or anyone else at the Holiday Inn.

Decisions upholding attempt convictions where there was a particular, identified victim underscore the insufficient evidence here. In these cases, the defendant had taken steps toward robbing, burgling, kidnaping, or molesting a specific victim or group of victims. Thus, in the landmark case, *People v. Dillon*, *supra*, 34 Cal.3d 441, this Court held the evidence was sufficient to support a conviction for attempted robbery of a marijuana crop. Central to the ruling is the fact that the defendant had set out to take specific property from a clearly delineated group of people – the farm's armed guards. (*Id.* at p. 455.) Similarly, in *People v. Padilla* (1995) 11 Cal.4th 891, 963-964, overruled on other ground, *People v. Hill* (1998) 17 Cal.4th 800, the defendant had targeted people at a specific site. This Court found the evidence sufficient to prove an attempted robbery as an aggravating factor under Penal Code section 190.3, subdivision (b), where the defendant was armed with a concealed, loaded handgun which he pointed at two police officers in the course of a violent struggle in a store and the adjoining parking lot. Likewise, in *People v. Bonner* (2000) 80 Cal.App.4th 759, 764, fn. 3, the defendant also had targeted particular victims at a particular location. The Court of Appeal held that substantial evidence supported the robbery conviction where the defendant, a former hotel employee, went to the hotel on the day he knew the manager and assistant manager routinely took a large deposit of receipts to the bank, hid, armed and masked, in the garage waiting for the two hotel officers to approach, and gave up his plan only when discovered by other hotel employees.

Unlike the intent to rob in these cases, Watkins had only a general

plan to rob someone at some point, perhaps at the Holiday Inn but perhaps elsewhere. The only direct evidence – his own testimony – established that Watkins did not intend to rob Raymond Shield. And nothing in the events that unfolded at the Holiday Inn proved otherwise. In short, there is no solid evidence of the specific intent required for an attempted robbery.

### 3. The Trial Court's Submission to the Jury of the Attempted Robbery, First Degree Felony Murder, and Robbery-Murder Special Circumstance Charges Violated Watkins's Due Process Rights

As shown in the preceding sections, the State's case for capital murder had a hollow core. The killing of Raymond Shield was senseless and tragic. But Shield was not killed during an attempted robbery. This Court's observation in *People v. Thompson*, *supra*, 27 Cal.3d at p. 325, about reviewing a capital conviction for sufficiency of the evidence is relevant here:

> The jurors who tried this case undoubtedly were sorely tested when they realized they would have to return a "not true" finding as to all special circumstances allegations if they determined appellant was primarily a killer instead of a thief. But constitutional protections, including the requirement of proof beyond a reasonable doubt, are not limited to those defendants who are morally blameless. See *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 324-325 [61 L.Ed.2d at pp. 576-577, 99 S.Ct. at p. 2792].) No matter how blameworthy in other respects, this appellant is entitled to the same dispassionate review of the sufficiency of the evidence as to the special circumstances findings as a civil litigant is allowed upon appeal from an adverse judgment for money. Indeed, in a case such as this, where the moral equities weigh so heavily against an individual, an appellate court has a special duty to apply its objectivity.

The municipal court judge at the end of the preliminary hearing gave such a dispassionate review to preliminary hearing evidence. In dismissing

the attempted robbery charge and robbery-murder special circumstance allegation (CT 281), the judge explained:

> I think it's pure speculation as to what went on there underneath the hood of the car. There could have been some racial epitaphs exchanged. The other incidents did not involve homicide. This one did. And it leads me to believe that – I don't know what went on behind the hood of that car. No one ever will. But the court is confident, for purposes of this preliminary hearing, there is not sufficient evidence to hold the defendants on the attempted robbery charge at the Holiday Inn incident.

(CT 279.)

The prosecution's evidence at trial on the attempted robbery, felony murder and robbery-murder special circumstance charges was essentially the same as that presented at the preliminary hearing. There was no new proof about what was said and what was done behind the hood of the truck. Watkins's testimony did not supply the missing elements. A similar dispassionate review on appeal leads to the same conclusion reached by the municipal court judge: the quantum of evidence necessary under *Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319, to support convictions consistent with the due process clause is lacking in this case. No rational trier of fact could have found that Watkins attempted to rob Raymond Shield because (1) there was no substantial evidence that he took a direct but ineffectual act toward robbing Shield and (2) there no substantial evidence that he intended to rob Shield. Without proof of an attempted robbery, the prosecution's case for a felony murder conviction and the robbery-murder special circumstance crumble. Therefore, instructing the jury that they could find Watkins guilty of attempted robbery and of first degree felony murder on the theory that Watkins attempted to rob Shield and could find true the

robbery-murder special circumstance violated Watkins's right to due process under both article 1, section 15 of the California Constitution and the Fourteenth Amendment to the United States Constitution.

### 4. The Trial Court's Submission to the Jury of the Attempted Robbery, Felony Murder, and Robbery-Murder Special Circumstance Charges is Reversible Error

In *People v. Guiton* (1993) 4 Cal.4th 1116, this Court set forth the standard for reversal when the evidence is insufficient on one of two theories of criminal liability presented to the jury. If the inadequacy of proof is factual, the conviction should be affirmed "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Id.* at p. 1130; *People v. Johnson*, *supra*, 6 Cal.4th at p. 42; *People v. Perez* (2002) 103 Cal.App.4th 203, 208-209 [reversal where no evidence of one prosecution theory, and evidence of other theory "was not strong"].) On the other hand, if the inadequacy of proof is legal, the "rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*Guiton*, *supra*, 4 Cal.4th at p. 1129, fn. omitted.)

However, the *Guiton* prejudice analysis need not be applied in Watkins's case, because there was no evidence – much less legally sufficient evidence – of a premeditated and deliberate theory of first degree murder. (See Section E of this argument). Thus, there was *no* factually adequate theory of first degree murder presented to Watkins's jury. Under such circumstances the first degree murder conviction *must* be reversed. (See, e.g., *People v. Craig* (1957) 49 Cal.2d 313, 319, 321.)

Even assuming, arguendo, that this Court were to find legally sufficient evidence to support a premeditated and deliberate theory of first

degree murder, *Guiton* still would compel reversal of Watkins's murder conviction, because the record affirmatively shows "that the verdict actually did rest on the inadequate ground." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) First, the jury's true finding with regard to the only special circumstance allegation – robbery-murder – definitively demonstrates that the jury relied on the factually inadequate attempted robbery theory. (CT 663.) Second, the prosecutor relied exclusively on the felony-murder theory (RT 1649. 1661, 1663, 1669-1681, 1683-1686, 1691-1697) and, aside from mentioning its legal elements (RT 1657), never argued the premeditated and deliberate murder theory to the jury. In his closing argument, Watkins's attorney asserted, "the shooting was not a premeditated and deliberate shooting and I don't believe even the district attorney is going to argue that." (RT 1728.) The prosecutor did not address this statement during his rebuttal, but rather emphasized the evidence in support of the felony-murder theory. (See RT 1750-1764.) Thus, the record establishes that the jury unanimously found Watkins guilty of murder on a felony-murder theory, and that felony murder was the *only* theory upon which that conviction rested.

This case manifestly is not one in which the "defendant has not challenged the legal or evidentiary support for the prosecution's *premeditated* murder theory" (*People v. Johnson*, *supra*, 6 Cal.4th at p. 42, original italics), or in which there is "a valid basis for the verdict" (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130). Instead, Watkins's case falls squarely within the *Guiton* exception to the usual harmless-error finding for insufficient evidence on one of two theories of criminal liability: "[I]nstruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt. . . ." (*Ibid.*)

Since the factually inadequate theory of felony murder was the sole basis for the first degree murder verdict and, in any event, both theories of first degree murder presented to the jury were factually inadequate, Watkins's conviction of first degree murder must be reversed.

### E. The Evidence Was Insufficient To Prove A Premeditated And Deliberate Murder

Although the prosecutor relied solely on the felony-murder theory in arguing for a first degree murder conviction, the jury was presented with the alternative theory of premeditated and deliberate murder. As discussed *supra* in section D.4 of this argument, the prosecutor never disputed the assertion of Watkins's attorney that this case did not involve a premeditated killing. The trial attorneys correctly recognized that the evidence was insufficient to sustain a first degree premeditated and deliberate murder conviction. Notwithstanding the prosecutor's tacit concession that he could not prove a premeditated and deliberate murder, Watkins will address the issue, because the theory was presented to the jury by the trial court's instruction. (See *Griffin v. United States* (1991) 502 U.S. 46, 50, 60; *People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.)

This Court in *People v. Bender* (1945) 27 Cal.2d 164, 184, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110, explained that the terms "premeditated" and "deliberate" have commonly understood meanings:

> The adjective "deliberate" means "formed, arrived at or determined upon as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; . . . Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; . . . unhurried; . . .

> Characterized by reflection; dispassionate; not rash." (Webster's New Int. Dict. (2d ed.).) The word is an antonym of "Hasty, impetuous, rash, impulsive." (*Id.*) It has been judicially declared that "Deliberation" means "careful consideration and examination of the reasons for and against a choice or measure." (*People v. Richards* (1905) 1 Cal.App. 566, 571.) The verb "premeditate" means "To think on, and revolve in the mind, beforehand; to contrive and design previously." (Webster's New Int. Dict. (2d ed.).)

Accordingly, a murder which is the result of "mere unconsidered or rash impulse hastily executed" cannot be first degree murder. (*Bender*, *supra*, at p. 185.) First degree premeditated murder is one done "as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on cooly and steadily, [especially] according to a preconceived design." (*People v. Caldwell* (1955) 43 Cal.2d 864, 869; see also *People v. Velasquez* (1980) 26 Cal.3d 425, 435, judg. vac. and remanded on other grounds, 448 U.S. 903.) The *Bender/Caldwell* definition of premeditated and deliberated murder, which has been neither legislatively nor judicially rejected, remains the controlling law in this State. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *Davis v. Woodford* (9th Cir. 2003) 333 F.3d 982, 992; Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference* (2000) 36 U.S.F. L.Rev. 261, 307-308.)

This Court has identified three kinds of evidence which may support a verdict of premeditated murder: (1) evidence of "planning activity" prior to the killing; (2) evidence of a prior relationship or conduct from which a "motive" could be inferred; and (3) evidence that the "manner" of the killing was deliberate and precise. (*People v. Anderson* (1968) 70 Cal. 2d 15, 26-27.) A verdict of first degree murder will be sustained "when there

is evidence of all three types and otherwise requires *at least* extremely strong evidence of (1) [planning] or evidence of (2) [prior relationship and motive] *in conjunction* with either (1) or (3) [manner of killing]." (*Id.* at p. 27, italics added.) In subsequent cases interpreting *Anderson* and its progeny, this Court has rejected an "[u]nreflective reliance on *Anderson* for a definition of premeditation." (*People v. Thomas* (1992) 2 Cal.4th 489, 516; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1125.) This Court has explained that "[e]vidence concerning motive, planning, and the manner of killing are pertinent to the determination of premeditation and deliberation, but these factors are not exclusive nor are they invariably determinative." (*People v. Silva*, *supra*, 25 Cal.4th at p. 368, citing *People v. Perez*, *supra*, 2 Cal.4th at pp. 1125-1126.)

Nevertheless, the *Anderson* analysis "was intended as a framework," to be used "as a guide" by the reviewing courts by identifying "categories of evidence relevant to premeditation and deliberation" that this Court typically finds sufficient to sustain convictions for first degree murder. (*People v. Thomas*, *supra*, 2 Cal.4th at p. 517; accord, *People v. Sanchez* (1995) 12 Cal.4th 1, 33 ["we are guided by the [*Anderson*] factors in our determination whether the murder occurred as a result of 'preexisting reflection rather than unconsidered or rash impulse'"].) While the three *Anderson* factors may not be exclusive or invariably determinative, *none* of them exists in Watkins's case, nor do any other facts exist which even remotely suggest premeditation and deliberation.

### 1. Evidence of Planning Activity

Evidence of planning activity consists of "facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in,

the killing." (*Anderson*, *supra*, 70 Cal.2d at p. 26.) Here, there was no evidence – much less strong evidence – that Watkins planned to kill Raymond Shield or anyone else. Over the years, this Court has found evidence of planning activity from a variety of actions by defendants prior to the killing including declaring an intent to kill,[26] leaving the scene to obtain a weapon,[27] preparing the location in advance,[28] luring or kidnapping the victim to a secluded area,[29] or committing other murders or attempted murders and thus evidencing a modus operandi.[30] Watkins did none of these things. The only evidence about the relationship between Watkins and Shield shows a very brief encounter – estimated at a minute (RT 1151)

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[26] See *People v. Steele* (2002) 27 Cal.4th 1230, 1250 (defendant carried knife into victim's home and said, "'Put the phone down or I'll kill you.'"); *People v. Silva*, *supra*, 25 Cal.4th at pp. 370-371 (defendant admitted he had formed an intent to kill before he went to get knife from his car and did not immediately carry out plan but placed knife in house before victim saw it); *People v. Raley*, *supra*, 2 Cal.4th 870, 887 (days before the killing, defendant said it would be possible to kill someone in the basement of mansion he guarded and "'no one would ever know.'")

[27] See *People v. Thomas*, *supra*, 2 Cal.4th 489, 517-518; *People v. Wharton* (1991) 53 Cal.3d 522, 547.

[28] See *People v. Crandall* (1988) 46 Cal.3d 833, 868 (defendant turned up T.V. and closed door and window and drew curtains before killing); *People v. Arcega* (1982) 32 Cal.3d 504, 519 (defendant drew curtains).

[29] See *People v. Rich* (1988) 45 Cal.3d 1036, 1082 (defendant lured or took victims from familiar places to isolated ones); *People v. Lucero* (1988) 44 Cal.3d 1006, 1019 (defendant lured victims into house); *People v. Hovey* (1988) 44 Cal.3d 543, 556 (defendant kidnapped victim to secluded spot).

[30] See *People v. Miller* (1990) 50 Cal.3d 954, 993 (defendant had committed 10 similar murders or attempted murders).

– at the front of the truck immediately before Watkins, while closing the truck door, suddenly shot Shield.

The only evidence of planning goes to robbery, not killing. Watkins and Martin were looking for another robbery victim. Prior to shooting Raymond Shield, Watkins and Martin had robbed three victims at gun point. But until the Shield killing, they had not discharged the gun. The evidence of the other robberies does not directly or indirectly prove that at any point before Watkins shot Shield, Watkins engaged in the "careful thought and weighing of considerations" or devised a "preconceived design" to kill.

**2. Evidence of Motive**

Motive evidence consists of "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim." (*Anderson*, *supra*, 70 Cal.2d at p. 27.) This Court has found "motive" evidence to support a finding of premeditation and deliberation where the defendant desired to eliminate a witness to another crime,[31] previously had a heated argument with the

[31] See *People v. Bloom*, *supra*, 48 Cal.3d at p. 1210; *People v. Caro* (1988) 46 Cal.3d 1035, 1050; *People v. Lucero*, *supra*, 44 Cal.3d at p. 1019; *People v. Hovey*, *supra*, 44 Cal.3d at p. 556.

victim,[32] or killed because of class-based animus.[33] Here, the motive evidence is thin. Watkins had no prior relationship with Shield. The only motive argued by the prosecution was that Watkins shot Shield because Shield did not give any of his property to Watkins. (See RT 1690; see *People v. Adcox* (1988) 47 Cal.3d 207, 240 [considering plan to rob victim as motive evidence].) However, as shown above, the evidence is insufficient to establish an attempted robbery of Shield and so this motive is speculative. Moreover, motive, by itself, is insufficient to establish premeditation. (See *Anderson*, *supra*, 70 Cal.2d at p. 27.)

### 3. Evidence of the Manner of Killing

Manner evidence consists of "facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way." (*Anderson*, *supra*, 70 Cal.2d at p. 27.) The manner in which Watkins killed Raymond Shield does not reveal a preconceived design to kill. Watkins did not display or aim the gun at Shield. (RT 1160 [Coryell testifying that she never saw a gun, or muzzle flash].) Nor did he pursue Shield.[34] Watkins

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[32] See *People v. Jackson* (1989) 49 Cal.3d 1170, 1200; *People v. Crandall*, *supra*, 46 Cal.3d at p. 869; *People v. Grant* (1988) 45 Cal.3d 829, 842; *People v. Miranda* (1987) 44 Cal.3d 57, 87; *People v. Bloyd*, *supra*, 43 Cal.3d at p. 348.

[33] See *People v. Miller*, *supra*, 50 Cal.3d at pp. 992-993 (defendant wanted to kill gay men).

[34] See *People v. Koontz*, *supra*, 27 Cal.4th at pp. 1081-1082 (armed with a concealed weapon, defendant pursued the victim from their shared apartment into an office in the apartment complex and locked door before

(continued...)

fired a single shot while sitting down in the truck. Shield was not shot at close range, but rather from a distance of about 15 feet while he was walking away from the truck. (RT 1155, 1581.) Shield was not shot in the head or chest, which might have indicated a premeditated design to kill. Rather, the bullet happened to pass through Shield's arm and hip and to perforate two abdominal arteries. (RT 1307-1309.)[35] Even if this Court

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[34] (...continued)
shooting victim).

[35] The single shot from a distance in this case is thus distinguishable from close-range shootings which this Court has found to be evidence of premeditation. (See, e.g., *People v. Marks* (2003) 31 Cal.4th 197, 232, 278 [defendant shot two victims at close range]; *People v. Millwee* (1998) 18 Cal.4th 96, 135 [defendant went unarmed to his parents's home, selected only operable weapon from father's gun closet, racked rifle to see whether it was loaded, deactivated safety feature and shot at his mother's head from close or point-blank range]; *People v. Mayfield* (1997) 14 Cal.4th 668, 768 [defendant shot victim twice within five seconds in the face]; *People v. Thomas*, *supra,* 2 Cal.4th at p. 518 [victims were killed by single contact shots to head and neck, "a method sufficiently 'particular and exacting'" to warrant an inference that defendant was acting according to a preconceived design"]; *People v. Jackson*, supra, 49 Cal.3d at pp. 1181-1182, 1200 [defendant fought with police officer victim, followed the retreating officer to the police car, grabbed police shotgun at a time when the officer was using the radio, pointed gun and unsuccessfully tried to pull trigger, then successfully cocked gun, appeared to comply with officer's demand to put gun down but then aimed at and shot officer]; *People v. Adcox, supra*, 47 Cal.3d at p. 240 [single shot to the back of the head of the kneeling victim]; *People v. Caro*, *supra*, 46 Cal.3d at p. 1050 [a close-range gunshot to the face]; *People v. Crandall, supra,* 46 Cal.3d at pp. 868 [victim was shot through head from above with gun pressed against pillow and pillow pressed against his forehead ]; *People v. Morris, supra*, 46 Cal.3d at p. 23 [victim died of two gunshot wounds, one to the head and one to the abdomen, fired at point-blank range]; *People v. Rich, supra*, 45 Cal.3d at p. 1082 [victim was shot at close range while she was sitting on the ground];
(continued...)

were to reject the theory that the gun was fired accidentally, the evidence shows that the shooting was an example of the sudden "random violent indiscriminate attack," or "explosion of violence," or "spontaneous reaction," which this Court and other reviewing courts repeatedly have deemed insufficient to support a finding of premeditation and deliberation. (See, e.g., *Anderson*, *supra*, 70 Cal.2d at p. 32; *People v. Rowland* (1982) 134 Cal.App.3d 1, 9; cf. *People v. Wharton*, *supra*, 53 Cal.3d 522, 548, quoting *People v. Lucero* (1988) 44 Cal.3d 1006, 1020 ["multiple blows to the skull from a blunt instrument [is not very] suggestive of premeditated murder"].)

Given the record in this case, including the lack of planning, the lack of a relationship between Watkins and Shield, the equivocal evidence of motive, and the manner of the killing, any inference of premeditation would be wildly speculative. Not even the prosecutor ventured to suggest that the record proved premeditation and deliberation. The evidence shows that a single shot to the elbow killed Shield. Whether that shot was intentional, reckless or accidental, the evidence shows an unlawful killing, and when nothing further is proved, "the presumption of law is that it was malicious and an act of murder; but, in such case the verdict should be murder of the second degree, and not murder of the first degree." (*People v. Craig*, *supra*, 49 Cal.2d at p. 319; *People v. Bender*, *supra*, 27 Cal.2d at p. 179.)

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[35] (...continued)
*People v. Grant, supra*, 45 Cal.3d at p. 842 [single shot to the head of the sleeping victim]; *People v. Miranda, supra*, 44 Cal.3d at p. 87 [defendant shot from distance of a few feet after warning them that they should turn over money or he would shoot]; *People v. Bloyd, supra*, 43 Cal.3d at p. 348 [execution-style killings in which one victim was shot in the head while lying on her back and other victim was shot in the head while kneeling].)

### F. Principles Of Double Jeopardy Preclude Retrial On First Degree Murder Charges

The Double Jeopardy Clause of the Fifth Amendment, as applied to the state by the Fourteenth Amendment, bars retrial for the same offense after an appellate court has reversed a conviction based on insufficiency of the evidence. (*Greene v. Massey* (1978) 437 U.S. 19, 24; *Burks v. United States* (1978) 437 U.S. 1, 18; *People v. Pierce* (1979) 24 Cal.3d 199, 209-210; *Piaskowski v. Bett* (7th Cir. 2001) 256 F.3d 687, 694.) This rule also applies where the reversal is based on the erroneous denial of the defendant's motion for judgment of acquittal. (*People v. Trevino*, *supra*, 39 Cal.3d 667, 697, 699.) Accordingly, if this Court, as it should, reverses Watkins's first degree murder conviction for insufficiency of the evidence, it also must order that he cannot be retried for any offense greater than second degree murder.

### G. Conclusion

The due process clause of the Fourteenth Amendment permits a conviction to stand only when substantial evidence proves beyond a reasonable doubt that the defendant committed the specific crime charged. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324 ["Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar"].) In this case, there was insufficient evidence that Watkins committed a first degree murder, under either a felony-murder or premeditation theory, and accordingly, the murder conviction on count 1 should be reversed. Because there was insufficient evidence that Watkins attempted to rob or even

intended to rob Raymond Shield, this Court also should strike the true finding of robbery-murder special circumstance on count 1, and should reverse the attempted robbery conviction on count 2.

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## VI.

## PROSECUTORIAL MISCONDUCT IN CROSS-EXAMINING WATKINS DENIED HIM A FAIR TRIAL

The prosecutor committed prejudicial misconduct in questioning Watkins. At the very outset of his cross-examination, the prosecutor made gratuitous comments indicating his belief that Watkins's testimony was not credible. Dressed as impeachment, the prosecutor inappropriately challenged Watkins with his behavior and demeanor outside of the jury's presence. The prosecutor also mocked Watkins's description of the events leading up to the Lee robbery, further indicating he did not believe Watkins's defense. This prosecutorial misconduct prejudicially violated Watkins's constitutional rights to due process, a fair trial, confrontation and cross-examination, and reliable, non-arbitrary determinations of guilt and penalty. (U.S. Const. 6th, 8th & 14th Amends.; Cal. Const. art. I, §§ 7, 15 & 17.) Accordingly, his convictions and death sentence should be reversed.

### A. The Applicable Legal Standards

The role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction . . . ." (*People v. Andrews* (1970) 14 Cal.3d 40, 48.) A prosecutor is held to an "elevated standard of conduct" because he or she exercises the sovereign powers of the state. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.). As the United States Supreme Court has explained:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution

> is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States* (1935) 295 U.S. 78, 88.) In other words, "The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; accord, *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968.)

A prosecutor's misconduct may so infect a state criminal trial with unfairness as to violate the due process clause of the Fourteenth Amendment and article I, sections 7, 15 (*Darden v. Wainwright* (1986) 477 U.S. 168, 181, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642; *People v. Espinoza*, *supra*, 3 Cal.4th at p. 820.) Misconduct by a prosecutor may also violate a defendant's right to confront and cross-examine the witnesses against him under the Sixth Amendment and article I, section 15 (*People v. Bolton* (1979) 23 Cal.3d 208, 214-215, fn. 4; *People v. Johnson* (1981) 121 Cal.App.3d 94, 104) and to a reliable determination of penalty under the Eighth Amendment and article I, section 17. (See *Darden*, *supra,* 477 U.S. at pp. 178-179.)[36]

In addition, under California law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has

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[36] The Sixth and Eighth Amendments apply to the states through the due process clause of the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 148 [Sixth Amendment]; *Robinson v. California* (1962) 370 U.S. 660, 667 [Eighth Amendment].)

committed misconduct even if such action does not render the trial fundamentally unfair. (*People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Espinoza*, 3 Cal.4th at p. 820.) A showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct. (*People v. Hill, supra*, 17 Cal.4th at pp. 822-823 & fn.1; accord, *People v. Smithey* (1999) 20 Cal.4th 936, 961.)

### B. The Prosecutor Improperly Impeached Watkins With Irrelevant, Inadmissible And Prejudicial Evidence And Compounded His Misconduct With Gratuitous Sarcasm

Watkins testified in his own behalf during the guilt phase. In fact, his testimony comprised his entire defense. Watkins explained the events both before and after the shooting of Raymond Shield, and openly admitted that he committed the robberies of Orosco, Gallegos, Muhammed, and Lee. Regarding the Shield crimes, Watkins admitted he shot Raymond Shield but unequivocally stated that he never intended to rob him or his family (RT 1484) and explained that the shooting was accidental. (RT 1493.) Watkins testified that he was very sorry for what had occurred (RT 1496), and that he was deeply affected by the testimony of Pamela Coryell, Raymond Shield's daughter, since he could imagine his loss if someone had shot his mother. (RT 1496.)

The prosecutor began his cross-examination by accusing Watkins of lying about feeling remorseful:

> Q [by Deputy District Attorney Hearnsberger]: Mr. Watkins, you indicate that you feel real bad about this?
>
> A [by Watkins]: Yes, I do, Sir.
>
> Q: Is there some reason that when you are outside the presence of the jury you and Mr. Martin are laughing and carrying on all the time?

(RT 1502.) Defense counsel immediately objected to the question, and the trial court sustained the objection. (RT 1502.) Defense counsel called a side bar conference at which Watkins and codefendant Martin moved for a mistrial. (RT 1503.) The trial court resolved the matter by admonishing the jury that the question was sustained and directing the jury to disregard the question and any answer by Watkins. (RT 1508.)

Following the jury's verdicts of guilt and a death penalty, Watkins moved for a new trial based upon prosecutorial misconduct in cross-examining him. (CT 865-868; RT 2188-2191.) The trial court denied the motion for a new trial, reasoning that Watkins had put his credibility at issue by testifying and that the court had admonished the jury to disregard the question. (RT 2190.)

The prosecutor's question was misconduct, and the trial court abused its discretion in denying Watkins's motion for a mistrial and his motion for a new trial. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984 [denial of a motion for mistrial is reviewed under the abuse of discretion standard].) "The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct." (*People v. Bell* (1989) 49 Cal.3d 502, 532.) Before the trial in this case, this Court had made clear that "[c]onsideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character." (*People v. Heishman* (1988) 45 Cal.3d 147, 197.) Moreover, as Watkins's attorney pointed out to the trial court, this case did not present a prosecutor attempting to impeach a defendant with his own out-of-court statement that he did not care about the victims or with other admissible evidence that he lacked remorse. (RT 1505; see, e.g., *People v. Heishman*, *supra*, 45 Cal.3d at pp. 190, 197 [ruling that prison employees' penalty phase testimony that

defendant showed no remorse was admissible and ruling that prosecutor's penalty phase comment on defendant's facial expressions before the jury was proper].)

Rather, in asking about Watkins's behavior outside the presence of the jury, the prosecutor indicated that he had special knowledge about facts not in evidence – Watkins's "laughing and carrying on" outside of the jury's presence – that proved Watkins to be a liar. Yet, as defense counsel noted, Watkins's laughter was simply a mechanism to relieve tension under exceedingly stressful circumstances. (RT 1505.) In fact, the prosecutor himself engaged in such behavior. (*Ibid.*)[37] As the trial court later recognized in response to the jurors' conduct during breaks in the penalty phase proceedings, "laughter and levity are a gift to mankind to cope in difficult situations." (RT 2160.)[38] Nevertheless, the prosecutor was

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[37] Codefendant Martin's attorney, joined by Watkins's counsel, made this point in response to the trial court's assertion that the inappropriate laughter showed Watkins's attitude toward the trial:

> He is talking about a situation not where the clients have been disrespectful in the courtroom during trial. He is talking about breaks where in order to relief [*sic*] the tension, I laughed at various time, and I take these proceedings very seriously. I feel very bad for the victim in this case. I am very concerned about the two clients who are facing a death penalty; that I have laughed; [prosecutor] Gary Hearnsberger has laughed; the investigating officer has been joking and laughing with me; and as has the other private counsel. That doesn't show that we don't have any feeling about this case.

(RT 1504-1505.)

[38] The trial court addressed the jurors in response to a written complaint from one of them that the "loud laughing" of some of the jurors in the hall and inside the courtroom was "giving the impression – to the

(continued...)

permitted to apply a double standard to Watkins who, being on trial for his life, was under more pressure than the lawyers, judge or jury in this case. Watkins's laughter outside the court proceedings was not treated as a release mechanism in a tense situation. Instead, his levity was considered "fair game" for discrediting him before the jury who would adjudicate his guilt and later would decide his fate.

This Court has recognized analogous cross-examination to be prosecutorial misconduct. In *People v. Wagner* (1975) 13 Cal.3d 612, the defendant took the stand and denied his involvement in the charged crime, the sale of marijuana. On cross-examination, the prosecutor asked a series of questions suggesting that defendant had an extensive history of prior drug transactions. Objecting to the questions, the defendant unsuccessfully moved for a mistrial. (*Id.* at p. 617.) On appeal, this Court rejected the prosecution's argument that the questioning was proper impeachment:

> By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question. The rule is well established that the prosecuting attorney may not interrogate witnesses solely "for the purpose of getting before

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[38] (...continued)
defense [and] their family members that we are insensitive to and rude." (CT 788; see RT 2156-2158.) The trial court admonished the jury as follows:

> I and counsel have absolutely no doubt that you are taking your task extremely serious, I recognize that laughter and levity are a gift to mankind to cope in difficult situations. And even myself with the responsibilities that I have, I take great joy sometimes in laughing about something or having a moment of levity just to make me get through the day.

(RT 2160.)

> the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given."

(*Id.* at p. 619, quoting *People v. Hamilton* (1963) 60 Cal.2d 105, 116, other citations omitted; see also *People v. Williams* (1997) 16 Cal.4th 153, 252 [finding misconduct in the prosecutor's question to defense expert that revealed the contents of the probation report previously ruled inadmissible]; *Gore v. State* (Fla. 1998) 719 So.2d 1197, 1198-1199 [reversing capital murder conviction for prosecutorial misconduct which included cross-examining defendant about inadmissible collateral crimes].) In this case, the prosecutor's use of cross-examination to "testify" to facts not in evidence similarly was improper.

The Ninth Circuit also has found prosecutorial misconduct in attempts to impeach a defendant with inadmissible evidence about his behavior – including the defendant's laughter *inside* the courtroom. (See, e.g., *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1223 [reversing conviction for assisting federal offenders to avoid apprehension on the ground of cumulative misconduct including asking defendant whether he had reputation for being "one of largest drug dealers on the reservation"]; *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 981 [reversing conviction because prosecutor commented on nontestifying defendant's laughter in court]; see also *United States v. Schindler* (9th Cir. 1980) 614 F.2d 227, 228 [warning that "prosecutors are acting imprudently when they jeopardize a possible conviction by cunningly attempting to place before the jury otherwise inadmissible evidence."].)

In *Schuler*, *supra*, 813 F.2d 978, the defendant was charged with making threats against the President. During closing argument, the

prosecutor remarked on the defendant's laughter in front of the jury during the testimony of two security agents. The Ninth Circuit found that the defendant's "courtroom behavior off the witness stand was legally irrelevant to the question of his guilt for the crime charged." (*Id.* at p. 980.) Although irrelevant, the prosecutor's comment told the jury that the defendant "was of bad character because he considered the charges of threatening the life of the President to be a joke" (*ibid.*), and that the jury could use the defendant's nontestimonial behavior as evidence of his guilt. (*Id.* at p. 982.) The Ninth Circuit found the prosecutor's misconduct to be unconstitutional:

> [I]n the absence of a curative instruction from the court, a prosecutor's comment on a defendant's off-the-stand behavior constitutes a violation of the due process clause of the fifth amendment. That clause encompasses the right not to be convicted except on the basis of evidence adduced at trial. The Supreme Court has declared that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds ... not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468 (1978).

(*Schuler*, *supra,* 813 F.2d at p. 981.)

In this case, the prosecutor's misconduct was more extreme. Unlike *Schuler*, where the defendant did not testify, Watkins's defense rested entirely on his own testimony. The prosecutor's improper questions impugning Watkins's credibility thus went to the heart of the defense case. Moreover, unlike *Schuler*, the inadmissible behavior here was not observed by the jury. By commenting on Watkins's behavior outside of the jury's presence, the prosecutor not only injected extrinsic evidence into the trial, but he became the sole witness against Watkins on this point in violation of

Watkins's confrontation clause rights. (See *People v. Bolton* (1979) 23 Cal.3d 208, 214-215, fn. 4 [recognizing but not reaching potential confrontation violation]; *People v. Johnson* (1981) 121 Cal.App.3d 94, 104 [finding that prosecutor's argument that he believed defense witness to be lying and that prosecutrix would deny making extortion demand violated the confrontation clause].) By tendering his own extrinsic knowledge of Watkins's conduct, the prosecutor conveyed to the jury his own disbelief of Watkins's testimony. The prosecutor's "testifying" question could serve only an illegitimate purpose: to persuade the jury, on the basis of his extrinsic knowledge, to view Watkins as a callous liar and, therefore, to reject his testimony and his defense. In this way, the prosecutor used reprehensible means to secure the conviction of Watkins which unfairly undermined his presentation of a viable defense. In the context of this capital case, the prosecutor's cross-examination was not simply a "hard blow[]" but was a "foul one[]." (*Berger v. United States*, *supra*, 295 U.S. at p. 88.)[39]

The prosecutor reinforced his inappropriate jabs at Watkins as the cross-examination continued. During questioning about the Lee robbery, Watkins openly admitted that he decided to commit a robbery after accidentally shooting Shield. (RT 1594.) The prosecutor inserted his gratuitous comments:

> Q [by Hearnsberger]: You decide to do another robbery?

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[39] Even if, as the trial court asserted, the jury had observed Watkins's inappropriate laughter (RT 1507), the prosecutor's cross-examination would still be misconduct, because the behavior is not probative of his guilt. (See *People v. Heishman*, *supra*, 45 Cal.3d at p. 197.)

A [by Watkins]: Yes, sir.

Q: What did you say to Mr. Martin?

A: I said -- really we were just talking, like, you know, let's get this gun back. But we weren't too successful. Like I said before. So we decided to probably rob this place, get one more shot, then just --

Q: No pun intended?

A: No pun intended.

Q: Sorry. Just give it one more shot?

A: Yeah.

Q: No pun intended?

(RT 1594.)[40] The prosecutor's unnecessary sarcasm crossed the line of proper advocacy. (See *Boyle v. Million* (6th Cir. 2000) 201 F.3d 711, 717-718 [granting habeas relief for multiple instances of misconduct including interrupting the testifying defendant and saying, "I apologize if I dropped those [deposition] records in your lap too hard ... I was just frustrated that you were lying and I'm going to prove it."]; *Gore v. State*, *supra*, 719 So.2d at p. 1201 [reversing capital murder conviction for cumulative misconduct including needless sarcasm in cross-examining defendant].) The prosecutor's flip remark here compounded his prior misconduct by underscoring his personal disbelief of Watkins's testimony.

The prosecutor's cheap tricks would be improper in any criminal case. In this case, where Watkins's conviction or acquittal of capital murder turned on his own credibility, the prosecutor's inflammatory

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[40] Watkins's attorney objected to the inappropriateness of these comments by stating to the trial court, "your Honor, I think that counsel has made his point." The trial court agreed, stating to the prosecutor, "next question, counsel." (RT 1594.)

misconduct was unconscionable. It unmistakably told the jury that Watkins was insincere and his testimony was a charade. Moreover, the prosecutor's "testifying" question tainted not only the jury's guilt and special circumstances verdicts but its penalty verdict as well. The prosecutor's improper attacks on Watkins's behavior away from the jury and his assertion of remorse went to the heart of the jury's decision of whether Watkins should live or die – an assessment of Watkins's character and culpability. In this way, the prosecutor's misconduct not only violated the guarantees of Fourteenth Amendment due process and Sixth Amendment confrontation and cross-examination, but also denigrated the Eighth Amendment requirement of heightened reliability in capital sentencing. (See *Sumner v. Shuman* (1987) 483 U.S. 66, 72; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330 [both recognizing heightened reliability demanded in capital cases by the Eighth Amendment].)

### C. The Prosecutor's Misconduct Requires Reversal Of Watkins's Attempted Robbery And Capital Murder Convictions

The prosecutor's prejudicial misconduct was not neutralized by the trial court's admonition, and, therefore, reversal of the attempted robbery and murder convictions and the robbery-murder special circumstance finding is required under both state and federal constitutional law. In many circumstances, an admonition may be assumed to cure the prejudice resulting from prosecutorial misconduct. (See *People v. Cox* (2003) 30 Cal.4th 916, 953 [holding that a timely admonition cures prosecutor's erroneous elicitation of polygraph evidence]; cf. *United States v. Schuler*, *supra*, 813 F.2d at p. 981 [finding constitutional error in absence of curative instruction].). However, in some cases, an admonition is inadequate to cure

the harm caused by a prosecutor's misconduct. In *People v. Wagner*, *supra*, 13 Cal.3d at p. 621, this Court reversed the conviction because, notwithstanding the trial court's admonitions and the defendant's denial of the other instances of drug sales, the prosecutor's misconduct left the jurors with the impression that defendant had engaged in prior drug transactions. (See also *People v. Pitts* (1990) 223 Cal.App.3d 606, 692-693, 733-735 [reversing convictions where admonitions did not cure prosecutorial misconduct, including use of witness examination to elicit improper innuendo and inadmissible evidence].)

The admonition here did not dispel the prejudice of the prosecutor's improper cross-examination. Even before the trial court had a chance to sustain Watkins's objection and admonish the jury, the question served its purpose. "[T]he 'cat' was already 'out of the bag . . . .'" (*State v. Gore*, *supra*, 719 So.2d at p. 1199 [reversing murder conviction and death sentence where prosecutor introduced prejudicial collateral crime evidence while cross-examining defendant].) Turning to a different metaphor, rather than "unring the bell" that the jury heard (*People v. Coddington* (2000) 23 Cal.4th 529, 631, overruled on other ground, *Price v. Superior Court* (2001) 25 Cal.4th 1046), the admonition more likely exacerbated the prejudice by emphasizing the importance of the misconduct. (See *People v. Bolton* (1979) 23 Cal.3d 208, 216, fn. 5 ["'[Merely] to raise an objection to [improper] testimony – and more, to have the judge tell the jury to ignore it – often serves but to rub it in'"]; see also *Ex parte Sparks* (Ala. 1998) 730 So.2d 113, 115 [reversing DUI conviction where corrective instruction to ignore prosecutor's question about prior DUI conviction was insufficient to

ensure a fair trial].)[41]

Watkins's credibility was critical to his defense. Watkins was the sole defense witness, testifying that he had no plan to rob Raymond Shield and that the shooting was accidental. The only other witness to the homicide was Pamela Coryell, who never saw a weapon drawn and never heard either Watkins or Martin demand any money or property from Shield. The evidence that Watkins attempted to rob Shield was inferred from the evidence of Watkins's other robberies and his testimony that he and Martin were looking for someone else to rob. Assuming, arguendo, that the evidence was sufficient (but see Argument V), the prosecution's proof was far from overwhelming. To convict Watkins of capital murder, the prosecutor had to persuade the jury to reject Watkins's testimony. Destroying Watkins's credibility was thus the prosecutor's primary task. In this context, the prosecutor's calculated use of inflammatory and inadmissible evidence to portray Watkins as a liar was extremely prejudicial. The prosecutor's misconduct infected the trial with such fundamental unfairness as to deprive Watkins of due process and require reversal of his convictions and death sentence. (See *Darden v. Wainwright*,

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[41] In *Sparks*, the Alabama Supreme Court directly addressed the problem with upholding a conviction despite prejudicial prosecutorial misconduct:

> [I]t appears to this Court that the current approach to these situations is inadequate insofar as it allows prosecutors a "free shot" at asking an improper question . . . while providing little means to protect the defendant's right to a fair trial other than a mere corrective instruction to jurors, which is administered only *after* the defendant has been exposed to the prejudice caused by the prosecutor's questioning.

(*Sparks*, *supra*, 730 So.2d at p. 115.)

*supra*, 477 U.S. at p. 181; *Donnelly v. DeCristoforo*, *supra*, 416 U.S. at p. 642.)

Similarly, the violations of Watkins's Sixth Amendment confrontation clause and Eighth Amendment reliability requirement rights resulting from the prosecutor's misconduct require reversal. In light of the prejudice noted above, these errors were not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Finally, reversal also is required under state law. Without the prosecutor's misconduct, there is a reasonable probability that the jury would have accepted Watkins's testimony and would have returned a more favorable verdict than a first degree special circumstance murder conviction. (*People v. Wagner*, *supra*, 13 Cal.3d at p. 620, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

For all these reasons, this Court should reverse the convictions on count 1 and count 2 and the true finding of the special circumstance.

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## VII.

## THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT

The prosecution requested, and the trial court gave, three instructions that permitted the jury to infer consciousness of guilt by Watkins. The first instruction in the language of CALJIC No. 2.03 discussed a willfully false or misleading statement:

> If you find that before this trial a defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and it weight and significance, if any, are matters for you determination.

(see CT 679, RT 1772.) The second instruction, a modified version of CALJIC No. 2.06 addressing efforts to suppress evidence, was given over Watkins's objection:

> If you find that the defendant attempted to suppress evidence against himself in any manner, such as by concealing evidence or refusing to stand in a lineup, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are matters for your consideration.

