

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA		
		No. S051342
Plaintiff and Respondent,		
vs.		
		San Bernardino
JOHN LEE CUNNINGHAM		County Sup. Ct.
		RCR 22225
Defendant and Appellant.		

Appeal from the Superior Court of San Bernardino County
The Honorable Michael A. Smith, Presiding

SUPREME COURT
FILED

APPELLANT'S REPLY BRIEF

JUN 10 2014

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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APPELLANT’S REPLY BRIEF

In this Reply Brief, Appellant John Lee Cunningham addresses specific contentions made by Respondent, but does not reply to arguments that are adequately addressed in the Opening Brief. The absence of reply to any particular argument, sub-argument or allegation made by Respondent, or of reassertion of any particular point made in the Opening Brief, does not constitute a concession, abandonment or waiver of the point by Mr. Cunningham (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn.3), but reflects his view that the positions of the parties have been adequately presented and the issues fully joined. The arguments in this Reply Brief are numbered to correspond to the argument numbers in Appellant’s Opening Brief.

THE GUILT PHASE

INTRODUCTION TO ARGUMENTS I, II AND III

Arguments I, II and III of the Opening Brief all arise out of shackling of Appellant for court appearances in San Bernardino during the pretrial and guilt trial phases of this case. The main focus of Argument I is on Mr. Cunningham's complaints about shackling, the trial judge's responses to those complaints, and the effect of shackling on the proceedings as a whole. Arguments II and III specifically claim that the trial judge's mishandling of Mr. Cunningham's complaint about shackling had a specific effect on the waiver of presence for proceedings in San Bernardino and the waiver of a jury for the guilt trial.

The three arguments have a complex interrelationship. Argument I is essential background and atmosphere for Arguments II and III. It conveys Mr. Cunningham's dread of the shackling as well as the despair that led to his conclusion that he could not rely on the judge to give him relief. Arguments II and III address the prejudice engendered by the error that is laid out in Argument I. The three arguments should all be considered as incorporated into each other as if set forth at length.

The shackling problem shrouded all of the proceedings that took place in San Bernardino. Its effect was encompassing and impossible to quantify. The judge's actions and inaction fueled Mr. Cunningham's apprehension at the prospect of spending substantial periods of time in great physical discomfort.

Under these circumstances, this Court should reverse the trial court's findings of guilt without requiring any finding of prejudice. In the alternative, the convictions should be reversed on the grounds that Mr. Cunningham's waivers of his rights to be present in court and to trial by jury were involuntary, and the acceptance of the invalid waivers was not harmless beyond a reasonable doubt.

I. MR. CUNNINGHAM WAS IMPROPERLY RESTRAINED WITHOUT AN ADEQUATE SHOWING OF NEED IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

In the Opening Brief, Appellant argued that he was wrongly restrained for pretrial court appearances. The restraints were unjustified because Mr. Cunningham presented no threat to orderly courtroom procedure. They were onerous, causing Mr. Cunningham great anxiety and physical pain. (AOB 40-50) They would have been entirely unnecessary if, as counsel suggested, the proceedings were moved to Rancho Cucamonga or to a different courtroom in San Bernardino. (AOB 50-52) Orders of the trial judge, ostensibly to relieve Mr. Cunningham of the burdensome restraints, were ineffectual. On at least one occasion, custodial officers violated the orders, and the judge declined to enforce them. Ultimately, the restraints amounted to structural error, in that they made it impossible for Mr. Cunningham to participate in his own court proceedings. (AOB 56-58)

Respondent argues that the restraints on Mr. Cunningham were limited to

reasonable security measures. (RB 52-56) The trial court granted the defendant's request to modify the restraints, and the only shackling the judge permitted was for transport between the courtroom and the holding cell. Mr. Cunningham declined to object to this particular shackling. (RB 45-52)

Primary areas of contention between appellant and respondent include the facts and circumstances of the restraints and the question of forfeiture. As to the facts, respondent proceeds on the assumption that all of Mr. Cunningham's legitimate complaints were met by the orders of the trial judge. Respondent constructs the argument for forfeiture by highlighting some of counsel's subsidiary statements of fact and taking them out of the context of defendant's underlying position. As to both the substance and the preservation of the shackling claim, respondent focuses entirely on the restraints imposed on Mr. Cunningham when he was transported through the public halls of the courthouse, saying that it was not an abuse of discretion for the court to allow those restraints and that Mr. Cunningham forfeited any claim that it was. Respondent's argument is not responsive to the claim that Mr. Cunningham actually pressed before the trial judge and maintains on appeal.

As Respondent notes repeatedly, defense counsel never took the position that it was impermissible to require that Mr. Cunningham be shackled while moving through the public areas. Neither is this Mr. Cunningham's position on appeal. Rather, Appellant's plea was, and is, that, given the necessity of shackling

him for transport through the halls to one courtroom in the San Bernardino Courthouse, the unreasonable burden placed on this defendant should have been ameliorated by moving the proceedings to a different courtroom or to Rancho Cucamonga.

It is extremely misleading for Respondent to claim that “Cunningham conceded the propriety of shackling in transit to and from the courtroom and expressly declined to contest that issue.” (RB 51-52) This is what defense counsel actually said, at both of the transcript locations Respondent cites:

[W]ith respect to the transportation through the corridors I realize it’s not practical to have him brought without shackles through these public corridors. My motion is instead that we go to a courtroom where that doesn’t have to be done. I know there are courtrooms in this building where that doesn’t have to be done and we certainly have nice vacant courtrooms in Rancho Cucamonga where the case should be heard where that doesn’t need to be done.

(1RT 39) And:

I agree that the law says that he does go through the public halls in shackles. I mean, they can shackle him to take him through the public halls. My argument is there’s no need for taking him through the public halls. There’s several departments here where that’s not necessary.

And, like I say, there’s the whole building in Rancho Cucamonga where that’s not necessary.

(5RT 1132)

Respondent further asserts that there is no issue here because the trial judge *granted* Mr. Cunningham’s request that he not be shackled in the courtroom. “As the trial court generously granted the defense requests to free Cunningham of any

and all restraints *in the courtroom* for pretrial proceedings, Cunningham cannot blame the court's shackling order for his absence from *courtroom proceedings*." (RB 58; emphasis in original.) Of course, in order for Mr. Cunningham to be present in that courtroom, he had to be brought there, through the hallways, in shackles. Whether or not it was reasonable for him to prefer absence to shackling, it is certainly not wrong to argue that those were his two alternatives. Further, the judge was on notice that this was the choice that Mr. Cunningham believed he faced. On June 30, 1993, Mr. Cunningham signed a declaration that said:

For as long as my case is to be heard in San Bernardino, and I am forced to remain in restraints and be exposed to the general public, I wish to waive my presence, and to remain in the West End Detention Center.

(4 CT 1050)

In fact, the judge's ruling did not even solve the problem that it ostensibly addressed. It is true enough that the judge ruled that Mr. Cunningham not be shackled in the courtroom.¹ However, to accept Respondent's position that this ruling solved the whole problem would require this Court to ignore what happened on the very first court date after the trial judge made this ruling.

On June 4, 1993, the judge ordered:

On motion of defense counsel, and there being no objection by the people, the court orders that defendant not be shackled in the courtroom.

¹The District Attorney made no serious showing of need for this defendant to be shackled in court, and the Attorney General has not even attempted to make that showing on appeal.

(CT 1038) On July 9, 1993, the judge was surprised to find that Mr. Cunningham was shackled in court, in apparent violation of his order. He did not insist that the order be obeyed. Instead, he decided to do nothing, because it was a “relatively short matter.” (1RT 68-69)

Mr. Cunningham had no reason to believe that the judge would ever protect him from his unnecessary, unjustified, and unbearable ordeal. He would certainly be shackled in the hallways for every court appearance in San Bernardino, and he may or may not be shackled in court. He was reasonable in proceeding as though the judge had issued no order at all to limit the shackling. This Court should view the matter similarly.

Respondent’s description of the proceedings of July 9, 1993, illustrates the Attorney General’s endeavor of minimizing the defendant’s unease and protestations over the shackling issue. First: “Defense counsel stated that ‘perhaps’ the shackles be removed.” (RB 50) Respondent apparently does not think it important that counsel first noted that the leg shackles were in violation of the court’s previous orders, and then that the blanket policy of shackling a defendant in calendar court was in violation of the constitution. (1RT 68-69) In this context, there is no mistaking the understatement that flavors “perhaps.”

Next, respondent says, “However, the court assured Cunningham that the shackles would be removed if he chose to participate in the ‘on-going’ proceedings.” (RB 50) This sentence is almost completely wrong, in light of what

the judge actually said:

If we were having an on-going proceeding with Mr. Cunningham the court would remove the leg chains. This is going to be a relatively short matter in terms of a waiver so I'm not going to do that at this time.

(1RT 69) The judge did not assure Mr. Cunningham of anything. He was not even speaking to Mr. Cunningham when he said "on-going proceeding," but referred to the defendant in the third person. He did not say anything about what would happen if Mr. Cunningham attended court proceedings in the future. As much as respondent would want to draw that conclusion, there is no reason at all for Mr. Cunningham to be "assured," and no evidence that he was. To be clear about appellant's position on this issue: nothing the trial judge did or said assuaged Mr. Cunningham's apprehension and anxiety over the prospect of painful and prolonged shackling. Certainly, Mr. Cunningham was not assured that he would not be subjected to excessive and painful restraints if he came to court.

The trial court failed in its obligation to prevent unnecessary and burdensome shackling. This is why Mr. Cunningham was not present for his trial. This failure cast a shadow over all of the proceedings that took place in the San Bernardino Courthouse. The trial is as tainted and unreliable as if Mr. Cunningham were explicitly barred from the courtroom. It violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *See Faretta v. California* (1975) 422 U.S. 806, 819 n. 15; *Kentucky v. Stincer* (1987) 482 U.S. 730, 745. The constitutional violations cannot be

shown to be harmless beyond a reasonable doubt (*Rushen v. Spain* (1983) 464 U.S. 114, 117-118 n. 2). Consequently, the convictions of capital murder and the special circumstance findings that were the outcome of those proceedings must be reversed.

II. MR. CUNNINGHAM WAS DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHT TO BE PERSONALLY PRESENT AT HIS TRIAL.

Appellant argued that his waiver of the right to be present at his guilt trial was invalid. The waiver was involuntary, in that it was induced by the unreasonable and unbearable shackling. The trial court did not make the findings that would be necessary to sustain such a waiver. (AOB 64-69, 73-78) Additionally, Mr. Cunningham's absence from his trial was contrary to Penal Code §§977 and 1043. (AOB 70-73, 78-81)

Respondent argues that appellant had failed to show that the waivers were involuntary due to shackling. The shackling that did occur was neither improper nor the cause of the waiver. (RB 59-61) As to appellant's statutory claims, they were forfeited. In connection with his absence from the guilt trial, Mr. Cunningham waived all appellate claims except those based on shackling. (RB 61-65)

Respondent's position, like the response to Argument I, rests on a particular version of the facts. Once again, that version is at odds with reality. Respondent argues that Mr. Cunningham's waiver of his presence at the guilt trial could not

have been coerced by burdensome shackling because “the trial court relieved Cunningham of all restraints in the courtroom and holding cell.” (RB 60) As we have seen, the trial court, on its one opportunity actually to relieve Mr. Cunningham of shackling in the courtroom, declined to do so. (1 RT 68-69; see pp. 6-8, above.) Respondent does not illustrate its claim with any instance of a court appearance in San Bernardino where Mr. Cunningham was not shackled.

In addition, focusing on the situation inside the courtroom ignores the more basic problem. No one disputes that Mr. Cunningham was to be shackled for movement within the San Bernardino courthouse. Defense counsel urged the trial judge to move the proceedings to Rancho Cucamonga, but the judge refused. Unquestionably, this refusal caused Mr. Cunningham to waive his presence.

People v. Lang (1989) 49 Cal.3d 991, cited by Respondent (RB 60-61), is easily distinguished. In that case, the defendant objected to being shackled during a viewing of the crime scene, and subsequently waived his presence for the viewing. This Court found that “the record fail[ed] to show that concern about appearing in shackles motivated defendant to waive his presence at the jury view.” (*Id.*, at p. 1026.) In this case, however, the defendant and his counsel consistently and explicitly stated that it was the shackling that motivated him to waive his presence.

Respondent’s argument that the statutory claims on the inadequacy of the waivers are “not cognizable on appeal” elevates form over substance. It is true

enough that Mr. Cunningham “relinquished his appeal rights for claims challenging the validity of his waiver of personal appearance for any reason other than the trial court’s shackling order.” (RB 65) But the argument that Mr. Cunningham’s absence violated California statutes is entirely linked to his objection to the shackling. The only violation of Penal Code sections 977 and 1043 was the involuntariness of the waiver of presence.

The statutes say that the defendant must be present. Mr. Cunningham told the trial judge that he perceived and anticipated his restraints to be so intolerable that he would waive his presence if necessary to be relieved of them. The judge proceeded in his absence.

It is worthwhile to examine the language on which Respondent relies to establish that “Cunningham’s statutory based claims attacking the validity of his personal presence waivers are not cognizable on appeal.” RB 65. The trial judge said:

You understand, Mr. Cunningham, that knowing that you have a right to be present and voluntarily deciding not to be present, the appeals courts, including the California Supreme Court and the federal district courts, *would very likely determine* that you could not then raise your lack of appearance at the trial as a ground[] for appeal[.]