(CT 680, RT 1772-1773 [instruction]; RT 1634 [objection]; RT 1636 [objection overruled].) The third instruction, pursuant to CALJIC No. 2.52, related to flight after the commission of a crime:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter

for the jury to determine.

(CT 693, RT 1779.)[42]

These instructions were erroneously given. The modified instruction under CALJIC No. 2.06 was not supported by sufficient evidence and removed from the jury the determination of the preliminary factual findings necessary for finding a consciousness of guilt. All the consciousness-of-guilt instructions were unnecessary, argumentative instructions. Moreover, all three instructions permitted the jury to draw irrational inferences against Watkins. These instructional errors, especially when considered together, deprived Watkins of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstance and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) These instructions were particularly prejudicial because the Raymond Shield charges turned on Watkins's credibility and the evidence of his guilt for capital murder – attempted robbery, both theories of first degree murder, and the special circumstance – was insubstantial. (See Argument V *supra*.) Accordingly, reversal of the convictions on count 1 and count 2, the robbery-murder special circumstance finding, and the death judgment is required.[43]

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[42] This instruction erroneously referred to flight "after being accused of a crime" (RT 1779), although there was no evidence to support this part of the instruction. The trial court had a sua sponte duty to delete this irrelevant reference. (Cf. *People v. Lang* (1989) 49 Cal.3d 991, 1025 [instruction on willfully false testimony under CALJIC No. 2.21 was appropriate where supported by sufficient evidence].)

[43] Although Watkins's trial counsel did not object to the false statement and flight instructions, the claimed errors are cognizable on appeal. With regard to CALJIC No. 2.52, Penal Code section 1127c and

(continued...)

### A. The Suppression of Evidence Instruction (CALJIC No. 2.06) Was Not Supported By Sufficient Evidence And Removed An Important Factual Determination From The Jury

The trial court erred in giving a modified version of CALJIC No. 2.06 for two separate reasons. First, the trial court failed, as required by *People v. Hannon* (1977) 19 Cal.3d 588, 597-598, to make a preliminary determination that there was evidence that would sufficiently support a consciousness-of-guilt inference from suppression of adverse evidence by Watkins. When the trial court overruled the defense objection to the modified CALJIC No. 2.06, it gave no explanation and made no findings about the state of the evidence. (See RT 1636.)

The evidence about Watkins's refusal to stand in the lineup was equivocal. Although his refusal to participate in the lineup was clear (RT 1292), his motivation was not. On the lineup refusal form, People's Exhibit 37, Watkins expressed his concern with the lineup procedure. He was worried because "at the substation West Covina detective took photos of me and they might have shown these photos to victims and may have said

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[43] (...continued)
case law mandate that the trial court instruct on flight when it believes the evidence warrants such an instruction, and this court has held that under these circumstances error is preserved even in the absence of an objection. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1055; *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) Moreover, instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

things to the victim that again may be detrimental to me and my case." (P. Exh. 37; RT 1299 [exhibit evidence read into record].) This preoccupation, particularly when Watkins had no right to counsel to advise him at the pre-indictment procedure (see *Kirby v. Illinois* (1972) 406 U.S. 682, 688-689 (plur. opn.) and *Moore v. Illinois* (1977) 434 U.S. 220, 226-227), suggests a question about the fairness of the identification process. The instruction made no mention of Watkins's reason for refusing the lineup. (Cf. *People v. Huston* (1989) 210 Cal.App.3d 192, 218 ["commend[ing] the trial court's taking care, in modifying CALJIC No. 2.06 for the occasion, to remind the jury that defendant's motives in refusing the lineup were in dispute."].)

Instead, the trial court simply ignored this equivocal record. Therefore, unlike other cases, by giving the suppression-of-evidence instruction the court cannot be said to have implicitly determined, as a matter of law, that the evidence of Watkins's refusal to stand in the lineup could support an inference of consciousness of guilt. (See, e.g. *People v. Johnson* (1992) 3 Cal.4th 1183, 1236.) Moreover, the equivocal evidence about Watkins's motivation distinguished his case from others where the evidence was held sufficient to support an inference that defendant attempted to suppress evidence. (See, e.g. *People v. Hart* (1999) 20 Cal.4th 546, 621 [CALJIC No. 2.06 was properly given where, after murder, defendant disposed of victim's purse containing her identification, replaced the bumper stickers on his car, burned a pair of tennis shoes, used plywood to shield his car from view and changed his appearance for the in-person lineup]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1139-1140 [CALJIC No. 2.06 was properly given where evidence suggested defendant threw knife from vehicle]; *People v. Breaux* (1991) 1 Cal.4th 281, 304, fn. 7 [CALJIC No. 2.06 was properly given based upon evidence that, after

murder, defendant substituted the license plates on the victim's car]; *People v. Cooper* (1991) 53 Cal.3d 771, 797-798 [CALJIC No. 2.06 was properly given where, after prison escape and murders, the defendant admitted throwing his prison clothes and prison-issue tennis shoes into the ocean]; *People v. Crandell* (1988) 46 Cal.3d 833, 870 [CALJIC No. 2.06 was supported by evidence where defendant told witness, "[D]on't trick me because if you trick me - you promise to help me, so if you trick me I got nothing to lose. I already killed. I have nothing to lose."].) In these cases, there was no apparent innocent or alternate explanation for the defendant's destruction of evidence. In Watkins's case, the contemporaneous evidence about his refusal to stand in the lineup shows that his conduct did not indicate consciousness of guilt. The trial court erred in overruling Watkins's objection to CALJIC No. 2.06.

Second, even if the evidence had supported a suppression-of-evidence instruction, the instruction given here unconstitutionally intruded on the jury's factfinding province. "When the jury is not given an opportunity to decide a relevant factual question, the defendant is deprived of his right to a jury trial and a fair trial under the Sixth Amendment and the due process clause of the Fourteenth Amendment. (*United States v. McClain* (5th Cir. 1977) 545 F.3d 988, 1003; see also *People v. Figueroa* (1986) 41 Cal.3d 714, 724 [instructing jury that promissory notes were securities violated defendant's due process right to a jury trial].) A criminal defendant has the "right to a full jury trial untempered by a judge's preemptive coloration of the facts." (*United States v. Johnson* (5th Cir. 1983) 700 F.3d 163, 167.) "[N]o fact, not even an undisputed fact, may be determined by the judge." (*Roe v. United States* (5th Cir. 1961) 287 F.2d 435, 440.)

The CALJIC No. 2.06 instruction violated these principles. It told the jury that Watkins's "refusing to stand in a lineup" was an "attempt[] to suppress evidence against himself . . . ." (RT 1772-1773.) The instruction equated the refusal to stand in the lineup with suppression of evidence, thereby removing this factual determination from the jury. Under the facts of this case, in which Watkins expressed concerns about the fairness of the lineup procedure, the jury could have found that his refusal was not an attempt to suppress evidence and, therefore, did not show consciousness of guilt. However, given the directive that the refusal to stand in the lineup was an attempt to suppress evidence, the jury was unlikely to have understood that it was free to reject the instruction's inference.[44] The elimination of the factual question underlying CALJIC No. 2.06 was particularly important, since the instruction addressed Watkins's credibility, which was central to the case. (See *United States v. Rockwell* (3rd Cir. 1986) 781 F.2d 985, 991 [instruction telling jury it need not resolve conflict in contradictory testimony "improperly invaded the province of the jury to determine the facts and assess the credibility of witnesses" and deprived defendant of a fair trial].) The suppression-of-evidence instruction violated Watkins's jury trial and due process rights. (U.S. Const., 6th & 14th Amends.; Cal. Const. art. I, § 16.)

### B. The Consciousness-Of-Guilt Instructions Improperly Duplicated the Circumstantial Evidence Instructions

The instructions under CALJIC Nos. 2.03, 2.06 and 2.52 were unnecessary. This court has held that specific instructions relating to the

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[44] The unconstitutionality of the irrational permissive inferences created by all the consciousness-of-guilt instructions is addressed in section D, *infra*, of this argument.

consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on other ground, *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. These instructions informed the jury that it may draw inferences from the circumstantial evidence, i.e. that it could infer facts tending to show Watkins's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need to repeat his general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection].)

### C. The Consciousness-Of-Guilt Instructions Were Unfairly Partisan and Argumentative

The consciousness-of-guilt instructions were not just unnecessary, they were impermissibly argumentative. The trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral,

authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that"'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, CALJIC Nos. 2.03, 2.06, and 2.52, the consciousness-of-guilt instructions given in this case, are impermissibly argumentative. Structurally, they are almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th 408, which read as follows:

> "If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated."

(*Id.* at p. 437, fn. 5.) All three instructions here tell the jury, "[i]f you find" certain facts (false statements, attempt to suppress evidence or flight in this case and a misguided and unjustified attempt at discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*). This Court found the instruction in *Mincey* to be

argumentative (*id.* at p. 437), and it also should hold CALJIC Nos. 2.03, 2.06 and 2.52 to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions, . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet*, *supra*, 405 U.S. at p. 77). Moreover, the prosecution-slanted instructions given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefitted by the instructions,

there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara, supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC Nos. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright, supra*, 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th, 495, 531-532, and a number of subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly, supra*, at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the allegedly protective aspect of the instructions is weak at best and often entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. They thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

Finding that a flight instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[45]

The reasoning of two of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such

[45] Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

> evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (*id.* at p. 748) and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745, holding that the reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements.)

The argumentative consciousness-of-guilt instructions invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case, and lessening the prosecution's burden of proof. They therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

### D. The Consciousness-Of-Guilt Instructions Permitted The Jury To Draw Two Irrational Permissive Inferences About Watkins's Guilt

All the consciousness-of-guilt instructions suffer from an additional constitutional defect – they embody improper permissive inferences. Each instruction permits the jury to infer one fact, such as Watkins's consciousness of guilt, from other facts, i.e., false statements (CALJIC No. 2.03), suppression of evidence (CALJIC No. 2.06), and flight (CALJIC No. 2.52). (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.*, at p. 900 (conc. opn. Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965)

380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, the consciousness-of-guilt evidence was relevant to whether Watkins was responsible for killing Raymond Shield and for robbing Orosco, Gallegos, Muhammed, and Lee. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33.)[46] Testifying at trial, before the consciousness-

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[46] Although not articulated by the prosecutor or the trial court, CALJIC No. 2.03 apparently was based on the evidence that Watkins used an alias, Jeffrey Scott, when he was arrested for the Lee robbery (RT 1452) and permitted the jury to consider that falsehood in deciding his guilt "for the crime for which he is being tried." CALJIC No. 2.52 apparently was based on the evidence that Watkins and codefendant Martin hurriedly left the Holiday Inn parking lot after the shooting (RT 1156) and that after the Lee robbery, they tried to avoid apprehension by the police. (RT 1231, 1272, 1381-1394.) The instruction told the jury that his flight was a fact that may be considered "in deciding the question of his guilt or innocence." (RT 1779.) The instruction under CALJIC No. 2.06 was based explicitly on the evidence that Watkins refused to stand in a lineup because he was

(continued...)

of-guilt instructions were delivered, Watkins admitted he committed the four robberies and accidentally shot and killed Raymond Shield, but he denied that he attempted to rob Shield. (RT 1488, 1493-1494, 1500,1581.) After Watkins's testimony, guilt was a foregone conclusion. The only issue was guilt for which homicidal crime: first degree murder (under either a felony murder theory or a premeditation theory), second degree murder, or manslaughter. Under the facts here, two types of irrational inferences were permitted.

The first irrational inference concerned Watkins's mental state at the time the charged crimes allegedly were committed. The improper instructions permitted the jury to use the consciousness-of-guilt evidence to infer, not only that Watkins killed Raymond Shield, but that he also had done so while harboring the intents or mental states required for conviction of first degree murder and attempted robbery. Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained,

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

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[46] (...continued)
concerned that the police detectives already had shown his photograph to those who would try to identify him. (RT 1292-1296; P. Exh. 37.) It permitted the jury to consider this action "as a circumstance tending to show a consciousness of guilt." (RT 1773.)

(*Id.* at p. 33.)[47]

Therefore, Watkins's actions after the crimes, upon which the consciousness-of-guilt inferences were based, simply were not probative of whether he harbored the mental states for first degree premeditated murder or first degree felony murder at the time of the shooting. There was no rational connection – much less a link more likely than not – between Watkins's flight, his use of an alias, or his refusal to stand in a lineup and consciousness by him of having committed the homicide with (1) premeditation; (2) deliberation, (3) malice aforethought, (4) a specific intent to kill, or (5) a specific intent to rob Shield. Given Watkins's testimonial admission that he was criminally culpable for homicide, the consciousness-of-guilt instructions were completely irrelevant. Whether taken individually or in combination, Watkins's flight, use of an alias, and refusal to stand in a lineup cannot reasonably be deemed to support an inference that he had the requisite mental state for first degree murder, as opposed to second degree murder or manslaughter.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579

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[47] Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing.

(LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics, fn. omitted.)

[CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52].) However, Watkins respectfully asks this Court to reconsider and overrule these holdings and to hold that in this case delivery of the consciousness-of-guilt instructions was reversible constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, which noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean 'consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id.* at p. 871.) As a preliminary matter, even accepting this assumption as correct, *Crandell* would render the consciousness-of-guilt instructions erroneous in Watkins's case because, as already noted, he admitted on the witness stand that he shot Raymond Shield, i.e., that he was guilty of "some wrongdoing." Thus, CALJIC No. 2.03 – and by analogy CALJIC Nos. 2.06 and 2.52 – are irrelevant in light of this Court's declaration that "'[a] reasonable juror simply could not have taken the words of the instruction to mean that lies by defendant supported an inference of intent to kill on his part. [Citation.]'" (*People v. Clark* (1993) 5 Cal.4th 950, 1022; *People v. Ashmus* (1991) 54 Cal.3d 932, 978.) If, as in this case, the defendant has taken the witness stand and admitted killing the victim, and the jury could not reasonably infer from the consciousness-of-guilt instructions a particular requisite mental state for murder, then the instructions served no purpose at all.

Moreover, the *Crandell* analysis is mistaken for three reasons. First, the instructions do not speak of "consciousness of some wrongdoing;" they

speak of "consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instructions to mean something they do not say. Elsewhere in the instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., CT 699 [CALJIC No. 2.90 stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [or] her guilt is satisfactorily shown."].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that Watkins was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324.)

Second, although the consciousness-of-guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad. They expressly advise the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.[48]

Third, this Court itself has drawn the very inference that *Crandell*

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[48] In a different context, this Court repeatedly has held that an instruction which refers only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness-of-guilt evidence among other facts, to find an intent to rob. (*Id.* at p. 608.)[49] Since this Court considered consciousness-of-guilt evidence to find substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same.

The consciousness-of-guilt instructions permitted a second irrational inference, i.e., that Watkins was guilty not only of unlawfully killing Raymond Shield (which Watkins admitted), but also of attempting to rob him (which Watkins sharply contested). This Court approved an inference precisely that far-reaching in *People v. Rodriguez* (1994) 8 Cal.4th 1060, when it held that the defendant's false statements about an injury to his arm "tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p. 1140, original italics; accord, *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [holding that it is rational to infer "that false statements regarding a crime show a consciousness of guilt of all the offenses committed during a single attack"].)

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[49] In *Hayes*, this Court wrote:

> There was also substantial evidence, apart from James' testimony, that defendant killed Patel *with the intent to rob him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested*, the knife that killed Patel was found in the manager's living quarters, defendant was seen carrying a box from the office to James' car, and four days later defendant committed similar crimes against James Cross.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 608, italics added.)

To determine if the sweeping inferences permitted by the consciousness-of-guilt instructions are constitutional in this case, the Court must ask: If the defendant fled from the scene of the homicide, used an alias, and refused to stand in the lineup, is it more likely than not that he has *also* committed attempted robbery in connection with the homicide? Obviously, the answer to each question is, "No,"[50] and the inferences permitted by the consciousness-of-guilt instructions are accordingly constitutionally infirm. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167.)

Because the consciousness-of-guilt instructions permitted the jury to draw two irrational inferences of guilt against Watkins, use of those instructions undermined the reasonable doubt requirement and denied him a fair trial and due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15). The instructions also violated Watkins's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make

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[50] Watkins's flight, use of an alias, and refusal to stand in a lineup could not conceivably indicate consciousness of guilt of attempted robbery – a charge he vehemently denied in his testimony – unless one first assumes that Watkins, in fact, committed such a crime. (See *United States v. Durham* (10th Cir. 1998) 139 F.3d 1325, 1332; *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149 [ruling that consciousness of guilt instructions should not be given where they, in effect, tell the jury "that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt.") Embodying such "circular" reasoning (*ibid.*) in a jury instruction permitting a jury to arbitrarily infer guilt therefrom would – and in this case did – constitute a clear denial of due process. (U.S. Const., 14th Amend.)

erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

**E. Reversal is Required**

Giving the consciousness-of-guilt instructions was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, Watkins's attempted robbery and murder convictions and the special circumstance finding must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, supra, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The error in this case was not harmless beyond a reasonable doubt. The jury was given not one, but three unconstitutional instructions, which magnified the argumentative nature of the instructions and their impermissible inferences. The instructions under CALJIC Nos. 2.03 and 2.06 were based on thin evidence – Watkins's use of an alias and his refusal to participate in a lineup, which may have resulted from his concerns about whether the lineup procedure would be fair and unbiased. (See P. Exh. 37.) The error affected the only contested issues in the case, i.e., the nature and degree of the homicide and the occurrence or non-occurrence of the charged attempted robbery. On those issues, the evidence, assuming arguendo it was sufficient (but see Argument V), was either weak or closely balanced. The jury's murder verdict revolved around Watkins's credibility. If the jurors had believed him, they could not have convicted him of first degree murder. The combined effect of the consciousness-of-guilt instructions was to tell the jury that Watkins's own conduct showed he was aware of his

guilt for the very charges he disputed. In the context of this case, these instructions were not harmless beyond a reasonable doubt. Therefore, the judgment on count 1, count 2, and the special circumstance allegation must be reversed.

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## VIII.

## THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

The trial court instructed the jury under former CALJIC No. 2.51 (5th ed.):

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(CT 692; RT 1778-1779.) This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to Watkins to show an absence of motive to establish innocence thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)[51]

### A. The Instruction Allowed The Jury To Determine Guilt Based On Motive Alone

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial

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[51] The claim of error is reviewable even in the absence of a trial court objection for the reasons stated in Argument VII, *supra*, pages 84-85, footnote. 43, which are incorporated here. In addition, the claim of error asserted here also applies to the penalty phase where the same motive instruction was given (CT 812) and applied to the prosecution's evidence of fights in jail introduced as aggravating factors under Penal Code section 190.3, subdivision (b). (See Argument XIV, *infra*, p. 199, fn. 92.)

evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, each of the other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. (See RT 1772, 1773, 1779 [CALJIC Nos. 2.03, 2.06 and 2.52 stating with regard to a wilfully false or deliberating misleading statement, an attempt to suppress evidence, and flight that each circumstance "is not sufficient by itself to prove guilt . . . ."].) The placement of the motive instruction, which was read immediately before the flight instruction, served to highlight its different standard.

Because CALJIC No. 2.51 is so obviously aberrant, it prejudiced Watkins during deliberations. The instruction appeared to include an intentional omission allowing the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

The failure of the trial court to instruct on the effect of a

> reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. Accordingly, the instruction violated Watkins's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. 1, §§ 7 & 15.)

### B. The Instruction Impermissibly Lessened The Prosecutor's Burden Of Proof And Violated Due Process

The jury was instructed that an unlawful killing during the attempted commission of a robbery is first degree murder when the perpetrator has the specific intent to commit robbery. (RT 1791.) Much later in the instructions, the trial court defined the mental state required for attempted robbery. (RT 1806-1807.) This definition was incorporated by reference into the instructions on the robbery-murder special circumstance. (RT 1801-1802.) However, by informing the jurors that "motive was not an element of the crime," the trial court reduced the burden of proof on the one fact that the prosecutor's capital murder case demanded and that Watkins's contested – i.e., that the jury find that Watkins had the intent to rob Shield. The instruction violated due process by improperly undermining a correct

understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. The only theory supporting the first degree felony murder allegation was that Watkins lured Raymond Shield to the front of the truck in order to rob him. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. Various opinions have used the two terms as synonyms:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]"

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, italics added.)

> "A person could not kidnap and carry away his victim to commit robbery if the *intent* to rob was not formed until after the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping.

(*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008, italics added.)

> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy.

(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, italics added.)

> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation ]: 'But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful.'"

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, italics added.) Accordingly, it is clear that "motive" and "intent" are commonly interchangeable under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at

pp. 1126-1127.) The court of appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the CALJIC No. 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at pp. 1127-1128.)

There is a similar potential for conflict and confusion in this case. The jury was instructed to determine if Watkins had the intent to rob, but was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was federal constitutional error.

### C. The Instruction Shifted The Burden Of Proof To Imply That Watkins Had To Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on Watkins to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived Watkins of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing Watkins to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

### D. Reversal is Required

Although Watkins admitted his guilt in the homicide, the degree of his guilt was very much at issue. The crucial question in this case was

whether Watkins was guilty of attempting to rob Raymond Shield and, thus, of first degree felony murder and the special circumstance. Watkins's intent with regard to Shield was the crux of the case. Watkins testified that, although he was looking for someone to rob, he did not intend to rob Shield and did not attempt to rob him. (RT 1484-1485, 1554, 1556.) Watkins's counsel argued that there was preparation for robbery, but not an attempted robbery. (RT 1722-1724.)

In contrast, the prosecutor argued that in light of the other robberies, the only reasonable inference was that Watkins and Martin attempted to rob Raymond Shield. (RT 1669-1674.)[52] The prosecutor's argument exploited the confusion created by the motive instruction: he equated the specific intent to rob Raymond Shield necessary for attempted robbery, i.e., "a certain unambiguous intent to commit that specific crime" (RT 1695), with his motive in getting off the freeway and going into the Holiday Inn, i.e., "he got out with his gun for the purpose of finding somebody to rob." (RT 1696.) In this way, the prosecutor's argument equated "motive" with "intent" and, under CALJIC No. 2.51, erroneously encouraged the jury to conclude that proof of a specific intent to rob Raymond Shield was unnecessary for guilty verdicts on the first degree murder and attempted robbery charges and a true finding of the special circumstance allegation. Accordingly, this Court must reverse the judgments on count 1, count 2 and the special circumstance allegation because the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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[52] The error of this argument and the insufficiency of the evidence of attempted robbery is discussed in Argument V *supra*.

## IX.

## THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra* at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict Watkins on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

### A. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.90, 2.01, 2.02, 8.83, And 8.83.1)

The jury was instructed that Watkins was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (CT 699; RT 1782.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(CT 699; RT 1782.)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While this same reasonable doubt instruction, standing alone, has been found to be constitutional (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 13-17), in combination with the other instructions, it was reasonably likely to have led the jury to convict Watkins on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given four interrelated instructions – CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (CT 677-678; RT 1771-1772 [sufficiency of circumstantial evidence]; CT 746; RT 1810-1811 [sufficiency of circumstantial evidence to prove specific intent or

mental state]; CT 733-734; RT 1802-1803 [special circumstances – sufficiency of circumstantial evidence]; CT 735-736; RT 1803-1805 [special circumstances – sufficiency of circumstantial evidence to prove required mental state].) These instructions, addressing different evidentiary issues in almost identical terms, advised Watkins's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (CT 677-678, 746, 733-734, 735; RT 1772, 1810-1811, 1803, 1804-1805.) These instructions informed the jurors that if Watkins *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This four-times repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating Watkins's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th, & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)[53]

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[53] Although defense counsel, as well as the prosecutor, requested the disputed CALJIC Nos. 2.01 and 2.02 (CT 677, 746), the claimed errors are cognizable on appeal. As noted in Argument VII, *supra*, pages 84-85, footnote 43 and incorporated here, instructional errors are reviewable even without objection if they are such as to affect a defendant's substantive rights. Moreover, because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335; *People v. Perez* (1979) 23 Cal.3d 545, 549 fn.3.) Here, neither

(continued...)

First, the instructions not only allowed, but compelled, the jury to find Watkins guilty on all counts and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, 397 U.S. at p. 364.) The instructions directed the jury to find Watkins guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." (CT 677, 734, 735, 746; RT 1772, 1811, 1803, 1804.) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 78 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty," italics added.) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally

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[53] (...continued)
condition for invited error has been met. Defense counsel's request did not induce the error. The prosecutor also requested delivery of the challenged instructions (CT 677, 733, 735, 746), and there is no showing that the instructions were given at defense counsel's, rather than the prosecutor's, behest. Furthermore, prior to Watkins's trial, this Court held that CALJIC No. 2.01 must be "given by the court on its own motion where the case rests substantially or entirely on circumstantial evidence." (*People v. Bloyd* (1987) 43 Cal.3d 333, 351.) The record also fails to show that defense counsel had any deliberate, tactical purpose for desiring the erroneous portions of the instructions.

infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Watkins rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, italics added, fn. omitted.) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, all four instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (CT 678; RT 1772, italics added; see also CT 734, 735, 746; RT 1803-1805, 1811.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations. Cutting to the chase in his closing argument, the prosecutor focused on how the circumstantial

evidence instructions govern the jury's assessment of "the major issue in this case and that is what happened at the Holiday Inn." (RT 1649.) The prosecutor relied directly on the flawed directive in choosing between reasonable and unreasonable interpretations to argue that the jury should reject Watkins's defense and convict him of first degree murder with a special circumstance finding:

> There is going to be an argument by the defense, I'm sure, that there was – that the felony murder rule should not be invoked because of the facts in this case and they are going to point out the fact that Mr. Watkins took the stand and Mr. Watkins said it wasn't an attempted robbery and therefore it doesn't exist. You may reject Mr. Watkins' testimony in that regard.
>
> You should look at all of the circumstances surrounding that. If you find that Mr. Watkins' testimony, how he explains things that happened that physically do not jive with the evidence, then that interpretation of the circumstantial evidence is unreasonable. *That interpretation that he is asking you to make of circumstantial evidence that he's not guilty or they are not guilty of the crimes is unreasonable and should be rejected.*
>
> *Spend some time deciding what is reasonable and what is not reasonable.* There are two interpretations. Obviously Mr. Watkins has said it's an accident, I had nothing to do with the robbery, it's an accident the gun went off. But that doesn't end your decision-making process because the circumstances are not consistent with that and if the circumstances are not consistent with that and what he says about and how he says it happened, *if that's unreasonable to you, then you forget that. You throw that type of evidence out and you are left with only one reasonable way to look at the evidence, only one reasonable set of circumstances and interpretations to be made which points to his guilt.* And if you feel that that's the way the evidence points, then he is guilty and Mr. Martin is guilty.

(RT 1649-1650, italics added.) The prosecutor later emphasized this point when he argued that "the only reasonable inference" is that Watkins and Martin "were attempting to rob Mr. Shield. . . . Anything else is not reasonable." (RT 1672-1673.)[54] The prosecutor returned to the circumstantial evidence instructions to make the same point about the attempted robbery in his rebuttal argument:

> Ladies and gentlemen, if you recall the first, *one of the first instructions we talked about was circumstantial evidence.* If you couldn't use circumstantial evidence in court, then unless you had an eye witness who saw somebody actually commit a crime, you could never convict anybody. And you know that that's just not the way things happen.
>
> You know in your own lives when you rely on certain things, when you come to certain decisions about things, *you have to rely on some amount of circumstantial evidence. You have got to be able to draw reasonable inferences.* And when the circumstances, you add up all the circumstances and *it just comes to the point that there is no other reasonable interpretation to make*, then you are left with that state of the case that it's been proven beyond a reasonable doubt that that is, in fact, what happened.

(RT 1755, italics added.)

Invoking the defective circumstantial evidence instructions, the prosecutor told the jury that (1) the evidence was open to only two interpretations – "what is reasonable and what is not reasonable" (RT 1650); (2) Watkins's testimony was unreasonable and, therefore, *must* be rejected; and (3) after rejecting Watkins's unreasonable testimony, the jury is left "with only one reasonable way to look at the evidence" (RT 1650), i.e., the prosecution's theory of guilt. The prosecutor's message was clear. He told

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[54] See Argument V, *supra,* addressing the error in this argument and the insufficiency of the evidence of attempted robbery.

the jurors that, under the challenged instructions, they had to accept the prosecution's view of the evidence if they found it to be reasonable. However, contrary to the prosecutor's argument, the jury was not required to convict Watkins of capital murder if it rejected his testimony. Even if the jury, as the prosecutor urged, "threw out" Watkins's testimony, the jury still had to find that the prosecution carried its burden of proving Watkins's guilt beyond a reasonable doubt.

In short, the prosecution's incriminatory interpretation of the evidence may have been reasonable but not sufficient to prove the attempted robbery that lay at the center of its case for first degree murder with a special circumstances finding. The challenged instructions did not provide for this alternative. Nor did defense counsel suggest they did. In fact, in selecting CALJIC No. 8.83 as one of the instructions he addressed, Watkins's attorney emphasized that the jury "must accept the reasonable interpretation and reject the unreasonable." (RT 1726.) Even assuming its legal sufficiency, which Watkins contests elsewhere (see Argument V), the evidence of an attempted robbery of Shield was thin at best. The prosecutor was unable to present any direct evidence about what occurred at the truck between Watkins and Martin, on the one hand, and Raymond Shield, on the other, just before the shooting. The prosecution's entire case rested on inferences from the circumstances leading up to the shooting. In this context, the circumstantial evidence instructions, as highlighted by the prosecutor's argument, permitted and indeed encouraged the jury to convict Watkins of first degree murder and to find the robbery-murder special circumstance true upon a finding that the prosecution's theory was reasonable, rather than upon proof beyond a reasonable doubt.

The focus of the circumstantial evidence instructions on the

reasonableness of evidentiary inferences also prejudiced Watkins in another way – by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship, supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.) Although the prosecutor, taking his cue from the instructions, asserted the reasonableness standard in his argument, Watkins's counsel never suggested that Watkins's conduct was reasonable. Reasonableness simply was not the issue. Rather, the question was whether Watkins's explanation of his actions at the Holiday Inn was credible. The instructions, however, undercut the defense by requiring that Watkins prove his exculpatory interpretation to be reasonable before it could be believed.

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find Watkins's guilt on a standard that is less than constitutionally required.

### B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51 And 2.52)

The trial court gave seven other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (CT 670-671; RT 1767-1768); CALJIC No. 2.21.1, regarding discrepancies in testimony (CT 687; RT 1776); CALJIC No. 2.21.2, regarding willfully false witnesses (CT 688; RT 1777); CALJIC No. 2.22, regarding weighing conflicting testimony (CT 689; RT 1777); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (CT 691; RT 1778);

CALJIC No. 2.51, regarding motive (CT 692; RT 1778-1779);[55] and CALJIC No. 2.52 regarding flight (CT 693; RT 1779.)[56] Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)[57]

As a preliminary matter, several instructions violated Watkins's constitutional rights as enumerated in section A of this argument by misinforming the jurors that their duty was to decide whether Watkins was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is

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[55] In Argument VIII, *supra*, Watkins demonstrates that this instruction unconstitutionally permitted the jury to find him guilty on the basis of motive alone.

[56] In Argument VII, *supra*, Watkins shows that this instruction, along with the other consciousness-of-guilt instructions was unnecessary, unfairly argumentative, and unconstitutionally permitted the jury to draw irrational permissive inferences about guilt.

[57] Although defense counsel as well as the prosecutor requested CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, and 2.27 (CT 670, 687, 688, 689, 691), Watkins's claims are still reviewable on appeal. (See section A of this argument, *supra*, pp. 114-115, fn. 53, which is incorporated by reference here.)

more likely to be guilty than innocent." (CT 671; RT 1767-1768.) CALJIC No. 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." (CT 677; RT 1772.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may tend to establish guilt," while the absence of motive "may tend to establish innocence." (CT 692; RT 1778.) CALJIC No. 2.52, regarding flight, further framed the issue before the jury as "deciding the question of his guilt or innocence." (CT 693; RT 1779.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find Watkins guilty because it had not been proven that he was "innocent."[58]

Similarly, CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her

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[58] As one court has stated:

> We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.*

(*People v. Han* (2000) 78 Cal.App.4th 797, 809, original italics.) *Han* concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739.) The same is not true in this case.

testimony in other particulars." (CT 688; RT 1777, italics added.) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[59] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 also improperly created and elevated Watkins's burden of proof. If the jury found some part of Watkins's testimony not to be true, he had not merely to create a reasonable doubt about the prosecution's case, but he had to establish that "the probability of truth favor[ed] his [own] testimony." This requirement violates the well-established principle, noted in section A of this argument, that a defendant has no burden of proof, even as to his own defense. (*People v. Gonzales*, *supra*, 51 Cal.3d at pp. 1214-1215.) In addition, the instruction appeared to be directed at Watkins's exculpatory testimony about the circumstances surrounding the shooting of Raymond Shield and, thus, improperly lessened

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[59] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

the prosecution's burden by singling out Watkins's testimony for suspicion.

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(CT 689; RT 1777.) This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC Nos. 2.21.1 and 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (CT 691; RT 1778), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." In this case, Watkins admitted that he killed Raymond Shield, and gave an explanation of the circumstances of the homicide that would negate a first degree murder conviction and a true finding of the robbery-murder special circumstance. However, CALJIC No. 2.27, by telling the jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact exists" – without qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that (1) Watkins himself had the burden of convincing them that the homicide was not a felony murder or a premeditated and deliberate murder and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Watkins's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-

existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation. . . ." (CT 711; RT 1789, italics added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation , rather than to raise a reasonable doubt about that element. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find Watkins not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

### C. The Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions

Although each one of the challenged instructions violated Watkins's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200

[addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC No. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].)[60] While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

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[60] Although this Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22 and 2.51, the courts of appeal have echoed the pronouncements by this Court on related instructions. (See *People v. Salas*, *supra*, 51 Cal.App.3d at pp. 155-157 [challenge to former version of CALJIC No. 2.22 "would have considerable weight if this instruction stood alone," but the trial court properly gave CALJIC No. 2.90]; *People v. Estep*, *supra*, 42 Cal.App.4th at pp. 738-739, citing *People v. Wilson* (1992) 3 Cal.4th 926, 943 [CALJIC No. 2.51 had to be viewed in the context of the entire charge, particularly the language of the reasonable doubt standard set out in CALJIC No. 2.90].)

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin, supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[61] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can

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[61] A reasonable doubt instruction also was given in *People v. Roder, supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Watkins's jury heard seven separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section 1096 as set out in former CALJIC No. 2.90.[62] This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

### D. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt,

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[62] As this Court has noted, the statutory language – with its references to "moral evidence" and "moral certainty" – is problematic. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503.) In combination with the instructions discussed in this argument, it is reasonably likely that CALJIC No. 2.90 allowed the jurors to convict Watkins on proof less than beyond a reasonable doubt in violation of his right to due process. (*In re Winship*, *supra*, 397 U.S. 358.)

their delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. Watkins testified regarding the fiercely-contested facts to which the instructions directly related. The questions of guilt of first degree murder and attempted robbery and the truth of the single special circumstance were so demonstrably close (assuming, arguendo, there even was legally sufficient evidence to support the verdicts on these charges)[63] that the dilution of the reasonable-doubt requirement by the guilt-phase instructions, particularly when considered cumulatively with the other instructional errors set forth in Arguments VII and VIII, must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.)

Accordingly, the judgment on count 1, count 2 and the special circumstance allegation must be reversed.

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[63] See Argument V *supra* in which Watkins shows that the evidence was insufficient to prove first degree murder, attempted robbery, and the robbery-murder special circumstance.

## X.

## THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED WATKINS ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

After the trial court instructed the jury that Watkins could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; CT 712; RT 1788-1789) or killed during the attempted commission of robbery (CALJIC No. 8.21; CT 713; RT 1790-1791), the jury found Watkins guilty of murder in the first degree (CT 762). The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge Watkins with first degree murder and did not allege the facts necessary to establish first degree murder.[64]

Count 1 of the second amended information alleged that "[o]n or about July 17, 1990, in the County of Los Angeles, the crime of MURDER, in violation of PENAL CODE SECTION 187(a), a Felony, was committed by LUCIEN AUGUSTUS MARTIN and PAUL SODOA WATKINS, who did willfully, unlawfully, and with malice aforethought murder RAYMOND SHIELD, a human being." (CT 313.) Both the statutory reference ("section 187(a) of the Penal Code") and the description of the crime ("did willfully, unlawfully, and with malice aforethought murder") establish that Watkins

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[64] Watkins is not contending that the information was defective. On the contrary, as explained hereafter, count 1 of the information was an entirely correct charge of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony murder in violation of Penal Code section 189.

was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.[65]

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[66] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[67]

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[65] The second amended information also alleged one felony-murder special circumstance. (CT 313.) However, this allegation did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

Also, the allegation of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony murder. A conviction under the felony murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (*People v. Hart* (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not (*People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Green* (1980) 27 Cal.3d 1, 61).

[66] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[67] In 1990, when the murder at issue allegedly occurred, Penal Code (continued...)

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try Watkins for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of Penal Code section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making

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[67] (...continued)
section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[68] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*,

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[68] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in Penal Code section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in Penal Code section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony murder rule. A crime cannot both include another crime and be included within it.

170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

*Witt* reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that Penal Code section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe [Penal Code] *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, italics added, fn. omitted.)

Moreover, in rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.3d 1153, 1212.) Although that conclusion can be questioned (see Argument XI), it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder (see Pen. Code, § 664, subd. (a) [referring to "willful, deliberate, and premeditated murder, as defined by Section 189"]) or murder during the commission of a felony, and *People v. Dillon*, *supra*, 34 Cal.3d at p. 472, expressly held that the first degree felony-murder rule was codified in Penal Code section 189. Therefore, if there is a single statutory offense of first degree murder, it is

the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; but see Argument XI, arguing the contrary). First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart*, *supra*, 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[69]

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn.

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[69] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction*. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original italics.)

23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, italics added, citation omitted.)[70]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in Penal Code section 189 together with the specific intent to commit that crime) are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be

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[70] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

life imprisonment without parole or death. (Pen. Code, § 190, subd. (a).) Therefore, those facts should have been charged in the information. (See *United States v. Allen* (8th Cir. 2004) 357 F.3d 745, 758 [vacating death sentence because failure to allege aggravating factor in indictment was not harmless error]; *State v. Fortin* (N.J. 2004) ___ A.2d ___, 2004 WL 190051, *53 [holding prospectively that in capital cases aggravating factors must be submitted to grand jury and returned in the indictment].)

Permitting the jury to convict Watkins of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated Watkins's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated Watkins's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

These violations of Watkins's constitutional rights were necessarily prejudicial because, if they had not occurred, Watkins could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 2004 WL 190051 at *53-54.) Therefore, Watkins's conviction for first degree murder must be reversed.

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## XI.

## THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT WAS NOT REQUIRED TO AGREE UNANIMOUSLY ON WHETHER WATKINS HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

As previously noted, the trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; CT 712; RT 1788-1789) and on first degree felony murder predicated on attempted robbery. (CALJIC No. 8.21; CT 713; RT 1790-1791.) The trial court further instructed that if the jury found that Watkins had committed an unlawful killing, it had to agree unanimously on whether Watkins was guilty of first degree murder, second degree murder, or voluntary or involuntary manslaughter. (CALJIC No. 8.74; CT 727; RT 1798-1799.) However, the trial court also instructed the jury pursuant to People's Special Instruction Number 1 that the jurors were not required to agree unanimously on whether Watkins committed premeditated murder or felony murder. Watkins's counsel objected to the instruction, which read as follows:

> In this case the defendants are charged with murder. You have been instructed that murder may be the first or second degree.
>
> There are two theories of first-degree murder about which you have been instructed, to wit: (1) felony murder, and (2) willful, deliberate and premeditated murder.
>
> For the jury to return a verdict of first-degree murder as to any defendant it is not necessary that all jurors agree on the same theory of first-degree murder.

(CT 715; RT 1792-1793 [given instruction]; RT 1611 [objection]; RT 1612 [proposed instruction].)

The instruction that the jury was not required to agree unanimously as

to whether Watkins had committed a premeditated murder or a first degree felony murder was erroneous, and the error denied Watkins's right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Watkins acknowledges that this Court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at pp. 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 394-395.) However, this conclusion should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This Court consistently has held that the elements of first degree premeditated murder and first degree felony murder are not the same. In the watershed case of *People v. Dillon* (1983) 34 Cal.3d 441, this Court acknowledged first that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.]" (*Id.* at p. 475 .) The Court next declared that "in this state the two kinds of murder [felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23; see also *id.* at pp. 476-477.)[71]

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[71] "It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of (continued...)

In subsequent cases, this Court retreated from the conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712, holding that "[f]elony murder and premeditated murder are not distinct crimes"), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, 34 Cal.3d at p. 476, quoted above, "meant that the elements of the two types of murder are not the same." Similarly, the Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva*, *supra*, 25 Cal.4th at p. 367) and that "the two forms of murder [premeditated murder and felony murder] have different elements" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131.)

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title in reality are different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.), quoted *supra,* p. 136, fn. 69) and to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply (see *Jones v. United States* (1999) 526 U.S.

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[71] (...continued)
deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference . . . ." (*People v. Dillon*, *supra*, at pp. 476-477, fn. omitted.)

227, 232). Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those are different or the same. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact that the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173), the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[72] see also

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[72] "The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence provides the foundation for our entire double jeopardy jurisprudence – including the 'same elements' test for determining whether two 'offence[s]' are 'the

(continued...)

*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.)).[73]

Malice murder and felony murder are defined by separate statutes and "each . . . requires proof of an additional fact that the other does not." (*Blockberger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not. (Pen. Code, §§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Therefore, it is incongruous to say, as this Court did in *People v. Carpenter*, *supra*, 15 Cal.4th 312, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which Watkins relies "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, at p. 394, first italics added.) If the elements of malice murder and felony

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[72] (...continued)
same,' see *Blockberger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.).)