(1 RT 209-210; quoted at RB 65; emphasis added here) The trial judge was not telling Mr. Cunningham that he *could* not appeal, but only what this and other courts might do. Certainly, he was not telling this Court that the issue was “not

cognizable on appeal.”²

To illustrate the role of the statutory claims in this argument, Appellant offers this brief discussion of Penal Code §1043. The section provides that the defendant in a felony case shall be personally present, and provides an exception for “any prosecution for an offense which is not punished by death in which the defendant is voluntarily absent.” Penal Code §1043(b)(2). *If* this were not a capital case, and *if* the absence was voluntary, there would be no violation.³ Since it is a capital case, the statute would still be violated by a voluntary absence. This is the situation contemplated by the appellate waiver. Mr. Cunningham waived his right to appeal to claim that the statute was violated in this way..

Importantly, Mr. Cunningham is pressing a claim that his waiver of presence was *not* voluntary. If the waiver is not voluntary then Penal Code 1043 is violated even in a noncapital case. Again, however, Respondent's position is that Mr. Cunningham waived his right to appeal the violation.

The problem with Respondent’s position is that the waiver of the right to appeal was itself involuntary and thus invalid. If Mr. Cunningham had not waived his right to appeal, he would not have been permitted to waive his right to presence. If he were forced to attend court proceedings in San Bernardino, he had

²Black’s Law Dictionary (9th ed. 2009) defines “cognizable” as “capable of being judicially tried or examined before a designated tribunal; within the court’s jurisdiction.”

³However, Penal Code §977 would still require a written waiver.

reason to believe that he would experience unreasonable and unbearable restraints. Therefore, to the extent that the prospect of the restraints rendered the waiver of presence involuntary (and invalid), it had the same effect on the waiver of the right to appeal violations of Penal Code 977 and 1043.

To the extent that the viability of the statutory claim, notwithstanding the waiver of the right to appeal, depends on the involuntariness of the waiver of presence, it may seem that the statutory claim adds nothing to the constitutional claim that the conviction is invalidated by the involuntary absence. It is still important, however, to consider these statutes.

Penal Code sections 977 and 1043 contribute to the context of this issue. They are evidence of how important a defendant's presence is at a capital trial and how solemnly this Court should weigh the validity of the waiver. The legislature, building a fence around the requirements of the Constitution, established that voluntary absence is permitted *except* in a capital case. This legislative determination should color this Court's constitutional consideration of the complete story of how John Cunningham came to be convicted *in absentia* of capital murder with special circumstances. This Court should not let that conviction stand.

III. THE EXCESSIVE SHACKLING COERCED A WAIVER OF MR. CUNNINGHAM'S RIGHT TO A JURY TRIAL DURING THE GUILT/INNOCENCE PHASE TO AVOID THE PAIN OF THE RESTRAINTS.

Appellant argued that the trial court failed to obtain a valid waiver of the right to a jury, with knowledge of the right and of the consequences of waiver. The judge did not attempt to determine whether the waiver was related to the coercive conditions of Mr. Cunningham's court appearances. (AOB 86-96)

Respondent argues that this claim was forfeited, because Mr. Cunningham repeatedly refused the trial court's offer of a retrial with a jury or with additional waivers. (RB 68-71) Respondent asserted that the waiver of a jury was not involuntary, and was motivated by a strategy of delaying defense discovery. (RB 71)

Respondent relies for the first part of the argument on the novel offer of the trial court to revoke the jury waiver, set aside the verdicts and grant a new trial with or without a jury. Respondent asserts that Mr. Cunningham rejected the offer. (RB 68-69) In the proceedings described by respondent, however, the voice of the defendant himself is entirely *absent*. Not only was he not present, but defense counsel said *nothing* that even represented that the defendant himself had rejected the offer. Incredibly, counsel did not even say that he had *told* Mr. Cunningham about the offer. The judge, however, decided the matter "based on Mr. Negus's statements."

Defense counsel has considerable discretion in trial strategy and decisions, and appellant makes no claim here concerning the propriety or implications of counsel's apparent decision not to consult with him. The trial judge's utter failure to inquire into the conspicuous absence of communication with or from the defendant is apparent from the trial record, and is sufficient to dispose of respondent's forfeiture claim as well as the question of "invited error." The doctrine of invited error is not to produce a situation where "defendant would suffer greatly from the mistakes and ignorance of their counsel, even though the trial court could have acted to prevent injustice." (*People v. Wickersham* (1982) 32 Cal.3d 307, 333.)

Respondent cites *Wickersham* to say that invited error requires only an indication of trial counsel's tactical reasons. Respondent goes on to say, "The record demonstrates that defense counsel's tactical reason for steadfastly refusing the trial court's generous offers was to preserve the jury trial claim as a ground for attacking the judgment on appeal." Respondent does not, however, cite to the record to show that it demonstrates anything. In the statements that Respondent quotes, defense counsel takes the position that it would be double jeopardy to retry the case,⁴ "what's done is done," and that the judge's proposals "would be

⁴As much as Respondent would like this Court to see it as a subterfuge, the double jeopardy issue raised by defense counsel is not as clearly baseless as respondent would have it. Both of the cases cited by the Attorney General (RB 67, fn 29) concern declaration of a *mistrial* with the defendant's consent.

superfluous and of no legal significance.” RT 67-68. On their face, these statements express skepticism about the legal validity of the proposals and offer no clue as to counsel’s “tactics.”

Respondent characterizes the trial judge’s offer as “generous.” Appellant contends that the offer was not “generous.” Rather, it was a clear indication that the judge was troubled and uncertain of the viability and integrity of the capital conviction.

Turning to the question of voluntariness, Respondent first denies that the waiver was motivated by the prospect of courtroom restraints. “[T]he underlying premise of Cunningham's argument that he would have been subjected to ‘courtroom restraints’ for a guilt phase jury trial is patently false.” (RB 71) Actually, an assertion that Cunningham “would have” been shackled is neither true nor false, as it concerns a hypothetical event – a guilt phase jury trial – that did not happen. Respondent apparently believes that there would have been no shackling, simply because the trial judge made an order to that effect. In fact, Cunningham's subjective belief that he would be shackled in the courtroom was the more reasonable one, as it was based on his own experience. The one time that he came to court after the judge’s order, he was shackled, and the judge refused to order the shackles removed. (See pp. 6-8, above.)

The nexus of shackling and the jury waiver may not be as obvious as that for the waiver of presence. However, defense counsel made the connection in

court on July 9, 1993:

[COUNSEL]: I would ask that he not be transported here or to any future hearings until we get ready to go to jury trial or go to Rancho Cucamonga where we should be.