[73] The Fifth Amendment guarantee against double jeopardy, like other fundamental trial protections secured by the Bill of Rights, is enforceable against the States through the due process clause of the Fourteenth Amendment. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717.)

murder are different, as *Carpenter* acknowledges they are, then malice murder and felony murder are different crimes. (*United States v. Dixon, supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime also is the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California, supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 476.)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

Because this is a capital case, the right to a unanimous verdict also is guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the

procedures leading to the conviction of a capital offense (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638). Therefore, jury unanimity is required in capital cases.

This conclusion cannot be avoided by recharacterizing premeditation and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*, 501 U.S. 624.) First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts repeatedly have characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) The specific intent to commit the underlying felony likewise has been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

Furthermore, this Court has recognized that the Legislature intended to make premeditation an element of first degree murder. In *People v. Stegner* (1976) 16 Cal.3d 539, the Court declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the

> character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill." [Citation.]

(*Id.* at p. 545, italics added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[74]

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (Pen. Code, § 189), not means or the "brute facts" which may be used at times to establish those elements.

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[74] Specific intent to commit the underlying felony, the *mens rea* element of first degree felony murder, is not specifically mentioned in Penal Code section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written by the Legislature" (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; accord, *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839). Furthermore, Penal Code section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (Pen. Code, §§ 189 & 190, subd. (a).) Therefore, they must be found by procedures which comply with the constitutional right to trial by jury (*Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, includes the right to a unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder only in that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice, while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608; accord, *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Under any interpretation, malice is a true "element" of murder.

Accordingly, the trial court should have instructed the jury that it must agree unanimously on whether Watkins had committed a premeditated murder or a felony murder. Instead, the trial court erred in giving the contrary instruction that unanimity on the type of murder was not required. Because the jurors were not required to reach unanimous agreement on the

elements of first degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to instruct was a structural error and, therefore, reversal of Watkins's murder conviction is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.)

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## XII.

## THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR JULIA ALMEYDA REQUIRES REVERSAL OF THE DEATH SENTENCE

Over Watkins's objection, the trial court granted the prosecution's challenge for cause and excused Julia Almeyda, a prospective juror who stated that she would be able to impose a death sentence, but noted that the decision would be "hard" and would not be made with a "clear conscience." The trial court did not undertake the relevant inquiry or apply the correct legal standard in disqualifying Ms. Almeyda from jury service. Because the record does not show that Ms. Almeyda's feelings about the death penalty substantially impaired her ability to sit as an impartial juror, her dismissal violated Watkins's rights to an impartial jury, a fair capital sentencing hearing, and due process of law under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. Reversal of Watkins's death judgment is required.

### A. Voir Dire of Julia Almeyda

The prospective jurors in this case filled out jury questionnaires prior to the commencement of voir dire. Ms. Almeyda was a 60 year-old married woman who had seven grown children, had lived in Pomona almost her entire life, and worked in food service for a local school district. (CT Supp. VI: 423-426.) In her questionnaire, Ms. Almeyda responded to inquiries about several topics with question marks, rather than with narrative answers. (CT Supp. VI: 422-449.) She did not answer any of the questions relating to the death penalty except to check the option of "uncertain" in response to the question "[d]o you feel that life in prison without the possibility of parole is

more severe than the death penalty?" (*Id.* at p. 449.)

During voir dire, the trial court began by asking Ms. Almeyda whether she had an opinion regarding the penalty choices; she answered "no." (RT 866.) When asked about her reaction to hearing that the death penalty could be involved, Ms. Almeyda stated, "Well, I just feel like I am the one who is going to be prosecuted, no one else. I am scared." (*Ibid.*) The trial court asked what in particular frightened Ms. Almeyda, and she explained, "I don't want to be the one to say anything against anybody." (*Ibid.*) When asked "if . . . you felt that the death penalty was appropriate, *could* you vote for the death penalty[,]" Ms. Almeyda replied, "I'm not sure I *would*." (RT 866-867, italics added.) Her uncertainty was not based upon any moral or religious beliefs, but, as Ms. Almeyda explained, "It's just me. I am a very negative person." (RT 867.)

The trial court directly asked whether Ms. Almeyda had a preference in terms of penalty, and she answered, "I don't know." (*Ibid.*) When asked whether she believed one penalty option was easier to choose than the other, she responded, "no." (*Ibid.*) When asked if there is a "better way to deal with them than subjecting them to the death penalty," she again answered, "no." (*Ibid.*)

The trial court next asked Ms. Almeyda to explain why, in her questionnaire, she answered the questions about the death penalty with a question mark. She answered, "[w]ell, I just feel that I'm not the one to judge anybody." (RT 868.) Her reluctance to judge people pertained to the questions of both guilt and penalty. (*Ibid.*) Ms. Almeyda also explained that she did not understand most of the death penalty questions. (*Ibid.*) When the trial court asked whether she ever had felt that the death penalty was appropriate in a particular case, Ms. Almeyda replied, "Yes," although she

could not recall a specific case. (RT 869.) The trial court's voir dire concluded as follows:

> THE COURT: Let me come back to the question again because I think we're all trying, the attorneys are trying to determine your viewpoint. In all honesty, could you ever vote for the death penalty?
>
> PROSPECTIVE JUROR ALMEYDA: Yes, I – yes, I would.
>
> THE COURT: You could?
>
> PROSPECTIVE JUROR ALMEYDA: I could.

(RT 869.)

After the noon recess, the prosecutor was granted permission to examine Ms. Almeyda about her death penalty views. He asked, "Could you vote for the death sentence for somebody?" Ms. Almeyda replied, "It would be hard for me." (RT 889-890.) The prosecutor pressed further, stating that he was "trying to find out is it so hard that you don't really think it is appropriate for you to do that?" (RT 890.) Ms. Almeyda stated that she "would feel guilt that a person would die because I said yes. I would carry a guilt." (*Ibid.*) The prosecutor concluded his questioning as follows:

> MR. HEARNSBERGER: If you sat on this jury that might very well be exactly what you are asked to do. [¶] Do you understand that? We are not just talking about mere possibility. There is a very real chance that you as a juror are going to be called upon to make that decision. And what you are expressing to me is your feelings are such that you probably really couldn't with a clear conscious [*sic*] make that decision, could you?
>
> PROSPECTIVE JUROR ALMEYDA: No.

(RT 890-891.)

The prosecutor challenged Ms. Almeyda for cause. (RT 893.) Watkins's attorney argued that Ms. Almeyda could be a fair juror, and that,

although it would be difficult for her, she could return a death verdict in the right set of circumstances which qualified her as a juror. (RT 893-894.) The trial court excused Ms. Almeyda for cause, concluding that with "the last round of questions Mrs. Almeyda indicated that she would feel guilty if she were to impose a death sentence. And based on that guilt she couldn't." (RT 894.) The trial court made no finding about Ms. Almeyda's credibility or her demeanor.

### B. The Trial Court Committed Reversible Error In Excusing Ms. Almeyda for Cause, Because Her Voir Dire Did Not Establish That Her Views About The Death Penalty Would Prevent Or Substantially Impair Her Ability To Follow The Law, Obey Her Oath, Or Impose A Death Sentence

#### 1. Applicable Legal Standards

The Sixth and Fourteenth Amendments guarantee a criminal defendant a fair trial by a panel of impartial jurors. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150; *Irvin v. Dowd* (1961) 366 U.S. 717, 722.) In capital cases, this right applies to the determinations of both guilt and penalty. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *Turner v. Murray* (1986) 476 U.S. 28, 36 n. 9.) This right also is protected by the California State Constitution. (See Cal. Const., art. I, § 16.)

The United States Supreme Court has enacted a process of "death qualification" for capital cases. (See *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522); *Wainwright v. Witt* (1985) 469 U.S. 412, 421.) Watkins maintains that this process produces "juries more predisposed to find a defendant guilty than would a jury from which those opposed to the death penalty had not been excused" in violation of the Sixth and Fourteenth Amendment right to a fair trial by an impartial jury. (*Witt v. Wainwright*, (1985) 470 U.S. 1039 (Marshall, J., dissenting from denial of certiorari);

*Grigsby v. Mabry* (8th Cir. 1985) 758 F.2d 226, revd. sub nom, *Lockhart v. McCree* (1986) 476 U.S. 162, 176.) The reasons supporting this claim are set forth in Justice Marshall's dissenting opinions in *Witt*, *supra*, at pp. 1040-1042, and in *McCree*, *supra*, at pp. 184-206, which are incorporated herein to preserve the issue for federal habeas corpus review, if necessary.

Even with a death qualification process, the Supreme Court has held that prospective jurors do not lack impartiality, and thus may not be excused for cause, "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-523, fns. omitted.) Such an exclusion violates the defendant's rights to due process and an impartial jury "and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) Rather, under the federal Constitution, "[a] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright v. Witt*, *supra,* 469 U.S. at 421, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) The focus on a prospective juror's ability to honor his or her oath as a juror is important:

> [T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*Lockhart v. McCree*, *supra,* 476 U.S. at p. 176; see also *Witherspoon*, *supra*, 391 U.S. at p. 514, fn. 7 [recognizing that a juror with conscientious scruples against capital punishment "could nonetheless subordinate his

personal views to what he perceived to be his duty to abide by his oath as a jury and to obey the law of the State."].) Thus, all the State may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas*, *supra* at p. 45.) The same standard is applicable under the California Constitution. (See, e.g.. *People v. Guzman* (1988) 45 Cal.3d, 915, 955; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

In applying the *Adams-Witt* standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962); see also, *Wainwright v. Witt*, *supra*, 469 U.S. at p. 433 [ruling that the question is whether the trial court's finding that the substantial impairment standard was met is fairly supported by the record considered as a whole].) As this Court has explained:

> On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.

(*People v. Heard* (2003) 31 Cal.4th 946, 958, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975, citations omitted.) The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Witt*, *supra*, 469 U.S. at p. 424; accord, *Morgan v. Illinois* (1992) 504 U.S. 719, 733.) The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (*Gray*

*v. Mississippi* (1987) 481 U.S. 648, 668.).

Finally, given the per se standard of reversal for *Witherspoon-Witt* errors, the trial court bears a special responsibility to conduct adequate death qualification voir dire. As this Court recently emphasized, when a prospective juror's views appear uncertain, the trial court must conduct careful and thorough questioning, including follow-up questions, to determine whether his "views concerning the death penalty would impair his ability to follow the law or to otherwise perform his duties as a juror." (*People v. Heard*, *supra*, 31 Cal.4th at p. 965.) In short, the trial courts must "proceed with great care, clarity, and patience in the examination of potential jurors, especially in capital cases." (*Id.* at p. 968.)

In this case, the trial court erred in excluding Ms. Almeyda, because the record failed to show that her views on capital punishment would have substantially impaired the performance of her duties as a juror. Accordingly, Watkins's death sentence must be set aside.

**2. Ms. Almeyda Was Qualified for Jury Service**

The prosecutor failed to carry his burden to show that Ms. Almeyda was not qualified to serve on Watkins's jury. (See *Gray v. Mississippi*, *supra*, 481 U.S. at p. 652, fn. 3 ["A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve."].) During the trial court's voir dire, Ms. Almeyda demonstrated that she was impartial with regard to capital punishment. She had no conscientious scruples, or even an opinion, about the death penalty. (RT 866, 867.) She had no preference for either death or life without the possibility of parole as the penalty. (RT 867.) She did not think one sentence would be easier to choose than the other (*Ibid.*). And she could

think of no better alternative to the death penalty. (*Ibid.*) She was reluctant to judge people with regard to both guilt and penalty, but her hesitation was not based on conscientious scruples about the death penalty. (RT 868.)[75] Thus, unlike many prospective jurors who have been excluded properly under *Witherspoon* and *Witt*, Ms. Almeyda never intimated that she opposed capital punishment, and never stated that she would not consider or return a death verdict.[76] Although Ms. Almeyda initially indicated that she was uncertain whether, in fact, she would return a death sentence (RT 867), Ms. Almeyda later stated that (1) there were cases in which she believed a death sentence to be appropriate and (2) she could and would vote for a death sentence. (RT 869.)

The subsequent questioning by the prosecutor failed to disprove Ms.

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[75] Like Ms. Almeyda, many of the people in this same group of 18 prospective jurors expressed fear or nervousness about participating in a case that potentially involved the death penalty. (See RT 851 [alternate juror Powers], RT 852 [Jarvis], RT 855 [Kwan], RT 858 [Bush]; RT 862 [Braaten]; RT 871-872 [King].)

[76] See, e.g., *People v. Phillips* (2000) 22 Cal.4th 226, 233 (prospective juror wrote in questionnaire that he would not vote to put anyone to death); *People v. Welch* (1999) 20 Cal.4th 701, 747 (prospective juror stated he was not sure he could ever be able to impose the death penalty if he believed it was the proper punishment); *People v. Dennis* (1998) 17 Cal.4th 468, 545 (prospective juror, who strongly opposed capital punishment, would not vote for death penalty in any circumstances); *People v. Bradford* (1997) 15 Cal.4th 1229, 1319-1320 (one prospective juror did not think she could return a death verdict except in the case of a child victim and another prospective juror, who opposed the death penalty, would render a death sentence only for espionage or mass murder); *People v. Pinholster* (1992) 1 Cal.4th 865, 917-918 (two prospective jurors said they would be unable to impose death penalty in a burglary-murder case); *People v. Sanders* (1990) 51 Cal.3d 471, 502 (prospective juror stated he was against death penalty in every case).

Almeyda's impartiality with regard to capital punishment. Again, she did not express any conscientious objections to capital punishment. And she did not disavow her earlier statements to the trial court that she could and would return a death verdict. In addition, the prosecutor's last question was convoluted: "And what you are expressing to me is your feelings are such that you probably really couldn't with a clear conscious [*sic*] make that decision, could you?" (RT 890-891.) This confusing question casts doubt on the meaning of Ms. Almeyda's response, "No." (See RT 891.)

The prosecutor did not ask Ms. Almeyda directly if she could return a death penalty with a clear conscience. If she could not, her answer to this question would have been "no." Rather, using the concluding phrase "could you," the prosecutor asked whether Ms. Almeyda was expressing a negative, i.e. that she *couldn't* return a death penalty with a clear conscience. If the prosecutor correctly described her position, then Ms. Almeyda's answer should have been "yes." Her "no" answer could mean that the prosecutor had misstated her position, or it could mean that Ms. Almeyda thought the prosecutor had asked if she could return a death penalty with a clear conscience. Neither counsel nor the trial court asked Ms. Almeyda any further questions, so the uncertainty caused by the question was never clarified. At most, Ms. Almeyda's answer established that she could not decide for death with a clear conscience. In this way, the prosecutor proved only that condemning a person to death would be not be easy for Ms. Almeyda and would weigh on her conscience.

### 3. The Trial Court's Exclusion of Ms. Almeyda Did Not Satisfy the *Adams-Witt* Substantial Impairment Standard

The trial court's dismissal of Ms. Almeyda for cause was erroneous.

The trial court based its exclusion on a single fact – that "she would feel guilty if she were to impose a death sentence. And based on that guilt she couldn't." (RT 894.) This finding is insufficient under *Adams* and *Witt*, since the record does not fairly show that her feelings would substantially impair her performance as a juror. Because Ms. Almeyda's responses were neither conflicting nor equivocal, the trial court's ruling is not binding on this Court. (See *People v. Heard*, *supra*, 31 Cal.4th at p. 958; *People v. Mendoza* (2000) 24 Cal.4th 130, 169.) Rather, the question is whether there is substantial evidence to support the conclusion that Ms. Almeyda's feelings of guilt would substantially impair her ability to sit as a juror in Watkins's case. (*Ibid.*) As shown below, such evidence is lacking.

As a preliminary matter, the trial court misconstrued Ms. Almeyda's voir dire and attributed to her a statement she did not make. Ms. Almeyda acknowledged she "would feel guilt that a person would die because I said yes." (RT 890.) However, contrary to the trial court's ruling, she did *not* say that she could not return a death sentence due to these feelings.[77] Rather, in

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[77] The relevant voir dire is as follows:

MR. HEARNSBERGER: Could you vote for the death sentence for somebody?

* * *

PROSPECTIVE JUROR ALMEDYA: It would be hard for me.

MR. HEARNSBERGER: I don't mean to put you on the spot, but we need to know. You are the only one who knows you, we don't. So this is our opportunity to try to follow-up on this. And you had shown some concern earlier in some of your answers. And I am trying to get a little bit more. [¶] I understand it is going to be hard for you, you have already shown that. And I am trying to find out is it so

(continued...)

response to the prosecutor's confusing, final question, she may have agreed that she could not return a death sentence with a clear conscience. However, Ms. Almeyda never retracted or qualified her assertion that she would be able to vote for a death verdict. Because the trial court erroneously interpreted Ms. Almedya's voir dire testimony to state a position she did not take, its implicit finding that she was biased with regard to the death penalty is not supported by substantial evidence.[78]

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[77] (...continued)
hard that you don't really think it is appropriate for you to do that? [¶] I mean some people don't think it is in their power or in their power for a human to judge another human in the death penalty which results in another's life being taken. If you feel that way it is fine.

PROSPECTIVE JUROR ALMEYDA: I would feel guilt that person would die because I said yes. I would carry a guilt.

MR. HEARNSBERGER: If you sat on this jury that might very well be exactly what you are asked to do. [¶] Do you understand that? We are not just talking about mere possibility. There is very real chance that you as a juror are going to be called upon to make that decision. And what you are expressing to me is your feelings are such that you probably really couldn't with a clear conscious make that decision, could you?

PROSPECTIVE JUROR ALMEDYA: No.

(RT 890-891.)

[78] Ms. Almeyda's answers were similar to those of prospective juror Delene Bush, who was in the same group as Ms. Almeyda and was not challenged for cause. For example, during voir dire, Ms. Bush stated that she was nervous regarding "the decision, I don't like it." ( RT 858.) At that point, Ms. Bush became very emotional, and the trial court called for a recess. (RT 858, 860.) She later explained her response as follows: "I thought I was okay all the time and then when it got up here, it just all hit me that it's all – the decision will be us, you know, me." (RT 860.)
(continued...)

Moreover, the trial court erroneously focused solely on Ms. Almeyda's guilt feelings and did not assess her qualifications on the basis of her voir dire "as a whole." (See *Witt, supra*, 469 U.S. at p. 433.) In reviewing her exclusion, this Court must consider the entire voir dire, not merely isolated answers. (*Id.* at pp. 433-435; see *Darden v. Wainwright* (1986) 477 U.S. 168, 178 [evaluating voir dire in its entirety to decide *Witherspoon-Witt* claim]; *People v. Carpenter, supra*, 15 Cal.3d at p. 358 [same]; *People v. Cox* (1991) 53 Cal.3d 618, 647-648 [evaluating voir dire in its entirety to decide *Witherspoon/Witt* claim and criticizing defendant's attempts to use excerpts of voir dire and take particular answers out of context].) As this Court instructed long ago: "In short, in our probing of the juror's state of mind, we cannot fasten our attention upon a particular word or phrase to the exclusion of the entire context of the examination and the full setting in which it was conducted." (*People v. Varnum* (1969) 70 Cal.2d 480, 493.) The same admonition is relevant to the trial court's assessment of juror impartiality. Because the trial court excluded Ms. Almeyda on the

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[78] (...continued)
Although Ms. Bush had no religious or moral convictions that would interfere with her ability to impose either penalty, she thought the sentencing choices "are both bad." (RT 859.) She believed she could vote for death if she heard all the facts. (*Ibid.*) She had no preference as to the penalty (RT 859-860), but, as she stated on her questionnaire, she was not a strong supporter of the death penalty. (RT 861.) When the prosecutor asked "can you vote death against somebody[,]" Ms. Bush replied, "I think maybe I could." (RT 887; see also RT 888 ["I think I could."].) This voir dire shows that Ms. Bush was no more impartial with regard to the death penalty than Ms. Almeyda. Although Ms. Almeyda, like Ms. Bush, expressed reluctance to sit in judgment on a capital case, she stated that not only *could* she, like Ms. Bush, vote for death if she believed the penalty to be appropriate, but she, unlike Ms. Bush, asserted that she *would* vote for a death sentence in such a case. (RT 869.)

basis of an isolated statement rather on her voir dire as a whole, its decision is not fairly supported by the record and is not worthy of deference.[79]

Furthermore, the "special care and clarity in conducting voir dire in death penalty trials" that this Court underscored in *People v. Heard*, *supra*, 31 Cal.4th at p. 967, did not occur in this case. The trial court did not ask Ms. Almeyda whether her sense of guilt would cause her to vote for a sentence of life without the possibility of parole or would impair her ability to vote for death. The trial court did not inquire whether, notwithstanding her sense of guilt, Ms. Almeyda could follow the juror's oath and its instructions. The trial court did not review the basic law governing the penalty determination. Deference cannot be accorded to the trial court's judgment about the impartiality of the prospective juror where, as here, the trial court failed to conduct an adequate inquiry using the proper legal standard.[80] The reason is simple: without asking the right questions, the

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[79] A trial court's determinations of about a prospective juror's "demeanor and credibility ... are peculiarly within a trial judge's province" and thus "are entitled to deference even on direct review." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 428.) That rule, however, does not apply in this the case, because the trial court made no findings about Ms. Almeyda's credibility.

[80] Compare *Adams v. Texas*, *supra*, 448 U.S. at p. 49 (granting habeas relief where "the touchstone of the inquiry . . . was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond a reasonable doubt"); *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1272 (granting habeas relief where "none of the questions which Mrs. Phillips answered articulated the proper legal standard under *Witt*"); and *Szuchon v. Lehman* (3rd Cir. 2001) 273 F.3d 299, 300 (granting habeas relief where "[n]either the Commonwealth nor the trial court, however, questioned Rexford about his ability to set aside his

(continued...)

trial court does not have the necessary information to determine whether the prospective juror's death penalty views would substantially impair her functioning as a juror. As this Court succinctly stated in *Heard*, *supra*, 31 Cal.4th at p. 968:

> Although we accord appropriate deference to determinations made by a trial court in the course of jury selection, the trial court in the present case has provided us with virtually nothing of substance to which we might properly defer.

The same conclusion applies here.

The trial court also failed to ensure that Ms. Almeyda understood the questions she was asked. Although Ms. Almeyda told the trial court that she did not understand – and therefore did not answer – most of the death penalty questions on the juror questionnaire (RT 868), the trial court did not inquire further about those questions. Nor did the trial court attempt to clarify either the meaning of the prosecutor's jumbled question or the meaning of Ms. Almeyda's response. It was incumbent on the trial court to

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[80] (...continued)
beliefs or otherwise perform his duty as a juror") with *Witt*, *supra*, 469 U.S. at p. 416 (holding exclusion proper where prosecutor asked prospective juror if her personal feelings against the death penalty would "interfere with judging the guilt or innocence of the Defendant in this case?"); *Darden v. Wainwright* (1986) 477 U.S. 168, 177 (holding exclusion proper where "[t]he court repeatedly stated the correct standard when questioning individual members of the venire" such as asking "Do you have any . . . conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating our own principles to vote to recommend a death penalty regardless of the facts?"); and *Lockett v. Ohio* (1978) 438 U.S. 586, 595-596 (holding exclusion proper where the trial court asked the prospective jurors "'[D]o you feel that you could take an oath to well and truely [*sic* ] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?'").

make sure that Ms. Almeyda, who admitted difficulty in understanding the written death penalty questions, clearly grasped the death qualification inquiry. After all, "additional follow-up questions or observations by the court would [not] have been unduly burdensome." (*People v. Heard*, *supra*, 31 Cal.4d at p. 968.)

At the end of Ms. Almeyda's voir dire, the record shows that she would and could vote for a death sentence and that she would feel "guilt" at doing so. Never having asked the correct questions, or even completely coherent ones, the trial court and the prosecutor failed to develop the facts relevant to the substantial-impairment test under *Adams* and *Witt*. Thus, just as prospective juror H's views about psychological factors were inadequate to support his exclusion in *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-968, the record fails to establish that Ms. Almeyda's sense of guilt would have substantially impaired her ability "to follow the law or abide by [her] oath[]." (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48.)

Read in the context of her voir dire, in which she stated she could return a death sentence and expressed no opposition to capital punishment, Ms. Almeyda's final comment at most established that returning a death sentence would weigh on her conscience. Nothing in the United States Supreme Court's jurisprudence, however, suggests that only prospective jurors who, with clear consciences, can condemn another human being to death are impartial with regard to service on a capital jury. Impartiality simply is not measured by the ease with which a prospective juror can vote for execution.

On the contrary, the United States Supreme Court has held that a prospective juror's reluctance to sit in judgment in a capital case is *not* an adequate ground for an exclusion for cause. In *Witherspoon*, the Court held

that a prospective juror was erroneously excluded, where, much like Ms. Almeyda, she repeatedly stated that "she would not 'like to be responsible for . . . deciding somebody should be put to death.'" (*Witherspoon*, *supra*, 391 U.S. at p. 515.) Such reluctance is normal: "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man.'" (*Ibid.*)

Following *Witherspoon,* the Supreme Court reversed the death sentence imposed in *Adams v. Texas*, *supra*, 448 U.S. 38, because a Texas statute required exclusion of prospective jurors "whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." (*Id.* at pp. 50-51.) The Court was explicit that such feeling did not warrant exclusion from jury service:

> [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of jurors to follow the court's instructions and obey their oaths, regardless of the their feelings about the death penalty.

(*Id.* at p. 50.) As *Adams* teaches, jurors cannot be excluded simply because "the potentially lethal consequences would invest their deliberations with greater seriousness and a gravity or would involve them emotionally." (*Id.* at p. 49.)

This Court also has ruled that uneasiness or nervousness about serving on a capital jury – including fear of adverse physical effects – does not justify an exclusion. As the Court explained in *People v. Bradford* (1969) 70 Cal.2d 333, 346-347:

> The venireman herein expressed little more than a deep uneasiness about participating in a death verdict. She complained that a death vote would make her "very nervous"

> and agreed with the trial court's suggestion that such a vote might have a "great physical effect" on her. It cannot be said from this limited examination that the venireman was physically "incapable of performing the duties of a juror." The decision that a man should die is difficult and painful, and veniremen cannot be excluded simply because they express a strong distaste at the prospect of imposing that penalty. (See *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, fns. 8, 9, 88 S.Ct. 1770, 20 L.Ed.2d 776.)

(See also *People v. Lanphear* (1980) 26 Cal.3d 814, 841 ["[A]bhorrence or distaste for sitting on a jury that is trying a capital case is not sufficient."]; *People v. Stanworth* (1969) 71 Cal.2d 820, 837 ["the mere fact that a venireman may find it unpleasant or difficult to impose the death penalty cannot be equated with a refusal by him to impose that penalty under any circumstances."].) Feelings of unease, conscience or reluctance, like those expressed by Ms. Almedya, are an impermissible "'broader basis' for exclusion than inability to follow the law. . .." (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48; see *Clark v. State* (Tex. Cr. App. 1996) 929 S.W.2d 5, 9 [holding that juror who preferred to let God make the penalty decision was erroneously excluded].)

In this case, the relevant question was whether, notwithstanding her sense of guilt, Ms. Almeyda could perform her duties as a juror in accordance with the law. (*Witt*, *supra*, 469 U.S. at p. 424.) Even a prospective juror who is opposed to capital punishment – and thus potentially much more biased than Ms. Almeyda – may be capable of subordinating her sense of conscience to her legal oath. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 658, quoting *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176 ["those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly

that they are willing to temporarily set aside their own beliefs in deference to the rule of law."]; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699 ["A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict."].) The record in this case fails to demonstrate that Ms. Almeyda's feelings of guilt would prevent or substantially impair her ability to consider and vote for a death sentence.

Similarly, Ms. Almeyda's initial uncertainty about returning a death verdict, which the trial court did not mention in its ruling, did not provide adequate reason for her dismissal. When asked at the beginning of her voir dire if she could vote for the death penalty, Ms. Almeyda answered, "I'm not sure I would." (RT 867.)[81] However, upon further questioning, she stated that she would and could return a death verdict. (RT 869.) Nothing in these

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[81] Of course, to be considered impartial with regard to capital punishment, a prospective juror need not be able to state under oath that she *would* return a death sentence. Such an assertion might suggest prejudgment of the case before hearing the evidence and might indicate a closed rather than an open mind as to penalty. Although Ms. Almeyda initially was uncertain whether she *would* return a death penalty, she repeatedly stated that she *could* do so. That is all that the State can demand in the death qualification process. (See *People v. Heard*, *supra*, 31 Cal.4th at p. 965 [prospective juror's answer "'Yes, I think they might'" when asked if psychological factors "would weigh heavily enough that you probably wouldn't impose the death penalty" did not suggest that the prospective juror "would not properly be exercising the role that California law assigns to jurors in a death penalty case."].)

responses indicate an impaired ability to perform the duties of a juror.

Ms. Almeyda's hesitation and initial uncertainty about returning a death verdict were less substantial than that held insufficient to justify exclusions of prospective jurors in *Gray v. Mississippi*, *supra*, 481 U.S. 648, and *Adams v. Texas*, *supra*, 448 U.S. 38. In *Gray*, the United States Supreme Court held that prospective juror Bounds had been excused in violation of *Adams* and *Witt*. (*Gray*, *supra*, 481 U.S. at p. 659.) Her voir dire was confusing, and at times she gave equivocal answers. (See *id.* at p. 653; *Gray v. State* (Miss. 1985) 472 So.2d 409, 421-422.) When asked if she had any "conscientious scruples" against the death penalty, Ms. Bounds replied, "I don't know." (*Gray v. Mississippi*, No. 85-54-54, Joint Appendix ["*Gray* Appen."] at p. 16.)[82] When asked if she would automatically vote against imposition of death, she first explained that she would "try to listen to the case" and then responded that "I don't think I would." (*Id.* at pp. 17, 18.) Pressed by the trial court, Ms. Bounds agreed that she did not have scruples against the death penalty where it was "authorized by law." (*Id.* at p. 18.) When directly asked by the prosecutor if she could for vote for death, she said "I don't think I could," (*id.* at p. 19), but when asked the same question again, she ultimately responded, "I think I could." (*Id.* at p. 22; *Gray v. Mississippi*, *supra*, 481 U.S. at p.654.)

The prosecutor moved to exclude Ms. Bounds for cause. The trial court noted that "I don't know whether she could or couldn't [vote for death]. She told me she could, a while ago." (*Gray* Appen. at p. 20.)

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[82] A copy of the portion of the Joint Appendix in *Gray v. Mississippi*, *supra*, 481 U.S. 648, containing a transcript of the voir dire is attached to this brief as Appendix A, and is the subject of Watkins's separately filed motion for judicial notice.

Seeking to resolve the question, the court asked Ms. Bounds whether she could vote for the death penalty, and she responded, "I think I could." (*Id.* at p. 22.) When the prosecutor again challenged Ms. Bounds, the trial court found that "she can't make up her mind." (*Id.* at p. 26.) The trial court resolved the ambiguity by discharging Ms. Bounds for cause. However, the United States Supreme Court held that Ms. Bounds's uncertainty was inadequate to support her exclusion. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 659 [agreeing with the unanimous Mississippi Supreme Court that Ms. Bounds was qualified to sit as a juror under *Adams* and *Witt*].)

Ms. Almeyda, like Ms. Bounds, was not opposed to capital punishment. However, unlike Ms. Bounds, who stated both that she could and could not vote for a death sentence, Ms. Almeyda's ability to vote for death was consistent and unequivocal. She said she could vote for a death verdict. She never asserted that she could not return a death sentence; she only voiced some uncertainty about whether she would. In light of her entire voir dire, Ms. Almedya's initial uncertainty about voting for death and her concern about feeling guilt were less reason for exclusion than Ms. Bounds's persistent equivocation and qualified assertion of her ability to return a death verdict.

Ms. Almeyda's qualifications to serve on a capital jury also were equal to, if not greater than, prospective jurors who were wrongfully excused in *Adams v. Texas*, *supra*, 448 U.S. 38. During voir dire in that case, several prospective jurors (1) were equivocal about whether their feelings regarding the death penalty would affect their penalty deliberations, (2) did not want to deliberate a man's fate, and/or (3) believed serving on a capital jury would be difficult. Prospective juror Nelda Coyle favored the death penalty in certain circumstances but deliberating a case that could result in a death

sentence "would bother" her. (*Adams v. Texas*, No. 79-5175, Brief for Petitioner, Appendix ["*Adams* Appen."] at p. 20,)[83] Ms. Coyle was equivocal when asked if her feelings about imposing the death penalty would affect her deliberations. (*Id.* at p. 23-24.) She admitted she was unable to say her deliberations "would not be influenced by the punishment . . . ." (*Id.* at p. 24.)

Prospective juror Dorothy Riddle believed in capital punishment and thought she could participate in a case resulting in a death penalty, but stated "it would be hard for me to do it, and then I wonder how I would feel afterwards." (*Id.* at p. 50.) She also could not say whether her reservations would affect her deliberations. (*Id.* at p. 52.)

Prospective juror Mrs. Lloyd White thought she believed in capital punishment but didn't "want to have anything to do with it." (*Id.* at p. 26.) She was not entirely sure, but believed her aversion to imposing death would "probably" affect her deliberations. (Id. at pp. 27, 28.) She "didn't think" she could vote for death. (*Id.* at pp. 27-28.)

Prospective juror Francis Mahon was unable to state that her feelings about the death penalty would not impact her deliberations. Instead, she admitted that these feelings "could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no." (*Id.* at pp. 3, 8.)

Prospective juror George Ferguson was opposed to capital punishment, believed involved in a capital case "would be too hard for me to do," stated that "as far as voting for the death penalty, I wouldn't want to do

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[83] A copy of the portion of the Appendix to Brief of Petitioner in *Adams v. Texas*, *supra*, 448 U.S. 38, which contains a transcript of the voir dire, is attached as Appendix B, and is the subject of Watkins's separately filed motion for judicial notice.

that," and admitted that opposition to capital punishment "might" impact his deliberations. (*Id.* at pp. 14-15, 16, 17.)

Prospective juror Forrest Jenson, who thought he could decide whether someone lived or died, admitted that his views on the death penalty would "probably" affect his deliberations. (*Id.* at pp. 9, 12.)

Despite the reluctance and equivocal views expressed by these prospective jurors, the Supreme Court ruled that the record contained insufficient evidence to justify striking them for cause. (*Adams*, *supra*, 448 U.S. at pp. 49-50.) The teaching of *Adams*, which was affirmed in *Witt*, is plain: a prospective juror's uncertainty – the inability "positively to state whether or not their deliberations would in any way be affected" – and reluctance to deliberate another's fate do not establish that his or her views would "prevent or substantially impair the performance of his duties as a juror . . .." (*Id.* at p. 45.)

The evidence regarding Ms. Almeyda's death penalty views is even less substantial than that deemed inadequate for the exclusions in *Gray* and *Adams*. Ms. Almeyda expressed only an initial uncertainty about whether she *would* return a death sentence, which she later clarified by asserting that she could and would vote for death, and the very human reaction that she could not vote for death with an clear conscience. Unlike many of the erroneously-excluded prospective jurors in *Gray* and *Adams*, she was not opposed to capital punishment and did not give conflicting or ambiguous answers about her ability to consider and impose a death sentence. In this way, Ms. Almeyda was far more qualified to serve on a capital jury than the prospective jurors whose exclusion required penalty reversals in *Gray* and *Adams*.

In the end, Ms. Almeyda was excluded from jury service because she

said she would feel guilt at returning a death sentence. Certainly the right to fair trial by an impartial jury in a capital case does not countenance exclusion for cause of jurors who are willing, but whose consciences make them reluctant, to impose death. Otherwise, a jury comprised only of people for whom voting for a death sentence would not disturb their consciences would produce a "hanging jury," i.e. "a jury uncommonly willing to condemn a man die" which the Sixth and Fourteenth Amendments prohibit. (*Witherspoon*, *supra*, 391 U.S. at p. 521; see also, *Adams*, *supra*, 448 U.S. at p. 44; *Witt*, *supra*, 469 U.S. at p. 418 [reasserting same principle]. In this case, Ms. Almeyda was not "unable or unwilling to impose the death penalty." (*People v. Holt* (1997) 15 Cal.4th 619, 652.)[84] Her voir dire did not offer substantial evidence that her qualms about returning a death sentence would substantially impair her ability to sit as an impartial juror.[85]

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[84] In *Holt*, the Court upheld two exclusions under *Witt* whose voir dire differs markedly from that of Ms. Almeyda. One excused juror (Richards) initially stated he would have difficulty imposing the death penalty when a killing was not intentional and later "answered unequivocally that he would not impose death for an unintentional killing." (*People v. Holt*, *supra*, 15 Cal.4th at p. 652.) The other excluded juror (Jones), who concluded during voir dire that she did not believe in the death penalty, "never stated that she would consider imposition of the death penalty" and "repeatedly expressed inability to state whether she could vote for death." (*Id.* at p. 653.)

[85] The conclusion that Ms. Alemyda was excluded erroneously is supported by decisions from other jurisdictions setting aside death sentences under *Witt*. (See, e.g., See *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 330-332 [prospective juror was uncertain about, and showed discomfort with, the death penalty but stated "that he would possibly or 'very possibl[y]' feel the death penalty was appropriate in certain factual scenarios" and "believed he could and would follow the law as instructed"]; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1271-1272 (continued...)

The trial court's excusal of Ms. Almeyda violated *Witherspoon, Adams* and *Witt*, and the error requires reversal of Watkins's death sentence.

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[85] (...continued)
[prospective juror's statement in questionnaire – "I feel the death penalty is proper in some cases but I don't feel I could ever think there was enough evidence to come to that conclusion" – did not satisfy *Witt*'s substantial impairment test]; *Szuchon v. Lehman*, *supra*, 273 F.3d at pp. 327-330 [prospective juror's statement that he did not believe in capital punishment was a broader basis for exclusion that inability to follow the law or abide by a juror's oath]; *Farina v. State* (Fla. 1996) 680 So.2d 392, 396-399 [prospective juror equivocated about support for the death penalty but also stated that she would act fairly in considering whether to vote for a death sentence, would try to be fair to the prosecution, and "would try to do what's right" with respect to the penalty determination]; *Clark v. State*, *supra*, 929 S.W.2d at p. 8 [prospective juror admitted that she was "somewhat" against the death penalty on religious grounds and "would . . . find [herself] wanting to vote in such a way so that the death penalty was not assessed," but also stated that she could follow the court's instructions even if it resulted in a death penalty]; *Riley v. State* (Tex.Cr.App. 1994) 889 S.W.2d 290, 300 [prospective juror acknowledged that answering the statutory penalty questions leading to a death sentence would be difficult and might violate her conscientious principles, but consistently affirmed that she could answer the questions affirmatively if proven beyond a reasonable doubt]; *Jarrell v. State* (Ga. 1992) 413 S.E.2d 710, 712 [prospective juror believed in the death penalty, but indicated that she had some qualms about imposing a death sentence and that she would go into the trial leaning toward a life sentence]; *Fuselier v. State* (Miss. 1985) 468 So.2d 45, 54-55 [two prospective jurors' comments that they did not think they could return a death sentence in a case based entirely on circumstantial evidence showed they would be hesitant to impose the death penalty but did not prove their abilities as jurors would be substantially impaired].)

## XIII.

## THE TRIAL COURT ERRONEOUSLY DENIED WATKINS'S MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

On February 20, 1992, prior to jury selection, defense counsel moved the trial court for individual voir dire by counsel. (RT 609.) The trial court replied that, at that point, it would not preclude attorney questioning and asked counsel to submit written argument on the motion. (*Ibid.*)[86] The trial court explained its jury selection procedure: it first would conduct an inquiry into hardship excuses and then would give juror questionnaires to those prospective jurors who were not excused for hardship. (RT 609-610.)[87] The prospective jurors would complete and return the questionnaires on the same day. (*Ibid.*)

On February 24, 1992, the trial court began jury selection according to this plan. (RT 618-661.) On February 27, 1992, after the trial court completed the hardship inquiries, it clarified the voir dire procedure for counsel. (RT 667.) Watkins's counsel asked the trial court whether the questioning of each prospective juror about the possibility of returning a death verdict would be sequestered. (RT 667-668.) The trial court responded that the voir dire "will be in open court." (RT 668.) Watkins's counsel objected to this procedure and requested "that the court ask those questions in a sequestered setting so that each individual will not have to answer those questions in front of the rest of the jury." (*Ibid.*) The trial court overruled the objection. (*Ibid.*) The death qualification of the

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[86] Defense counsel apparently did not submit the requested authorities.

[87] A 27-page questionnaire was given to the prospective jurors for completion. (See e.g., CT Supp. II 1: 1-28.)

prospective jurors was conducted in open court.

As explained below, the trial court's failure to conduct individual sequestered death qualification voir dire, and its unreasonable and unequal application of state law governing such voir dire, violated Watkins's federal and state constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel, and a reliable death verdict (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const. art. I, §§ 7, 15, 16), and his right under California law to individual juror voir dire where group voir dire is not practicable (Code Civ. Proc., § 223).

### A. A Voir Dire Procedure That Does Not Allow Individual Sequestered Voir Dire On Death-Qualification Violates A Capital Defendant's Constitutional Rights To Due Process, Trial By An Impartial Jury, Effective Assistance of Counsel, And A Reliable Sentencing Determination

A criminal defendant has federal and state constitutional rights to trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; *Morgan v. Illinois* (1992) 504 U.S. 719, 726; Cal. Const, art. I, §§ 7, 15 & 16.) Whether prospective capital jurors are impartial within the meaning of these rights is determined, in part, by their opinions regarding the death penalty. Prospective jurors whose views on the death penalty prevent or substantially impair their ability to judge in accordance with the court's instructions are not impartial and constitutionally cannot remain on a capital jury. (See generally, *Wainwright v. Witt*, *supra*, 469 U.S. 412; *Witherspoon v. Illinois*, *supra*, 391 U.S. 510; see also *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 733-734; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279.) Death qualification voir dire plays a critical role in ferreting out such bias and assuring the criminal defendant that his constitutional right to an impartial jury will be honored. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.) To that extent, the

right to an impartial jury mandates voir dire that adequately identifies those jurors whose views on the death penalty render them partial and unqualified. (*Ibid.*) Anything less generates an unreasonable risk of juror partiality and violates due process. (*Id.* at pp. 735-736, 739; *Turner v. Murray*, *supra*, 476 U.S. at p. 37.) A trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors necessarily creates such an unreasonable risk.