THE COURT: Whichever occurs first?

[COUNSEL]: Whichever occurs first.

(1 RT 70) This is a strong indication that a jury trial *in absentia* was not considered a viable option. The circumstances that forced Mr. Cunningham to waive his presence also led to the jury waiver.

We know that (1) Cunningham chose absence over shackling, (2) Cunningham had no reason to trust that he would not be shackled, and (3) even the waiver itself was taken without Cunningham's presence. We can't know exactly what was on Cunningham's mind, but we do know that it is not "false" that he made the decision about the jury under the reasonable belief that he would be shackled in court. The decision to submit to a court trial cannot be separated from the shackling question. It is natural that a defendant who is considering waiver of a jury would be influenced by the belief that a jury would either see him in shackles or not see him at all, and that a jury would be influenced by his absence, while a judge might not.

Respondent then argues that the jury waiver was "motivated by the strategy of separating the guilt and penalty phases so that he would not be required to turn over any defense discovery at that time." This is a dubious and cryptic reading of

the record and its implication that the defense was trying to gain some advantage by holding back on discovery is baseless.

At the first transcript page cited by Respondent, defense counsel said:

What I told [the prosecutor] as I sit here right now I have no discovery to give him as to guilt phase. And I also told him that I do not need a continuance as to guilt phase. The continuance is necessary for the penalty phase.

(1 RT 190) Next, defense counsel said:

Mr. Guzzino is anxious to get the guilt phase on. We felt that as we don't wish to have a jury decide that and just the court, we could then separate the guilt phase from the penalty phase because I, I have no discovery to give and I can't foresee having any to give on the guilt phase. It all relates to the penalty phase.

(1 RT 195) The reasonable interpretation of counsel's remarks is that the defense was not ready with the evidence as to penalty and would need a continuance, but did not have that problem as to guilt, because there was not defense evidence on guilt and thus nothing to hand over in discovery.

Mr. Cunningham has clearly established that the unnecessary and onerous conditions that he reasonably believed he would experience for court appearances in San Bernardino Courthouse caused him to give up his right to presence at his guilt trial, and that he made the reasonable choice to have his guilt decided by a party (the judge) who was less likely to be influenced by his absence. His rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution (and their California counterparts) were violated by the trial that

followed these involuntary waivers. This Court should reverse the verdict.

IV. THE TRIAL COURT ERRED IN ACCEPTING THE FUNCTIONAL EQUIVALENT OF A GUILTY PLEA WITHOUT AN ADEQUATE ADVISEMENT OF RIGHTS.

Appellant argued that the bench trial in the guilt phase was so similar to a “slow plea” of guilty that the trial judge was obligated to formally advise the defendant and obtain a waiver of the rights that are implicated by a guilty plea. The trial amounted to a “slow plea” because the defendant was not present, there was no defense presentation, and counsel conceded guilt at the conclusion of the state’s evidence. (AOB 97-111)

Respondent argues that the defendant had forfeited any claim regarding the waiver of a jury. (RB 71-73) Further, the trial was not a “slow plea.” The defendant did not submit on the preliminary examination or police reports, and did not give up the right to confront and cross-examine witnesses. Respondent notes that the trial judge actually made “not true” findings on two of the special circumstances. (RB 73-76)

Respondent’s forfeiture argument on this issue mirrors that of Argument III. Again Respondent says that the issue cannot be pressed on appeal because the trial judge offered a remedy which the defendant refused. (RB 72-73) Again, Respondent speaks as if Mr. Cunningham were an active participant in the proceedings and personally declined the judge’s offer of a retrial. In fact, the record fails to show that Mr. Cunningham rejected a retrial. The judge made no

effort to convey the offer directly to the defendant. Defense counsel did not represent that he was speaking for the defendant, or even that the defendant was aware of the offer.

To support the forfeiture argument, Respondent has to photoshop Appellant into the record.

After further discussion of the issue, the court again offered Cunningham “the opportunity to have a new trial on the guilt issue,” noting if “he doesn’t wish to avail himself of that, so be it.” (5RT 1407-1410)

RB 72. The trial judge, of course, did not “offer Cunningham” anything, because John Cunningham was very conspicuously absent. In fact, the discussion at the transcript pages cited by Respondent is entirely hypothetical; the judge did not even “offer” anything to defense counsel. Looking at the complete sentence that Respondent presents in fragments as a quotation:

If we determine that we did have a slow plea and – then, and the court offers the defendant the opportunity to make additional waivers which would include vacating the, the verdict and give him the opportunity to have a new trial on the guilt issue, and he doesn’t wish to avail himself of that, so be it.

(5 RT 1410) The trial judge mused about something that might happen, but Respondent wants this Court to act as though it actually happened.

Respondent again spins the record, saying, “Where Cunningham steadfastly rejected offers of a new guilt phase trial in the trial court, he should not be permitted to argue now on appeal that he is entitled to a new guilt phase trial.” (RB 73) It is true enough that Cunningham never stated a contrary position. He never

stated any position at all.

Regarding the substance of the claim, appellant urges this Court to eschew formalistic definition of “slow plea.” There is cause for concern whenever a criminal defendant’s guilt is established in a procedure that is significantly less robust, in which the prosecutor’s burden is undeniably lightened. There should at least be some assurance that the defendant consents to the procedure and understands whatever increased likelihood there is that he will be convicted. With that, appellant will rely on the arguments set forth in Argument IV of the Opening Brief.

V. THE COURT ERRED IN ADMITTING MR. CUNNINGHAM’S STATEMENTS WHICH WERE INVOLUNTARY AND OBTAINED BY DELIBERATE VIOLATIONS OF THE FEDERAL AND STATE CONSTITUTIONS.

In the Opening Brief, Appellant made four arguments about the admissibility of his statements. First, the California police who interviewed him in South Dakota violated *Miranda* by deliberately refraining from asking whether Cunningham wished to waive his rights. (AOB 121-130) Second, the police ignored the request for counsel that Cunningham made during those interviews. (AOB 130-137) Third, Cunningham’s consent to a videotaped reenactment at the crime scene was invalid because law enforcement had connived to get the consent before counsel was appointed, and because Cunningham had been given improper inducements for the consent. (AOB 137-143) Finally, all of Cunningham’s

statements were involuntary, in that they were obtained by deception at a time his behavior was bizarre and irrational. (AOB 147-157)

Respondent argues that the custodial statements made in South Dakota were not involuntary, were not elicited in violation of *Miranda*, and were given after an implied waiver of the right to silence and without Mr. Cunningham ever making an unambiguous request for the assistance of counsel. (RB 92-105) Respondent further argues that the statements made in South Dakota were harmless in light of the video re-enactment, which itself was made after express waivers and with no improper inducement. (RB 105-110)

Appellant considers that most of the issues regarding his statements in South Dakota and the re-enactment are fully covered in the Opening Brief. This Reply will specifically address the validity of his purported waiver of his rights under *Miranda*.