This Court has long recognized that exposure to the death qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 74-75.) When jurors state their unequivocal opposition to the death penalty and are subsequently dismissed, the remaining jurors may be less inclined to rely upon their own impartial attitudes about the death penalty when choosing between life and death. (*Id.* at p. 74.) By the same token, "[j]urors exposed to the death qualification process may also become desensitized to the intimidating duty of determining whether another person should live or die." (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1173.) "What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Hovey*, *supra*, at p. 75.) Death qualification voir dire in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court, and to be less forthright and revealing in their responses. (*Id.* at p. 80, fn. 134.)

Given the substantial risks created by exposure to the death qualification process, any restriction on individual and sequestered voir dire on death-qualifying issues – including that imposed by Code of Civil

Procedure section 223, which abrogates this Court's mandate that such voir dire be done individually and in sequestration (*Hovey v. Superior Court, supra*, 28 Cal.3d at p. 80; *People v. Waidla* (2000) 22 Cal.4th 690, 713) – is inconsistent with constitutional principles of jury impartiality. (See, e.g., *Morgan v. Illinois, supra*, 504 U.S. at pp. 736, citing *Turner v. Murray, supra*, 476 U.S. at p. 36 ["The risk that . . . jurors [who were not impartial] may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'"].) Nor is such restriction consonant with Eighth Amendment principles mandating a need for the heightened reliability of death sentences. (See, e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Likewise, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to raise peremptory challenges (*Morgan v. Illinois, supra*, 504 U.S. at p. 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188), the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel.

Put simply, juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled impartiality principles. Such doubt requires reversal of Watkins's death sentence. (See, e.g., *Morgan v. Illinois, supra*, 504 U.S. at p.739; *Turner v. Murray, supra*, 476 U.S. at p. 37.)

### B. The Trial Court Erred in Denying Watkins's Request for Individual Sequestered Voir

Even assuming that individual sequestered death qualification voir dire is not constitutionally compelled in *all* capital cases, under the circumstances of this case, the trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors still violated Watkins's constitutional rights to an impartial jury and due process of law. The court's conduct also violated Watkins's constitutional right to equal protection of the law, and his federal due process protected statutory right to individual voir dire where group voir dire is impracticable. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Code of Civil Procedure section 223 vests trial courts with discretion to determine the feasibility of conducting voir dire in the presence of other jurors. (*People v. Box* (2000) 23 Cal.4th 1153, 1180; *People v. Waidla*, *supra*, 22 Cal.4th at p. 713; *Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1184.) Under that code section, "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." (Code Civ. Proc., § 223.)[88] However, as this Court has held, individual sequestered voir

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[88] In 1992, Code of Civil Procedure section 223 stated:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all

(continued...)

dire on death penalty issues is the "most practical and effective procedure" to minimize the negative effects of the death qualification process. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 80, 81.) The proper exercise of a trial court's discretion under section 223, therefore, must balance competing practicalities. (See, e.g., *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 ["exercises of legal discretion must be . . . guided by legal principles and policies appropriate to the particular matter at issue."].)

The trial court gave no explanation of its decision to overrule Watkins's request for individual sequestered voir dire about the death penalty. The record thus does not reflect an exercise of discretion in which the trial court "engaged in a careful consideration of the practicability of . . . group voir dire as applied to [Watkins's] case." (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1183 [trial court's comments that Proposition 115 had effectively overruled *Hovey* did not reflect an exercise of discretion]; cf., *People v. Waidla*, *supra*, 22 Cal.4th at pp. 713-714 [trial court set out "reasonable" reasons for denying sequestered voir dire].) There is simply no "reasoned judgment" here which can be deemed an exercise of judicial discretion. (See *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 977 ["'a ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the

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[88] (...continued)
criminal cases, including death penalty cases. [¶] Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. [¶] The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

ruling the court failed to exercise the discretion vested in it by law.'"]; *People v. Downey* (2000) 82 Cal.App.4th 899, 912, citations omitted.) Therefore, in denying Watkins's motion for individual, sequestered voir dire, the trial court erred in failing to exercise its discretion under Code of Civil Procedure section 223. (Cf., *People v. Romero* (1996) 13 Cal.4th 497, 532 [remanding case where trial court did not set forth reasons for its exercising discretion to strike prior conviction under section 1385]; *People v. Bigelow* (1984) 37 Cal.3d 731, 743 [failure to exercise discretion about appointing advisory counsel]; *People v. Green* (1980) 27 Cal.3d 1, 24-26 [failure to exercise discretion to determine whether prejudicial impact outweighed probative value of evidence]; *In re Brumback* (1956) 46 Cal.2d 810, 813 [failure to exercise discretion regarding bail on appeal].)

The record supports Watkins's request for sequestered voir dire. Prospective jurors who admitted in their questionnaires that they were biased in favor of the death penalty became educated during the voir dire process and changed their responses. As a result, Watkins was forced to exercise peremptory challenges to remove them from the petit jury. For example, prospective juror Charles Harrison, who described himself as a "strong supporter" of capital punishment, stated in his questionnaire that the death penalty was appropriate "where the evidents [*sic*] convicts a person." (CT Supp. VI: 1120.) Later in the proceedings, Mr. Harrison participated in group voir dire where the trial court explained that the jury must consider aggravating and mitigating factors in deciding the sentence (RT 720), and several prospective jurors were asked whether their moral or religious beliefs would interfere with their ability to decide between a sentence of life without possibility of parole and death or would automatically cause them to select one penalty over the other. (See RT 756-769.) This discussion made clear

that the law did not condone an automatic death decision and required jurors to consider the defendant's background before making the sentencing choice. (See RT 762-763.) During questioning by the trial court, Mr. Harrison indicated that he leaned strongly toward the death penalty, preferring it "on a scale of one to ten, I'd be about nine most of the time ...." (RT 770.) Mr. Harrison survived a defense challenge for cause (RT 774, 799) and was excused by a joint defense peremptory challenge (RT 992).

Prospective juror Ashutosh Mehta also appears to have been educated toward "acceptable" death qualification answers through voir dire. The defense challenged him for cause based on his questionnaire. (RT 775.) He stated on his questionnaire that he believed that if a person commits murder, "he or she forfeits his or her right to live" (CT Supp. VI: 1623) and acknowledged that because of his inclination toward the death penalty, he would vote for first degree murder (*id.* at p. 1624). After listening to the examination of several other prospective jurors, Mr. Mehta told the trial court that he would try to be open in considering a sentence of life without possibility of parole. (RT 797.) After the defense's renewed challenge for cause was overruled (RT 800), Mr. Mehta was excused with a joint defense peremptory challenge (RT 997).

Prospective juror Melvin Bingham also appears to have been influenced by the group voir dire. In his questionnaire, Mr. Bingham indicated that he was a strong supporter of the death penalty and that his views were rooted in religion. (CT Supp. VI: 556-557.) He also indicated that the only murders not deserving the death penalty were "self defense when threatened." (*Id.* at p. 557.) In response to the trial court's voir dire, Mr. Bingham stated that he understood that the death penalty is not automatic upon conviction of murder with special circumstances and stated

that he could vote for life without possibility of parole if he believed that penalty were appropriate. (RT 762-763.) Again, the defense used a joint peremptory challenge to remove Mr. Bingham from the jury. (RT 986-987.)

Further, the record shows that, as result of the trial court's denial of sequestered voir dire, some prospective jurors, including three sitting jurors (Sheila Twaddell, Audrey Yarbrough and Haydee Cummings), were exposed to the prejudicial comments of another prospective juror, Natalie Nguyen. In the presence of the venire group, Ms. Nguyen stated she always would choose the death penalty over a life-without-parole sentence. (RT 767-768.) She explained her fear that "they get out, they kill some people again." (RT 768.) She held the same concern for a person sentenced to state prison for the rest of his life without the possibility of parole. (RT 769.)[89] The failure of the trial court to grant sequestered *Hovey* voir dire resulted in three sitting jurors hearing extremely prejudicial conjecture about the defendants' future dangerousness that would have been inadmissible in the prosecution's case-in-chief. (See *People v. Murtishaw* (1981) 29 Cal.3d 733, 767-768.)

Because the trial court denied sequestered voir dire, these same jurors also heard the strongly-held views of prospective juror Harrison, mentioned above, who attributed his strong preference for the death penalty over life without parole to the biblical injunction of an "eye for an eye" and his "Christian beliefs." (RT 769, 771.) It is improper for a jury to consider religious doctrine in reaching its capital sentencing verdict. (*Sandoval v.*

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[89] Prospective jurors in a later group also voiced concerns that prisoners even under a sentence of life without parole might obtain release from prison or might escape. (See, e.g., RT 920, 923 [prospective juror Fleming]; RT 950 [prospective juror Aguiling].) In Argument XVI, Watkins shows that the trial court erroneously failed to define the penalty of life without the possibility of parole.

*Calderon* (9th Cir. 2000) 241 F.3d 765, 775-777 [holding that prosecutor's invocation of religious authority in support of his argument for the death penalty denied due process]; *People v. Roybal* (1998) 19 Cal.4th 481, 520-521 [ruling that prosecutor's reference to biblical passages in urging a death sentence was clear misconduct].) Nevertheless, some of the sitting jurors were exposed to such irrelevant and impermissible religious factors.

In short, the denial of sequestered voir dire risked tainting the jury panel with the prejudicial views of certain prospective jurors.

### C. The Trial Court's Unreasonable And Unequal Application Of The Law Governing Juror Voir Dire Requires Reversal Of Watkins's Death Sentence

Under Code of Civil Procedure section 223, reversal is required where the trial court's exercise of discretion in the manner in which voir dire is conducted results in a "a miscarriage of justice, as specified in section 13 of article VI of the California Constitution." However, section 223 must be viewed as providing Watkins an important procedural protection and liberty interest (namely, the right to individual juror voir dire on death penalty issues where group voir dire is impracticable) that is protected under the federal due process clause. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346.) Moreover, the state law prejudice standard for errors affecting the penalty phase of a capital trial is the "same in substance and effect" as the federal test for reversible error under *Chapman v. California*, *supra*, 386 U.S. at p. 24. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) Accordingly, the trial court's unreasonable application of section 223 in Watkins's case must be assessed under the *Chapman* standard of federal constitutional error. In practical terms, any differences between the two standards is academic, for whether viewed as a "miscarriage of justice," or as an error that

contributed to Watkins's death verdict (*Chapman v. California*, *supra*, 386 U.S. at p. 24), the trial court's failure to conduct individual, sequestered juror voir dire on death penalty issues requires reversal of Watkins's death sentence.

The group voir dire procedure employed by the trial court created a substantial risk that Watkins was tried by jurors who were not forthright and revealing of their true feelings and attitudes toward the death penalty (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80, fn. 134), and who had become "desensitized to the intimidating duty" of determining whether Watkins should live or die (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1173) because of their "repeated exposure to the idea of taking a life." (*Hovey*, *supra* at p. 75.) Therefore, the trial court's failure to carefully consider the practicability of group voir dire as applied to Watkins's case led to a voir dire procedure that denied Watkins the opportunity to adequately identify those jurors whose views on the death penalty rendered them partial and unqualified, and generated a danger that Watkins was sentenced to die by jurors who were influenced toward returning a death sentence by their exposure to the death qualification process. (See *id.* at pp. 74-75.)

These hazards infringed upon Watkins's rights to due process and an impartial jury (see *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729), and cast doubt on whether the Eighth Amendment principles mandating a need for the heightened reliability of death sentences is satisfied in this case. By their very nature, these rights are so important as to constitute an "essential part of justice" (*People v. O'Bryan* (1913) 165 Cal. 55, 65) for which the risks of deprivation must be regarded as a miscarriage of justice. Indeed, errors that infringe on these rights are "the kinds of errors that, regardless of the evidence, may result in a 'miscarriage of justice' because they operate to

deny a criminal defendant the constitutionally required 'orderly legal procedure' (or, in other words, a fair trial)[.]" (*People v. Cahill* (1993) 5 Cal.4th 478, 501; see also *People v. Diaz* (1951) 105 Cal.App.2d 690, 699 ["The denial of the right to trial by a fair and impartial jury is, in itself, a miscarriage of justice."].)

The trial court's refusal to conduct sequestered death-qualification voir dire cannot be dismissed as harmless. (*People v. Cash* (2002) 28 Cal.4th 703, 723.) Because the group voir dire procedure employed by the trial court was inadequate to identify those jurors whose views on the death penalty rendered them partial and unqualified, it is impossible for this Court to determine from the record whether any of the individuals who were ultimately seated as jurors held disqualifying views on the death penalty that prevented or impaired their ability to judge Watkins in accordance with the court's instructions. Stated simply, the jurors' exposure to death qualification of other jurors leads to doubt that Watkins was sentenced to death by a jury empaneled in compliance with constitutional impartiality principles, and that doubt requires reversal of Watkins's death sentence. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

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## XIV.

## THE PROSECUTOR UNCONSTITUTIONALLY INTERJECTED IRRELEVANT AND INFLAMMATORY EVIDENCE OF RACIAL VIOLENCE INTO THE PENALTY PHASE

The prosecutor at the penalty phase deliberately elicited evidence of racial overtones regarding two of the three group fights in which Watkins allegedly participated while confined in jail. This race evidence was wholly irrelevant and highly prejudicial. Watkins moved for a mistrial, but his motion was denied. The elicitation and admission of this evidence denied Watkins his rights to a fair trial, equal protection, and due process under the Fourteenth Amendment and rendered his death sentence unreliable, arbitrary and capricious in violation of the Eighth Amendment. As shown below, the prosecutor's tainting of the penalty phase with impermissible racial evidence requires reversal of Watkins's death sentence.

### A. Factual Background

In addition to the facts and circumstances of the crimes presented in the guilt phase, the prosecution's aggravating evidence consisted of stipulations about Watkins's prior convictions for grand theft, cocaine possession, and firearm possession by an ex-felon and his participation in three group fights while confined on the capital charges in the Los Angeles County Jail facility known as "Wayside." The prosecutor began his penalty phase case with Kanoa Biondolillo, who had been in custody at Wayside and testified about an assault on a fellow detainee, Russell Cross, on June 30, 1991. The prosecutor's direct examination, which consists of five pages of the reporter's transcript, focused repeatedly on the races of Cross and his assailants. (RT 1871-1876.) After establishing that Biondolillo witnessed the assault on Cross, the prosecutor questioned Biondolillo as follows:

Q And what did you see that lead [*sic*] up to the assault?

A He had sat on somebody else's bunk.

Q And was Mr. Cross a *white person*?

A Yes, he was.

Q And the bunk who he sat on, was that of the *same race*?

A No, it was a *black guy*.

Q The area that you were housed in on that particular date, is that a dormitory type of area or is it individual cells?

A It's a dorm, about a hundred people in it.

Q And were there *all different races* in there?

A Yes, there were.

Q And were there a lot of *white people* in there?

A No, there wasn't.

Q How many *white people* were there?

A Approximately about ten.

Q And do you have any idea how many *black people* there were?

A Fifty.

Q All right. [¶] Now, you indicated that Mr. Cross sat down on the bunk of a *black person*?

A Yes, he did.

Q When he sat down, did you see him engage that person in conversation, or what did he do?

A He sat down, was playing cards.

Q Who was he playing cards with?

A Three other *white people*, including myself.

Q After he sat down on that bunk, what did you see happen?

A The guy's bunk who he sat down on walked up behind him and hit him in the head.

Q The *black person* came up and hit him on the back of the head?

A Yeah.

Q After that, what happened? What did you see happen?

A They were wresting, rolling around. He tried to push him away, you now, stop the fight. And then about five other *black guys* ran up and got in on it.

Q When you say "got in on it," what did you see the other five *black people* do?

A They first had stopped it and they asked the other *black guy* what happened. The other *black guy* was kind of like, he was just going off. And that's all they took, they didn't care, they just wanted to see why they were fighting. Then after that they just started hitting Mr. Cross.

(RT 1872-1874, italics added.) Biondolillo testified that Cross did nothing to cause the fight, which Biondolillo described further. (RT 1874-1875.) The prosecutor then asked Biondolillo:

Q And do you know if any of the individuals who was involved in that, any of the *black individuals* who was involved in that assault are in court today?

(RT 1875, italics added.) In response, Biondolillo identified Watkins as the "male black" at the end of the defense table. (RT 1875-1876.)

The prosecution's second penalty phase witness was Los Angeles County Sheriff Deputy Ricky Hampton. (RT 1877-1886, 1889-1899.) He described another large group fight involving about 40 inmates in dorm C-D of Wayside on June 2, 1991. (RT 1877-1879.) Hampton identified Watkins, whom he knew as Jeffrey Scott, as one of the participants in the disturbance (RT 1881) and testified about Watkins's actions as follows:

Q When you first saw Mr. Scott involved in that disturbance, what did you see him doing?

A He was striking inmates with his fists, and as several of them were falling to the ground, he would kick them.

Q Do you know how many people you saw him fight with?

A He was probably – there were nine *Hispanic* inmates in a corner, and they had them backed into the corner and were just hitting at random. He probably hit five of the nine.

Q Are you indicating that it appeared to be a particular group of individuals that were being struck and hit?

A Yes, we had – were able to let a few of the inmates out to safety and they continued to just focus on the nine. They were approximately four feet away from me.

Q Are all nine of those inmates that you are referring to that were – were these nine people like overpowered by a number of other individuals?

A Initially, yes.

Q All right. [¶] And those nine people, were those nine people all *Hispanics*?

A I believe they were. Maybe one or two could have been *white*, I'm not sure. I don't recall.

Q The individuals who were attacking this group, were they of a *particular race* or were they mixed races?

A I believe they were all *black males*.

(RT 1882-1883, italics added.) Hampton then explained that Watkins threw a 55-cup coffee pot at one inmate who fell to the ground and sustained a large gash above his eye. (RT 1883-1884.) The incident started as a small group fight which did not involve Watkins, escalated into a large group fight involving Watkins, and dwindled to a small group fight, which included Watkins, after deputies ordered the inmates to disperse. (RT 1889-1893,

1895-1896.)

At proceedings without the jury following Hampton's testimony, Watkins's attorney moved for a mistrial on the ground that the prosecutor unnecessarily had interjected race into the case for the apparently calculated purpose of prejudicing the jury. (RT 1912-1913.) Watkins's counsel explained that, in examining his witnesses, the prosecutor continually made reference to the issue of race by highlighting that Watkins is black and that the victim in one fight was white and the victim in the other was Hispanic and characterizing the fights as black/white or black/Hispanic confrontations. (RT 1913.) He also noted that the victim in the underlying murder case was white. (*Ibid.*) Finally, Watkins's attorney asserted that, because there was no reason for these racial references, the prosecutor's calculated strategy was "to prejudice the jury since the majority of the jury is white, the victim in this case is white, as well as there are several Hispanic jurors." (*Ibid.*) The prosecutor did not respond to the motion. The trial court overruled Watkins's objection and denied his motion for a mistrial. (*Ibid.*)

### B. The Prosecutor's Interjection Of Irrelevant Racial Factors Into The Penalty Phase Denied Watkins Equal Protection And Due Process Of Law And Created A Substantial Risk That He Was Arbitrarily And Capriciously Sentenced To Death

The United States Supreme Court's modern capital punishment jurisprudence was borne, in large part, of a concern about race bias in the administration of the death penalty. The legal challenge culminating in the landmark case of *Furman v. Georgia* (1972) 408 U.S. 238 was a concerted campaign against the rampant racially-discriminatory application of the death penalty. (See Burt, *Disorder in the Court: The Death Penalty and the*

*Constitution* (1987) 85 Mich. L. Rev. 1741, 1745; Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (1973), pp. 27-29, 73-105.) The lead petitioner in *Furman*, like Watkins in this case, was a black man sentenced to death for the unintentional killing of a white man during a felony. (*Id.* at p. 253 (Douglas, J. conc. opn.).) The "unquestionable importance of race in *Furman*" is seen in its various opinions. (*Graham v. Collins* (1993) 506 U.S. 461, 481 [conc. opn. of Thomas, J.].) For example, Justice Douglas condemned racially discriminatory patterns of capital sentencing, holding that the Georgia death penalty statute unconstitutional because it was "pregnant with discrimination" on the basis of race and other impermissible prejudices. (*Furman, supra*, 408 U.S. at pp. 250-251, 255, 257 [conc. opn. of Douglas, J.].) Justice Marshall shared this concern about racial bias in determining who would be executed:

> Racial or other discriminations should not be surprising. In McGautha v. California, 402 U.S., at 207, 91 S.Ct., at 1467, this Court held 'that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is (not) offensive to anything in the Constitution.' This was an open invitation to discrimination.

(*Id.* at p. 365 [conc. opn. of Marshall, J.].) Justice Stewart also denounced selecting "the few to be sentenced to die" on the "constitutionally impermissible basis of race." (*Id.* at p. 310 [conc. opn. of Stewart, J.].) Thus, the concern about race bias in the administration of capital punishment informs the *Furman* rule, reaffirmed in *Gregg v. Georgia* (1976) 428 U.S. 153, that under the Eighth Amendment, the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." (*Id.* at p. 188.)

Since *Furman*, the United States Supreme Court has reiterated its

concern about racial prejudice affecting prosecutorial conduct and jury deliberations in capital cases. (See, e.g. *Miller-El v. Cockrell* (2003) 537 U.S. 322, 346-347 [prosecutor's conduct of jury selection raised an inference that the State sought to exclude African-Americans from the jury]; *Turner v. Murray*, *supra*, 476 U.S. at pp. 36-37 [capital defendant accused of an interracial crime is entitled to question prospective jurors on the issue of racial bias]. In *Turner*, the Court bluntly described the danger of racial bias in capital sentencing:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's [mitigating] evidence . . . . More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

(*Id.* at p. 35.) In *McCleskey v. Kemp* (1989) 481 U.S. 279, the United States Supreme Court rejected the petitioner's challenge to racial disparities in capital sentencing in Georgia, noting that he had presented "no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." (*Id.* at pp. 292-293.) Nonetheless, the Court reasserted the need to "eradicate racial prejudice from our criminal justice system" which includes constitutionally "prohibit[ing] racially biased prosecutorial arguments" and the exercise of "prosecutorial discretion . . . on the basis of race." (*Id.* at p. 309 and fn.

30.)[90] Finally, prosecutorial misconduct at the penalty phase requires reversal of a death sentence when it "so infect[s] the trial with unfairness as to make the resulting [verdict] a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

The lower courts have forcefully condemned as constitutional error prosecutors' attempts to inject irrelevant issues of race, ethnicity and religion into criminal trials. As the Seventh Circuit has stated, "'[t]here is no place in a criminal prosecution for gratuitous references to race . . . Elementary concepts of equal protection and due process alike forbid a prosecutor to seek to procure a verdict on the basis of racial animosity.'" (*Aliwoli v. Carter* (7th Cir. 2000) 255 F.3d 826, 831, citations omitted.) Other courts, including this Court, concur. (See, e.g., *People v. Cudjo* (1993) 6 Cal.4th 585, 625-626 ["even neutral, nonderogatory references to race are improper absent compelling justification"]; *United States v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 594 ["Appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial"]; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974 [prosecutor violated defendant's federal due process and equal protection rights when he highlighted permissible testimony about Sikh beliefs in a manner that invited the jury to rely on racial, ethnic and religious prejudices and stereotypes]; *United States v. Saccoccia* (1st Cir. 1995) 58 F.3d 754, 774 ["courts must not tolerate prosecutors' efforts gratuitously to inject issues like race and

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[90] Thus, the prosecution cannot use evidence of race or other constitutionally protected classifications and activities in seeking a death sentence. (*Dawson v. Delaware* (1992) 503 U.S. 159, 165 [admission of defendant's membership in white racist prison gang was constitutional error requiring reversal of death sentence where that evidence was not relevant to any issue being decided at the punishment phase].)

ethnicity into criminal trials"]; *United States v. Doe* (D.C. Cir. 1990) 903 F.2d 16, 28 ["Undeniably, prosecutorial remarks kindling racial or ethnic predilections 'can violently affect a juror's impartiality'"].)

When prosecutorial appeals to racial prejudice deny a fair trial, the defendants' convictions have been reversed. (See, e.g. *Morton v. Morton* (3rd Cir. 2001) 255 F.3d 95, 119-120, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 [granting habeas relief in rape and robbery case where prosecutor's claim that African-American defendant selected white victim on the basis of her race rendered trial fundamentally unfair]; *United States v. Cabrera*, *supra*, 222 F.3d at pp. 595-597 [reversing drug distribution convictions under plain error doctrine where lead government witness injected extraneous, impermissible and prejudicial references to defendant's Cuban origin]; *United States v. Cruz-Padilla* (8th Cir. 2000) 227 F.3d 1064, 1069-1070 [affirming grant of new trial where prosecutor's racially biased arguments based on defendant's status as an illegal alien denied a fair trial on drug charges]; *United States v. Vue* (8th Cir. 1994) 13 F.3d 1206, 1212-1213 [reversing conviction for drug smuggling where customs agent testified about tendency of Hmong people to smuggle opium into the Twin Cities]; *United States v. Cruz* (2nd Cir. 1992) 981 F.2d 659, 663-664 [reversing drug convictions where prosecution witness referred to the defendant as "the Dominican" and to the "very high Hispanic population" in the neighborhood in which the drug transactions took place]; *United States v. Doe*, *supra*, 903 F.2d at pp. 23-29 [reversing drug convictions where prosecutor commented about Jamaicans taking over the crack cocaine trade in Washington, D.C.]; *Withers v. United States* (6th Cir. 1979) 602 F.2d 124, 125-126 [reversing black defendant's kidnapping and related convictions where prosecutor asserted that "[n]ot one white witness has been produced in this case that

contradicts" the victim's testimony]; *Miller v. North Carolina* (4th Cir. 1978) 583 F.2d 701, 706-708 [granting habeas relief where prosecutor in rape trial argued that white victim would not have consented to sex with black defendants].)

These cases establish that the risk of prejudice from gratuitous racial references is not to be tolerated in noncapital cases. That risk is markedly greater at the sentencing phase of a capital trial where the jury's discretion provides "a unique opportunity for racial prejudice to operate but remain undetected." (*Turner v. Murray*, *supra*, 476 U.S. at p. 35.) For this reason, state courts have not hesitated to reverse death sentences where prosecutors, in argument or examination of witnesses, have impermissibly appealed to the jury's racial prejudices. In *Dawson v. State* (Nev. 1987) 734 P.2d 221, 223-224, the Nevada Supreme Court, set aside a black defendant's death sentence for murder, aggravated by the "brutal kidnapping, beating and rape" of the victim, because the prosecutor interjected racial overtones into the sentencing hearing. The prosecutor, based on the defendant's statements introduced at the guilt phase, remarked in the penalty argument that the defendant "had a preference for white women" and that he previously "had had a 'physical relationship' with a white woman." (*Id.* at p. 223.) The court quickly dismissed the state's attempt to justify the comment as showing that the defendant had a plan to capture, rape and murder a white victim:

> Rather than try to parse the niceties of appellate counsel's attempt to justify the actions of the state's trial counsel in using this kind of material in a death penalty hearing, we unhesitantly declare such conduct to be prejudicially improper even if there were some logic to it and even if, as claimed, no racial bias was intended to be elicited by the remarks.

(*Ibid.*) The Nevada court did not engage in a prejudice analysis but, acknowledging the unique discretion entrusted to a capital sentencing jury, held that reversal of the death sentence was required:

> It was totally unnecessary and clearly contrary to the interests of the state in bringing convicted criminals to justice for the prosecutor to introduce this kind of hatred-engendering forensics. We cannot let the death penalty stand under these circumstances.

(*Id.* at p. 224.)

In *Robinson v. State* (Fla. 1988) 520 So.2d 1, the Florida Supreme Court reached a similar conclusion with regard to the prosecutor's questioning of a witness at the capital-sentencing trial. The court reversed the defendant's death penalty for the rape-murder of a white woman because the prosecutor "injected evidence calculated to arouse racial bias during the penalty phase of his trial." (*Id.* at p. 5.) In his cross-examination of the defense medical expert, the prosecutor attempted to elicit testimony about the defendant's alleged hostility toward white women and successfully elicited testimony that the defendant, who had been convicted of murdering a white woman and had a prior rape conviction, had previous "sexual encounters" with white women. (*Id.* at p. 6.)

As in Watkins's case, defense counsel in *Robinson* moved for a mistrial based on the prosecutor's questioning, and the motion was denied. (*Ibid.*) The Florida Supreme Court found that the prosecutor's examination was "a deliberate attempt to insinuate that [defendant] had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice." (*Ibid.*) The court excoriated the prosecutor's ploy:

> Racial prejudice has no place in our system of justice and has long been condemned by this Court. [Citations omitted.] Nonetheless, race discrimination is an undeniable fact of this

> nation's history. As the United States Supreme Court has recently noted, the risk that the factor of race may enter the criminal justice process has required its unceasing attention. *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 1775, 95 L.Ed.2d 262 (1987) . . . [¶] The situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white woman, is fertile soil for the seeds of racial prejudice. We find the risk that racial prejudice may have influenced the sentencing decision unacceptable in light of the trial court's failure to give a cautionary instruction.

(*Id.* at p. 7.) Emphasizing that "the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding" due to the highly subjective and uniquely discretionary decision confronting the jury, the court reversed the death sentence. (*Id.* at pp. 7-8, citation omitted.)

Addressing an analogous situation, the New Jersey Supreme Court in *State v. Hightower* (N.J. 1990) 557 A.2d 99, 118-119, sharply condemned the racial overtones of the prosecutor's cross-examination of a criminologist in a capital trial of a black man. The criminologist had testified at the penalty phase, without mentioning race, about the recidivism rates of paroled murderers. The prosecutor then elicited testimony from the criminologist that black men age 50 to 54 – which included the defendant's age if he were to be paroled at the end of the statutory 30-year term – commit more crimes than men in the general population age 20 to 24. As in Watkins's case, defense counsel in *Hightower* moved for a mistrial. The trial court denied the motion for a mistrial, but struck from the record, and admonished the jury to disregard, the testimony about recidivism rates other than in the general population. The trial court explained that "the information did not have 'any place in the courtroom, because of the danger of it being misapplied, because of the danger of an emotional flare-up based on race.'"

(*Id.* at p. 118.)

On appeal, the New Jersey Supreme Court agreed that the prosecutor's "entire line of questioning" was improper:

> Only one chain of inferences is possible from the cross-examination: defendant is a black male; the study shows that black males have a higher rate of recidivism than do whites; defendant is more likely to kill again merely because he is a black male; therefore defendant's race weighs in favor of a death sentence.

(*Id.* at p. 119.) The state supreme court further held that the trial court was correct to strike the race-based testimony. The court was emphatic: "A defendant's race should never be a factor in the determination of a sentence, whether in a trial for a murder or for a traffic offense." (*Ibid.*) Because the death sentence was reversed for other error, the court did not rule on whether the cross-examination was ground for a mistrial. (*Ibid.*)

As in *Dawson*, *Robinson*, and *Hightower*, the prosecutor here deliberately inserted "hatred-engendering" racial factors into the calculus of whether Watkins should live or die. (*Dawson v. State*, *supra*, 734 P.2d at p. 224.) There is no question that the prosecutor's "examination of [his] witnesses was a deliberate attempt to insinuate" the racial aspect of the jail fights into the penalty phase. (*Robinson v. State*, *supra*, 520 So.2d at p. 6.) With regard to the June 30, 1991 assault on Cross, the prosecutor intentionally raised the issue of race by asking inmate Bondolillo to identify Cross's race, the race of the inmate whom Cross allegedly offended, and the racial make-up of the inmates in the dorm and those involved in the fight. (RT 1872-1874.) In questioning Bondolillo, the prosecutor asked seven questions about race within a page and a half of reporter's transcript. (RT 1872-1873.) Bondolillo was an astute witness, and soon began to refer to

the race of the participants in the fight without continual prompting by the prosecutor. (See, e.g., RT 1873 ["then about five other black guys ran up"].) Not only did the prosecutor ask Bondolillo specifically about race, but he referred to race in recapitulating the evidence in his questions. (RT 1874.)[91]

With regard to the June 2, 1991 incident, Sheriff Deputy Hampton identified that victims of the assault as Hispanic. (RT 1882.) The prosecutor did not ignore the ethnic identification. Rather, he pursued it, emphasizing that the victims were Hispanic and white and the assailants were black. (RT 1882-1883.) In eliciting evidence about both fights, the prosecutor did not simply make a passing reference to race, but he focused repeatedly on the fact that the perpetrators in both assaults were black and the victims were white and Hispanic.

There is little doubt that the prosecutor deliberately sought to inject a racial undercurrent into the penalty phase. Indeed, he admitted as much at the conference about the penalty phase instructions. Arguing for the CALJIC No. 2.51 instruction on motive, the prosecutor unabashedly explained his strategy with regard to the issue of race:

> And I believe that whether I make the argument or not it could be an inference could be drawn from the facts of the assaults that have been placed on – that have been testified to

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[91] Two of the prosecutor's questions during his examination of Biondolillo illustrate this point:

> Q The black person came up and hit him on the back of the head?

(RT 1872.)

> Q When you say "got in on it," what did you see the other five black people do?

(RT 1873.)

> at this point that they were racially motivated. That there was a motive for the assault and that the jury can consider that, that there is a motive in determining whether in fact an assault occurred.

(RT 2012.) The prosecutor's argument was nothing more than a disingenuous device to insert racial animosity into the penalty trial. His case was based on eyewitness testimony, not circumstantial evidence. Prosecution witnesses Hampton and Biondolillo presented direct evidence of Watkins's assaultive conduct in jail. The prosecutor had no reason to show motive, and, thus, his motive theory was a sham.[92]

The racial identities of those involved in these jailhouse brawls were irrelevant to the other crimes evidence authorized by Penal Code section 190.3, subdivision (b) and to Watkins's deathworthiness. The only pertinent evidence was Watkins's participation in the fights. The racial overtones to the fracases had absolutely "no bearing on any aggravating or mitigating factors." (*Robinson v. State*, *supra*, 520 So.2d at p. 7.) Put bluntly, the fact that Watkins fought with white and Hispanic inmates has nothing "to do with whether he deserves to die for his deeds[.]" (*Dawson v. State*, *supra,* 734 P.2d at p. 80.)

The prosecutor's direct examination of Biondolillo and Hampton was a transparent attempt to appeal to any racial prejudice or racial fear in the jury. As Watkins's attorney pointed out in moving for a mistrial, the jury was predominantly white with a few Hispanics. (RT 1913.) The prosecutor's clear, if implicit, message was that Watkins was violent in jail – and therefore would be violent in prison – toward white and Hispanic

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[92] As set forth in Argument VIII, *supra*, page 105, footnote 51, the trial court erroneously instructed the jury on motive pursuant to CALJIC No. 2.51 at both the guilt phase and the penalty phase.

people, i.e,. people like the jurors. This blatant racial pandering introduces into the "difficult and painful" decision of whether a man should die (*People v. Bradford*, *supra*,70 Cal.2d at p. 347) precisely the type of whim and caprice condemned by the United States Supreme Court in *Furman*. (*Furman v. Georgia*, *supra*, 408 U.S. at p. 253 [conc. opn. of Douglas, J.]; *id.* at p. 295 [conc. opn. of Brennan, J.]; *id.* at pp. 309-310 [conc. opn. of Stewart, J.].)

The racial prejudice the prosecutor sought to exploit need not have been conscious or overt to have affected the jury's sentence: "race prejudice stems from various causes and may manifest itself in different forms." (*Powers v. Ohio* (1991) 499 U.S. 400, 416.) In a society where race discrimination "still remain[s] a fact of life" (*Vasquez v. Hillery* (1986) 474 U.S. 254, 264), jurors' capital-sentencing decisions may be swayed by negative stereotypes about racial groups and their individual members. (See King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions* (1993) 92 Mich. L. Rev. 63, 77 ["[n]egative racial stereotypes produce a 'reverse halo effect': members of negatively stereotyped groups are assumed to possess negative traits, and positive information about them is devalued"].) A juror who believes that members of a certain race are "violence prone or morally inferior might well be influence by that belief" in deciding to impose a death sentence. (*Turner v. Murray*, *supra*, 476 U.S. at p. 35.) In addition, such a juror may be "less favorably inclined" toward a capital defendant's mitigating evidence. (*Ibid.*)

The inflammatory potential of the prosecutor's racial evidence, which "'can violently affect a juror's impartiality[,]'" should not be underestimated, particularly given the context of this trial. (*United States v. Doe*, *supra*, 903 F.2d at p. 28; see also, *People v. Cudjo*, *supra*, 6 Cal.4th at

pp. 625-626.) Watkins's penalty phase took place in Los Angeles County over seven days from March 16 through 27, 1992. At the same time, the racially-charged trial of the police officers accused of beating Rodney King was underway with the jury having been selected on March 2, 1992. (*Famous American Trials: The Los Angeles Police Officers' (Rodney King Beating) Trials 1992-1993*, Chronology, <http://www.law.umkc.edu/faculty/projects/ftrials/lapd/lapd.html>.) "[W]idespread publicity and emotional outrage" surrounded the case. (*United States v. Koon* (C.D. Cal. 1993) 833 F.Supp. 769, 788, affd. in part & revd. in part (9th Cir. 1994) 34 F.3d 1416, affd. in part & revd. in part, (1996) 518 U.S. 81.) Against this background, the prosecutor's deliberate insertion of wholly irrelevant racial factors into his aggravating evidence was especially egregious. His decision to play the "race card" by insinuating that Watkins, a black man, preyed on white and Hispanic people denied him equal protection and due process under the Fourteenth Amendment, rendered his penalty phase fundamentally unfair, and resulted in an arbitrary, capricious and unreliable death sentence in violation of the Eighth Amendment. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181; *Turner v. Murray*, *supra*, 476 U.S. at pp. 36-37; *Bains v. Cambra*, *supra*, 204 F.3d at p. 974.)

### C. The Prosecutor's Interjection Of Irrelevant Racial Factors Into The Penalty Phase Violated International Law

International law "confers fundamental rights upon all people vis-a-vis their own governments." (*Filartiga v. Pena-Irala* (2nd Cir. 1980) 630 F.2d 876, 885.) When asserted, those rights must be considered and administered in United States courts. (*The Paquete Habana* (1900) 175 U.S.

677, 700.) International human rights are secured through treaties and customary international law. The rights secured by ratified treaties apply domestically under the Supremacy Clause. (U.S. Const., art. VI, § 1, cl. 2.) A state statute or policy will be struck down if it conflicts with a treaty obligation. (*Antoine v. Washington* (1975) 420 U.S. 194, 201 [state game laws could not be applied to Indians where treaty gave them right to hunt and fish on lands ceded to the United States]; *Kolovrat v. Oregon* (1961) 366 U.S. 187, 190 [state law on inheritance by aliens must yield under federal Supremacy Clause to treaty rights].)

Similarly, customary international law, i.e. the "law of nations," is enforceable as "part of our law." (*The Paquete Habana*, *supra* at p. 700 [recognizing customary law prohibition against seizure of an enemy's coastal fishing boats during wartime]; *Martinez v. City of Los Angeles* (9th Cir. 1998) 141 F.3d 1373, 1384 [recognizing the "clear international prohibition against arbitrary arrest and detention"]; *Kadic v. Karadzic* (2nd Cir. 1995) 70 F.3d 232, 238 [holding that plaintiff had stated claims under the Alien Tort Claims Act because defendant's conduct violated well-established norms of customary international law]; *Filaratiga v. Pena-Irala*, *supra*, 630 F2d at p. 885 [recognizing the customary international law right to be free from torture]; *Restatement (Third) of Foreign Relations Law*, *supra*, § 701 cmt. e ["The United States is bound by the international customary law of human rights."].) In addition, the principle of *jus cogens* applies in the United States. (*Kadic v. Karadzic*, *supra* at p. 238 [recognizing that the prohibition against torture has gained status as *jus*

*cogens* because of widespread condemnation of the practice].[93]

The right to equal treatment before the law and equal protection of the law without discrimination on the basis of race is guaranteed by both treaties to which the United States is a party and customary international law. The International Covenant on Civil and Political Rights ("ICCPR"),[94] the American Declaration of the Rights and Duties of Man ("American Declaration"),[95] the International Convention Against All Forms of Racial Discrimination ("Race Convention")[96] prohibit the racially discriminatory

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[93] A peremptory norm of international law, *jus cogens*, is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512; Restatement Third of the Foreign Relations Law, *supra*, §102.k.)

[94] The International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976. The United States ratified the treaty on April 2, 1992, and the President deposited instruments of ratification on June 8, 1992. (See Sen. Res. 49, 138 Cong. Rec., pp. 4781-4784.)

[95] The American Declaration of the Rights and Duties of Man, Resolution XXX, was adopted in 1948 by the Organization of American States, which includes the United States. See the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980). The American Declaration was incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires. Although the American Declaration is not a treaty, the United States voted its approval and, as a member of the OAS, is bound to recognize its authority over human rights issues. Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Serv.L/V/II.52, doc. 17, para. 48 (1987).

[96] The International Convention Against All Forms of Racial

(continued...)

imposition of the death penalty on Watkins.

Article 26 of the ICCPR provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex. . . ." This same protection is found in Article II of the American Declaration which guarantees the right of equality before the law.[97]

The Race Convention contains extensive protections against racial discrimination. Article 5 of the Convention provides:

> [S]tates Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution.. . .[98]

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[96] (...continued)
Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. 60 U.N.T.S. 195 (1994).

[97] The American Declaration in Article XVIII also guarantees every person the right to "resort to the courts to . . . protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."

[98] Long before the Race Convention, the United States recognized the international obligations to cease state practices that discriminated on

(continued...)

Furthermore, Article 6 of the Race Convention demands that "States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention. . . ."