Respondent argues that because implied waivers were approved by the Supreme Court many years before the investigation of this case, the detectives could not have committed misconduct or deliberately violated *Miranda* by deciding not to obtain an express waiver.⁵ This depends on a formalistic reading of what the police did here. It is one thing to say that when a suspect's behavior

⁵Respondent (at RB 95) characterizes Appellant as "implicitly conceding the validity of implied waivers." It is not at all clear what this means or how it helps Respondent's argument. Appellant neither intends nor acknowledges any concession on this matter.

clearly conveys his willingness to speak, the police do not need to have the suspect state the waiver of *Miranda* rights expressly. It is quite another for the police, as a matter of investigatory strategy, to behave so as to deliberately minimize the likelihood that a suspect will invoke his rights. A certain amount of ambiguity is acceptable, but that is different from tolerating and encouraging a policy that is designed to maximize ambiguity. None of the cases relied on by Respondent involve the deliberate police conduct presented here.

The most illuminating lesson, in appellant's view, is found in the discussion in *Missouri v. Seibert* (2004) 542 U.S. 600, of the distinction between that case (where the Court suppressed a warned statement that was obtained after an unwarned statement) and *Oregon v. Elstad* [(1985) 470 U.S. 298] (where a warned statement was not rendered inadmissible by a prior unwarned statement). "The [*Elstad*] Court, indeed, took care to mention that the officer's initial failure to warn was an 'oversight' [.]" 542 U.S. at 614. The unwarned admission in *Elstad* was "obtained in arguably innocent neglect of *Miranda*." *Id.*, at 615. The police who interrogated Mr. Cunningham may have been "arguably innocent" in a technical sense, in that they claimed to have followed the letter of the law as they understood it. It was not "innocent," however, to the extent that it was deliberate and intentional. It certainly was no "oversight."

Nonetheless, because the trial judge here found that "the officers did have a good-faith belief that their practice was indeed lawful" (3 RT 648), Respondent

asserts, “This lack of bad faith is important.” (RB 96) According to Respondent, “good faith” played a role in Justice Breyer’s concurring opinion in *Siebert*, and “[w]ithout Justice Breyer’s concurrence, there would have been no majority supporting the result in *Siebert*.” In other words, in Respondent’s view, the result (suppression) in *Siebert* would have been different if Justice Breyer had been convinced that the police in that case had acted in good faith.

Respondent’s spotlight on Justice Breyer’s concurrence in *Siebert* is not so impressive, for reasons of form and substance. First, it is specious to label “good faith” as “significant” simply because Justice Breyer’s vote was needed for majority support of the result in *Siebert*. The Supreme Court has said that, in some circumstances, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds” *Marks v. U.S.* (1977) 430 U.S. 188, 193, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 169 n. 15. Respondent makes no attempt to show that Justice Breyer’s invocation of “good faith” is somehow narrower than Justice Souter’s expression of the judgment of the Court.

Further, it is doubtful that Justice Breyer would deem the procedure followed by the officers in this case to be in “good faith.” Justice Breyer clearly meant “good faith” to contrast with the actions of the police in *Siebert* itself, and what was the essential feature of that police behavior? Its “manifest purpose” was “to get a confession the suspect would not make if he understood his rights at the

outset[.]” 542 U.S. at 613. The officers who interrogated John Cunningham followed a procedure whose purpose was to avoid an explicit answer to the question, “Do you want to waive these rights?”⁶ Finally, the trial court’s “finding of good faith” was not exactly a ringing endorsement. The trial judge agreed that the cases supported the proposition that there is no necessity of obtaining an express waiver. But the judge also said:

However, those cases do not stand for the proposition that the officers then, or police officers generally, can completely abandon asking the waiver question. Especially if at least one of the reasons for not asking the waiver question is that the officers believe that it – by not asking the waiver question suspects are less likely to invoke their rights. And therefore, not asking the waiver question is a means to avoid or get around a suspect invoking their rights and enable them to obtain statements when they might not otherwise obtain statements.

I’m satisfied that the cases do not stand for that proposition. And that when cases have been presented to the courts, such as the case of *People versus Bey ...*, the courts have made it clear that that philosophy constitutes an attempt by the officers to evade the constitutional protections of the 5th Amendment as expressed in *Miranda*. And therefore, that practice under those circumstances does violate the constitution and due process.

(3 RT 648-649) The trial court ruled as it did despite these misgivings because it found by a preponderance of the evidence that there was an effective waiver “notwithstanding that practice.” *Ibid*.

The judge relied on at least one item of evidence that does not seem

⁶See 2 RT 330 (Detective Ortiz agrees he was “consciously avoiding asking him do you want to talk to me”); 2 RT 330 (Ortiz agrees that “agreeing in advance to not ask the second question was basically part of this whole overall procedure that you were using to try and get Mr. Cunningham’s confidence so he would talk to you”).

logically connected to the conclusion that the judge drew. Although no one asked Mr. Cunningham whether he would waive his rights, the trial judge reasoned that because Cunningham *waived* his rights in 1982 and 1988, he knew he had a right not to talk. (3 RT 659) Respondent makes a similar leap: the two prior waivers show that Cunningham was capable of making an unequivocal request for counsel. (RB 99) This logic is mysterious, at best. It amounts to, “if he’s done *A* on every previous occasion we know about, that shows that he knows how to do *B*.” If he had *invoked* his rights on either of those occasions, that might show that he understood his rights. A waiver in the past does not show that he knew he had the right *not* to waive; proceeding in prior interrogations without counsel does not show that he knew how to request counsel.

Respondent further states that there is no deliberate, intentional violation of *Miranda* “where the detectives relied in good faith on existing case law which was validated by the admission of statements in the majority of the cases handled by the superior court judges who handled the bulk of the local criminal calendar.”

(RB 96) It would be more accurate to say that the police who questioned appellant knew that at least two criminal court judges were uncomfortable with the “no express waiver” practice, but also knew that police using the practice prevailed on most suppression motions. They knew the practice was *legally* suspect but *practically* useful. They had a reasonable belief that they would prevail in court and not be penalized, not a good faith belief that their practice was in fact

constitutional. This kind of cynical, deliberate practice is different from what the Supreme Court considered in *Berghuis v. Thompkins* [(2010) 560 U.S. 370]. It is one thing to say that the suspect does not have to give an express waiver, but it is quite another for the police to tailor the *Miranda* advisement to *minimize* the chance that the defendant will invoke his rights.