International law sets forth minimum standards of human rights that must be followed by states that have signed treaties, accepted covenants, or otherwise are obliged under *jus cogens* to apply fundamental rights their own citizens. The protections of the ICCPR, the Race Convention, and the American Declaration establish an affirmative obligation of the United States to redress racial discrimination and to ensure that race is not a prejudicial factor in criminal prosecutions. Accordingly, this Court has not only the right, but the obligation to enforce these international standards. As shown above, the imposition of the death penalty on Watkins was tainted by the prosecutor's racially discriminatory evidence and tactics. Watkins's

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[98] (...continued)
the basis of race. (See *Oyama v. California* (1948) 332 U.S. 633 [holding that the California Alien Land Law preventing an alien ineligible for citizenship from obtaining land violated the equal protection clause of the United States Constitution].) In a concurring opinion in *Oyama*, Justice Murphy stated that the UN Charter was a federal law that outlawed racial discrimination and noted:

> Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

(*Id.* at p. 673.)

death judgment cannot be affirmed without violating the ICCPR, the Race Convention, the American Declaration, customary international law, and the principle of jus cogens.

**D. Reversal is Required**

The prosecutor's contamination of the penalty phase with irrelevant but highly inflammatory racial overtones requires reversal. Whether judged under the fundamental fairness standard in *Darden v. Wainwright*, *supra*, 477 U.S. at p. 181, or under the harmless error standard in *Chapman v. California*, *supra*, 386 U.S. at p. 24, the improper race evidence prejudiced Watkins's chances for a sentence of life without possibility of parole.[99]

First, a predominantly white jury was deciding the appropriate sentence for the killer in an interracial murder. The prosecutor's use of impermissible race evidence about the jailhouse fights to show that Watkins, a black man, attacked white and Hispanic men undoubtedly echoed the obvious but unstated racial facts of the murder, i.e. that Watkins, a black man, killed Raymond Shield, a white man. The interracial nature of the killing greatly increased the prejudicial impact of the prosecutor's misconduct. (See *Turner v. Murray*, *supra*, 476 U.S. at p. 37 [acknowledging the "unacceptable risk of racial prejudice infecting the capital sentencing proceedings" in a case involving "interracial violence."].)

Second, the case for death was hardly overwhelming. The killing of Raymond Shield, while inexcusable, was an unintentional murder. In the

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[99] Under *Darden*, the question of prejudice is subsumed under the standard for finding a due process violation, i.e. whether the prosecutor's misconduct infected the trial with fundamental unfairness. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

realm of capital murders, this case presents one of the least aggravated special-circumstance convictions. The circumstances of the murder in this case offer even less reason to find the error harmless than the rape-murder in *Robinson*, where the court vacated the death sentence. (*Robinson v. State*, *supra*, 520 S.2d at pp. 2-3.) Thus, a common basis for finding harmless error – overwhelming evidence to support the verdict – is missing here.

Third, the other robberies Watkins committed the same day as the homicide, while certainly serious, were not sufficient, by themselves, to persuade the jury to return a death verdict. Although Watkins displayed a gun, he did not use it and did not injure any of the robbery victims. The robberies and murder together showed Watkins on a crime spree on one day of his young life, but did not portray him as person beyond all redemption. Thus, the prosecutor needed the jail fights to tip the scale toward death as his focus on them in his penalty argument attests. (See RT 2070-2073.)[100] However, the large jail brawls – which Watkins joined, but did not instigate and which did not result in major injury – were not the most extreme kind of aggravating evidence. Undeterred in his zeal for a death sentence, the prosecutor found a way to inflate this evidence: he infused a run-of-the-mill jail fracas with the specter that Watkins was a black predator who would target white and Hispanic inmates in prison. In this way, the prosecutor's racial fear-mongering was an important part of his case for death. Moreover,

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[100] The prosecutor drove home his point as follows:

> After this jury already determined the facts of this case, the crimes of which he was convicted, announced in this courtroom that he was found to be guilty beyond a reasonable doubt of all these crimes, a special circumstance, a first degree murder, and he is still acting out violently against other individuals. (RT 2071.)

unlike a passing remark in closing argument, the repeated references to race by the prosecutor and his witnesses in this case cannot be dismissed as insignificant. (See *People v. Cudjo*, *supra*, 6 Cal.4th at p. 626 [finding the prosecutor's "brief and isolated" racial reference to be harmless].)

Fourth, the trial court took no steps to attempt to counteract the racial overtones of the prosecution's evidence. The court could have admonished the jury after it denied Watkins's motion for a mistrial, or could have instructed the jury before its deliberations, that racial factors were to play no role in their penalty decision. Although a curative instruction may not always be sufficient to cure the harm resulting from impermissible racial evidence or argument (*Moore v. Morton*, *supra*, 255 F.3d at pp. 115-116), the absence of a curative instruction weighs toward a finding of prejudice. (*United States v. Cruz-Padilla*, *supra*, 227 F.3d at p. 1070; *Robinson v. States*, *supra*, 520 So.2d at p. 7 [finding "the risk that racial prejudice may have influenced the sentencing decision unacceptable in light of the trial court's failure to give a cautionary instruction."].) The penalty instructions informed the jury that they were to consider Watkins's other violent criminal activity (RT 2117, 2133), which would include all the facts and circumstances of those crimes including the race of the perpetrators and the race of the victims. In short, nothing in the instructions precluded the jury from doing exactly what the Eighth and Fourteenth Amendments forbid – basing Watkins's death sentence, even in part, on his race and the race of his victims.

Fifth, the erroneous motive instruction under CALJIC 2.51, requested by the prosecutor (CT 812), exacerbated the prejudice from the impermissible racial evidence. The motive instruction was especially pernicious, because it gave the law's imprimatur to the inflammatory racial

factors the prosecutor admittedly wanted the jury to consider in deciding whether to sentence Watkins to life or death.

Sixth, the prosecution's case for death was offset by Watkins's remorse, the evidence about the problems in his life, and the pleas by his uncle, mother, half-sister and former teacher that his life be spared.

Finally, the jury's difficulty in reaching a penalty verdict with regard to Watkins precludes any finding that the illegitimate racial evidence was harmless beyond a reasonable doubt. On the third day of its penalty deliberations, the jury announced that it had reached a verdict as to codefendant Martin, but was having difficulty agreeing to a sentence for Watkins. (CT 791; RT 2161-2164.) The trial court accepted the verdict of life without possibility of parole against codefendant Martin. (*Ibid.*) The jury continued its deliberations with regard to Watkins, and finally returned a sentence of death against Watkins. (CT 792-793; RT 2167-2169.) A jury's difficulty in arriving at a unanimous verdict generally supports a finding of prejudice. (See, e.g., *Mariano v. Vasquez* (9th Cir. 1987) 812 F.3d 499, 506; *Blackburn v. Foltz,* (6th Cir.1987) 828 F.2d 1177, 1186; *Martinez-Macias v. Collins* (W.D.Tex.,1991) 810 F.Supp. 782, 811, affd. (5th Cir. 1992) 979 F.2d 1067.) This principle applies with even great force to a capital sentencing verdict, which involves the highly subjective, moral judgment about whether the defendant deserves to live or die. (See *Turner v. Murray*, *supra*, 476 U.S. at p. 33, citing *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, fn. 7.)

In light of all these factors, the State cannot prove beyond a reasonable doubt that the impermissible and inflammatory references to race did not contribute to the jury's decision to sentence Watkins to death. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Robinson v. State*, *supra*,

520 So.2d at p. 8.) Like the Nevada Supreme Court in *Dawson* and the Florida Supreme Court in *Robinson*, this Court should unhesitatingly declare that it will not tolerate the risk that racial prejudice, spurred by the prosecutor's misconduct, influenced the jury to return a death verdict against Watkins. His death sentence must be set aside.

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## XV.

## WATKINS'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Watkins was subject to the death penalty under the robbery-murder special circumstance. It was the sole fact that made him death-eligible. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. Watkins moved to strike the robbery-murder special circumstance on the ground that imposing the death penalty for a killing done without a deliberate purpose to kill is a disproportionately severe sentence that constitutes cruel and unusual punishment. (CT 617-618.) The prosecution opposed the motion (CT 624-626), and the trial court denied his motion. (CT 630; RT 607.) As shown below, Watkins's motion was well-founded. The lack of any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder before a death sentence may be imposed violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.

### A. California Authorizes The Imposition Of The Death Penalty Upon A Person Who Kills During An Attempted Felony Without Regard To His Or Her State Of Mind At The Time Of The Killing

Watkins was found to be death-eligible solely because he was convicted of committing an attempted robbery and killing during his flight from the robbery attempt. (See §§ 189, 190.2, subd. (a)(17)(i).) While normally the prosecution, to obtain a murder conviction, must prove that the defendant had the subjective mental state of malice (either express or

implied), in the case of a killing committed during an attempted robbery, or, indeed, during any attempted felony listed in section 189, the prosecution can convict a defendant of first degree felony murder without proof of any mens rea with regard to the murder.

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(*People v. Dillon*, *supra*, 34 Cal.3d at p. 477.) This rule is reflected in the standard jury instruction for felony murder:

> The unlawful killing of a human being, *whether intentional, unintentional or accidental*, which occurs [during the commission or attempted commission of the crime] [as a direct causal result of _____] is murder of the first degree when the perpetrator had the specific intent to commit that crime.

(CALJIC No. 8.21, italics added.)

Except in one rarely-occurring situation,[101] under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is the actual killer in a robbery felony murder, the defendant also is death-eligible under the robbery-murder special circumstance.[102] (See *People v. Hayes*

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[101] See *People v. Green* (1980) 27 Cal.3d 1, 61-62 (robbery-murder special circumstance does not apply if the robbery was only *incidental* to the murder).

[102] As a result of the erroneous decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 154, which was reversed in *People v. Anderson*,

(continued...)

(1990) 52 Cal.3d 577, 631-632 [the reach of the felony-murder special circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'"].)[103] The key case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, where the Court held that under section 190.2, "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." (*Id.* at p. 1147.) The *Anderson* majority did not disagree with Justice Broussard's summary of the holding: "Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing." (*Id.* at p. 1152 (dis. opn. of Broussard, J.).)

Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the killing. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, this Court rejected the defendant's argument that, to prove a felony-murder special circumstance,

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[102] (...continued)
*supra*, 43 Cal.3d 1104, this Court has required proof of the defendant's intent to kill as an element of the felony-murder special circumstance with regard to felony-murders committed during the period December 12, 1983 to October 13, 1987. This Court has held that *Carlos* has no application to prosecutions for murders occurring either before or after the *Carlos* window period. (*People v. Johnson* (1993) 6 Cal.4th 1, 44-45.)

[103] In fact, the robbery-murder special circumstance is even broader than the robbery felony-murder rule because it covers a species of implied malice murders, so-called "provocative act" murders. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1080-1081.)

the prosecution was required to prove malice. In *People v. Earp* (1999) 20 Cal.4th 826, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This Court held that the defendant's argument was foreclosed by *Anderson*. (*Id.* at p. 905, fn.15.) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life.[104]

In this case, Watkins testified that he did not intend to kill Shield but shot him accidentally when his gun went off as he was closing the door to the truck. (RT 1492-1497, 1575-1582.) In urging the jury to convict Watkins of first degree murder under the felony murder rule, the prosecutor argued:

> The only elements of first degree murder is [*sic*] that the individual or individuals specifically intended to rob and they were engaged in a commission or the attempt to commit a robbery and that killing occurred. There is no other state of mind that needs to be shown. And that killing can either be intentional, unintentional or accidental.

(RT 1658.) Addressing the robbery-murder special circumstance, the prosecutor emphasized that the act of killing Shield, by itself, proved the special circumstance:

> If it is the actual trigger finger, the actual guy who did the killing, if you find he was the person who did the killing during an attempted robbery, then there is nothing else you

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[104] Alternatively, this Court found that there was sufficient evidence that the defendant did act with reckless indifference to justify the death penalty. (*People v. Smithey, supra,* 20 Cal.4th at pp. 1016-1017.)

have to decide. The special circumstance is true.

> So as to that individual if you, all of the evidence that we have heard is consistent with Mr. Watkins having pulled the trigger. If you find that Mr. Watkins was the person who pulled the trigger and that when he did that he was engaged in an attempted robbery, then you not only find him guilty of first degree felony murder, but you also find this special circumstance to be true.

(RT 1663-1664.) The jury was instructed pursuant to the standard felony-murder instruction CALJIC No. 8.21 set forth above. (CT 713; RT 1791.)

### B. The Robbery-Murder Special Circumstance Violates The Eighth Amendment's Proportionality Requirement And International Law Because It Permits Imposition Of The Death Penalty Without Proof That The Defendant Had A Culpable Mens Rea As To The Killing

In a series of cases beginning with *Gregg v. Georgia, supra,* 428 U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia* (1977) 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty for getaway driver to a robbery felony-murder]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded defendant].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia, supra,* 428 U.S. at p. 183.)

The Supreme Court has addressed the proportionality of the death penalty for unintended felony-murders in *Enmund v. Florida*, 458 U.S. 782, and in *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on the "getaway driver" to an armed robbery murder because he did not take life, attempt to take life, or intend to take life. (*Enmund*, *supra*, 458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. Justice O'Connor, writing for the majority, held that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (*Tison*, *supra*, 481 U.S. at pp. 158.) Justice O'Connor explained the rationale of the holding as follows:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane or all–the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional. . . . *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence – the taking of human life – the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing

judgment when that conduct causes its natural, though also not inevitable, lethal result.

(*Id.* at pp. 157-158.) In choosing actual killers as examples of "reckless indifference" murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor eschewed any distinction between actual killers and accomplices. In fact, it was Justice Brennan's dissent which argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices (*id.* at pp. 168-179 (dis. opn. of Brennan, J.), but that argument was rejected by the majority.

That *Tison* established a minimum mens rea for actual killers as well as accomplices was confirmed clearly in *Hopkins v. Reeves* (1998) 524 U.S. 88. In *Reeves*, a case involving an actual killer, the Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under *Enmund/Tison*, but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because *those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder*, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a *mens rea* requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in *Enmund* does not concern the guilt or innocence

> of the defendant – it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, *so long as their requirement is satisfied at some point thereafter.*

(*Reeves*, *supra*, 524 U.S. at 99, citations and fns. omitted; italics added.)[103]

Every lower federal court to consider the issue – both before and after *Reeves* – has read *Tison* to establish a minimum mens rea applicable to all defendants. (See *Lear v. Cowan* (7th Cir., 2000) 220 F.3d 825, 828; *Pruett v. Norris* (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn.9.[104] The *Loving* court explained its thinking as follows:

> As highlighted by Justice Scalia in the *Loving* oral argument, the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio*, 438 U.S. 586 (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of

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[103] See also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc. opn. of Stevens, J.) (stating that an accidental homicide, like the one in *Furman*, may no longer support a death sentence.)

[104] See also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.

> the victim." 438 U.S. at 624. Without speculating on the views of the current membership of the Supreme Court, we conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.

(*Loving*, *supra*, 220 F.3d at p. 443.)

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. In *Atkins v. Virginia*, the Court's most recent proportionality decision, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins*, *supra*, 536 U.S. at p. 312.) Of the 38 death penalty states, there are at most five states other than California – Florida, Georgia, Maryland, Mississippi and Nevada – where a defendant may be death-eligible for felony-murder *simpliciter*.[105] The position of

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[105] In Shatz & Rivkind, *The California Death Penalty: Requiem for Furman?* 72 N.Y.U. Law. Rev. 1283, 1319, fn.201 (1997), the authors list seven states other than California as authorizing the death penalty for felony murder *simpliciter*, but Montana, by statute (see Mont. Code Ann., §§ 45-5-102(1)(b), 46-18-303), and North Carolina, by court decision (see *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665), now require a showing of some mens rea in addition to the felony murder in order to make a defendant

(continued...)

Mississippi is not altogether clear because its supreme court recently stated:

> [T]o the extent that the capital murder statute allows the execution of felony murderers, they must be found to have intended that the killing take place or that lethal force be employed before they can become eligible for the death penalty, pursuant to Enmund v. Florida, 458 U.S. 782, 796 (1982).

(*West v. State* (Miss. 1998) 725 So.2d 872, 895.) And, in Nevada, felony murder *simpliciter* as a basis for death eligibility apparently is being reconsidered in the courts. (See *Leslie v. Warden* (Nev. 2002) 59 P.3d 440, 449 (conc. opn. of Maupin, J.).) That at least 44 states (32 death penalty states and 12 non-death penalty states) and the federal government[106] reject felony murder *simpliciter* as a basis for death eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).

Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values" (*Atkins*, *supra*, 536 U.S. at p. 312), professional opinion as reflected in the Report of the Governor's Commission on Capital Punishment (Illinois)[107] and international opinion[108]

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[105] (...continued)
death-eligible.

[106] See 18 U.S.C. § 3591(a)(2).

[107] The Court has recognized that professional opinion should be considered in determining contemporary values. (*Atkins*, *supra*, 536 U.S. at p. 316, fn. 21.)

[108] The Court has regularly looked to the views of the world community to assist in determining contemporary values. (See *Atkins*, 536

(continued...)

also weigh against finding felony murder *simpliciter* a sufficient basis for death-eligibility. The most comprehensive recent study of a state's death penalty was conducted by the Governor's Commission on Capital Punishment in Illinois, and its conclusions reflect the current professional opinion about the administration of the death penalty. Even though Illinois's "course of a felony" eligibility factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(b)(6)(b)), the Commission recommended eliminating this factor. (*Report of the Former Governor Ryan's Commission on Capital Punishment*, April 15, 2002, at pp. 72-73, <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.pdf >.) The Commission stated, in words which certainly apply to the California statute:

> Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.
>
> A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If

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[108] (...continued)
U.S. at p. 316 n.21; *Enmund*, 458 U.S. at pp. 796-797, fn. 22; *Coker v. Georgia, supra*, 433 U.S. at p. 596.)

> the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal.

(*Id.* at p. 72.)

With regard to international opinion, the Court observed in *Enmund*:

> "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." *Coker v. Georgia*, 433 U.S. 584, 596, n. 10, 97 S.Ct. 2861, 2868, n. 10, 53 L.Ed.2d 982 (1977). It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.

(*Enmund*, *supra*, 458 U.S. at p. 796, fn. 22.) International opinion has become even clearer since *Enmund*. Article 6 (2) of the International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party, provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be "read restrictively" because death is a "quite exceptional measure." (Human Rights Committee, General Comment 6(16), ¶ 7; see also American Convention on Human Rights, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996)["In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes . . . ."].) In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. (E.S.C. res.

1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*)[109] The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (*Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. CCPR/C/79/Add.85, November 19, 1997, ¶ 13.)

The imposition of the death penalty on a person who has killed negligently or accidentally is not only contrary to evolving standards of decency, but it fails to serve either of the penological purposes – retribution and deterrence of capital crimes by prospective offenders – identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty ... measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund*, *supra*, 458 U.S. at pp. 798-799, quoting *Coker*, *supra*, 433 U.S. at p. 592). With respect to retribution, the Supreme Court has made clear that retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said: "It is

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[109] The Safeguards are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. While the safeguards are not binding treaty obligations, they provide strong evidence of an international consensus on this point. "[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight." (*Restatement (Third) of the Foreign Relations Law of the United States*, § 103 cmt. c.)

fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund*, *supra*, 458 U.S. at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Court further explained:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of ... Clergy" would be spared.

(*Tison*, *supra*, 481 U.S. at p. 156.) Plainly, treating negligent and accidental killers on a par with intentional and reckless-indifference killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Court said in *Enmund*:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia*, *supra*, 428 U.S., at 186, 96 S.Ct., at 2931 (fn. omitted).

(*Enmund*, *supra*, 458 U.S. at pp. 798-99; accord, *Atkins*, *supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never foresaw.

Since imposition of the death penalty for robbery murder *simpliciter*

clearly is contrary to the judgment of the overwhelming majority of the states, recent professional opinion and international norms, it does not comport with contemporary values. Moreover, because imposition of the death penalty for robbery murder *simpliciter* serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." As interpreted and applied by this Court, the robbery-murder special circumstance is unconstitutional under the Eighth Amendment, and Watkins's death sentence must be set aside.

Finally, California law making a defendant death-eligible for felony murder *simpliciter* violates international law. Article 6(2) of the ICCPR restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional crimes. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2; see Argument XIV, section C, *supra*, which is incorporated by reference here.) In light of the international law principles discussed previously, Watkins's death sentence, predicated on his act of shooting Raymond Shield without any proof that the murder was intentional, violates both the ICCPR and customary international law and, therefore, must be reversed.

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## XVI.

## THE TRIAL COURT ERRONEOUSLY FAILED TO DEFINE THE PENALTY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

During jury selection, one of the prospective jurors expressed concern that a person sentenced to life imprisonment could be paroled from prison. (RT 922.) Immediately following this voir dire, Watkins's attorney asked the trial court to clarify the meaning of a sentence of life without the possibility of parole. (RT 924.) The prosecutor agreed that "it would be appropriate to tell the jury that for the purpose of these proceedings they should assume that a life without possibility of parole sentence means that the person will be sentenced and will not be eligible for parole." (RT 924-925.) The trial court stated that it would give such an instruction. (RT 925.)

Before the exercise of the peremptory challenges, the trial court told the prospective jurors that "life without possibility of parole means just that, life without possibility of parole." (RT 977.) However, despite juror misunderstanding of the law and the agreement of the parties and the trial court on the need for a clear instruction, the jury was not told before it deliberated Watkins's penalty that a sentence of life without possibility of parole meant that Watkins would never be considered for release on parole. The trial court had a sua sponte duty to instruct on the true meaning of this sentence, and its failure to do so requires reversal of the death verdict.

The trial court is obligated to instruct sua sponte on all principles of law closely or openly connected with the case. (*People v. Wilson* (1967) 66 Cal.2d 749.) "Life without possibility of parole" is a technical term in capital sentencing proceedings, and it is commonly misunderstood by jurors. The failure to define for the jury "life without possibility of parole" thus violated due process by failing to inform the jury accurately of the meaning

of the sentencing options. The failure also resulted in an unfair, capricious and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (See *Caldwell v. Mississippi*, *supra*, 472 U.S. 320.)[110]

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at pp. 169-170 and fn. 9.)

The *Simmons* rule has been reaffirmed repeatedly by the United States Supreme Court. In 2001, the Supreme Court reversed a South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense. (*Shafer v. South Carolina* (2001) 532 U.S. 36.) The Supreme Court observed that where "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" (*Id.* at p. 52, citation omitted.) Most recently, in *Kelly v. South Carolina* (2002) 534

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[110] Although this Court has rejected this argument in the past (see, e.g., *People v. Gordon* (1990) 50 Cal.3d 1223, 1277; *People v. Thompson* (1988) 45 Cal.3d 86, 130-131), this Court should nevertheless reconsider this issue based on recent United States Supreme Court rulings.

U.S. 246, the Supreme Court again reversed a South Carolina death sentence in a case where the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (*Id.* at p. 256.)

In *Simmons*, the state had argued that the petitioner was not entitled to the requested instruction because it was misleading, noting that circumstances such as legislative reform, commutation, clemency and escape might allow the petitioner to be released into society. (*Simmons*, *supra*, 512 U.S. at p. 166.) In rejecting this argument, the United States Supreme Court stated that, while it is possible that the petitioner could be pardoned at some future date, the instruction as written was accurate and truthful, and refusing to instruct the jury would be even more misleading. (*Id.* at pp. 166-168.)

This Court erroneously has concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is "life without parole." (*People v. Arias* (1992) 13 Cal.4th 92, 172-174.) Empirical evidence, however, establishes widespread confusion about the meaning of such a sentence. One study revealed that, among a cross-section of 330 death-qualified Sacramento County potential venirepersons, 77.8% disbelieved the literal language of life without parole. (Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at pp. 42-45.) In another study, 68.2% of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point.

(Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, at pp. 43, 45.) The results of a telephone poll commissioned by the Sacramento Bee showed that, of 300 respondents, "[o]nly 7 percent of the people surveyed said they believe a sentence of life without the possibility of parole means a murderer will actually remain in prison for the rest of his life." (Sacramento Bee (March 29, 1988) at pp. 1, 13; see also Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170; *Simmons*, *supra*, 512 U.S. at p. 168, fn. 9.) In addition, the information given California jurors is not significantly different from that found wanting by the Supreme Court.

In the present case, Watkins's jurors were instructed that the sentencing alternative to death is life without possibility of parole, but they were not informed that life without possibility of parole means that defendant will not be released. The trial court's remark during voir dire that "life without possibility of parole means just that, life without possibility of parole"(RT 977) repeated, but did not explain, the sentence. The bare words "life without possibility of parole" simply did not respond to the common misunderstanding among some prospective jurors, which had prompted Watkins's attorney to request an instruction, that defendants sentenced to life without the possibility of parole are not eligible for release from prison.

The trial court's attempt to define the sentence of life without the possibility of parole was inadequate under *Kelly*, *Shafer* and *Simmons*. In *Kelly*, the Supreme Court acknowledged that counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. The Supreme Court also recognized that the trial court told the jury that the term life imprisonment should be understood

in its "plain and ordinary" meaning. (*Kelly*, *supra*, 534 U.S. at p. 257.) Nevertheless, these efforts did not serve to adequately explain the defendant's parole ineligibility. Similarly, in *Shafer*, the defense argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." (*Shafer*, *supra*, 532 U.S. at p.52.) Again, the Supreme Court found these statements inadequate to convey a clear understanding of parole ineligibility. (*Id.* at pp. 52-54.) Moreover, in *Simmons*, the Supreme Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." (*Simmons*, *supra*, 512 U.S. at p. 170.)[111] In this case, the instruction that the sentencing alternative to death was life without possibility of parole – even taken together with the trial court's "life without possibility of parole means life without possibility of parole" statement – did not adequately inform Watkins's jurors that a life sentence for Watkins would make him ineligible for release on parole from prison.

Further, the inadequate instruction violated the principles of *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, as interpreted in *Darden v. Wainwright*, *supra*,477 U.S. at p. 183, fn.15, because it "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less

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[111] The reliance in *Simmons* on *Gardner v. Florida* (1977) 430 U.S. 349, to reject the state's "plain and ordinary meaning" argument indicates that the federal Constitution will not countenance a false perception, whether resulting from incorrect instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence. (See *Simmons*, *supra*, 512 U.S. at pp. 164-165.)

responsible than it should for the sentencing decision." Without instructional guidance on the meaning of life without possibility of parole, there was a reasonable likelihood that the jurors deliberated under the mistaken, but common misperception, that the choice they were asked to make was between two inherently different alternatives: death and a limited period of incarceration. (See *Simmons*, *supra*, 512 U.S. at p. 170.) The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable distrust of "life imprisonment," the decision of the jury was simplified.

The prejudicial effect of the instruction's failure to clarify the sentencing options is clear. Here, there is a substantial likelihood that at least one of Watkins's jurors[112] concluded that the non-death option offered was neither real nor sufficiently severe and chose a death sentence because of the fear that Watkins would someday be released if he received any other sentence.[113] Given the existence of the prosecution's evidence in this case

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[112] See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937 (conc. opn. of Gould, J.) ("in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence,'" quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, 691-692).

[113] California jury surveys show that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death juries cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. (C. Haney, L. Sontag, & S. Costanzo,

(continued...)

regarding three in-custody offenses from which the jurors might infer future dangerousness (see RT 1871-1886, 1889-1898, 2021-2038 ), as well as the prosecutor's closing argument on this point (see RT 2071-2072), Watkins's jurors should have been given an explicit instruction that a sentence of life without the possibility of parole meant that Watkins would never be eligible for release from prison on parole.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."(*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) Had the jury been instructed concerning Watkins's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) ___ U.S. ___, 123 S.Ct. 2527, 2543; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) It certainly cannot be established that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, the judgment of death must be reversed.

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[113] (...continued)
*Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994), 170-71; accord, Ramos, *et al.*, *Fatal Misconceptions*, *supra*, at p. 45.)

## XVII.

## THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES WATKINS'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates Watkins's Eighth Amendment right to be protected from the arbitrary and capricious imposition of capital punishment and also violates his Fourteenth Amendment right to equal protection of the law.

### A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not

"so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51, 104 S.Ct. 871, 879-880, 79 L.Ed.2d 29 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, 104 S.Ct., at 881, quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) The time has come for *Pulley v. Harris* to be reevaluated since, as this felony murder *simpliciter* case illustrates,[114] the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman*

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[114] Watkins separately challenges the constitutionality of imposing a death sentence for felony murder *simpliciter* in Argument XV.

*v. Georgia*, *supra*, 408 U.S. at p. 313 (conc. opn. of White, J.).)[115] Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[116]

The capital sentencing scheme in effect at the time of Watkins's trial was the type of scheme that the *Pulley* Court had in mind when it said that

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[115] Watkins does not challenge the narrowing effect of California's special circumstances in this automatic appeal because that factual question depends on an empirical showing that must wait for a petition for writ of habeas corpus. (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1317-1318.)

[116] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. (See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

"there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Even assuming, for purposes of this argument, that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors – especially the circumstances of the offense factor delineated in Penal Code section 190.3, subdivision (a) – and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 grant a jury unrestricted (or nearly unrestricted) freedom in making the death-sentencing decision. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.) .)

California's authorization of the death penalty for felony murder *simpliciter* works synergistically with its far-reaching and flexible sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in Arguments XVI and XVIII through XX, which are incorporated here. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability – including Watkins, who killed accidentally – are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a

manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide Watkins with intercase proportionality review. The absence of intercase proportionality review violates Watkins's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

### B. The Lack Of Intercase Proportionality Review Violates Watkins's Right To Equal Protection Of The Law

The United States Supreme Court repeatedly has directed that a greater degree of reliability in sentencing is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive, California provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates the constitutional guarantee of equal protection of the laws. (U.S. Const., 14th Amend.)

At the time of Watkins's sentence, California required intercase proportionality review for noncapital cases. (Former Pen. Code § 1170, subd. (d).) The Legislature thus provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL) – a comprehensive and detailed disparate sentence review. (See generally *In re Martin* (1986) 42 Cal.3d 437, 442-444 [detailing how system worked in practice].) However, persons sentenced to the most extreme penalty – death – are unique among convicted felons in that they are not accorded this review. This distinction is irrational.

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court rejected a claim that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this Court rejected the argument. The reasoning undergirding *Allen*, however, was flawed.

The *Allen* court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case is a jury: "This lay body represents and applies community standards in the capital sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286.) Although the observation may be true, it ignores a more significant point, i.e., the requirement that any death penalty scheme must ensure that capital punishment is not randomly and capriciously imposed. It is incongruous to provide a mechanism to assure that this type of arbitrariness does not occur in noncapital cases, but not to provide that same mechanism in capital cases where so much more is at stake for the defendant.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special circumstances (Pen. Code, § 190.2) and sentencing factors (Pen. Code, § 190.3), and a court of statewide jurisdiction is well situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses or offenders. (See *Ford v. Wainwright* (1986) 477 U.S. 399;

*Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584.) But juries – like trial courts and counsel – are not immune from error, and they may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

Jurors are not the only sentencers. A verdict of death always is subject to independent review by a trial court empowered to reduce the sentence, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (See Pen. Code, § 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a reduction of a jury's verdict would render the jury's sentencing function less than inviolate, since it is not inviolate under the current scheme.

The second reason offered by the *Allen* Court for rejecting the defendant's equal protection claim was that the sentencing range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at 1287, italics added.) The idea that the disparity between life and death is a "narrow" one, however, defies constitutional doctrine: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year

prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for – rather than against – requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court in *Allen* relied on the additional "nonquantifiable" aspects of capital sentencing when compared to noncapital sentencing as supporting the different treatment of persons sentenced to death. (See *People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction, however, is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, § 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 421 & 423.) It is reasonable to assume that precisely because "nonquantifiable factors" permeate all sentencing choices, the legislature created the disparate review mechanism discussed above.

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (See *Bush v. Gore* (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, the equal protection clause prevents violations of rights guaranteed to the people by state governments. (See *Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The arbitrary and unequal treatment of convicted felons, like Watkins, who are condemned to death cannot be justified, as this Court ruled in *Allen*, by the fact that a death sentence reflects community standards. All criminal

sentences authorized by the Legislature, whether imposed by judges or juries, represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence review that is provided to all other convicted felons in this state – the type of review routinely provided in virtually every death penalty state. The lack of intercase proportionality review violates Watkins's Fourteenth Amendment right to equal protection and requires reversal of his death sentence.

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## XVIII.

## THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute, and the instructions given in this case, assign no burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. They delineate no burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. And neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors. As shown below, these omissions in the California capital-sentencing scheme run afoul of the Sixth, Eighth, and Fourteenth Amendments.

### A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances" (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the

jury's satisfaction pursuant to any delineated burden of proof.[117]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders Watkins's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments. Although this Court has rejected similar claims (see, e.g. *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774), the issue must be revisited in light of recent Supreme Court authority that creates significant doubt about the continuing vitality of California's current death penalty scheme.

With the issuance of three opinions within the past five years, *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court has dramatically altered the landscape of capital jurisprudence in this country in a manner that has profound implications for penalty phase instructions in California capital cases. As the Court has observed, "*in a capital sentencing proceeding*, as in a criminal trial, ""the interests of the defendant are of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."" [Citations.]" (*Monge v. California*, *supra,* 524 U.S. at p. 732, italics added.)

Nevertheless, this Court has reasoned that, because the penalty phase determinations are "moral and ... not factual" functions, they are not

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[117] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Pen. Code, § 190.3, subd. (b)) must be proved beyond a reasonable doubt. Watkins discusses the defects in Penal Code section 190.3, subdivision (b) in Argument XX, section B.

"susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) As the above-quoted statement from *Monge* indicates, however, the Supreme Court contemplates the application of the reasonable doubt standard in the penalty phase of a capital case. It has made this point clear in the trilogy of cases that began with *Jones v. United States*, *supra*, 526 U.S. 227.

In *Jones*, the Court held that under the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. (*Jones v. United States*, *supra*, 526 U.S. at p. 243, fn. 6.) *Jones* involved a federal statute, but in *Apprendi v. New Jersey*, the Court extended to the states through the Fourteenth Amendment the holding of *Jones*, concluding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, quoting *Jones v. United States*, *supra*, 526 U.S. at pp. 252-253.)

*Apprendi* considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute,

however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, where the jury determines guilt but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*: "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on

which the legislature conditions an increase in their maximum punishment. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[118] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Ibid.*)

Despite the holding in *Apprendi*, this Court stated that "*Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." (*People v. Ochoa* (2001) 26 Cal.4th 398, 454.) The Court reasoned that "once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death." (*Ibid.*) After *Ring*, however, this holding is no longer tenable.

Read together, the *Jones-Apprendi-Ring* trilogy renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v.*

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[118] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia J.).)

*New Jersey*, *supra*, 530 U.S. at p. 494.) As the Court stated, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Ibid.*) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen. Code, § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia J.).) They thus trigger *Ring* and *Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

The Court in *Ring* and *Apprendi* made an effort to remove the game of semantics from sentencing determinations. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) Accordingly, whether California's weighing assessment is labeled an enhancement, eligibility determination, or balancing test, the reasoning in *Apprendi* and *Ring* require that this most critical "factual assessment" be made beyond a reasonable doubt.[119]

In addition, California law requires the same result.[120] The reasonable

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[119] It cannot be disputed that the jury's decision of whether aggravating circumstances are present, whether the aggravating circumstances outweigh mitigating circumstances, and whether death is the appropriate penalty are "assessment[s] of facts" for purposes of the constitutional rule announced in *Apprendi* and *Ring*. This Court has recognized that "penalty phase evidence may raise disputed factual issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236.) The Court has also stated that the section 190.3 factors of California's death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; see *Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804, 818 ["the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard"].)

[120] The practice in other states also supports this conclusion. Twenty-six states require that any factors relied on to impose death in a penalty phase must be proved beyond a reasonable doubt, and three other states have related provisions. See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 18-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-

(continued...)

doubt standard is routinely applied in this state in proceedings with less serious consequences than a capital penalty trial, including proceedings that deal only with a prison sentence. Indeed, even such comparatively minor matters as sentence enhancement allegations, e.g., that the defendant was armed during the commission of an offense, must be proved by the standard of beyond a reasonable doubt. (See CALJIC No. 17.15.)

The disparity of requiring a higher standard of proof for matters of less consequence while requiring no standard at all for aggravating circumstances that may result in a defendant's death violates equal protection and due process principles. (See, e.g., *Myers v. Ylst* (9th Cir.

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[120] (...continued)
2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Mont. Code Ann., §§ 46-18-302(b)(B), 46-18-305; Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann. §, 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Moreover, in at least eight states in which the death penalty is permissible, capital juries are specifically instructed that a death verdict may not be returned unless the jury finds beyond a reasonable doubt that aggravation outweighs mitigation and/or that death is the appropriate penalty. (See Acker & Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes* (1995) 31 Crim. L. Bull. 19, 35-37, and fns. 71-76, and the citations therein regarding the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington.)

1990) 897 F.2d 417, 421 ["A state should not be permitted to treat defendants differently ... unless it has 'some rational basis, announced with reasonable precision' for doing so."].) Accordingly, both the *Jones-Apprendi-Ring* trilogy and consistent application of California precedent require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

### B. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues," (*People v. Superior Court (Mitchell)*, *supra*, 5 Cal.4th at p. 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Watkins urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding

whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code,

§190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan*, *supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code Section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[121]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 420, subd. (b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to noncapital than to

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[121] Of course, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v. Washington* (1984) 466 U.S. 668, 686-87; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.)

capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See e.g. *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421.)

### C. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing Watkins's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Watkins recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or

as a constitutional procedural safeguard"].) Nevertheless, Watkins asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[122]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[123]

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[122] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[123] Watkins acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto* (2003) 30 Cal.4th 226, 265.) Watkins, however, does not believe that the Court fully addressed the arguments raised therein. Further, Watkins must raise this issue to preserve

(continued...)

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at p. 732; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida* (1977) 430 U.S. 349, 359 (plur. opn. of White, J.); *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating

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[123] (...continued)
his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

factors true also stands in stark contrast to rules applicable in California to noncapital cases.[124] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its

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[124] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

**D. Conclusion**

As set forth above, the trial court violated Watkins's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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## XIX.

## THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED WATKINS'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition or event which, as such, does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever morale [*sic*] or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. . . .
>
> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating

circumstances with the totality of the mitigating circumstances.

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(RT 2149-2151; CT 856-857.) The trial court also gave Defense Special Instruction No. 1, which read in pertinent part:

> If the mitigating evidence gives rise to compassion or sympathy for the defendants, the jury may, based on such sympathy or compassion alone, reject death as a penalty. . . . Moreover, the law does not require that you find the existence of any mitigating factor before you choose life without the possibility of parole over death.

(RT 2151-2152; CT 859.)

These instructions, which formed the centerpiece of the trial court's description of the sentencing process, were constitutionally flawed. The instructions did not adequately convey several critical deliberative principles, and were misleading and vague in crucial respects. Whether considered singly or together, the flaws in these pivotal instructions violated Watkins's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

### A. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on Watkins hinged on whether the jurors were

"persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (RT 2151; CT 857.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless, and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here

concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[125]

Watkins acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

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[125] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th & 14th Amends.), the death judgment must be reversed.

### B. The Instructions Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment, Not Simply An Authorized Penalty, For Watkins

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255

F.3d 926, 962.) However, the instruction under CALJIC 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which

death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (RT 2150 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate . . . ."].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence Watkins to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and must be reversed.

### C. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[126] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in the instruction pursuant to CALJIC No. 8.88 or in the Defense Special Instruction No. 1. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

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[126] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

The Defense Special Instruction No. 1 does not correct this defect. That instruction is entirely permissive. It allows the jury to impose a sentence of life without the possibility of parole on the basis of sympathy or compassion alone or without finding the existence of a mitigating factor. However, it does not *require* such a sentence under any circumstances. In this way, even with this defense instruction, reasonable jurors deliberating Watkins's sentence might not have understood that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instructions given to Watkins's jury violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instructions improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original italics.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and Watkins respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the

defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[127]

*People v. Moore* (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of

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[127] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in Watkins's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, Watkins can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe*

(1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated Watkins's Sixth Amendment rights as well. Reversal of his death sentence is required.

### D. The Instructions Failed To Inform The Jurors That Watkins Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion."] That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the

> Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

**E. Conclusion**

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, together with Defense Special Instruction No. 1, failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, Watkins's death judgment must be reversed.

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## XX.

## THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER WATKINS'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on Penal Code section 190.3 pursuant to CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (RT 2117-2119) and pursuant to CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors (RT 2149-2151). These instructions, together with the application of these statutory sentencing factors, render Watkins's death sentence unconstitutional. First, the application of Penal Code section 190.3, subdivision (a) resulted in arbitrary and capricious imposition of the death penalty on Watkins. Second, the introduction of evidence under Penal Code Section 190.3, subdivision (b) violated Watkins's federal constitutional rights to due process, equal protection, and a reliable penalty determination. Even if this evidence were permissible, the failure to instruct on the requirement of jury unanimity with regard to such evidence denied Watkins's federal constitutional right to a jury trial and to a reliable penalty determination. Third, the failure to delete inapplicable sentencing factors violated Watkins's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. Fourth, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fifth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Sixth, the failure of the instruction to require specific, written findings by the

jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to Watkins's penalty trial, his death judgment must be reversed.

### A. The Instruction On Penal Code Section 190.3, Subdivision (a) And Application Of That Sentencing Factor Resulted In The Arbitrary And Capricious Imposition Of The Death Penalty

Penal Code section 190.3, subdivision (a), permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account "[t]he circumstances of the crimes of which the defendants were convicted in the present proceeding and the existence of any special circumstance found to be true." (RT 2117; CT 797.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

An analysis of how prosecutors actually use section 190.3, subdivision (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decisionmaking that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

As applied in California, however, section 190.3, subdivision (a), not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. This can be seen upon examination of a cross-section of cases before this Court.[128]

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that – from case to case – reflect starkly opposite circumstances. Thus, prosecutors have argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- because the defendant struck many blows and inflicted multiple wounds,[129] or because the defendant killed with a

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[128] As set forth in his separate motion filed concurrently with this brief, Watkins respectfully requests that the Court take judicial notice of these records pursuant to Evidence Code section 452, subdivision (d).