Law enforcement refrained from obtaining an arrest warrant until the Mr. Cunningham participated in the “reenactment” interview. Respondent maintains that the argument against admission of the interview is fatally flawed because Mr. Cunningham was arrested on a parole violation, while two of the cases Appellant cites involved defendants who were arrested, but not arraigned, on the charges that were the subject of the investigation.⁷

In reading the two cases (*People v. Bonillas* (1989) 48 Cal.3d 757, and *People v. Thompson* (1980) 27 Cal.3d 303), it is crucial to keep in mind that prosecutors in this case very explicitly instructed the detectives that the video reenactment had to be done before the warrant was filed. (2RT 292) The Respondent Brief itself states, “The prosecutors told the detectives that the reenactment should be done before an arrest warrant was filed *in order to avoid any impropriety.*” (RB 82-83; emphasis added) More precisely, it had to be done then to avoid either blatantly violating Mr. Cunningham’s right to counsel or

⁷According to Respondent, Appellant “implicitly conced[es] this flaw in his claim.” (RB 107) Again, Appellant neither intends nor acknowledges any concession on this matter.

allowing his counsel to advise him against it.

In both *Bonillas* and *Thompson*, this Court found that the pre-arraignment delays were not excessive. In addition, however, the Court specifically noted that those delays were not meant to facilitate the investigation. (See *Bonillas*, 48 Cal.3d at 787 [“There is no evidence, and in fact Sergeant O'Rourke denied, that the arraignment was delayed for the purpose of obtaining the psychiatric interview.”]; *Thompson*, 27 Cal.3d at 330 [“Officer West's testimony established that the purpose of the delay was not to obtain statements from appellant.”]). In this case, the sequence of events was explicitly intentional. (2RT 292)

Throughout this argument, Respondent relies on an assumption that the law enforcement authorities acted within the technical and literal limits of the law. The fact remains that the police and prosecutors were very careful that the investigation would not be hindered by any of Mr. Cunningham's constitutional rights. The resulting conviction and death sentence should be reversed.

VI. THE CUMULATIVE EFFECT OF THE ASSERTED ERRORS AT THE GUILT PHASE OF THE TRIAL REQUIRES REVERSAL.

In his opening brief, Appellant argued that even if the individual errors at the guilt phase of his trial could be deemed harmless, their combined effect was sufficiently prejudicial so as to require reversal of the convictions and special circumstances. (AOB 160-162) Respondent simply took the position that there was no error whatsoever and did not address the subject of combined prejudice.

(RB 110-111)

The claims set out in Arguments I to V of the Opening Brief have features in common, and share themes of voluntariness, waiver, and the responsibility of the judge to safeguard the integrity and reliability of a capital trial. Appellant urges this Court to weigh the effect of all of the circumstances surrounding Mr. Cunningham's conviction of capital murder with special circumstances, and to find that their combined prejudice renders the outcome unacceptable.

THE PENALTY PHASE

VII. THE TRIAL COURT ERRED IN DENYING THE MOTION TO QUASH THE JURY PANEL BASED ON THE SYSTEMATIC EXCLUSION OF HISPANICS.

Appellant argued that evidence presented to the trial court showed that Hispanics were significantly under-represented in the jury venire. The defendant's expert (Dr. John Weeks, professor of Geography and Director of the International Population Center at San Diego State University) used appropriate methodology to derive the 1995 Hispanic representation in the population of San Bernardino County and to compare that figure with the Hispanic representation within the juror venire. The disparity was systematic, in that it was the result of an improper feature of the process. The trial court erred, both in rejecting the statistical testimony of the defendant's expert and in ruling that there was no violation of the constitution's cross-section requirement even if the defense statistics were correct. (AOB 163-190)

Respondent argues that the testimony in the trial court did not show any exclusion. The Attorney General disparages the defense expert's calculations as "substantially compromised by rank assumptions and unfounded speculation" and mounts a general attack on "statistical trickery," while citing no authority that was contrary to the expert testimony. According to Respondent, the defendant's claim failed under the criteria of *Duren v. Missouri* [(1979) 439 U.S. 357] because the disparity (even as presented by the defense expert) was insubstantial and there was

no showing of systematic exclusion. (RB 118-124)

The basic test for representativeness of a venire (contained in both the Opening and Respondent Briefs, but included here for reference) is this:

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri (1979) 439 U.S. 357, 364.

The Attorney General’s approach to the second prong of *Duren* consists of two assertions. First, Respondent rejects Dr. Weeks’ calculation of the probable proportion of Hispanics in San Bernardino in 1995, insisting that the 1990 official U.S. Census data (which was five years old and almost certainly not correct in 1995) was more reliable. Comparing this old measure of the county population with the up-to-date data about the jury venire, respondent, unsurprisingly, finds that the absolute and relative disparities are insignificant. Second, Respondent insists that absolute disparity (of at least ten percentage points) should be the only measure of inadequate representation. On this basis, Respondent can argue that even Dr. Weeks’ figure for the Hispanic population cannot establish sufficient disparity.

The palpable hostility of the trial court and the respondent to Dr. Weeks’

professional work is disturbing enough as a general matter. One would hope that due process and equal protection in the forum for life and death decisions would at least counsel appropriate acknowledgment of the director of a center at a California State University,⁸ and certainly that a representative of the People of California would not hold forth on “statistical trickery,” bereft of any authority. We now know, however, that Dr. Weeks based his calculations of the probable Hispanic population in 1995 on predictions that were in fact nearly 5 percentage points *less* than the actual figures obtained in the 2000 census.⁹ Of course, the trial judge could not know about the 2000 figures when he denied Mr. Cunningham’s motion, and those figures are not offered here for this Court’s consideration as evidence of the actual Hispanic population in 1995. Rather, they show how wrong one can go to dismiss academic knowledge out of hand.

Respondent points out (RB 130 and fn. 46) that “[n]either this Court nor the United States Supreme Court has decided whether absolute or relative disparity is the better test for systematic exclusion.” While Respondent urges this Court to adopt the absolute disparity test, it would seem more prudent to resolve legal issues without endeavoring to decide a question in a specialized mathematical

⁸In *Hall v. Florida* (2014) --- S.Ct. ---, 2014 WL 2178332, slip op. at 19, the Supreme Court, regarding the views of medical experts, said, “These views do not dictate the Court’s decision, yet the Court does not disregard these informed assessments.”

⁹<http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

field. Statistics are a tool for measuring likelihood and risk. What do the measures of disparity tell this Court about the likelihood that race is important to the makeup of the venires in San Bernardino, or the risk that a capital defendant's constitutional right to a fair jury has been infringed? It is squarely the job of the judiciary to say how much risk of unfairness is acceptable. The measurement of risk is a very different question.