[129] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera*, No. S004569, RT 160-161 (same).

single execution-style wound;[130]

- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[131] or because the defendant killed the victim without any motive at all;[132]
- because the defendant killed the victim in cold blood,[133] or because the defendant killed the victim during a savage frenzy;[134]
- because the defendant engaged in a cover-up to conceal his crime,[135] or because the defendant did not engage in a cover-up

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[130] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-3027 (same).

[131] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-969 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[132] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[133] See, e,g., *People v. Visciotti*, No. S004597, RT 3296-3297 (defendant killed in cold blood).

[134] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy (trial court finding).

[135] See, e.g., *People v. Stewart*, No. S020803, RT 1741-1742 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

and so must have been proud of it;[136]

- because the defendant made the victim endure the terror of anticipating a violent death,[137] or because the defendant killed instantly without any warning;[138]
- because the victim had children,[139] or because the victim had not yet had a chance to have children;[140]
- because the victim struggled prior to death,[141] or because the victim did not struggle;[142]
- because the defendant had a prior relationship with the victim,[143] or because the victim was a complete stranger to the

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[136] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-3031 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[137] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11, 125; *People v. Hamilton*, No. S004363, RT 4623.

[138] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[139] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[140] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[141] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[142] See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[143] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-3067 (same);

(continued...)

defendant.[144]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the circumstances-of-the-crime aggravating factor to embrace facts which cover the entire spectrum of facts inevitably present in every homicide:

- **The age of the victim** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[145]

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[143] (...continued)
*People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[144] See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[145] See, e.g., *People v. Deere*, No. S004722, RT 155-156 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT
(continued...)

- **The method of killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;[146]

- **The motive for the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;[147]

- **The time of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day;[148]

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[145] (...continued)
4715-4716 (victim was "elderly").

[146] See, e.g., *People v. Clair*, No. S004789, RT 2474-2475 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an axe); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-6787 (use of a club); *People v. Jackson*, No. S010723, RT 8075-8076 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[147] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-970 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6761 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[148] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-2604 (late at night); *People v. Lucero*, No. S012568, RT 4125-4126 (middle of the day).

- **The location of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.[149]

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.

In this case, the prosecutor argued that factor (a) encompassed not just the murders, but the four unrelated robberies as well as the attempted robbery of Raymond Shield. (RT 2063, 2070.) He urged the jury to consider the manner in which the robberies where committed – using a gun in the very early morning hours against isolated people. (RT 2069.) He exhorted the jury to find that Watkins "attitude" in committing the crimes including the fact that he "insulted" Orosco and Muhammed "as aggravating factors. (RT 2068.) The prosecutor argued as circumstances-of-the-crime aggravation the fact that Raymond Shield was killed while "going out in his local neighborhood to take his family so they could catch a bus for vacation" (RT 2069) and that he was "gunned down in front of his wife, in front of his daughter, in front of his grandkids ... " (RT 2069-2070.)

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[149] See, e.g., *People v. Anderson*, No. S004385, RT 3167-3168 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT 7340-7341 (city park); *People v. Carpenter*, No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

As this case illustrates, the circumstances-of-the-crime aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra*, 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and Watkins's death sentence must be vacated.

### B. The Instruction On Penal Code Section 190.3, Subdivision (b) And Application Of That Sentencing Factor Violated Watkins's Constitutional Rights To Due Process, Equal Protection, Trial By Jury And A Reliable Penalty Determination

#### 1. Introduction

At the penalty phase, the prosecutor relied on three jailhouse fights in which Watkins purportedly participated as aggravating evidence under Penal Code section 190.3, subdivision (b). To prove these alleged crimes, the prosecutor introduced testimony from two a jail inmates and two sheriff deputies. (RT 1871-1886, 1889-1898, 2021-2038.)

The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if Watkins should be executed. (CT 797; RT 2117.) The jurors properly were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that Watkins did in fact commit the criminal acts alleged. (CT 823; RT 2133-2134.) Although the jurors were told that all 12 must agree on the final

sentence (RT 2151), they were not told that during the weighing process, before they could rely on the alleged assaults and/or batteries as an aggravating factor, they had to unanimously agree that, in fact, Watkins committed those crimes. (CT 823; RT 2133.) On the contrary, the jurors were explicitly instructed that such unanimity was not required:

> It is not necessary for all jurors to agree. If any jurors [*sic*] is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation.

(*Ibid.*) Thus, the sentencing instructions contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on Watkins's guilt, the degree of the homicide (if any), and the special circumstance allegation. (CT 716-718, 727, 730; RT 1798-1799, 1801.)

As set forth below, the unadjudicated crimes evidence should not have been admitted. But even assuming the evidence was constitutionally permissible, the aspect of Penal Code section 190.3, subdivision (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously violates both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

### 2. The Use of Unadjudicated Criminal Activity as Aggravation Renders Watkins's Death Sentence Unconstitutional

The instruction on factor (b) aggravation was upheld against an Eighth Amendment vagueness challenge in *Tuilaepa v. California*, *supra*, 512 U.S. at p. 977. However, the instruction and evidence in this case violated the Eighth Amendment, because they permitted the jury to consider

unreliable evidence of Watkins's alleged unadjudicated criminal conduct while confined in the county jail.

Admitting evidence of previously unadjudicated criminal conduct as aggravation violated Watkins's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment, and a reliable determination of penalty under the Eighth Amendment. (*State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated Watkins's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst, supra*, 897 F.2d at p. 421.) And because the state applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated Watkins's state and federal rights to due process of law. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 7 and 15.)

### 3. The Failure to Require a Unanimous Jury Finding on the Unadjudicated Acts of Violence Denied Watkins's Sixth Amendment Right to a Jury Trial and Requires Reversal of His Death Sentence

Even assuming, arguendo, that the evidence of the alleged jailhouse fights was constitutionally admissible at the penalty phase, the failure of the instructions pursuant to Penal Code section 190.3, subdivision (b) to require

juror unanimity on the allegations that Watkins committed prior acts of violence renders his death sentence unconstitutional.[150] The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v.Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be

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[150] Argument XVIII, *supra*, discusses the effect of *Ring* generally on the factfinding and determinations made by a capital sentencing jury in California. This argument addresses *Ring*'s impact on factor (b) aggravation.

significant agreement among the jurors.[151]

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to this date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988) 497 U.S. 639, 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Hines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent* (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona*, *supra*, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the

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[151] The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) It is arguable, therefore, that where the state seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that Watkins committed the alleged act of violence, there is no need to reach this question here.

Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exist[s]"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to tell if all 12 jurors would have agreed that Watkins committed the alleged assaults while awaiting trial. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Dellinger* (1985) 163 Cal.App.3d 284, 302 [same].)[152]

**4. Absent a Requirement of Jury Unanimity on the Unadjudicated Acts of Violence, the Instructions on Penal Code Section 190.3, Subdivision (b) Allowed Jurors to Impose the Death Penalty on Watkins Based on Unreliable Factual Findings That Were Never Deliberated, Debated, or Discussed**

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence

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[152] This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under *Chapman v. California, supra,* 386 U.S. at p. 24, there is no need to decide whether *Ring* errors are structural in nature.

is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (Pen. Code, § 190.3, subd. (b).) Before the factfinder may consider such evidence, it must find that the state has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (CT 823; RT 2133.)

Thus, as noted above, members of the jury may individually rely on this – and any other – aggravating factor each of the jurors deems proper as long as the jurors all agree on the ultimate punishment. Because this procedure totally eliminates the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447

U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364. a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required ... even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas).)

The Supreme Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding ...." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of Douglas, J.).)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have neither debated, deliberated nor even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

### C. The Failure To Delete Inapplicable Sentencing Factors Violated Watkins's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case.[153] However, the trial court did not delete those

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[153] Those inapplicable factors included: factor (d) ("Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"); factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented

(continued...)

inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness, and unreliability into the capital decision-making process, in violation of Watkins's rights under the Sixth, Eighth, and Fourteenth Amendments. Watkins recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, Watkins raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against Watkins. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand, and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable

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[153] (...continued)
to the homicidal act"); factor (f) ("Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a morale [*sic*] justification or extenuation for his conduct"); factor (g) ("Whether or not the defendant acted under extreme duress or under the substantial domination of another person"); factor (h) ("Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect of the effects of intoxication"); and factor (j) ("Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"). (See CT 797-798.)

factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence Watkins to death because there was evidence in mitigation for "only" two or three factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived Watkins of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411, 414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of Watkins's death judgment is required.

### D. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable, And Evenhanded Application Of The Death Penalty

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing

factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate Watkins's sentence upon the basis of nonexistent and/or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Failing to provide Watkins's jury with guidance on this point was reversible error.

### E. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to Watkins's jury of such adjectives as "extreme" (see factors (d) and (g); RT 2118), and "substantial" (see factor (g); RT 2118), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

## F. The Failure To Require The Jury To Base A Death Sentence On Written Findings Regarding The Aggravating Factors Violates Watkins's Constitutional Rights To Meaningful Appellate Review And Equal Protection Of The Law.

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived Watkins of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California* (1984) 512 U.S. 967, 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to

due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (11 Cal.3d at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170(c).) Under the Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-

*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[154] California's failure to require such findings renders its death penalty procedures unconstitutional.

### G. Even If The Absence Of The Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate To Ensure Reliable Capital Sentencing, Denying Them To Capital Defendants Like Watkins Violates Equal Protection.

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding.

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[154] See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

(See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights ... It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) ...." (*Commonwealth v. O'Neal* (Mass. 1975.) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not

simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument XVII, section B, *supra*, pages 237-241, Watkins explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to the denial of other safeguards such the requirement of written jury findings, unanimous agreement on violent criminal acts under Penal Code section 190.3, subdivision (b) and on other particular aggravating factors, and the disparate treatment of capital defendants set forth in this Argument XVIII, and this argument. The procedural protections outlined in these arguments but denied capital defendants are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

**H. Conclusion**

For all the reasons set forth above, Watkins's death sentence must be reversed.

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## XXI.

## WATKINS'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT

A few years ago, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, Watkins raises this claim

under the Eighth Amendment as well. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

**A. International Law**

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

As explained in Argument XIV, *supra* (pages 201-203 and footnote 94), the ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[155] The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent

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[155] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude Watkins's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (see Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Watkins's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on Watkins constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *id.* at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).) Thus, Watkins requests that the Court reconsider and, in the context of this case, find Watkins's death sentence violates international law. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

**B. The Eighth Amendment**

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 (plur. opn. of Stevens, J.)). Indeed, *all* nations of Western Europe – plus

Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[156]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the

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[156] Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (See Amnesty International's "List of Abolitionist and Retentionist Countries," *supra,* at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)

civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].)

## CERTIFICATE OF COUNSEL
## (CAL. RULES OF COURT, RULE 36(B)(2))

I, Nina Rivkind, am the Senior Deputy State Public Defender assigned to represent appellant, Paul Sodoa Watkins, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 88,845 words in length excluding the tables and certificates..

Dated: March 8, 2004.

Nina Rivkind

Nina Rivkind

## XXIII.

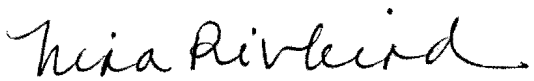
## CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: March 8, 2004.

Respectfully submitted,

LYNNE S. COFFIN
State Public Defender



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Attorneys for Appellant

felony murder without proof of a culpable mens rea with regard to the killing (Argument XV), and numerous other instructional errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of Watkins's convictions and death sentence.

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prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Aside from the erroneous exclusion of prospective juror Julia Almeyda (Argument XII), which is reversible per se, the errors committed at the penalty phase of Watkins's trial include, inter alia, the prosecutor's irrelevant and inflammatory injection of race factors into the deliberation of Watkins's fate (Argument XIV) which was exacerbated by the erroneous motive instruction (Argument VIII), the imposition of the death penalty for

reversal, the guilt phase errors in this case include, inter alia, the prosecutor's misconduct in unfairly attacking Watkins's credibility (which was essential to his defense) while cross-examining Watkins on irrelevant behavior outside the presence of the jury (Argument VI); error in instructing the jury with CALJIC Nos. 2.03, 2.06, and 2.52 regarding consciousness of guilt (Argument VII); error in instructing the jury with CALJIC No. 2.51 regarding motive (Argument VIII); error in diluting the requirement of proof beyond a reasonable doubt (Argument IX); errors in instructing the jury of first degree premeditated murder and first degree felony murder (Argument X and Argument XI). The cumulative effect of these errors so infected Watkins's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and Watkins's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of Watkins's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers

## XXII.

## REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[157] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Aside from the insufficiency of the evidence, which requires a per se

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[157] Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and Watkins's death sentence should be set aside.

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APPENDIX A

No. 85-5454

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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DAVID RANDOLPH GRAY, PETITIONER

*v.*

STATE OF MISSISSIPPI, RESPONDENT

---

ON WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

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## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: SEPTEMBER 25, 1985
CERTIORARI GRANTED: FEBRUARY 24, 1986

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CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

RELEVANT DOCKET ENTRIES

| Date | PROCEEDINGS |
|---|---|
| 6/18/82 | Indictment returned, |
| | Defendant arraigned, |
| | Counsel appointed. |
| 7/16/82 | ORDER—Def. withdraws Motion for Transcript, |
| | ORDER—Clerk to issue special venire of 200 jurors, |
| | ORDER—Sustaining Motion to Produce Exculpatory Material, |
| | ORDER—Overruling Defendant's Motion to Argue Last, |
| | ORDER—Sustaining Motion that State Select Offense, |
| | ORDER—Sustaining Motion for Production and Inspection, |
| | ORDER—Sustaining Motion to Reveal Agreements, |
| | ORDER—Overruling Motion to Preclude Testimony, |
| | ORDER—Compelling Defendant to Submit to Blood Test, |
| | ORDER—Sustaining Motion for Mental Examination. |
| 7/23/82 | ORDER—Motion to Suppress Hearing continued to 7/28/82. |
| 7/28/82 | ORDER—Motion to Suppress overruled, |
| | ORDER—Motion to Quash overruled. |
| 8/9/82 | Jury selected and sworn, |
| | Commencement of trial. |

| Date | PROCEEDINGS |
|---|---|
| 8/12/82 | Judgment of conviction entered, |
| | Defendant sentenced. |
| 8/17/82 | ORDER—Overruling Motion for New Trial. |
| 8/20/82 | ORDER—Defendant allowed to appeal in forma pauperis, |
| | Notice of Appeal filed. |
| | SUPREME COURT OF MISSISSIPPI |
| 6/5/85 | Opinion |
| 7/24/85 | Rehearing denied. |

CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI,
FIRST JUDICIAL DISTRICT

* * * *

(EXCERPTS FROM VOIR DIRE, AUGUST 1982)

[367] BY MR. NECAISE: [The Prosecutor] Mr. Ruiz, do you have any conscientious scruples against Capital Punishment when imposed by law? [368]

BY MR. RUIZ: [The venireman] Yes, I do.

BY MR. NECAISE: You do. Now, is that in this particular type case, Mr. Ruiz, or in any case?

BY MR. RUIZ: In any case.

BY MR. NECAISE: Are you telling me, Mr. Ruiz, that no matter what law, what instruction His Honor would give you all on that, if he told you that this is a case that, uh, where you could bring in the Death Penalty, are you telling me that you could not, that you could, nonetheless, not under any circumstances (sic) bring in a penalty and impose the Death Penalty, regardless of what the law is?

BY MR. RUIZ: No, I couldn't.

BY MR. NECAISE: You could not. [369] Is that in this case or in any other type case?

BY MR. RUIZ: Any type case.

BY MR. NECAISE: Did the court hear those questions?

BY THE COURT: Yes, Sir.

BY MR. NECAISE: All right, sir. Now, if your Honor please, we move to strike Mr. Ruiz for cause.

BY THE COURT: I'll overrule it, at this point.

BY MR. NECAISE: All right, sir. We intend to. uh, this is the time, if your Honor please, that we would like to use one of our challenges at this time, uh, to replace him so that we can move on.

BY THE COURT: All right. You can step down Mr. Ruiz. [370]

BY MR. NECAISE: And let the record show that the State takes exception to the court's ruling on that because we think. . . .

BY THE COURT: (Interposing) All right.

BY MR. NECAISE: . . . it's a classic case of one for cause.

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[372] BY MR. NECAISE: Do you have any conscientious scruples against Capital Punishment when imposed by law?

BY MR. EASTON: No, Sir.

BY MR. NECAISE: Then, I take it, Mr. Easton, that if this is a case wherein the law allows and the evidence warrants the imposition of the Death Penalty and you feel that this is a case, after you hear it all, that warrants the imposition of the Death Penalty, Mr. Easton, you are telling me you could vote for the Death [373] Penalty?

BY MR. EASTON: I believe so. Yes, sir.

BY MR. NECAISE: You believe so?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: Do you have doubts, not as to what the evidence is going to show because I'm not asking you to give me a commitment as to what my proof is going to be because I, I understand, Mr. Easton, you are going to have to wait and see what the case warrants, see if it warrants it. But, I want to know if you find that the evidence warrants and the law allows, in this case, could you return a verdict that says that this man sitting here should suffer the extreme penalty?

BY MR. EASTON: I don't think so.

BY MR. NECAISE: You don't think so. All right. Mr. Easton, are you telling me that [374] you could not do that in this case or in any case?

BY MR. EASTON: That would probably depend on the circumstances of the case.

BY MR. NECAISE: In other words, in some cases you might be able to do it?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: But, in this case, you don't think that you could?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: Do you have some reason, do you know something about the case that would, you just don't think its the type of case that warrants the Death Penalty? Is that what you're saying?

BY MR. EASTON: Well, I'd have to hear the evidence [375] first before I could make a determination as to whether it warrants the Death Penalty or not.

BY MR. NECAISE: But, then, didn't you just tell me that you didn't think you could return the Death Penalty in this type of case?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: You could not return it?

MR. EASTON: Yes, sir.

BY MR. NECAISE: Yes, sir, you could not return it or yes, sir, you could return it? Maybe we're having a little trouble communicating here.

BY MR. EASTON: - Yes, sir, I don't know whether I could, uh, return the Death Penalty.

[376] BY MR. NECAISE: You have some doubt in your mind?

BY MR. EASTON: Yes, sir.

BY MR. NECAISE: Judge, we ask that you allow us to excuse Mr. Easton, using one of our causes, at this time, in order to expedit things.

THE COURT: Overruled.

BY MR. NECAISE: Well, then, we use one of our challenges.

* * * *

[381] BY MR. NECAISE: Mrs. Coker. Mrs. Coker, do you have any conscientious scruples against Capital Punishment when imposed by law?

BY MRS. COKER: I do not believe in it.

BY MR. NECAISE: You do not believe in Capital Punishment? Now, Mrs. Coker, do you tell me you don't

believe in Capital Punishment in this type of case or in any type of case?

BY MRS. COKER: In any type of case.

BY MR. NECAISE: You mean to tell me that if the court instructed you that this is a case, gave you the law and told [382] you that this is a case whereby you could impose the Death Penalty, that you would not follow the law, if it meant imposing the Death Penalty?

[Inaudible reference deleted]

BY MRS. COKER: I would not.

BY MR. NECAISE: You would not do it?

BY MRS. COKER: I would not do it.

BY MR. NECAISE: You just don't believe in Capital Punishment.

BY MRS. COKER: That's right.

BY MR. NECAISE: And you would never vote for Capital Punishment, are you telling [383] me, in any case or just this type case?

BY MRS. COKER: In any case. I would never vote for it in any case.

BY MR. NECAISE: You would never vote for the Death Penalty. Now, if Your Honor please, we would move at this time for the court to excuse Mrs. Coker for the same reason.

BY THE COURT: I'll require you to use one of your challenges.

BY MR. NECAISE: All right, sir.

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[385] BY MR. NECAISE: Now, Mrs. Bush, do you have any conscientious scruples against Capital Punishment when imposed by the law?

[386] BY MRS. BUSH: I don't know, I don't know if I do or not.

BY MR. NECAISE: Now, if the court, you're going to first be called upon to decide the guilt or innocence.

BY MRS. BUSH: Yes, sir.

BY MR. NECAISE: And after that, if you find him guilty, then the court is, you are going to hear some additional evidence. And then you are going to go back and decide whether he suffers the Death Penalty or whether he gets a life sentence. Now, are you telling me that you have any conscientious scruples, do you believe in Capital Punishment?

[Inaudible reference deleted.]

[387] BY MRS. BUSH: Yes, if he's guilty . . . (inaudible).

BY MR. NECAISE: Ma'am?

BY MRS. BUSH: Yes, if he's guilty.

BY MR. NECAISE: But, you, are you saying that you don't know?

BY MRS. BUSH: No, I don't.

BY MR. NECAISE: You don't know whether one deserves it or not. Well, of course, you wouldn't know that until you heard the evidence.

BY MRS. BUSH: I mean, you know, I would, I would vote not guilty.

BY MR. NECAISE: You would vote not guilty, if you was on the Jury?

BY MRS. BUSH: That's right.

[388] BY MR. NECAISE: You mean you would vote not guilty as to what one of them, uh, about whether he committed the crime or not guilty as to whether he ought to get the Death Penalty?

BY MRS. BUSH: Not guilty as to whether he should get the Death Penalty. I don't think anybody should get the Death Penalty.

BY MR. NECAISE: You don't think anybody, ma'am?

BY MRS. BUSH: (Inaudible.)

BY MR. NECAISE: You don't think anybody ought to ever get the Death Penalty?

BY MRS. BUSH: I mean, the way the Jury is going now, what I'm saying is I would, I would vote not guilty.

BY MR. NECAISE: Right now, the way this Jury's going, you would put not guilty?

[389] BY MRS. BUSH: Yes, sir.

BY MR. NECAISE: Is that not guilty, you would . . . .

BY MRS. BUSH: (Interposing) I would, you know, I would vote not guilty on the Death Penalty.

BY MR. NECAISE: You would, in other words, you don't believe in the Death Penalty?

BY MRS. BUSH: No, sir, I don't.

BY MR. NECAISE: Is that in just this kind of case or any kind of case?

BY MRS. BUSH: Any kind of case.

BY MR. NECAISE: You just don't believe anybody ought to get the Death Penalty?

BY MRS. BUSH: Yes, sir.

[390] BY MR. NECAISE: You just don't believe that anybody ought to get the Death Penalty. Regardless of what the evidence is?

BY MRS. BUSH: I'm saying that I don't think anybody should get the Death Penalty.

BY MR. NECAISE: Regardless of what the evidence are, (sic) you don't believe anybody ought to be put to death for any type of crime that they've committed?

BY MRS. BUSH: Well, look here, I mean, I don't know whether he's guilty or not guilty. I can't say whether he's guilty or not guilty.

BY MR. NECAISE: I understand that. And we going to have to prove . . . .

BY MRS. BUSH: (Interposing) That's why, that's why I say I can't say that he should have the Death Penalty. I can't say that.

[391] BY MR. NECAISE: Let me ask you this, you are first going to be called upon to decide his guilt or innocence.

BY MRS. BUSH: (Inaudible.)

BY MR. NECAISE: And let's say that all twelve of you agree that he did it. Okay. Now, he's been convicted. All twelve of you have agreed that he's the one what killed him, killed Ronald Wojcik. And then you'll come out here and you'll hear some more evidence and you'll go back to that same room a second time and you'll decide whether he ought to get life or death. Now, at that time, could you vote for the Death Penalty?

BY MRS. BUSH: (Inaudible.)

BY MR. NECAISE: Ma'am?

BY MRS. BUSH: I don't think so.

BY MR. NECAISE: Well, is it, is it just this type of case, Mrs. Bush, or is it any case?

BY MRS. BUSH: It would be in any case.

BY MR. NECAISE: Well, are you telling me that no matter what type of crime occurred, no matter what type of crime occurred out here in the streets in the City of Gulfport, that if Mrs. Bush was brought up here to decide, along with eleven other folks, that that individual that committed that crime ought to get the Death Penalty, could you vote for the Death Penalty?

BY MRS. BUSH: No. sir.

BY MR. NECAISE: You could not, are you telling me now that you never would vote for the Death Penalty? [393] BY MRS. BUSH: Yes, sir.

BY MR. NECAISE: Now, with her answer being in the negative, if the court please, we call upon the court again and ask the court to excuse her because of her conscientious scruples against Capital Punishment. . . .

BY THE COURT: (Interposing) I'll overrule you on that. Let her step down.

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(Off-the-record discussion between Mr. Necaise and Mr. Stegall.)

BY THE COURT: He used his challenge on her, peremptorily.

* * * *

[394] BY MR. NECAISE: Mrs. Price, Mary Price, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. PRICE: I don't believe in Capital Punishment.

BY MR. NECAISE: Are you telling me that where the evidence, where the law allows and the evidence warrants, that you could not, in fact, vote for the Death Penalty?

BY MRS. PRICE: I just don't think that the Death Penalty should be imposed.

BY MR. NECAISE: Are you telling me, Mrs. Price, [395] that you couldn't vote for the Death Penalty in this type of case or any type of case?

BY MRS. PRICE: In any type of case.

BY MR. NECAISE: Okay. Now, let me say this to you. I don't, uh, don't be embarrassed. You are perfectly entitled to that feeling, uh, and if that's your view, you are certainly entitled to it. I am certainly not trying to embarrass you. But, what I am looking for is twelve people who come into the Jury Box who say that if the evidence warrants and the law allows, that they could, in fact, impose the Death Penalty if they find those two, if the law allows and the evidence warrants. And, uh, but, you are, are you telling me that you couldn't, you could not, in this, not in any type, not in any type of case, regardless of what type of crime happened in the streets of the City of Gulfport, [396] that you could not, you could never vote, when they brought the individual in, who had been adjudged guilty, you could never vote to give he or she the extreme penalty of death, regardless of what the evidence showed?

BY MRS. PRICE: Well, it would depend upon the type of case and depending upon the facts.

BY MR. NECAISE: What type of case would it take? Give me a set of facts where you would vote to impose the Death Penalty.

BY MR. STEGALL: If it please the court, I object to that.

BY THE COURT: Overruled.

BY MR. NECAISE: Give me a set of facts, Mrs. Price, where, if you were seated on the Jury, and the person had been adjudged guilty, and you had heard [397] all the evidence and he had been adjudged guilty. And now it becomes time for you to decide the penalty phase. What type of evidence, what type of case would it have to be for you to vote for the Death Penalty?

BY MRS. PRICE: (No response.)

BY MR. NECAISE: Ma'am?

BY MRS. PRICE: You've confused me.

BY MR. NECAISE: Well, I don't, I'm sorry, I don't mean to confuse you and I apologize. I hope I'm not doing it. Am I?

BY MRS. PRICE: No, I'm just nervous.

BY MR. NECAISE: I know your nervous. Okay. Just settle down and just be calm. Did you understand my question?

[398] BY MRS. PRICE: You wanted to know what type of case, what facts it would take for me to be able to vote for the Death Penalty.

BY MR. NECAISE: Right. And that is a case where the law warrants it and the evidence allows it. You see, the law, it's not my law and it's not the Judge's law, we have to follow the law that the Legislature passes up there in Jackson and that the United States Supreme court says is the law, we have to take those laws and work with them. And, as you heard the Judge explain, not every person who kills someone can get the Death Penalty. But, if you kill someone while doing certain things, then you are subject to the Death Penalty, if the Jury so desires to impose the Death Penalty. And, what I'm trying to find out is that if this is a case that you find that the evidence allows and the law warrants, in this case, [399] the imposition of the Death Penalty, could you vote to give this Defendant, right here, the Death Penalty?

BY MRS. PRICE: I don't think I could.

BY MR. NECAISE: You don't think you could. Is that on this case or on any case?

BY MRS. PRICE: I don't think I could take it upon myself to vote for the Death Penalty for anybody.

BY MR. NECAISE: On any case?

BY MRS. PRICE: Yes, sir.

BY MR. NECAISE: Ma'am?

BY MRS. PRICE: Yes, sir, on any case.

BY MR. NECAISE: You could never vote for it. Now, if Your Honor please, we would [400] excuse, ask that the court, ask the court to excuse her for the same cause, we call upon the court to excuse her.

BY THE COURT: I'll overrule you.

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[401] BY MR. NECAISE: Now, let's see, you're going to have to help me. This is Mrs. Walker. Mrs. Walker, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. WALKER: (Inaudible.)

BY MR. NECAISE: Ma'am?

BY MRS. WALKER: I don't have any objection to it. But, I couldn't vote for it.

BY MR. NECAISE: You don't have any objections to it, but you just couldn't vote for it.?

[402] BY MRS. WALKER: No.

BY MR. NECAISE: It would be all right for somebody else to vote for it. But, you couldn't vote for it. Is that what you're telling me, Mrs. Walker?

BY MRS. WALKER: Yes, sir.

BY MR. NECAISE: You believe in it, but you couldn't vote for it?

BY MRS. WALKER: Yes, sir.

BY MR. NECAISE: Is that in this type, in this particular type case, Mrs. Walker, or in any type case?

BY MRS. WALKER: In any type case.

BY MR. NECAISE: Are you telling me that no matter what the evidence in this case would show, you could

never vote [403] for the Death Penalty in any kind of case?

BY MRS. WALKER: No, I couldn't.

BY MR. NECAISE: If the court please, we call upon the court again.

BY THE COURT: I'll overrule you again and let you use your peremptory.

BY MR. NECAISE: Judge, let me ask that the record state that in all of these I am taking exception to the court's ruling.

BY THE COURT: All right.

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[410] BY MR. NECAISE: All right, sir. Mr. Lassabe, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MR. LASSABE: Well, I. . . .

BY MR. NECAISE: (Interposing) Let me tell you this, let me say this to you before you answer that, Mr. Lassabe. I need to know whether you believe in that or whether you want to get off the Jury. You'd just rather not serve.

BY MR. LASSABE: I. . . .

[411] BY MR. NECAISE: (Interposing) And I want you to use that one on me, you know, because, quite frankly, I'm getting down close on my challenges now and I might go a different way if you tell me that you just would rather get off, you know.

BY MR. LASSABE: No, it wouldn't be that. I, I've never settled it in my own mind.

BY MR. NECAISE: You've never settled it in your own mind.

BY MR. LASSABE: No, sir, I haven't.

BY MR. NECAISE: Well, do you tell me then, Mr. Lassabe, do you believe you doubt you could, where the law allows and the evidence warrants it. . . .

BY MR. LASSABE: (Interposing) I believe in the law.

BY MR. NECAISE: I believe, you believe in the law. [412] All right, sir.

BY MR. LASSABE: Yes, sir.

BY MR. NECAISE: All right, sir. Do you believe in the law of Capital Punishment?

BY MR. LASSABE: Well, I would suppose so.

BY MR. NECAISE: Well, now, does Mr. Bennie Lassabe believe in the law, he believes in the law. But, does Mr. Bennie Lassabe believe that he could enforce that law?

BY MR. LASSABE: I don't know sir.

BY MR. NECAISE: Well, I don't either. And I just, you know, and I don't know, you know, uh, and, I don't know, you know, only you can answer that. Only you can look in your mind and say. Now, I understand that we've got to prove to you, beyond a reasonable doubt, I understand that. [413] And I understand that the burden of proof is on us. I understand all of that. But, what I want to known is if you get down to this case and this Jury finds this Defendant guilty of the crime with which he is charged, the court is then going to instruct you that this is a case whereby one of the penalties is death and the other is life. And, I am asking you, after you look at all of the evidence, if you find that this is a case that in Bennie Lassabe's opinion warrants the Death Penalty because the court has already told you that the court authorizes it, could you, in fact, vote for the Death Penalty?

BY MR. LASSABE: I don't know.

BY MR. NECAISE: You don't know.

BY MR. LASSABE: No, sir.

[414] BY MR. NECAISE: Well, is it in just this type of case or any case that you have that doubt?

BY MR. LASSABE: I just don't know.

BY MR. NECAISE: You just don't know.

BY MR. LASSABE: I just don't know what I would do.

BY MR. NECAISE: You just don't know what you would do. If the court please, we move the court to . . .

BY THE COURT: (Interposing) I'll overruie you on him, because he didn't even know.

BY MR. NECAISE: Yes, sir.

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[442] BY MR. NECAISE: Do you have any conscientious scruples against Capital Punishment when imposed by the law?

[443] BY MRS. PANNELL: I think I do.

BY MR. NECAISE: You think you do.

BY MRS. PANNELL: I think I do.

BY MR. NECAISE: In this type of case or in any case?

BY MRS. PANNELL: In any case.

BY MR. NECAISE: Are you telling me then that you cannot, under and circumstances, return a verdict that would be, that would impose the Death Penalty, regardless of what the evidence might show?

BY MRS. PANNELL: I could not.

BY MR. NECAISE: Even if the court told you that was the law, that one of the verdicts that you could return would be that [444] of the Death Penalty, you are telling me that you could not do that?

BY MRS. PANNELL: I don't believe I could.

BY MR. NECAISE: You say you don't believe you could?

BY MRS. PANNELL: I just don't believe in the Death Penalty.

BY MR. NECAISE: If Your Honor please, we . . .

BY THE COURT: (Interposing) Mrs. Pannell, how come you are against Capital Punishment?

BY MRS. PANNELL: I just don't know how I can say it. I just don't. . . .

BY THE COURT: (Interposing) Well, let me ask you something, is it religion or what is it, I mean, that you wouldn't follow the law if I, uh, if that was the law in a particular case?

[445] BY MRS. PANNELL: No, it's not religion.

BY THE COURT: Well, what is it, then?

BY MRS. PANNELL: It, uh, I just don't know. I might could, after evidence was presented. But, as I feel now, I. . . .

BY THE COURT: (Ir·terposing) I feel like you could, myself.

BY MR. NECAISE: Is the court overruling me?

BY THE COURT: I'll overrule you.

BY MR. NECAISE: Then, we move to strike.

BY THE COURT: All right. Step down, Mrs. Pannell. Now, I don't want nobody telling me that, just to get off the jury. Now, that's not being fair with me.

* * * *

[530] BY MR. NECAISE: All right. And do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. BOUNDS: I don't know.

BY MR. NECAISE: Well, I don't know either.

[531] BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Well, I mean, I don't know how you feel about it. I know how I feel about it. I believe in it. You know, if you asked me, I could vote to impose the Death Penalty. But, I'm not going to be allowed to vote on it. And, what I am trying to do is to find twelve people who tells (sic) me that they have no conscientious scruples against Capital Punishment when imposed by the law. Do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Are you telling me, Mrs. Bounds, that you could, if the evidence allows, if the evidence warrants and the law allows the imposition of the Death Penalty, that you [532] could, in fact, vote for the Death Penalty?

BY MRS. BOUNDS: Would you ask me that again?

BY MR. NECAISE: All right. If the evidence war-

rants it and the law allows it, I can tell you at the front end that the law, in this type of case, allows the imposition of the Death Penalty. The evidence will be a decision for you to make as to whether this type of evidence warrants the imposition of the Death Penalty.

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Could I ask the Court to question Mrs. Bounds further?

BY THE COURT: Well, Mrs., uh, Bounds, the question is this, uh, I'll read it to you.

"Would you automatically vote [533] against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial in this case?"

BY MRS. BOUNDS: I would try to listen to the case.

BY THE COURT: That's not answering my question. Uh, the question the question will be, should be answered yes or no. Now, I'll read it again. "Would you automatically vote against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial in this case?"

BY MRS. BOUNDS: Read it again.

BY THE COURT: Huh?

BY MRS. BOUNDS: Would you read that over again?

BY THE COURT: All right, I'll read it again. [534] Uh, now listen carefully to what I'm asking you. "Would you automatically vote against the imposition of the Death Penalty regardless of the evidence that might be developed in the trial of this case?

BY MRS. BOUNDS: No, sir.

BY THE COURT: You would not?

BY MRS. BOUNDS: No, sir.

BY THE COURT: All right. I take it then that you have no conscientious scruples against the imposition of it, when it's authorized by law, if you would not automatically vote against it?

BY MRS. BOUNDS: (No audible response.)

BY THE COURT: Nobody goes around. . . .

[535] BY MR. NECAISE: (Interposing) Judge, she was about to answer the Court on something. I don't know what it was.

BY THE COURT: What is it, Mrs. Bounds?

BY MRS. BOUNDS: I would do my best.

BY THE COURT: Well, that's not the question. . . .

BY MRS. BOUNDS: (Interposing, but inaudible as the Court continued talking, as Mrs. Bounds was talking.)

BY THE COURT: . . . as to whether you would do your best or not. Nobody's doubting your sincerity, Mrs. Bounds. And, uh, the law does not allow the Courts to go around, just willy-nilly, killing people because of crimes. Do you understand?

BY MRS. BOUNDS: (Inaudible.)

[536] BY THE COURT: It's certain types of crimes where it may be imposed and the question is simply this: "Would you automatically vote against the imposition of the Death Penalty regardless of any evidence that might be developed in the trial of this case?"

BY MRS. BOUNDS: No, sir, I don't think I would.

BY THE COURT: She said she wouldn't.

BY MR. NECAISE: No, sir. She said I don't think I would.

BY THE COURT: Answer me yes or no, Mrs. Bounds. If you're against it, say so. And if you're not, say you're not. You can say one or the other.

BY MRS. BOUNDS: No, sir.

BY THE COURT: No?

[537] BY MRS. BOUNDS: No, sir.

BY THE COURT: In other words, you do not have any conscientious scruples against the imposition of the Death Penalty, it it's authorized by law. Is that right?

BY MRS. BOUNDS: No.

BY THE COURT: No. Okay.

BY MR. NECAISE: Mrs. Bounds, if this is a case where you find, from the evidence that it warrants the imposition of the Death Penalty, could you go back there and vote for the Death Penalty in this case?

BY MR. STEGALL: Judge, I'm going to object to him continuing, she, the Court has explained to her fully. . . .

BY THE COURT: (Interposing) Overruled, one time. [538] I'm not going to let him go much further though.

BY MR. STEGALL: Excuse me, Mr. Necaise.

BY MR. NECAISE: In this case, if the evidence warrants and the law allows, and you get back there . . . (inaudible) . . . and you all are back there, trying to decide whether this Defendant should suffer the penalty of death, and you find from the evidence that you've got laid there before you that, in your opinion, from what you've heard and what you've seen from the evidence, that this is a case that warrants this man dying in the gas chamber, could you vote that he should suffer the penalty of death?

BY MRS. BOUNDS: I have to say yes or no?

BY MR. NECAISE: Yes, Ma'am.

BY MRS. BOUNDS: How can I say that when I've never [539] experienced it?

BY MR. NECAISE: Well, what I am saying is could you listen to the evidence and if you find that this is a case, if the case warrants it—that's a decision you're going to have to make. If this is a case that you find, in your mind, okay, if this is a case, this is in your mind, if you think, if you come up with this conclusion, okay, this is a case that this person should suffer the Death Penalty, such horrible, atrocious, heinous crime, in my opinion, in Mrs. H. C. Bounds' opinion, this man should suffer the penalty of death, could you write down "Death Penalty"?

BY MRS. BOUNDS: I don't think I could.

BY MR. NECAISE: You don't think you could?

BY MRS. BOUNDS: I don't think I could.

BY MR. NECAISE: You could not! [540] Now, if Your Honor please, we. . . .

BY THE COURT: (Interposing) Well, I don't know whether she could or couldn't. She told me she could, a while ago.

BY MR. NECASIE: Well, all I can do, Judge, is go by what, by what the lady says. The Court's put, the Court has put the State in a precarious position by making us use our challenges when we clearly met the law in about six cases. On about six challenges that the Court has made us use. . . .

BY THE COURT: (Interposing) Well, I think I had one or two that. . . .

BY MR. NECAISE: (Interposing) I agree with you, Judge. There's two or them. . . .

BY THE COURT: . . . . just used that to get off of the Jury. At least one person that I'm positive of.

[541] BY MR. NECAISE: Well, I'm sorry that they did that, Judge.

BY THE COURT: All right. All right. Let me ask you the question again. Now, answer me yes or no and search your conscience on it because you, you, I know you're an honest and sincere person.

BY MRS. BOUNDS: I think I am.

BY THE COURT: And anybody that, uh, born and raised up in Scott County and goes to the Presbyterian Church is, uh, has got to be a good clean individual. All I want you to do is just search your own conscience and tell me, positively, give me a yes or no, to this and don't equivocate. The question, once again, is: "Would you automatically vote against the imposition of the Death [542] Penalty regardless of any evidence that might be developed in the trial of this case?" Now, take your time and think about it and answer it yes or no, Mrs. Bounds.

BY MRS. BOUNDS: No, sir.

BY THE COURT: You are positive its no?

BY MRS. BOUNDS: Yes.

BY THE COURT: Well, do you understand that, uh, you're telling me now that you can impose the Death Penalty?

BY MRS. BOUNDS: (No audible response.)

BY THE COURT: Do you understand that's what you are telling me?

BY MR. NECAISE: Judge, the lady does not understand [543] your questions.

BY THE COURT: Wait a minute, Mr. Necaise.

BY MR. STEGALL: Judge, I'm going to object to the District Attorney . . .

BY THE COURT: (Interposing) I've already, I've already set him down. I don't need any help from either of you. All right.

Do you realize that you've said, I'm afraid that a while ago you didn't understand my question, Mrs. Bounds. Do you realize that you have now told me that you could impose the Death Penalty?

BY MRS. BOUNDS: That I can impose the Death Penalty?

BY THE COURT: Yes, ma'am. That is what you just told me, if you understood the question.

[544] BY MRS. BOUNDS: Okay.

BY THE COURT: Now, can you or not?

BY MRS. BOUNDS: I thought you said can I vote against it.

BY THE COURT: No. Let me read it one more time. It's the same question now, Mrs. Bounds. "Would you automatically, would you automatically vote against the imposition of the Death Penalty regardless of any evidence that might be developed in the course of the trial?"

BY MRS. BOUNDS: (No response.)

BY THE COURT: The question is in the first few words—"Would you vote against". Is your answer to that yes or no?

BY MRS. BOUNDS: No.

[545] BY THE COURT: You would not vote against it?

BY MRS. BOUNDS: (No response.)

BY THE COURT. You could vote for the Death Penalty?

BY MRS. BOUNDS: I think I could.

BY THE COURT: All right. She says she can vote for the Death Penalty.