In *Berghuis v. Smith* (2010) 559 U.S. 314, the Supreme Court expressly declined to hold that a ten-percentage point absolute disparity is required to meet the second element of *Duren*. The Supreme Court decided only that the Michigan Supreme Court's finding of no systematic exclusion under the third prong of *Duren* involved no unreasonable application of clearly established federal law.

The *Berghuis v. Smith* opinion includes a footnote that, quoting the brief for Diapolis Smith, points out the implications of relying exclusively (as Respondent here urges) on the measurement of absolute disparity.

Under the rule the State proposes, "the Sixth Amendment offers no remedy for complete exclusion of distinct groups in communities where the population of the distinct group falls below the 10 percent threshold." Brief for Respondent 35.

559 U.S. at 330, fn. 4. It is worth noting that the 2012 Black population of San Bernardino County, according to the United States Department of Commerce, is

9.6%.¹⁰ The plain implication is that the Respondent here would consider it acceptable for a Black defendant in San Bernardino to have no expectation of ever seeing a Black juror on his case.

In another footnote, *Berghuis v. Smith* points out a salient characteristic of another statistical measure:

Standard deviation analysis seeks to determine the probability that the disparity between a group's percentage in the qualified jury pool is attributable to random chance. See *People v. Smith*, 463 Mich. 199, 219-220, 615 N.W.2d 1, 9-10 (Cavanagh, J., concurring).

Id., at 324, fn. 1. Unlike both absolute and comparative disparity, standard deviation analysis accounts for the sizes of populations and samples. This is important in light of another complaint of Respondent and the trial judge – that Dr. Weeks' survey of the jury venire was too small.

Standard deviation analysis is part of the procedure that was described and employed by the United States Supreme Court in *Castaneda v. Partida* (1977) 430 U.S. 482, 496, fn. 17. In the Opening Brief, Appellant demonstrated that the *Castaneda* calculation showed that the difference between the expected number of Hispanics responding to the summons and the actual number was 3.56 standard deviations, substantially more than the two standard deviations that *Castaneda* stated would justify an inference of discrimination. (AOB 181-182) Respondent

¹⁰<http://quickfacts.census.gov/qfd/states/06/06071.html>

simply does not address this application of *Castaneda*.

Respondent's overall approach is to question the Appellant's evidence while making no discernible effort to understand it or to support the allegations that it is "compromised by rank assumptions and unfounded speculation." (RB 121) This approach stands in stark contrast with Appellant's view, which is that the statistics in this and similar cases measure the vitality of fundamental constitutional values. Appellant urges this Court to endorse the educated and thoughtful examination of the systems of life and death decisions, and apply it to reverse the death sentence in this case.

VIII. THE TRIAL COURT ERRONEOUSLY EXCUSED A QUALIFIED JUROR FOR CAUSE WITHOUT VOIR DIRE BECAUSE THE JUROR EXPRESSED SKEPTICISM ABOUT THE DEATH PENALTY.

Appellant argued that the trial judge removed a potential juror (G.P.) in violation of *Witt/Witherspoon*. None of the written answers in the juror's questionnaire were sufficient to demonstrate such a fixed position on the death penalty as to disqualify the juror. The juror should not have been dismissed on the basis of the questionnaire with no voir dire. For *Witt/Witherspoon* error, there is no prejudice inquiry. (AOB 190-203)

Respondent argues that the juror was properly excused on the basis of the questionnaire. The questionnaire answers revealed more than "mere reluctance" to

impose the death penalty; in fact, the juror was strongly opposed and would only impose a death sentence if the defendant requested it. Appellant had waived his claim that the juror should not have been excused without voir dire; the defense expressly agreed to conduct voir dire only when a challenge for cause was denied. (RB 125-135)

Both of Respondent's assertions are wrong. G.P. was not so clearly removable for cause. Additionally, notwithstanding any prior agreement about voir dire, the judge was obligated to follow up and clarify whether G.P.'s views would prevent or substantially impair him from performance as a juror.

Respondent offers several examples from the juror questionnaire to support the cause challenge, but focuses particularly on G.P.'s answer to question 106(b). The question is whether the juror can choose the death penalty in an appropriate case. According to Respondent, "G.P. stated that he would only choose a death verdict where the defendant himself requested it." (RB 129, citing 8 RT 2048.) In fact, G.P. wrote,¹¹ "It's a possibility. If he himself requests it and if he is in sound mind and body."¹² (Appendix A, p. 25.) The variance between G.P.'s words and

¹¹As Respondent notes, G.P.'s questionnaire is not included in the Clerk's Transcript. It is attached for reference as Appendix A to this brief. Together with the filing of this brief, appellant is moving for this questionnaire (and others that are not presently in the Clerk's Transcript) to be incorporated into the appellate record, and providing a copy to the Court and Respondent.

¹²The trial judge's quotation was only slightly different: "Yes, it's a possibility if he himself requests it and if he is sound in mind and body."

Respondent's version is obvious. G.P. offered an *example* of a case where he would agree to the death penalty, and Respondent presents it as the *only* situation in which he would consider death.

It would seem that the logical thrust of question 106(b) is to bring out nuances in a juror's point of view. For a juror who tends to be opposed to the death penalty, the question offers an opportunity to demonstrate a position at some distance from the extremes. Respondent's interpretation distorts the question and answer, changing their character from broadening to narrowing.¹³

Respondent casts G.P.'s answer to 106(b) as "the highly unlikely scenario of a defendant exercising his right to a jury trial *in order to request* the death penalty." (RB 130; emphasis in original) This scenario is certainly not unheard of; appellate counsel has found three cases in which the defendant either testified or made a statement to the jury requesting the death penalty. *People v. Guzman* (1988) 45 Cal.3d 915, 933; *People v. Webb* (1994) 6 Cal.4th 494, 513; *People v. Maury* (2003) 30 Cal.4th 342, 376. To the extent that G.P.'s answer contemplated a relatively unusual scenario, this weighs in favor of clarification with additional voir dire, not summary excusal.

Respondent also says that "G.P. was particularly unqualified to serve on

¹³It is worth noting that neither the trial judge nor the prosecutor gave particular attention to this question and answer; certainly, neither interpreted the answer as Respondent does.

Cunningham’s jury” because “Cunningham waged a vigorous and impassioned defense against a death verdict.” (RB 129) Regardless of the accuracy of this characterization, it was certainly not apparent to the trial court at the time of the challenge for cause. Rather, the judge had heard from defense counsel that “Mr. Cunningham is a defendant whose will to resist the desire of the state to execute him wavers at times.” (1 RT 161)

Even if all of the parties agreed to have no individual voir dire unless a challenge for cause was denied, the question remains whether the result in this case is acceptable. A juror was excused, over defense objection, for statements that were ambiguous and insufficient to establish that the juror was prevented or substantially impaired from serving. The death sentence should be reversed.