BY MR. NECAISE: Judge, I want to make a Motion now.

BY THE COURT: All right. Come to the Bench and make your Motion.

(At the Bench, with the Court, Counsel and Court Reporter present, and outside the hearing of the Jurors in the Box and of the Courtroom, the following proceedings were then had:

(BY MR. NECAISE: The State had exhausted their [546] peremptory challenges, their twelve peremptory challenges. And, of course, the State would not, the Court would not allow the State to excuse anybody who had conscientious scruples against Capital Punishment under any circumstances and would vote against the Death Penalty under and circumstances on five different Jurors, which we can give the Court their names, and the Court MADE us use our challenges. And now we get on one where the Court has, where she has equivocated and where she has said one time yes and one time no. And there's just no question about it that if we had another challenge, we would use it on this lady because as the Court can see she is very weak and indecisive about the question. And I ask the Court, because the Court has not followed this case, throughout the case, that you let us have another challenge in this case, in particular, on this woman and we can give you the ones on Ruiz, uh, Coker, uh, Arlean Walker, Annie Mae Bush, uh, Lassabe, Price [547] and, uh, who were very unequivocal, that they would not under any circumstances, would not vote to impose the Death Penalty.

(BY THE COURT: Well, I think that's right, I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many.

(BY MR. NECAISE: I didn't either, Judge.

(Discussion between Court and Counsel.

(BY MR. STEGALL: We're going to object to the granting of a thirteenth peremptory challenge. The Court has already ruled on the State's, uh, uh, arguments in previous attempts at challenges for cause and the granting of a thirteenth would, uh, be one in excess of that provided by law. And the Defendant would object, if, uh, . . .

(BY MR. NECAISE: Judge, I'm not asking you to give [548] us a thirteenth challenge. I'm asking the Court to change its ruling and use those, uh, for cause rather than having the Court, uh, rather than having the State to use its peremptories.

I'm asking the Court to, to change its ruling. . . .

(BY THE COURT: (Interposing) Well, I didn't examine them myself. Of course, I admit that they were unequivocal, about five of them, that answered you that way.

Go ask her if she'd vote guilty or not guilty, if she could vote guilty or not guilty and let's see what she says to that.

If she says, if she gets to equivocating on that, I'm going to let her off as a person who can't make up her mind.

(BY MR. STEGALL: Well, Judge, my, uh, we will respond, of course, subject to what happens here. . . .

[549] (BY THE COURT: (Interposing) All right. All right. Let's go.)

BY MR. NECAISE: Mrs. Bounds, do you feel like this is a case, and I don't, I certainly don't want you to think that I'm picking on you. But, uh, what we are

trying to do here is that we are trying to pick twelve people, uh, who we feel that, uh, would be fair and impartial persons, what we are looking for is people who could be fair and impartial and who could, if the evidence warranted it, could impose the Death Penalty because we feel that this a case that warrants the imposition of the Death Penalty. We know that the law allows it. And could you tell me, do you feel like you could reach a verdict in this case, either guilty or not guilty in this case?

BY MRS. BOUNDS: Could I reach a verdict?

[550] BY MR. NECAISE: A verdict.

BY MRS. BOUNDS: A verdict?

BY MR. NECAISE: Yes, ma'am.

BY MRS. BOUNDS: Either way?

BY MR. NECAISE: Yes, ma'am.

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: You could reach a verdict of guilty or not guilty. Now, if that verdict was guilty and you felt that from the evidence that you used to find him guilty, that evidence which you had used to find him guilty, if you felt that that evidence was of such a heinous, atrocious and cruel manner, do you feel that you could vote for imposing the Death Penalty on this twenty-eight year old Defendant?

[551] BY MRS. BOUNDS: Yes.

BY MR. NECAISE: Ma'am?

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: Judge, the lady says yes, but we could challenge her for cause.

BY MR. STEGALL: If it please the Court, I would like to point out that she has answered the question in the proper manner. . . .

BY THE COURT: (Interposing) You all approach the Bench. You all approach the Bench.

(At the Bench, with the Court, Counsel and the Court Reporter present, outside the hearing of the Jurors

in the Box and of the Courtroom, the following proceedings were then had:

(BY MR. STEGALL: She answered his question and, and, [552] she's answered his questions in exactly the proper manner. She obviously, would have some difficulty, as me or anybody else would, on a Death Penalty, but she said she could do it, if the facts justified it.

Now, Mr. Necaise never used the language of the case that you've been using in directing your questions to them, when he asked these people those questions.

(BY THE COURT: I don't believe he did, either, when you come right down to it. I don't believe you did, Albert.

(BY MR. NECAISE: I didn't use it, but I said could you, in any case, and they said we could not, in any case, we could not and I said, do you mean to tell me that if the law says that you could find this person guilty and sentence him to Life, you tell me that you wouldn't follow the law. No, we would not follow the law, if it meant giving him the Death Penalty. We would not, under any [553] circumstances. Remember, I even asked one woman, well, what kind of case would you vote for the Death Penalty and she said I don't know of any case that I'd vote for the Death Penalty. And I said give me an example, pick out the case. . . .

(BY THE COURT: (Interposing) I should have questioned them on this, I guess. . . .

(BY MR. NECAISE: (Unable to distinguish Mr. Necaise's remarks as the Court continued talking, at the same time.)

(BY THE COURT: . . . but I never had no idea it was going to. . . .

(BY MR. STEGALL: (Interposing) Disregarding the evidence. . . .

(BY THE COURT: . . . wind up in a mess like this. I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.

[554] Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right, there was eight of them that had said that they were against Capital Punishment.

And I think there was, uh, five of those that were unequivocally opposed to it and answered, in substance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point, allow him to challenge this lady for cause. She is totally indecisive. I think she is totally indecisive. She says one thing one time and on thing another.

The Court is of the opinion that it cheated the State by making him, uh, use, uh, by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case.

[555] (BY MR. STEGALL: Excuse her for cause?

(BY THE COURT: I'm going to excuse her.

(BY MR. STEGALL: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record. . . .

(BY THE COURT: (Interposing) I'm not going to add any to his challenges.

(BY MR. STEGALL: Okay. All right.

(BY THE COURT: I'm not going to go back and give him five more. I'm going to excuse her for cause.

(BY MR. STEGALL: Okay. All right.)

BY THE COURT: You can go, Mrs. Bounds, and call back tomorrow afternoon.

**APPENDIX B**

# INDEX

No. F-77-1286-I

| | |
|---|---|
| THE STATE OF TEXAS<br>v.<br>RANDALL DALE ADAMS | IN THE CRIMINAL DISTRICT COURT<br>NUMBER TWO OF<br>DALLAS COUNTY, TEXAS |

*Relevant Docket Entries*

| | |
|---|---|
| March 28, 1977 | 9:15 A.M.—Begin Voir Dire—Panel of 50 qualified as group. 10:15 A.M.—Begin V. dire Individually w/juror #1. Voir Dire continues for four weeks and ..... days. Twelfth juror selected on April ..... 1977. |
| April 26, 1977 | Case called for trial. Both sides announced ready. Jury selected, impaneled and sworn. Defendant arraigned. Indictment read. Plea of NOT GUILTY before the jury. Evidence presented. Jury charged. Arguments of counsel. Jury verdict of GUILTY of Capital Murder. |
| May 3, 1977 | Punishment verdict: Issue I —yes<br>Issue II —yes<br>Issue III—yes |

In the Criminal District Court No. 2 of
Dallas County, Texas

No. F-77-1286-1

[Record on Appeal (hereafter "Rec."), page 1A]

## TRUE BILL OF INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed within the body of said Dallas County, upon their oaths do present in and to the Criminal District Court, #2 of Dallas, County, at the January Term, A.D., 1977, that one, RANDALL DALE ADAMS, hereinafter styled Defendant, on or about the 28th day of November in the year of our Lord One Thousand Nine Hundred and seventy-six in the County and State aforesaid, did unlawfully, knowingly, and intentionally cause the death of Robert Wood, an individual, hereinafter called deceased, by shooting the deceased with a pistol and the deceased was a peace officer then and there acting in the lawful discharge of an official duty, namely: a uniformed patrolman conducting a traffic violation investigation, and the Defendant then and there knew that the deceased was a peace officer, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

HENRY WADE,
*Criminal District Attorney of*
*Dallas County, Texas.*

/s/ CHARLES L. COCKRELL,
*Foreman of the Grand Jury.*

Filed in the Criminal District Court No. 2 of Dallas County, Texas, on February 21, 1977.

In the Criminal District Court No. 2
of Dallas County, Texas

Individual voir dire examination
of prospective jurors

• • •

[Transcription of voir dire examination (hereafter "VD"), page 31]

MRS. FRANCIS MAHON

[VD 33] [By Assistant district attorney Steve Tokley]:

Q. Now, this is a case that the law refers to as capital murder and by that we mean—we're talking about a situation where the Defendant, if found guilty, will receive either a sentence of death or a sentence of life. Those are the only two possible punishments provided by the law.

In this case, as you already know, the Dallas District Attorneys Office is seeking the death penalty. Let me ask you now, if you will tell us what your feelings are about the death penalty?

A. Well, I'm not real sure, it depends on the circumstances of the case. There are some, I feel that yes, they should have the death penalty but I think that others shouldn't. It depends on the case, on the situation.

Q. All right. I think that certainly is a fair [VD 34] statement. I don't think every murder calls for the death penalty and our law recognizes that, and prescribes a certain number of types of murder cases where the death penalty is involved. One of those is the unlawful killing of a Police Officer while that Officer is in the lawful discharge of his duty.

I'm not talking to you about this case, but if you were to sit in a case of that nature which is recognized by the law as a case that could call for the death penalty if the facts and circumstances called for it, would you be in favor of the death penalty?

A. Since it is a law, yes, I could.

Q. Now, how long have you been in favor of the death penalty in certain types of cases?

A. Well, I think there's always been a need for the death penalty in certain types of cases.

Q. Have you always been in favor of it?

A. Yes.

Q. Now, I want you to understand that when we discuss the death penalty with you, that we're not discussing a mass murder situation. We're discussing a situation where the Defendant, if found guilty, would be found guilty of the taking of one human life, do you understand that?

[VD 35] A. Yes, I do.

Q. Are you saying then that if you were selected to be on the jury and if it was the proper case, that you would be in favor of the death penalty?

A. Yes, if it's the proper case, yes, I think so.

* * *

[VD 60] Q. Now, do you feel like if you were sitting on the jury that you could listen to all the evidence presented in the case if you found the Defendant guilty beyond a reasonable doubt, finding him guilty along with the other members of the jury and could you, if the State proved to you that the proper answers to those three questions, beyond a reasonable doubt, would you answer the three questions yes, knowing that the sentence will then be set out by law to be death?

A. Well, I have no choice but to answer them yes if that's the way I felt and that had been proven, [VD 61] yes.

Q. Now, you understand when you say if that's the way you felt, would you answer them?

A. If that's the way the evidence was or that was—this has to come from me. It just can't come from what I hear. I would have to hear, weigh what I hear, and give it some very serious thought. It's just not something I can say yes I would or I wouldn't.

Q. Yes, I understand that. I understand that. But, understanding I'm not in a position to give you examples.

A. I know you're not.

Q. But let me put you in a situation here and you tell me how you feel.

Let's assume that you listen to the evidence of a case, you were convinced from the evidence as were the other eleven jurors, that the Defendant was guilty, you found him guilty of capital murder. You now know that there's only one of two possible punishments, either the sentence

of death or a sentence of life. You know that you're going to be asked those three questions at the close of the evidence in the Hearing. You listen to all the evidence in the second Hearing. You're convinced from the evidence presented to you in the trial that number one, he did act [VD 62] deliberately. Number two, there is this probability that he will commit future criminal acts of violence, based upon the evidence presented, and number three, you're convinced that he did act unreasonably in killing this victim, the evidence has convinced you of that. Therefore, the proper answers to these three questions would be yes, would it not?

A. At this point, I think yes. I don't know whether I would at a time like that, would weigh the death penalty over life or not. I'm really—I really just don't know.

Q. I'm coming to that in just a minute and I appreciate your candor on it. But are we to the point to where in my hypothetical situation, are we to the point to where you're convinced that the evidence shows that the proper answers to those questions is yes, one, two, three?

A. Yes, I'm to that point.

Q. That's been proven. All right. But let's suppose on the other hand your own personal feelings were, for some reason known only to you, your own personal feelings, were that this man should not get the death penalty?

A. Well, there would have to be something that would give me that feeling, I think.

[VD 63] Q. Well, I don't know that there would be any cause for us to speculate right now but can you see where that might happen?

A. Well, it could happen, you know it could happen.

Q. Then the question is, would you set aside those personal feelings and answer the questions yes based upon the evidence?

A. Well, I would be honest with myself.

Q. Ma'am?

A. I would be honest with myself and I think that's being honest with me, but I would have to answer yes if that was my conviction.

Q. Based upon the evidence?

A. Oh, by all means based upon the evidence.

Q. Well, you mentioned something about the sentence

of death or life, that you didn't know how that would effect you. What did you mean by that?

A. Well, I don't think you would ever really know how that would effect you until it came right down to the—I don't know. Since I know the Judge has a choice—

Q. No, the Judge—that's one he won't make.

A. Well, since I'm controlling the Judge's choice.

[VD 64] THE COURT: In essence, Mrs. Mahon, what Mr. Tokley is saying is that when—if we get to the punishment part, if he's found guilty of capital murder, then you really don't set punishment. You don't say we vote death, we vote life. You answer questions. The law contemplates that you will not—that you will answer those questions without regard to what punishment the answers would bring about.

In other words, if you believe that the evidence shows you beyond a reasonable doubt that all three questions should be answered yes, then you would answer them yes or no depending on the case, without regard to what punishment will result from that.

JUROR MAHON: Well, I think I would have to do that.

THE COURT: Okay.

A. (By Juror Mahon) It might be difficult to disregard.

MR. TOKLEY: Could I pursue that a little bit, Your Honor, that's the area—

THE COURT: Go ahead.

[VD 65] Q. (By Mr. Tokley) Let me tell you what the law says here and you tell me how you honestly feel. Let me again point out, there are no right or wrong answers, but this is very important.

A. I wouldn't know how to give a right or wrong answer.

Q. The law says that a perspective juror is disqualified, is disqualified, from serving on this kind of case unless they unequivocally say under oath, as you now are, that the mandatory sentence of death or life would not effect their deliberations on any issue of facts in the case.

Can you tell us that?

A. Well, I don't think so. I don't think it would effect me in any way. I've never been confronted with this.

Q. I understand.

A. But I don't think it would.

Q. Well, we've got to go a little deeper than that.

A. I know you do. Maybe I'll have to search me a little.

Q. Take a little time, why don't you, if you will do that for a moment. Because the law is very emphatic on that point. It says a juror must [VD 66] unequivocally state, unequivocally state that this mandatory sentence of death or life would not—not don't think so—but would not effect their deliberations on any issue of the facts in the case.

A. Say that again to me.

Q. Let me repeat that. Let me be sure you understand it and I'll take whatever time you feel is necessary.

A. Please, this makes me a little bit nervous.

Q. I can understand.

A. I wish I had a drink of water.

THE COURT: Could we have some water? See if you can find us some water.

JUROR MAHON: That's sure nice. I never did find a fountain in the hall.

MS. JAMES [Defense counsel]: Your Honor, the Counsel would also appreciate a drink of water on our table.

THE COURT: We'll see if we can take care of it. It will probably have to be at the next recess. We'll take care of the jurors now.

A. (By Juror Mahon) Now, would you state that again for me please?

Q. The law says a perspective juror is [VD 67] disqualified from service on this type of case unless they state unequivocally that the mandatory sentence of death or life would not, would not, effect that juror's deliberations on any issue or fact in the case.

Do you understand that?

A. Yes, I understand what you're saying.

Q. Now, again, this is why I say there are no right or wrong answers. There are some persons who can say unequivocally that it would not. There are others who tell us that it would effect their deliberations on these facts and issues. And there are some who tell us they just don't know whether it would or wouldn't and they never can give us any more of a straight answer than that.

A. Of course, I'm not trying to just get on the jury.

Q. I understand.

A. Because I just don't know. I really do not know

whether it would effect me or not when it came right down to it.

Q. Like law?

A. That's right. I'm really not sure.

Q. Well, in other words then—

A. Now, I do believe, if I may take it a little [VD 68] further, I do believe if at that time I can dismiss this other from my thoughts and think only of those questions and nothing else, then it would not effect my feelings. But, if at any time those two decisions came back to my mind—

Q. Yeah.

A. —it could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no.

MR. TOKLEY: We'll challenge juror for cause.

THE COURT: Ms. James?

MS. JAMES: Your Honor, the Defendant objects to the challenging of cause for Francis Mahon on the grounds no showing that she could be unequivocally influenced by her knowledge of the range of punishment, no matter what the facts showed and that there has been no showing she would not follow the Court's instructions and abide by the law and that she would not—there has been no showing that she would not take affirmative action in answering the special issues resulting in the death penalty of a particular type of prosecution in the case at bar, and no showing she would be [VD 69] unequivocally influenced by her knowledge of the range of punishment or that she would not set aside her feelings and vote to impose the punishment of death as a punishment for the offense of capital murder.

For those reasons, the Defendant objects to the State excusing Francis Mahon for cause as a juror in this case.

THE COURT: Let's—Mrs. Mahon, let me see if I understand your answers correctly. Is what you're saying, you cannot give us your unequivocal assurance that the mandatory penalty of death or imprisonment for life will not effect your deliberations on any issue of fact? Now, that's a double negative but that's the way I have to pose the question. You cannot unequivocally assure us that the penalty of death or life will not influence or will not effect your deliberations or an issue of fact, any issue of fact?

JUROR MAHON: Well, if—as I said, if I was thinking of

fact only and I was dealing only with facts, I could answer that yes or no I feel sure.

[VD 70] THE COURT: Well, that's—go ahead.

JUROR MAHON: Based on what I had heard, the facts that were presented. But I did say that I was afraid or I did not know when it came right down to it and if there was any doubt in my mind about one of those questions, that I would not be influenced by life or death. If there was any doubt in my mind about one of those three questions that were asked, then I might have a tendency to say no to one of them if there was a doubt in my mind there. You see what I'm saying?

THE COURT: What you're saying, you cannot give us your assurance that you would not be influenced by the punishment in answering the questions on fact issues.

JUROR MAHON: Well, I'm saying I could be influenced and I think most anyone could be.

* * *

[VD 348] FORREST J. JENSON

* * *

[VD 351] [By Assistant district attorney Winfield Scott]:

But, in light of that, we obviously need to know, as the Judge indicated to you, we need to know what your feelings, your attitudes are about the death penalty. Could you share them with us now?

A. Well, I think I believe in letting the punishment fit the crime. I've never had to decide whether or not somebody lived or died and I don't know if I could or not. I feel like I could if I had to.

Q. Okay. That's why we're talking about it now. In other words—

A. It would have to go beyond all reasonable doubt, I think, before anybody would take it upon themselves to judge someone else. But if so, I feel like I probably could.

Q. All right. Well, that's why we need to cross this bridge right now. And let me ask you, have you—why do you feel the death penalty is proper in certain cases?

A. Well, I'm not—I wouldn't say I'm really for the death penalty, but I do feel that society has to have some deterrent to crime and as a result, probably capital punishment is the only means of deterrent that we have.

[VD 362] Q. (By Mr. Scott) So you're saying it's your personal feelings—in other words, you would answer the questions regardless of whether you personally felt he should not die?

A. Well granted, I think I would probably let my conscious kind of be a guide all the time through the trial while you're weighing all the evidence.

Q. Right.

A. But when it got down to the end, you would—you got to make a decision, will it be yes or no, it can't be both.

Q. Well, would you answer the questions yes, yes, yes, if you thought those were the proper answers and knowing that that's going to result in his death, even though you thought he should not have to die for what he did or would your feelings force you in good conscious to answer one no to save it? Like you think he ought to be saved?

A. Well, if I personally thought he ought to be saved, then I wouldn't be convinced that he was positively guilty then.

Q. So your feelings—

A. I mean, there's bound to be one of three I wouldn't agree with so I would have to vote no on one of them.

[VD 363] Q. In other words, I'm talking about if you feel the answers should be yes, yes, yes?

Ms. James: Your Honor, now the Prosecutor is attempting to get a commitment from him. I think he's going at this in such a way—

The Court: Overruled.

Q. (By Mr. Scott) I'm saying if the evidence convinced you the answers should be yes, yes, yes and yet at the same time, you feel the answers should be yes, yes, yes even though you know that's going to send him to the chair. Your personal feelings are that yes, I think it was intentional and yes, I don't think there was any provocation and yes, I think there's—more likely than not that he may well commit some sort of criminal acts of violence against property or people in the future, but I don't know how serious those acts are going to be.

Criminal acts of violence, I submit, could include breaking out somebody's plate glass window, it could be several acts. I don't know whether it was that or killing another Police Officer but whatever it is, I personally—even though I'm answering those questions yes, yes, yes—I personally

don't think this man deserves to die for what he did and therefore, [VD 364] because I feel that way, the only way I know to save him is to misanswer one of the questions and answer it no to save him.

Now, in effect, that is what a person is faced with. In other words, we don't have any quarrel with the person who feels that way, we just need to know it now. If you feel like you have to, in effect, misanswer a question to make a verdict fix your conscious—

A. No, I don't believe I would.

Q. You would go ahead and let the chips fall where they may?

A. Yeah, I think I would.

Q. What about on guilt or innocence? In other words—on guilt or innocence, if you felt the man was guilty and should be found guilty and yet you knew that a finding—you have heard enough evidence in the guilt or innocence phase to convince you you're going to answer those three questions yes, would you in any way, knowing that the ultimate—the guilty verdict is probably going to end up resulting in a death sentence because of the three yes answers that are abundantly clear in the case itself.

Would you in any way want to vote for not guilty to save him from the electric chair that way?

[VD 365] Ms. James: Your Honor, this question has been asked and it's repetitious. He's going over the same ground over and over again and I object.

The Court: Overruled.

Q. (By Mr. Scott) Would that interfere with your thinking?

A. I think if I had already made the decision in my mind that the answers to all three of them were yes and unless I—something come up that would disprove one of these three answers, I doubt if I would change.

Q. I'm talking about back on about guilt. In other words, would your feelings—

A. Oh, we're deciding the guilt or innocence?

Q. If you feel he's guilty but you honestly feel he should not get death, would that effect your deliberations on guilt?

The Court: Excuse me, pardon me. I think he's missed something in this. The trial actually has two parts.

Juror Jenson: Right.

THE COURT: The first part you decide is he guilty or not guilty. If you find him not guilty, that's the end of it [VD 366] If you find him guilty, then you get into a Punishment Hearing.

JUROR JENSON: Right.

THE COURT: And as a juror you never do vote life or death. All you do is answer three questions. Do you follow that?

JUROR JENSON: Right.

THE COURT: What Mr. Scott is asking you—he's back on the guilt or innocence part.

JUROR JENSON: Yes.

THE COURT: He's asking you, if after hearing the evidence, you go out and you have to decide is he guilty or not guilty. Is the fact that the death penalty will be a consideration down the line, if he's convicted, is the fact that it could wind up being a death penalty type of case, is that going to influence your verdict on guilt or innocence? Or, on the other hand, will you call it as you see it and if he's guilty, say he is and if he's not guilty, will you say so?

JUROR JENSON: I don't think so [VD 367] because even if we decide he's guilty or I decide he's guilty, you still have two alternatives. I mean, even if he's guilty, at that stage in the game, you don't necessarily have to decide whether he's—he'll get three yeses or two yeses and one no or what have you. You haven't sentenced him to the electric chair or what have you until the second stage and that's where you make the decision there. You kind of take it one step at a time.

Q. (By Mr. Scott) That's true. What we need to know is whether your feelings about the death penalty would effect the way you deliberated on the questions? Would it effect your—

A. Well, I think it probably would because afterall, you're talking about a man's life here. You definitely don't want to take it lightly. Now, if you went in here and, you know, if he was going to get life and probably paroled in some years, it puts a whole new light on the subject. But when you have got the death penalty to deal with, I think you have got to be pretty certain.

Q. So you feel your feelings would enter into the deliberations on those questions?

[VD 368] A. Right.

Q. And the feelings that you have, I take it, about the death penalty and its propriety, are strong, aren't they? Let me—I take it then, that mandatory penalty of death or imprisonment for life would effect your deliberations on the issues of fact in the penalty phase of the trial—those three questions on your deliberations?

A. Yeah, I think it would. But still again, if—if he's proven guilty, you know, beyond all reasonable doubt to me, and I think my conscious could clearly—I could vote—I think I could vote yes to all three questions. But, like I say, that's my conscious I'm dealing with.

Q. But if you found him guilty and then you're in the penalty phase and you really feel that he should not get death, I take it, that that feeling would effect the way you deliberated the three questions?

A. Well, I'm just human just like everybody else.

Q. Sure.

A. I think it probably will effect anybody's.

Q. I'm not going to argue with you about that. I just need to know. And we appreciate your being honest with us. So what you're saying is that it would effect your deliberations, your feelings about—

[VD 369] A. Right.

Q. —whether or not the guy ought to get life or death would effect the way you deliberated those three questions?

A. Yes, I believe so.

Q. And do you think it would—let me just say that there's an oath that a juror would have to take and from what you told me, you would not be able to take this oath, but let me go through it with you.

The oath is that the mandatory penalty of death or imprisonment for life that you would have to state under oath that it would not effect your deliberations on any issue of fact, including those three questions.

And I take it from what you've told said that you could not take that kind of oath, could you?

Ms. James: I object to the Prosecutor's conclusions, Your Honor.

A. Well, yeah, I guess it would.

The Court: Don't answer.

A. I don't know of anybody it couldn't because, I mean,

I haven't heard the evidence yet. I don't know what we're talking about. Now, if the evidence—if I hear the trial and I decided that the man is guilty, then I have heard all the circumstances, you [VD 370] know, you can have guilt but the circumstances—still the circumstances around it, you know, may change everything. I mean, a man goes out and steals a cow just for kicks. But a man that's starving to death goes out and steals a cow, is a lot different.

Q. Sure. What I'm getting at is, even though this oath is required, that is, that you just flat throw your feelings out the window, that's what the oath in effect requires—

A. Well—

Q. —you're saying you couldn't do that?

A. I don't think so. I don't believe anybody could because you might as well get a computer to sit on the jury.

* * *

[VD 613] MR. GEORGE C. FERGUSON

* * *

[VD 614] [By Assistant district attorney Winfield Scott]:

Now, we need to know from you just how you feel about capital punishment, about the death penalty. I know the Judge mentioned that to all the jury panel and could you share with us now what your feelings about the capital punishment, any reservations you have about it or any convictions you have regarding the subject.

A. Well, I would much rather see a life sentence. I don't even like hunting, I don't like to kill animals. So my feeling is that possibly it may be more painful to have a life sentence.

Q. All right. Do I take it from that that you're opposed to capital punishment?

A. Yes, I am.

[VD 615] Q. And have you been opposed to capital punishment most of your life?

A. Yes, I have.

Q. And I take it you have strong feelings on that point, don't you?

A. Well, pretty strong. Of course, you know, someone—if in self defense, I wouldn't have any feeling about it, I would do it, but otherwise, I do.

Q. I'm talking about the legalized execution. I'm talking

about legalized—in other words, placing someone in an electric chair and running electricity through his body.

A. I don't think I want to do that.

Q. And I take it from what you have said, that you personally just flat, because of the way you feel, could not be involved in that yourself?

A. It would be too hard for me to do. Now, I'm not going to say that I might not see enough that would convince me, but at that point, I would say it would be almost impossible that I should say, kill somebody.

Q. And so—well, your feelings on the subject, I take it, are strong enough that you have grave doubts in your mind that you would never vote for death?

[VD 616] A. I believe so.

Q. All right. Do you think there is conceivably ever a case that you personally would ever take pen in hand and sign your name to a death warrant?

A. I don't believe so.

Q. You don't think you could ever do that?

A. I don't believe so.

Q. Are you then really flat opposed to the death penalty to the extent where you would automatically have to vote against it in order to be straight with your conscious?

A. With my conscious, yes.

Q. You would have to automatically vote against that?

A. Yes.

Q. All right. Now, I understand your position, sir, and I'm sure your feelings are firm and fixed on this point, but the law requires me to go a step further and then we'll be done with this and hopefully your service—it will be clearer what your position is. But let me—the law requires I go one step further because of the new procedures that we have.

The law as it stands now in Texas, you don't simply go out and deliberate on guilt or innocence and then death or not death. The procedure is a little [VD 617] different than you might have expected. There are actually three questions that you answer and these three questions are as follows: whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and intentionally and with reasonable expectation that the death of the deceased or another would result.

The second question is whether there is a probability

that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. Now, that addresses itself to the future and has to do with criminal acts of violence. Now, it doesn't say acts of violence against people or property. It could be either one. And it doesn't talk about how serious those acts have to be: whether it's murder or breaking out somebody's plate glass window or what have you. But it does talk about it in terms of acts instead of one future act.

Now, the last question has to do with, if raised by the evidence, whether or not the conduct of the Defendant in killing the deceased was unreasonable in response to provocations, if any, by the deceased. Of course, if there's no provocation, the answer to that question would automatically be yes.

The law says once a jury starts their [VD 618] deliberations in an effort to answer those three questions, the answers naturally have to be either yes or no. And the law says if the jury comes up with three yes answers then that is a mandate to the Judge to sentence the Defendant to death.

Now, the Judge has no discretion at all in the matter. Three yes answers equals death by electrocution. One no in that group would result in a life sentence. In other words, that's the only other punishment that's available.

Now, as you can see, that's sort of an indirect death sentence but it's nonetheless, just as much a death sentence whether you go at it directly or indirectly. The end result is still the same.

Now, I take it that your feelings are such about capital punishment that your feelings would effect your deliberations in a case on the issues?

A. Well, the three questions that you mentioned, I think I could honestly try to answer those questions the way I saw them.

Q. I understand.

A. But as far as voting for the death penalty, I wouldn't want to do that.

Q. Well, do you understand that's, in effect, what you would be doing?

[VD 619] A. Yes, I understand that and in a round about way you're doing it.

Q. It's not round about, three yes answers, that's death and that's my point. We don't want to thrust you on a jury and cause you to violate your conscious. And if you're telling us that you honestly could not, in good conscious, allow yourself to be put in the position of having to ever answer those questions because of your feelings, well then, we understand.

You see, a lot of people come down and think well, if I don't agree to be on the jury, then I'm not being a good citizen and that's just not true. You're being just as good if you honestly tell us how you feel inside. That's just as important to law enforcement and to the administration of justice, as to the person who comes down and says yes, I can serve. Some —not everybody can fill those twelve seats.

From what you have told me earlier, I got the distinct impression if you were forced to anwser those questions, if you were forced to deliberate on death, that you personally just could never be a person who could do that?

A. It would be hard.

Q. And I know what you mean when you say it would be hard, but I actually have to carry it a step [VD 620] further and just ask you; you had said earlier you would automatically have to vote against death and I take it that's the way you honestly feel?

A. At this point, I think it is.

Q. All right. And so therefore, I take it that you could not state under oath that the mandatory penalty of death or imprisonment for life would not effect your deliberations? I take it they would effect your feelings about that, would effect your deliberations on any issue of fact.

A. Well, they might. Of course, I have got a son that's a Policeman. He's been a Policeman twelve years and if this had been my son, then I might feel all together different.

Q. All right.

A. I don't know, but like I say—

Q. Well, it makes a big difference if it's somebody in your own immediate family. And I think that that's why jurors cannot be on a case that they're directly involved in. This wasn't your son, Officer Wood, and I think—I know a lot of people who share your feelings about things like this, that if it was someone in your own immediate family, you might want to take matters in your own hands.

But as far as being on a jury, obviously, you could never be on a jury [VD 621] involving someone in your immediate family. Are you saying that unless it were someone in your immediate family?

A. No, I'm not saying that. I'm saying my feelings would probably be much stronger and had it been my son, I might be able to sit on a jury and be able to say I voted for the death penalty. But since it isn't, I think that would be an indelible memory that I would have.

Q. Such an indelible memory that you just—

A. I think it would be troublesome to me.

Q. And you're afraid it would affect you to the extent that you could not in good conscious ever consider the sentence of death, whether you arrived at it directly or indirectly?

A. I don't believe I could.

Q. And therefore, you could not state under oath that the mandatory sentence of death or life would not affect your—it would affect your deliberations?

A. Yes, it would.

* * *

[VD 623] THE COURT: All right. Now, so the question is, could you give us your assurance without reservations that if [VD 624] you're on the jury and you found him guilty of capital murder, that your deliberations on those issues of fact on those three questions, could you give us your assurance that you would not be influenced in answering those questions by the punishment of death or life imprisonment?

MR. SCOTT: Your Honor, I would ask that it be posed to the other alternative also since he's indicated all along—

THE COURT: Let me get a clear cut answer to this first because I don't know that it's been put exactly in those terms.

JUROR FERGUSON: I can't, at this point, see how it could keep from influencing me in some fashion. Now—

THE COURT: Now, life imprisonment?

JUROR FERGUSON: No problem.

THE COURT: All right. Well, do you think that punishment of death would affect your deliberations on the issue of facts involving the punishment hearing in a capital murder case?

JUROR FERGUSON: Well, if you were [VD 625] putting me in a situation where I knew it was—saw it was a yes answer to those three questions that, in effect, I would be doing the same thing as sending him to the electric chair.

THE COURT: Is what you're saying, knowing he would go to the electric chair, are you saying that would affect your ability to answer those questions?

JUROR FERGUSON: It wouldn't affect my ability, but it would cause me to do some squirming trying to be honest in my answers if I felt like the answers to the three questions was yes.

THE COURT: Do you think it would affect your deliberations on these issues of fact?

JUROR FERGUSON: I don't see how it could keep from affecting it some.

THE COURT: All right. Do you have any further questions, Mr. Scott, in light of that answer?

MR. SCOTT: No, but we would like to submit for cause both under Witherspoon and under the oath, 12.31.

[VD 626] THE COURT: I'll take it one step further now. From what you say, are your feelings in this regard so strong that you could not set aside those feelings and vote on those issues of fact on a punishment hearing and set out of your mind the question of the death penalty? This is another way of saying the same thing, I guess. But are you saying under all circumstances that it would influence your deliberations on these fact issues?

JUROR FERGUSON: I don't see how it could keep from influencing it. That's what I'm trying to say.

THE COURT: I understand.

JUROR FERGUSON: I don't see any way that it could not in some fashion influence my thoughts. Now—

* * *

[VD 1017] NELDA COYLE

* * *

[VD 1023] [By Assistant district attorney Steve Tokley]:

Q. The first thing I'm going to tell you is that this is a capital murder case. By that I mean it's the type of murder where if the Defendant is found guilty he would receive only one of two possible punishments, either a sentence of death

or a sentence of life. Those are the only two possible punishments.

In this case the District Attorney's office is seeking the death penalty. Now, knowing that I want you to tell me what your feelings are about the death penalty.

A. You mean if it should be?

Q. Yes, to start with.

A. Well, I'm not against it in certain circumstances.

Q. Are you in favor of it in certain circumstances?

A. Yes.

Q. Okay. Now, how long have you been a believer in the death penalty in certain types of cases?

A. Always.

Q. Always?

A. Ever since I can remember.

[VD 1030] And may I, from talking to you, aren't you telling me that—or are you telling me—let me put it this way: Are you telling me that the mandatory sentence of death or life would affect you in your deliberations on any of those issues of fact?

A. I believe so.

Q. That is what I understood from talking to you. And may I take from what you just then said that you could not say under oath that the mandatory sentence of death or life would not affect you in your deliberations on any issue of fact?

A. It would bother me.

Q. It would affect you in your deliberations, is that what you are saying? I have to ask you in the words of the law.

A. Yes.

[VD 1031] Q. And therefore, since the mandatory sentence of death or life would affect you you could not say under oath that it would not, is that correct?

A. Right.

* * *

[VD 1046] THE COURT: Let me see if I can be of some help. It's really this simple. When you deliberate to decide upon a fact in this case, to decide factual issues whether it is—whether the Defendant is guilty, whether you should answer the question yes or no, whatever, the law says in order to be qualified to be on this Jury you have to be able to give these lawyers and give me the unequivocal assurance that when you deliberate with the other jurors on those

questions that you will not be affected in any way by the punishment that could result from the case. That in deciding whether the Defendant for instance would commit future acts of violence and in reaching your decision on that and in voting and filling out a [VD 1047] verdict form, that you wouldn't be influenced in any way by the fact that death might result or life imprisonment might result. That you will simply listen to the evidence and decide those facts without regard to what the effect would be, whether life or death would ensue. Do you follow?

JUROR COYLE: (Juror nods.)

THE COURT: Some people can do this and some people can't. Some people can sit on a jury and listen to the facts and reach a decision based upon the facts decide if it was deliberate, if there is a probability of future acts of violence and whether or not there was provocation that was reacted to or not. Other people can't. They feel that, well, if I'm on the jury there is no way that I can really put out of my mind about death or life and just answer the questions and I know that I would be affected by what punishment would result in trying to answer these questions. Do you follow [VD 1048] me?

JUROR COYLE: Yes.

THE COURT: Now, what I think this is—what Ms. James is getting at and it's the very question Mr. Tokley asked perhaps in a little different words. Where do you stand or sit on this? In other words, would you be——

JUROR COYLE: Like I told him. I haven't done this before so I would simply not know.

THE COURT: Okay. I understand your answer.

JUROR COYLE: Do I have to say yes or no?

THE COURT: No, if you don't know, you don't know. Up to this point, you see, the State is entitled to have twelve jurors that can follow all of the law in this case and the defense is entitled to have twelve jurors the same. That is why we spend so much time talking to the jurors. There aren't any right or wrong answers, don't concern yourself about whether [VD 1049] you are—what you are saying is wrong or right. All we are trying to do is find out how you feel.

Now, the State is entitled and the defense is entitled to twelve jurors who will listen to this case and can assure all

of us at the outset that their deliberations on these factual questions will definitely not be influenced by the punishment.

What you are saying, as I understand it, is that you really don't know, and I take it by that to mean you are not sure if it would and you are not sure if it wouldn't?

JUROR COYLE: I haven't done this before.

THE COURT: But is that a fair statement of what you are saying?

JUROR COYLE: Yes.

THE COURT: Okay. Now, to take that to the next step, is that to say that it is possible that your deliberations on these factual issues could be affected by the punishment?

[VD 1050] JUROR COYLE: That I couldn't answer because of the punishment.

THE COURT: Well, not that you could not answer it but that your answer or your deliberation would or could possibly be affected by the punishment that might result?

JUROR COYLE: I'm not sure I understand what you mean.

THE COURT: Okay. My question is, both sides are entitled to have twelve jurors who unconditionally guarantee us that when you are deliberating on these fact issues, when you go back and deliberate your verdict, you are trying to decide should I answer this question yes, should I answer this question no, should I answer this question yes, should I find him guilty or not guilty, that in deciding these things that the punishment of life or death would not affect your deliberations, that you would deliberate on those fact issues without regard to what the punishment is in the case.

[VD 1051] JUROR COYLE: Yes, well, I think I could answer that.

THE COURT: Now, earlier you had told Mr. Tokley, I believe your statement was that you could not or you were not sure if the punishment that might result whether it would or would not affect your deliberations on these fact issues.

JUROR COYLE: It's difficult for me to say because I have never been in this position before.

THE COURT: Now, what—the reason we all dwell on this so long is very simple. The law says that nobody can serve as a juror on a case where the death penalty could be involved, in a capital case, nobody can serve on that jury unless they can definitely assure all of us that they will in

no way be affected in their deliberations of facts by the punishment that is involved.

Now, if we cannot get this assurance then you are not a qualified [VD 1052] juror, you see? Even though you would say well, maybe I could and maybe I couldn't.

JUROR COYLE: Well, I'm sorry. I follow you. I just don't know.

THE COURT: That is fine. If that is the way you feel that is fine because we get a lot of people that say I won't be affected and a lot say that they would. And there are also a lot that say I really don't know.

You see, it would not be fair to the Defendant for instance——

JUROR COYLE: I understand.

THE COURT: You see, to have a juror that might gauge a certain answer to get a certain result on punishment would not be fair.

JUROR COYLE: I understand.

THE COURT: And the same to the State. So that is why we have to have this assurance from the juror that there is no question in your mind but what you could follow the law and not be affected in your deliberations by [VD 1053] the punishment.

Now, I understood earlier, and let's go back to this, that what you are saying is you are not sure?

JUROR COYLE: That's right. I haven't done this before.

THE COURT: Okay. And that maybe you won't be affected and maybe you would? Now, I take your unsure to mean maybe I would and maybe I wouldn't?

JUROR COYLE: I know it's sort of wishy-washy.

THE COURT: No.

JUROR COYLE: But I can't tell you something that I haven't done.

MS. JAMES: Actually, Your Honor, I believe the best qualified jurors are those that come with no preconceived notions.

THE COURT: That might be, Ms. James, but let me finish this.

What I'm trying to do, I guess, is to find out more about what you mean when you say that I'm not certain or I don't know, because it's the I don't [VD 1054] know that really brings the problem. It's the I don't know or I'm not sure

means that maybe I would not be affected or maybe I would be affected, is that what it means, the I don't know, because until I get there I won't know and it's possible I could and it's possible I couldn't?

JUROR COYLE: Right.

THE COURT: Okay. You understand the situation we are in now is, and I'm not trying to get you to change your answers, I know you won't, you tell us exactly how you feel, that is what this is all about right here. The dilemma right now is that Ms. James wants to find out for certain whether or not you could or could not—back up.

We need to know before you can be on the jury, we have to know that you would not be affected by the punishment in your factual deliberations and I understand at this point in time that—what you said is you cannot give us [VD 1055] that assurance.

JUROR COYLE: (Witness nods head.)

MR. TOKLEY: Let the record reflect her answer was yes.

THE COURT: You have to speak out so she can take down what you say. What was your answer to that, ma'am, you nodded yes, but what was your answer?

JUROR COYLE: Rephrase it.

THE COURT: All right. As I understand it you are not able at this point in time to asure us that your deliberations on the fact situations would not be influenced by the punishment, is that correct?

JUROR COYLE: That's right.

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[VD 1063] Q. (By Mr. Tokley) All right. Then the question was asked of you, we discussed the procedure in this type of case. I discussed it with you, the Judge discussed it with you and Ms. James has discussed it with you, that the procedure being this is a trial in which there are two parts. The first part has to do with whether or not the Defendant is guilty of the crime that is charged. That is an issue in the case. If guilty then the second part has to do with whether he receives the death penalty or life sentence. That is determined by the answering by the jury of three questions. We discussed those three questions and discussed that three yes answers equal death, one or more no answers will be a mandatory life sentence.

And then I asked you after explaining the State's burden of proof throughout the case, I then asked you if your feelings concerning the mandatory sentence of death or life would in any way affect your deliberations on any of those issues of fact in the case.

Ms. JAMES: Your Honor, I would object to the prosecutor attempting to [VD 1064] lead the witness, that each and every time that the witness gives——

THE COURT: He hasn't finished the question yet.

Ms. JAMES: I'm making my objection.

THE COURT: When he finishes his question, I will allow him to finish the question before I allow your objection.

Ms. JAMES: I thought he was finished. Excuse me.

Q. (By Mr. Tokley) I believe you said that at first you didn't know whether it would or not?

A. That's right.

Q. Is that the way you feel?

A. Yes.

Q. And therefore——

A. But if I had to make a decision, I guess I'm goofing this whole thing up, but I don't know what else to say.

Q. Well, I think what we want to know from you is—you have told us and I think you have tried to tell us and have repeated it more than [VD 1065] one time, that you cannot tell us whether the mandatory sentence of death or life would affect your deliberations or not?

A. I haven't been there.

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[VD 1067] Q. (By Mr. Tokley) Mrs. Coyle, can you tell us at this time unequivocally that the mandatory sentence of death or life would not affect your deliberations on any issues of fact in the case?

Ms. JAMES: The same objection, Your Honor.

THE COURT: Same ruling.

Q. (By Mr. Tokley) Can you tell us that or can you not?

A. I cannot tell you this because I don't know.

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[VD 1525] MRS. LLOYD WHITE

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[VD 1528] [By Assistant district attorney Steve Tokley]:

Q. What are your feelings about the death penalty?

A. I guess I just don't believe in capital punishment then.

Q. Fine. No one has any quarrel with you about that. You are certainly entitled to that and that is what we need to find out from you.

THE COURT: Let me help, see if this will help you relax a little bit.

There is no right or wrong answers, it's a question of how you [VD 1529] feel. And the most important thing is that the lawyers and I know how you feel about these things. That is all we are trying to do is to find out how you feel, okay?

And as I understand it you do not believe in or are opposed to capital punishment; is that correct?

JUROR WHITE: Let me say this: I always thought I believed in capital punishment but as soon as—when it comes to me, someone asking me, it's just difficult.

THE COURT: Let me try it this way—

JUROR WHITE: It's hard to answer or something.

THE COURT: All right. Let me ask you this, Mrs. White. There is one group of people we run into who believe in the death penalty, they believe it's a good law, they can sit on a jury and vote on it in a proper case if they thought it was proper.

Another group is opposed to the [VD 1530] death penalty, they don't want anything to do with it, they wouldn't vote for it.

There is another group that believes in capital punishment but they don't themselves believe that they themselves should be the ones to have to sit and vote it although they believe in it, they themselves could not sit on a jury and vote for it.

There is yet another category that are opposed to it but they feel they could sit on a jury and do it even though they are opposed to it. Even though—because it is the law.

JUROR WHITE: I think I believe in capital punishment but I don't want to have anything to do with it, is that clear?

THE COURT: Well, that helps us understand.

JUROR WHITE: That is my feeling.

Q. (By Mr. Tokley) All right. You believe in capital punishment but you personally [VD 1531] could never sit in a case which would call upon you to make decisions that could lead to a man's death?

A. Uh-huh.
Q. That is your feeling?
A. Yes.

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[VD 1535] Now, you have told us that even though philosophically you are in favor of capital punishment you yourself personally could not be involved in this kind of situation, am I correct?

A. Yes, sir.

Q. All right. May I from your answers—are you saying that this mandatory sentence of death or life would affect your deliberations on the issues of fact in the case including those three questions, is that correct?

A. Yes, sir.

Q. No doubt about that I presume, but the mandatory sentence would affect your deliberations?

A. Well—

[VD 1536] Q. Do you understand my question?

A. No. Say that again, please, sir.

Q. You have indicated to the Judge quite strongly that you personally even though believing in the death penalty could not, because of your own reasons and your own make-up, sit in this type of case and make decisions that could result in the death penalty, we are clear on that?

A. Uh-huh, yes, sir.

Q. From that then are you saying that the mandatory sentence of death or life would affect you in your deliberations on the issues of fact in the case?

A. In voting on it, is that what you mean?
Q. In your deliberations on it, yes.
A. Well, I don't know.
Q. You cannot say that it would not, is that correct?
A. Yes.

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[VD 1543] THE COURT: Let me ask you this: Would you ever in a case, would you ever be able to, if you were a juror, we are talking hypothetically, if you were a juror would you ever be able in a capital murder case to vote yes to all three of those questions if the [VD 1544] evidence dictated to your way of thinking that the correct answer would be yes, would you ever be able to vote yes to all three questions in a

capital murder case realizing that the death penalty would result?

JUROR WHITE: I don't think so.

THE COURT: All right.

MR. TOKLEY: I challenge for cause, 1231.

THE COURT: Let me go back and ask this. If you were on this jury, could you give your unequivocal assurance, I'm asking hypothetically, could you give us your unequivocal assurance if you were on the jury and if you did find him guilty of capital murder that you could answer those three questions on the punishment part without in any way being affected by the punishment that exists, the death or life punishment, or do you think that knowing the punishment is there would affect your deliberations on those questions? [VD 1545] JUROR WHITE: It would probably affect me in my deliberations.

THE COURT: All right. Would it be fair then to say that you cannot give us your assurance that you would not be affected by the punishment of life or death in deliberating the fact issues in the case?

JUROR WHITE: That's correct.

* * *

[VD 1547] THE COURT: I think what Ms. James is saying, could you ever if the case was just bad enough, could you ever set aside your feelings and vote for the death penalty either directly or indirectly?

JUROR WHITE: I guess I could, I guess I could.

Q. (By Ms. James) All right. That is the answer. There are no right or wrong answers but that is your answers that you could?

A. I guess I could.

Q. You could set aside your own personal feelings and vote yes if the facts definitely justified it?

A. I guess I could.

Q. We would not want you to vote yes—we need your honest vote on the questions, not on your feelings. In other words, if you felt that the fellow should get death but you feel some of the [VD 1548] answers should be no you would be obligated to vote no in answer to the questions regardless of your feelings and also the converse is also true. If you

felt that some of the questions or all of the questions should be answered yes but your personal feelings were to set it aside and attempt to save him from the penalty, whichever it is, you would still have to answer yes if you honestly feel that the answer to that particular question should be yes, you understand now?

THE COURT: Do you understand what she is saying?

Q. (By Ms. James) You have to have—you have to vote the question—the answers to the questions honestly irregardless of what you think the penalty should be, do you think you can do that?

A. Yes.

Q. If the facts and circumstances justified it?

A. Yes.

Q. A yes or no answer—you would answer yes or no irrespective of how you would—you would set aside your feelings about how you thought the punishment should come out?

A. I think so.

• • •

[VD 1558] MS. JAMES: Your Honor, I again object to this question, it's been asked and answered on the first go-around. I think they finally did answer the first time they went around. [VD 1559] She did not think her fact deliberations would be unequivocally——

JUROR WHITE: Well, I don't think—I think that was wrong.

THE COURT: Your objection is overruled.

JUROR WHITE: I think I answered wrong. I think I have got to go back the other way now.

THE COURT: Well, that is what we are trying to find out.

JUROR WHITE: Now, am I making myself clear now?

THE COURT: Well, the reason I go into it is because I think that you originally answered it one way and then answered it a different way, is that right?

JUROR WHITE: I think that is what I did, yes.

• • •

[VD 1562] [By the Court]:

Now, my question is: In deciding and deliberating these fact issues in the case could you give us your assurance that in deliberating on these fact issues that you would not be

affected by the mandatory punishment of death or life imprisonment?

[VD 1563] JUROR WHITE: I could not give you my assurance that I would not be affected.

THE COURT: Okay. Are you saying then it's possible you would be affected, is that a fair statement?

JUROR WHITE: Yes, sir.

THE COURT: Okay. Thank you very much.

Do you submit the juror based on that?

MR. TOKLEY: I challenge for cause.

THE COURT: Now, she is passed to you for further questioning on this issue.

CONTINUED EXAMINATION

BY MS. JAMES:

Q. I'm sorry we have to go over it again but I understood you to say when we asked you at the beginning could you lay your opinion and your feelings aside and answer the questions honestly, I think you said yes?

A. I did but I cannot say yes to that now. That is not—I couldn't lay my feelings aside.

* * *

[VD 2571] CURTIS WILLIAMS

* * *

[VD 2576] [By Assistant district attorney Winfield Scott]

Q. Okay. Can you tell us how you feel?

A. I think a person should be punished if they have done wrong.

Q. What about capital punishment, the ultimate punishment?

A. First, killing another person, killing someone, I don't know about that. I don't know.

Q. Let me ask you this: Are your feelings such that you don't really know how you feel about it?

A. I just don't know how I feel.

Q. All right. Are they such that you really, as you sit there now, don't know whether you could vote [VD 2577] for death or not?

A. I don't know whether I could vote for death or not, I just don't know.

* * *

[VD 2585] Q. (By Mr. Scott) Can you tell us now whether [VD 2586] or not you could ever vote for the death penalty, to your present way of thinking?

A. (By the witness) I don't know.

Q. You don't know, all right. So you can not tell us that your mind is open to it right now, is it?

A. No, it's not.

Q. Some day in the future you might be able to vote for capital punishment——

Ms. James: That's leading.

The Court: Sustained.

Q. (By Mr. Scott) Do you or not think that maybe some day in the future you may be able to vote for capital punishment?

A. (By the witness) Probably. I don't know.

Q. But not right now?

A. I don't know whether right now——

Ms. James: Object, leading.

The Court: Sustained.

Q. (By Mr. Scott) How do you feel right now? That's all we want to know.

A. Well, like I said, I believe in punishment.

Q. Yeah.

A. Punishing a person if they've done wrong. But if—taking another person's life—for a life, I just couldn't.

[VD 2587] Q. You couldn't do it?

A. I don't think I could.

Q. You don't think you could ever do it?

A. The way I feel now, I don't think I could do it.

Q. Do you feel that way pretty strongly?

A. Right.

Q. We're talking about right now.

A. Yes.

Q. Do you think the way you feel right now that you'd have to right now, at least, automatically vote against the death penalty?

A. I might, probably.

Q. Is that the way you think you feel?

A. Right.

Q. Okay. And to your—the way you feel now, tell us yes or no, do you feel like that you could never ever vote for the

death penalty right now? Maybe some day, but not right now?

A. Maybe some day, not now.

Q. Right now, you flat could not?

Ms. James: Object, leading.

The Court: Don't lead.

Q. (By Mr. Scott) You flat could not, no matter how aggravated the facts, give death?

[VD 2588] A. (By the witness) I don't think I could.

Q. Do you feel pretty strongly about that?

A. Yes, sir.

Q. So when you say you don't think you could, are you saying you flat couldn't? We need a firm answer from you.

A. That's—it's kind of hard to do. It's like saying you can go out there and run in the back of another car, but once you are there——

Q. I know where you are now mentally, not in the future, but right now. Are you not of a frame of mind that you could ever, right now, this moment, ever, no matter how aggravated the facts, give a sentence of death? And you've said you didn't think so. Are you saying 'No, I couldn't' or 'I can't say' or 'Yes, I could'?

A. I don't know.

Q. You don't know?

A. No.

* * *

[VD 2591] Q. (By Mr. Scott) Let me go to 1231. Let me read this to you. It says: "In order to be qualified to serve on the Jury a Juror has to be of the frame of mind that the mandatory punishment of death or life imprisonment will not affect their deliberation on any issue of fact."

Now, if your feelings about capital punishment, about whether or not you could ever give it, would affect you in your deliberations, then you are not a qualified Juror, and that's the end of it.

Is that the way you feel, or am I wrong?

A. (By the witness) Well, like I've told you, if a guy that killed somebody—I can see him receiving a sentence or something like that, but I don't think [VD 2592] I could just—depending on me to say, 'Kill this guy,' I don't think I could do that.

Q. When you say "I don't think" are you saying you couldn't do it?

A. I can't do it.

Q. All right. I think we've finally broken the ice. It doesn't hurt to say 'I can't do something.' I know that's not easy for someone to say. I appreciate your candor. A lot of people feel that way. You're not less of a citizen because you feel that way. There are a lot of things I can't do personally. There's nothing wrong with that.

Are you saying, then, and I know how you feel, but I've got to kind of belabor the point to make it clear to all, are you saying you flat—your feelings right today are such that you could never ever vote in such a way as to sentence a man to his death? You personally.

A. I don't think I could.

Q. You could not or you do not think you could?

A. I don't think I could.

Q. Are you saying, then, that your feelings would affect your deliberations, how you feel about it?

A. Probably.

* * *

[VD 2595] THE WITNESS: If I knew all three questions was going to kill a guy, I don't think I could answer them yes.

* * *

[VD 2596] THE COURT: In other words, a Juror has got to be able to answer the questions yes or no. And what the law will not allow is a person who is on the Jury to go into the jury room and answer those questions with regard to what the—punishment would result.

In other words, if the evidence, to a Jury's mind, says the answers should be yes, then the Juror should be able to write yes. Okay, you know if you answer all three, then he gets death, and you know if you answer any one no, he gets life, right?

THE WITNESS: (Witness nods head, indicating affirmative response.)

THE COURT: Now, if you're on the Jury, would you be able to decide those questions without any regard whatsoever to the punishment that would follow, in other words, about life or death?

Or, on the other hand, would your deliberations be affected—your deliberations on fact issues be affected by the punishment of death or life? Do you understand?

THE WITNESS: Yes, I understand.

THE COURT: What is your answer?

[VD 2597] THE WITNESS: I could answer the questions.

THE COURT: All right, sir. Would you and could you answer all three of those questions yes if the evidence says, to your way of thinking, that the questions ought to be answered yes?

THE WITNESS: That's right.

THE COURT: Even though you realize if you did answer yes that the death penalty is going to come out of that, could you still answer those questions yes? That's what I'm getting at. If you can, you can; if you can not, you can not. We just need to know how you feel.

THE WITNESS: I guess I could answer all three questions yes.

THE COURT: Say you're back in the jury room and found him guilty in capital murder, you're voting on these questions with the other Jurors; and let's say under the evidence you heard that you believe that the right answer to all three of those questions is yes, okay?

THE WITNESS: Right.

THE COURT: You know that if you vote yes on all three questions that his punishment is going to be death; and my question is, under those circumstances would you go ahead and vote yes or [VD 2598] would you be influenced by the death penalty part to keep you from voting yes?

THE WITNESS: I think I would be influenced by the death penalty.

THE COURT: Do you think the punishment of death would affect your deliberations?

THE WITNESS: Yes.

* * *

[VD 2602] THE COURT: Let me ask you again, in your [VD 2603] deliberations on the issues of fact, in other words, those three questions we've talked about, would you be

affected in your deliberations by the punishment of death or life imprisonment?

THE WITNESS: That's right.

• • •

[VD 2692] BOBBIE ANDREWS

• • •

[VD 2697] [By Assistant district attorney Winfield Scott]:

Can you give us a clear unequivocal answer about how you feel about it?

A. (By the Witness) Well, I think I'm in the group that believes in it, but I'm not sure I would want to be a part of administering it.

Q. All you have to tell us, and then you'll be on your way home, you personally could never ever vote for it yourself even though you may personally be for it, if that's the way——

A. I don't believe I could do it.

Q. When you say, "I don't believe I could"——

A. I've never been in this position.

Q. Are you saying you flat could not do it yourself?

A. Yes.

Q. All right. Are you—is there any equivocation on your part? Or are you flat saying, 'I could never, ever do it no matter what the facts or circumstances are. I might be in favor of it as a concept in society, in an abstract sense, but I personally could never do it'?

A. Yes.

Q. No ands, ifs or buts about it?

[VD 2698] A. No.

• • •

[VD 2704] We come back to statutory Article 1231; if you are on this Jury could you give us your unequivocal assurance that the punishment of life or death would not affect your deliberations on any fact issues in this case?

THE WITNESS: I don't believe I could give you my unequivocal assurance.

THE COURT: Are you saying it is possible that the punish-

ment of life or death might affect your deliberation on the fact issues?

(Pause.)

THE COURT: The reason I put it—let me explain it this way: I think very often Jurors fall into one of several categories, 'Yes, I would be affected,' 'No, I would not be affected,' or 'I don't know.' You see?

THE WITNESS: Uh-huh.

THE COURT: I don't know that there's really [VD 2705] anywhere else to fall, but I'm not sure. It's either yes or no or I'm not sure. I'm not trying to limit you, I'm saying this in an effort to find out how you feel.

In other words, to be on the Jury you have to be able to give us the assurance that your answers to fact issues would not be affected—would not be affected by the punishment of life or death.

It would not be right to the Defendant, for instance, if a Juror felt, after hearing all the evidence, 'By golly, he ought to die in the electric chair' and went back there and answered those questions yes to see to it by the answers that he got death. Do you see what I mean?

THE WITNESS: Uh-huh.

THE COURT: Those questions are not geared to letting the Jury manipulate the answers. The answers have to be honest.

Nobody has any quarrel with the way you feel. If you will be affected, not be affected, or you don't know. It's that simple.

So let me give you the question one more time. Would the mandatory punishment of death or life affect your deliberations on any fact issue [VD 2706] in this case?

THE WITNESS: (Pause.) I have to say it would.

* * *

[VD 2708] [By defense counsel James]:

Now, what I'm trying to say, do you mean to say there's no situation, no matter how aggravated, no situation in which the facts could be so vile and aggravating that you could never, ever consider giving the death penalty as the penalty for capital murder?

A. I certainly could consider it. I was just answering his

question. I felt my feelings might enter into it. I do not believe in taking someone else's life.

Ms. JAMES: I hope none of us do.

MR. SCOTT: Object to her side bar comment.

THE COURT: Sustained. Ms. James, go ahead with the next question.

Ms. JAMES: All right.

Q. (By Ms. James) Now, well, would you share with us the reason why you feel that it might affect your deliberations?

MR. SCOTT: If she knows.

THE COURT: If she knows.

A. (By the Witness) Well, I would feel that I had had a part in being responsible for someone's life being taken.

* * *

[VD 2719] [By defense counsel James]:

Q. Would there be any feeling in your mind that you would automatically always vote against death as a punishment whenever you have formed an opinion that the person on trial is guilty and the offense is capital murder, even though you formed that opinion?

A. Would I automatically vote against it?

Q. Yes.

A. I just said that I was afraid I could not lay aside my feelings. I don't know that I would automatically vote against it.

Q. Regardless of your views on capital punishment, can you render an impartial verdict on whether [VD 2720] the Defendant is guilty or innocent?

A. Well, I don't see how I can answer that question today. Ask it again.

Q. Regardless of your views on capital punishment could you render an impartial verdict on whether the Defendant is guilty or innocent?

A. Well, I said that I'm not sure my feelings would not affect my decisions. So I think that answers your question.

* * *

[VD 2726] THE COURT: Can you assure us that your—can you assure us that the mandatory punishment of death or life imprisonment would not affect your deliberations on any fact issue in this case if you're on the Jury?

THE WITNESS: That's what I said I could not assure you of.

THE COURT: The reason—okay, go ahead.

THE WITNESS: Well, I still feel the same way. I don't understand why she's, you know, trying to put it in a different way so I would answer in a different way.

THE COURT: We come back to the ultimate question——

THE WITNESS: Well, I have given you my answer, but . . .

THE COURT: What I'm asking is your answer, as you said earlier, or is it different, or what?

THE WITNESS: Well, you know, it's hard for me to visualize—I would not want to be dishonest in the way I answered the questions. But my [VD 2727] personal feeling is I don't want to be a part of taking someone's life.

Now, is that—you know, are those two answers not compatible?

THE COURT: I don't want to comment on that, because in the end I have to come back to the statutory question. We can not impanel, under the law, anyone—anybody on this Jury unless and until that Juror can swear under oath that the mandatory punishment of death or life imprisonment will not affect their deliberations on any fact issue in this case.

THE WITNESS: Okay. I can not do that.

THE COURT: You can not swear to that?

THE WITNESS: Right.

* * *

[VD 4443] ANTHONY GUIFFRIDA

* * *

[VD 4448] [By Assistant district attorney Winfield Scott]:

Could you give us your personal convictions, your personal feelings about the death penalty and capital punishment?

A. I think I feel the second group in that respect. Many times I have said that they deserve this or that, but to actually put my hand to it, I don't think I could. I don't think I could.

Q. No quarrel with that at all. Again, I strongly feel that people have a right to feel how they want to in this country, and I have got some strong feelings myself about some of our laws, and if I were on a jury, I'm not sure if I could follow certain of our laws personally.

Again, you can feel one way about a law or the fact that it exists in our society and that there's a need for it, but you also have a right to your feelings. A lot of people feel exactly like you do, and they have no quarrel with the law, but it's just that they personally could never be the one who actually sentences someone to their death.

[VD 4449] A. It's because I feel—well, if it were not something that affected me, maybe I would have a different attitude. I don't know.

Q. You mean if it was someone in your own family?

A. Yes.

Q. Obviously you would not be a proper juror if it involved someone in your own family, but would it be fair to say that if it wasn't someone in your family that you personally would never feel like you personally could ever vote for the death penalty?

A. I really don't know.

Q. Well, then let me explain. There's nothing wrong with not knowing if you're not sure.

Would it be fair to say this. You could not give us the assurance that you would ever be able to vote for death?

Ms. James: I ask that he rephrase it, leaving out the double negative.

The Court: Overruled.

A. (By the Witness) At this point I really don't know.

• • •

[VD 4452] Q. So as you sit right now, you cannot really assure us that you could ever personally vote for death. Would that be a fair statement?

A. That's true.

Q. All right, and would it, therefore, be a fair statement that because of your feelings about being uncertain, about personally being able to give the death [VD 4453] penalty, am I correct that your feelings would affect the way that you deliberated the case? Your uncertainty at this point?

A. Yes.

• • •

[VD 4456] I think the real problem comes with what we are getting ready to go into. You have said the way you pretty well feel. You cannot assure us that you would ever

in your present position that you do not feel that you could ever vote for death in this case?

A. That's true.

Q. Today?

A. No.

Q. But in the future perhaps?

A. I would say so personally that there's a chance.

Q. Exactly. And now in light of the fact—from what you have said I take it that if you had to answer those three questions, that it wouldn't make any difference to you?

A. It would not.

Q. Because you realize that three yeses would mean death?

A. Yes, I realize that.

[VD 4457] Q. And would I be correct in saying that because of your present feelings that you could not give us any assurance that you would ever personally be able to answer those three questions yes because you know if you do that that would sentence a man to his death. Am I correct about that?

A. Right now, yes.

Q. Right now. In other words, right now because of the way that you feel you could not assure us that you would answer all three questions yes?

A. I don't think at this particular time. I say this particular time.

THE COURT: In your life?

MR. GIUFFRIDA: Maybe six months or a year or so. That I honestly can't say. I honestly feel that I could not give a sentence, or answer some way, where it would commit someone to death. I just don't think I could do it.

Q. (By Mr. Scott) And do you feel pretty strongly about that right now?

A. Right now I do, yes.

Q. And your feelings right now are such that you would have to vote in such a way as to vote——

A. I don't think I could give the death penalty [VD 4458] right now.

Q. Again, is it a matter of knowing nothing for sure?

A. Right.

Q. Fair enough. Now, I think one last thing. Because you are uncertain personally and presently about how you feel,

would it be fair to say that you could not tell us, you could not assure us that your feelings about this automatic death sentence would not affect your deliberations on any issues of fact? In other words, that because of your feelings, I take it that they could affect your deliberations?

A. Uh-huh, yes.

Q. And, therefore, I take it, and you tell me whether I'm right or wrong, I take it in your present way of feeling that you could not state under oath that the mandatory sentence of death or imprisonment, life imprisonment, would not affect your deliberations?

Ms. James: I object. He's leading the witness. I object to the way it's raised.

The Court: Restate your question.

Q. (By Mr. Scott) From what you told me—you told me—the mandatory penalty of death or imprisonment for life will not affect your deliberations on any issue of fact? From what you have told me, my impression is that [VD 4459] you could not take such an oath, because you don't know how you feel. Would that be fair?

A. That would be fair right now.

Q. Right now, the way you feel is that your feeling about sentencing someone to death could darn well affect your deliberations on any——

Ms. James: I object. He's leading again.

A. (By the Witness) I would say so.

• • •

[VD 4461] Except the fact that we are sitting here—but what I'm trying to ask you is, you're saying that you could never on this occasion if you were selected to sit on a jury and the person on trial was found guilty of capital murder that you could never set aside your own personal feelings and follow the law and answer the three questions as questions without considering the offense of the range of punishment? Is that what you're saying?

The Court: Do you understand the question?

Mr. Giuffrida: Yeah, I think so.

Q. (By Ms. James) What is your answer?

A. I don't think I could actually give it.

• • •

[VD 4492] PENNY L. McDONALD

• • •

[VD 4496] [By Assistant district attorney Winfield Scott]:

Would you tell us how you honestly personally feel?

A. I don't believe in capital punishment.

Q. You don't?

A. No, I don't.

Q. And so you would be in the group that is flat against it?

A. Yes.

• • •

[VD 4497] I take it that your feelings are so strong that you could never vote for the death penalty?

Ms. JAMES: I object. He is leading, Your Honor.

THE COURT: Don't lead.

Q. Could you ever——

A. It would have to be a very serious crime, and I feel that this is no more important than the death of anyone else.

Q. That particular offense, murder of a police officer, is not one of the ones that you personally could ever vote death on?

A. No.

Q. And am I correct, in your way of thinking, in the murder of a police officer, no matter how aggravated the facts were, you personally could never vote for death?

A. It would have to be very aggravated. I would have to be thoroughly convinced that it was a very, very aggravated act.

Q. Let me go back to square one.

You told us that you were against the death penalty.

A. Yes.

[VD 4498] Q. Well, are you against it but in some cases you could give it or are you just flat against it?

A. I couldn't give it in some cases.

Q. And you say that the murder of a police officer is or is not one of the kinds of cases that you might be able to give?

A. Well, it could be.

Q. Now, when you say very, very aggravated, you understand this indictment does not allege the murder of a squad car full of police officers or a police station full of police officers. It alleges the murder of one police officer.

Now, I don't know—I'm trying to sort of probe around and determine what you mean by being very, very aggravated. Do you mean a multiple murder?

A. No.

Q. It does not have to be murder of one police officer?

A. Yes, it could.

• • •

[VD 4506] THE COURT: I'm sorry. When you say you're against capital punishment, are you saying that you're against it period, or are you against it in most cases or I don't quite understand what you're saying.

Ms. MCDONALD: I'm against it as far as ever being personally concerned with it. Reading the paper or reading anything—I'm against it as far as that goes.

THE COURT: Well, are you saying that even though you're against it, since it is a law, that you could serve on a jury and vote for it if the facts were proper?

Ms. MCDONALD: Yes, I could.

Q. (By Mr. Scott) I understand your position now. It's a matter of the facts and circumstances and if the proper facts came along to your way of thinking, you could vote for death?

A. Yes, I could.

• • •

[VD 4529] Q. (By Mr. Scott) Would your feelings affect the way that you deliberated the issues of fact in the case?

A. Yes, I think anyone's feelings would.

[VD 4530] Q. I'm not arguing with that. Would the mandatory sentence of death or life affect your deliberation on the issue of guilt or innocence?

A. Not the guilt or innocence. If the man is guilty, he's guilty, and the next step is the next step.

Q. You say it would on the three questions?

A. Might. I don't know. Like I said before, I would have to hear all of the circumstances and all of the facts. I think anyone who sat back there, even they told you emphatically—would inject their own feelings.

• • •

[VD 4535] In other words, would the question of life or death affect your deliberations on the fact issues in the case?

Now, if you can assure us of that, that would not affect your deliberations, then you are qualified. If you cannot give us that assurance, you are not qualified. Does that help you understand?

Ms. McDONALD: I don't know if I could find him guilty unless the circumstances, evidence, you know, was right—I could do it if I felt strongly about it.

* * *

[VD 4542] Q. We need to know how you feel now, not how you might feel. In other words, are you in a frame of mind right now where if you were convinced he is guilty, you would find him guilty, and if you're convinced the answer to the three questions should be yes, even though by answering them yes, you know he is going to get death, and you don't think he ought to get death, what would you do?

A. I wouldn't answer the three questions yes unless [VD 4543] I felt he deserved death from the facts, and I can't consider the facts until I have heard them, and then I might change my mind. I can't say what I would do until I know the facts.

Q. Would you, if you thought the facts meant the questions should be answered yes, and yet your feelings told you he should not get death, would your conscience require you to misanswer one of the questions?

A. No.

Q. So you would set aside your conscience?

A. Yes, I would.

* * *

[VD 4550] Q. (By Mr. Scott) We got so balled up in this other thing that I never got back to the oath.

You understand that we, as prosecutors, have to disqualify jurors if he or she states under oath that the mandatory sentence—life imprisonment, or death; will not affect his or her deliberations on any issue of fact.

Now, are you able to give us that assurance now?

A. I don't know. I don't know. It goes back to so many things. I don't know if I can.

[VD 4551] THE COURT: Do you have reservations in your mind about it?

Ms. McDONALD: Yes, I have a reservation about my ability.

Q. (By Mr. Scott) So at this point, you're not prepared to take such an oath?

A. No, I don't want to.

* * *

[VD 4552] Q. (By Ms. James) I think you answered—well, [VD 4553] you said several things. You answered that in the guilt or innocence phase that it would depend on the facts and circumstances, but that you could, in a proper case, vote for the death penalty, if the facts and circumstances require the answer to be yes to those questions.

A. Yes, I could.

Q. All right, then there is no question in your mind that you could do it?

A. Right now there is not, but I don't know about when I get back there and about when I have heard all of the facts.

Q. Well, you see, we are not asking you to commit that yes, I will vote yes on the answers. We are not asking you to vote yes or no.

All I'm asking is that if the three questions arise in the course of the trial, can you vote?

A. Yes.

Q. And you can vote about the death penalty or the life sentence, whatever?

THE COURT: Don't lead the juror. Rephrase your question.

Q. (By Ms. James) It would not affect, I take it, from your answer that it would not affect your deliberations in the guilt or innocence phase of the trial? If you will give us that assurance——

[VD 4554] MR. SCOTT: I object. Leading.

THE COURT: Sustained.

Q. (By Ms. James) The question is, would it or would it not affect your deliberations on the guilt or innocence phase of the trial? Or on the answer to the three questions as questions—as individual questions, if you knew that the penalty was either life or death.

A. I don't think that it would.

Q. Is it a possibility?

A. I can't be any more specific. I don't know until I get back there. I don't think that it would. Right now it wouldn't. Right now I can say that. If the prosecutor proves

it to me beyond a reasonable doubt—beyond a shadow of a doubt then I will find him guilty. If I will answer them yes, that will be that. That's the way I feel right now.

Q. I'm not asking you to prejudge about what the facts and circumstances that might come up. We can't do that. We can't suggest that.

Right now, can you or can you not take the oath that you would not be affected——

A. (interposing) I don't know. I don't know that I can give you that oath. That's just what I told Mr. Scott. I dont' know.

I know right now I feel like if the facts were [VD 4555] right, I could do it.

I don't know how I'm going to feel after I've heard the facts.

Ms. JAMES: I submit she is qualified.

THE COURT: Do I understand that what you're saying is that you cannot assure us that you cannot give us your assurance under oath that the man's punishment, life or death, would not affect your deliberations on the fact issues in this case?

Do I understand what you're saying, is that you're not able to assure us of that?

Ms. MCDONALD: Right now I could, but I don't know if that would hold up when the time came, and I don't want to give my assurance. I don't want to put the Court in that position.

THE COURT: Can you assure us that on the mandatory punishment of death or life, will not affect your deliberations on the fact issues in the case?

Ms. MCDONALD: Not in the future I can't.

THE COURT: In other words, you can't give us your assurance now, and say, next week [VD 4556] or the week after that when you're deliberating this case, that you cannot now assure us that you will not be affected in deliberating upon the fact issues; that the maximum punishment would not affect your deliberations? Is that what you're saying?

Ms. MCDONALD: That's correct.

Ms. JAMES: May I respectfully object to the Court's leading interrogation, and I would further like to question the juror some more.

Q. (By Ms. James) Now, I'm not asking you to foresee

everything that you might do in the future, but I would like to know whether or not—of course, you do not know your own mind sufficiently to be very certain of what—in fact, absolutely certain. This you do or do not know. Of course, you do not know about decisions you might make in the future.

You understand that I'm not asking you to prejudge a case. I'm asking you to tell me what you know that you would be able to do. Even though it might be a week or two before we get to that point.

I think we understand each other now.

We are having semantic problems now.

MR. TOKLEY: I object to Ms. James' [VD 4557] narration of "semantic problems".

THE COURT: Overruled.

A. (By the Witness) I don't know if I could do it in two weeks, a month, or three weeks. After being subject to the testimony and the facts, I don't know. I can't take an oath today saying that I will. I won't take an oath saying that I will.

Q. That's because I gather that you're being very careful before you actually commit your ability to take an oath at this point. I don't know what might happen in the future. Facts and circumstances might arise, but I'm not asking you to just imagine any situation. I'm asking you what frame of mind that you're in right now? You know your own stability. Are you stable sufficiently enough to be able to assure us that your deliberations would not be affected, as you have stated they are right now?—Unaffected by anyone?

A. I can't say they won't be affected in two weeks, if it gets that far to the punishment. I can't say. I can't tell the prosecutor that yes, I will, without a doubt in my mind, if I find him guilty, and I answer those three questions yes, I will say yes, he should go to the electric chair, and I can't tell you that I won't do it.

• • •

[VD 4559] Q. (By Ms. James) Can you take an oath——

A. (interposing) I can take an oath. I can't take that oath and be honest about it. I can take an oath and do what I want to do. I can't take an oath and tell y'all that I'm going to knock out the whole fact that the death penalty is involved

in it, because I don't know when I get there. I don't know the facts or anything. The facts may prove that I could do it, and I would do it and vote for the death penalty.

[VD 4560] Q. To keep an open mind, that's all we are really asking you to do.

A. You're asking me to take an oath, and I can't take an oath.

* * *

[VD 4563] [By defense counsel James]:

it's my understanding that you have said several times that you could answer the questions independently of any feelings that you might have at this time about the death penalty or life imprisonment?

A. Right now, I don't—I don't know.

I cannot take an oath that I will do that, and I can't do that. I just can't.

I just don't feel that strong. I don't feel that strongly about it. I just don't think I can take an oath. I can't take an oath and really sit back there and do that.

* * *

[VD 4566] Q. (By Ms. James) That's what I'm attempting to do. The statute says the prosecutor should inform the jury that a juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact. That means answers to questions. It does not mean your feelings.

A. My feelings could affect the way that I answer the questions. My feelings could answer the way that I interpret the evidence, and I don't know what my feelings are going to be.

I cannot take an oath and say my feelings will not be affected as to what happens.

* * *

[VD 4567] [By defense counsel James]:

And then after you have listened to all of the evidence and made a decision as to the guilt or innocence, then, and only then, could you answer the three questions, after you have heretofore laid your own feelings, [VD 4568] your preconceived feelings about the mandatory sentence?

A. I don't know that, and because I don't know I cannot take an oath saying that I will. That's what the prosecutor wants. I can't give that oath. I can't give anybody that oath. I can't honestly say that. I could say that I could raise my hand and take the oath, but to get back there, I know that it would affect me.

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[VD 4920] DOROTHY G. RIDDLE

• • •

[VD 4922] [By Assistant district attorney Steve Tokley]:

Now, I want to ask you, knowing all of that, I want to ask you what are your feelings about the death penalty?

A. Well, I feel like—if I felt like, myself, that, you know, would justify what he's done that I probably could.

Q. You probably could?

THE COURT: Would you pull that microphone up a little higher? Thank you.

[VD 4923] Well, that's all right. Okay.

JUROR RIDDLE: Okay. I'm sure I know—at the same time—but I just feel—I don't know how to answer it except that I could, I'm sure, if I felt like it was—

Q. (By Mr. Tokley) Let me put this on a real personal basis to you. Try to put it in the light that it would be in. I think the question really boils itself down to if—could you sit on this jury and if you found the Defendant guilty as charged, could you make decisions that, if the facts and circumstances called for it, would result in this man's death. That's what it really boils down to. We have to know now whether you could or you couldn't.

Ms. JAMES: Your Honor, I object to the phraseology of, resulting in this man's death.

THE COURT: Overruled.

Q. (By Mr. Tokley) Go ahead.

A. Yes.

Q. Do you have any doubt about that at all?

A. No, after listening to it, I'm sure I could.

• • •

[VD 4925] May I assume then—may I take it from that answer that you don't have any quarrel with the death penalty?

A. No.

Q. You believe in the death penalty?

A. Right.

Q. But you just personally could not sit on a jury yourself and be involved in making decisions that would result in the death penalty. Am I correct in that?

A. Well, I think after hearing a case or going through it, I could. Just at the moment it's just such a big decision for me to say yes or no to.

• • •

[VD 4928] You tell me how you feel at this point.

A. Well, I guess I feel that I do believe in it.

Q. Sure.

A. But, of course, the way I feel right now—it would be a big—it would be hard for me to do it, and then I wonder how I would feel afterwards.

Q. Some people it would just—some people it would just—it would just violate their conscience.

A. Uh huh.

Q. And this we don't want to do, and that would be unfair to you and it would be unfair to those of us who participated in the case, certainly unfair to the Defendant.

So, I just—I will ask you the question again. Do you feel like that you could personally serve on this jury, and if the facts and circumstances [VD 4929] called for it, make decisions, personally make decisions that would result in this man's death?

A. I would just say no.

• • •

[VD 4933] Q. Now, I just want to ask you based upon the reservations that you have indicated about even though you—even though you have no quarrel with the death penalty, you have indicated that as far as your personal service was concerned you don't feel like you could do it? Would the mandatory sentence of death or life affect your deliberations on any of the fact issues of the case?

A. I don't think after going that far and hearing all the evidence that if I felt like all the answers should be yes, I don't think it would.

[VD 4934] Q. All right. You say you don't think that it would? Let me just tell you what the Statute requires. I

will just—in no uncertain terms—to be qualified to serve on the jury like this you have to be able to assure us in no uncertain terms that the mandatory sentence of death or life would not—not probably wouldn't or might not, but would not affect your deliberations on any of the fact issues in the case.

Now, either you can tell us that or you can't tell us that, and this is where you have to let us know, and if you have serious reservations about it then you need to let us know that. But can you unequivocally tell the Court and the lawyers that the mandatory sentence of death or life will not affect your deliberations on any of the fact issues of the case? Can you say that under oath or can you not say that?

A. That would not affect me. That—I would say yes, I could do that after all the—

Q. You are saying that the mandatory sentence of death would not affect you?

A. No.

Q. Okay. Are you sure about that?

A. Yes.

Q. Okay. You are sure about that in spite of [VD 4935] the reservations that you earlier had?

A. Yes.

Q. So, you are saying then, that if you were selected on this jury and if you were convinced that the Defendant was guilty and if you were convinced that the evidence indicated that the proper answer to the three questions was yes that you could answer all three questions yes knowing full well that it would result in this man's death. Can you tell us that?

A. Yes, until you said it that way.

Q. That's the way it is. We are not talking about in the abstract. We are not talking about some philosophical solution.

A. I know it.

Q. We are talking about a real live case and real life decisions that could, if the facts and circumstances called for it, result in a real person's death. And don't feel like—don't feel like you have to prove something to yourself or to us by saying I can do it.

A. Yeah.

Q. If you honestly feel like you can't do it, then you are a much better citizen for telling us than leading yourself

and leading us to think that you can and then having these horrible doubts that linger all [VD 4936] the way through the trial.

Ms. James: I object to this tutoring of the witness. I think she expressed her views very adequately and unequivocally.

The Court: Overruled.

Ms. James: And that she's qualified.

The Court: You are overruled.

Q. (By Mr. Tokley) Okay.

A. I will say no just like the first time.

Q. Okay. So, then—and I'm not trying to get you to do something, but I'm trying to put you in the situation that you are really in and I feel like it's out of fairness to you that I'm doing that as much as for us.

A. Yes, I understand that.

Q. Are you saying that the mandatory sentence of death or life would affect your deliberations on the fact issues in the case?

A. Yes.

Q. Is that what you are telling us?

A. Yes.

Q. All right. Now—

Ms. James: Leading, Your [VD 4937] Honor. The question was leading.

The Court: Overruled.

Q. (By Mr. Tokley) Mrs. Riddle, I know you are struggling with this, and I appreciate your honesty and I appreciate your frankness, but is that really the way you feel when it gets down to it?

A. Yes, sir.

Q. You simply could not tell us under oath that the mandatory sentence of death or life would not affect your deliberations?

Ms. James: Leading, Your Honor.

A. (By Juror Riddle) No, I could not tell you that.

The Court: Overruled.

Q. (By Mr. Tokley) Because it would—

A. Yes.

Q. Are you sure about that?

A. Yes.

• • •

## DECLARATION OF SERVICE

Re: People v. Paul Sodoa Watkins No. S026634

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main St., 10th Floor, San Francisco, California 94105; that on I served a true copy of the attached:

**APPELLANT'S OPENING BRIEF**

on each of the following, by placing same in an envelope addressed as follows:

Office of the Attorney General
Attn: Louis Karlin, D.A.G.
300 South Spring Street, Ste. 5212
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Paul S. Watkins
(Appellant)

Each said envelope was then, on March 9, 2004, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on March 9, 2004, at San Francisco, California.

_____
DECLARANT