IX . THE PROSECUTION IMPROPERLY EXERCISED ITS PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN POTENTIAL JURORS FROM THE JURY PANEL.

On appeal, there are *Batson/Wheeler* claims with respect to four of the District Attorney’s peremptory challenges. In the opening brief, Appellant asserted that four of six peremptories were black, and four of six blacks on the venire were struck. (AOB 205-209) The trial judge, applying the pre-*Johnson*¹⁴ standard, erroneously declined to find a prima facie case of discrimination. (AOB

¹⁴*Johnson v. California* (2005) 545 U.S. 162.

211-218) Comparative juror analysis shows that the District Attorney's volunteered justifications applied equally to non-black jurors who were not struck. (AOB 221-227) The error requires automatic reversal. (AOB 227-228)

Respondent argues as to one juror that there was no prima facie case to support an inference of discrimination; as to two more jurors, that the *Batson/Wheeler* claim was not preserved; and as to a fourth juror, that there was no showing of the juror's race. (RB 135-153) Comparative juror analysis is not appropriate in stage one, and appellant's comparisons do not support his claims. (RB 153-161) If the Court finds *Batson/Wheeler* error under these circumstances, Respondent argues that the case should be remanded, not reversed. (RB 162)

Respondent's position is that one juror, A.L., should not be included in the *Batson/Wheeler* discussion because there was no showing of his race. Appellate counsel has examined A.L.'s juror questionnaire and has determined that A.L. in fact described his race and ethnic origin with the words "Caucasion," "Danish," and "Dane."¹⁵ (Appendix B, p. 2.) Nonetheless, when the prosecutor challenged A.L., defense counsel said, "*Batson* again," and neither the trial judge nor the prosecutor made any response. There is at least a question about what was going on here, including the possibility that A.L.'s appearance may not be as

¹⁵Respondent correctly notes that A.L.'s questionnaire is not among those included in the Supplemental Clerk's Transcript. It is attached for reference as Appendix B to this brief. As noted in footnote 11, above, Appellant is moving for augmentation of the appellate record with this and other questionnaires that were apparently omitted.

unambiguous as his self-identification. Counsel's prior *Batson* objection concerned D.W., a Black juror. An extended discussion of *Batson* before the commencement of peremptory challenges was clearly focused on the prosecutor's disparate focus on Black jurors during voir dire and cause challenges. All of this supports a strong inference that, notwithstanding his questionnaire, A.L. was treated as Black.

Respondent states:

It should be noted that defense counsel did not restrict his *Batson/Wheeler* objections to African-Americans or racial groups. He also attempted to argue Vietnam veterans were a cognizable class. (10 RT 2512-2516.) Thus, there is simply no way of knowing what cognizable class Cunningham was asserting as the basis for his *Batson* objection to the prosecutor's peremptory challenge of A.L.

RB 147. It is true enough that defense counsel suggested that the District Attorney intended to keep Vietnam veterans off of the jury, and that such exclusions would be *Batson* violations. He did not, however, allege any actual *Batson* violations on that basis. A.L. certainly was not a Vietnam veteran; he stated so explicitly during his voir dire. (9 RT 2324-2325)

In conjunction with the three clear instances of peremptory challenges of black jurors, and the racial patterns of voir dire and cause challenges noted by the defense (see 10 RT 2408-2410), this Court should resist Respondent's suggestion that "the underlying premise of Cunningham's entire *Batson/Wheeler* argument ...

is severely undermined” (RB 147; quotation from AOB 228 omitted.), and rebuff Respondent’s attempt to derail consideration of the *Batson/Wheeler* issue.

Regarding another struck juror (A.C.), the Attorney General’s approach is to turn an ambiguous record into a demonstration of the juror’s dishonesty. Respondent reports, “[The prosecutor] further indicated that A.C. expressed severe reservations about the death penalty during voir dire and lied about seeing news coverage of a recent planned execution in California which never occurred.” (RB 141-142) Respondent makes its own assertion that “A.C. untruthfully stated that she had just heard a news report that someone was to be executed in California.” (RB 159) It is very interesting to examine the transcript text that Respondent cites in support of this accusation. She said:

I heard it on the news a couple days ago prior to coming here, that they had some guy that had death. I heard it on the news.

(8 RT 2111 (cited at RB 159).) Next, there was this colloquy between A.C. and the prosecutor:

Q: And when you heard that a couple days before coming into the courtroom on this case, did they tell you the person’s name who had gotten the death penalty? Do you remember any of the facts about that case?

A: No, I just heard it on the news. I didn’t really - -

Q: Was that for someone here in the State of California?

A: Yes.

Q: And what was the news about, the story? What was said about that? Can you tell us?

Can you tell us?

A: I wasn't really listening. I just - - they just said another person will die in the death [*sic*].

(8 RT 2112 (cited at RB 159).) It is worth remembering that this all arose out of item #104 on the juror questionnaire: "Are you aware that a person was executed in California's gas chamber in the recent past?" (7 Supp. CT 1949) Earlier, the trial judge himself told all of the juror panel that "two people have already been executed in California under this law, and I anticipate there will be more in the near future." (See, *e.g.*, 7 RT 1755.) This prospective juror was unfairly disparaged by the prosecutor and by respondent, and it is worth remembering that this hostile and disingenuous characterization is offered to show that the prosecutor was *not* motivated to challenge A.C. on the basis of her race.

Concerning D.W. and S.A-M., Appellant will rely on the argument in the Appellant's Opening Brief, including the comparative juror analysis. The *Batson/Wheeler* violation is sufficiently preserved and is apparent on this record. The impracticality and inadequacy of a remand nearly twenty years after the trial are manifest. The death sentence must be reversed.

X. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A CONTINUANCE TO AVOID CONDUCTING VOIR DIRE IN AN UNDULY PREJUDICIAL ATMOSPHERE.

In his Opening Brief, Appellant argued that the trial judge erred in denying

Federal Building in Oklahoma City, that jury selection be put off for about three months. The accused bomber, Timothy McVeigh, was widely known to be a U.S. Army veteran. Mr. Cunningham was also a veteran, and counsel expected that his status as a veteran and his war experience in Vietnam would be prominent in his defense. (AOB 228-235) Respondent argues that the denial of the continuance was reasonable, because the Oklahoma City bombing “simply had no bearing on Cunningham’s case.” (RB 163-168)

Appellant considers this issue to be fully joined by the briefs on file with this Court.

XI. THE TRIAL COURT ERRED BY FAILING, *SUA SPONTE*, TO APPOINT A SECOND ATTORNEY FOR MR. CUNNINGHAM IN THIS CAPITAL CASE.

In his Opening Brief, Appellant argued that the failure of the trial judge to appoint a second attorney *sua sponte* violated his state and federal constitutional right to counsel and undermined the reliability of the sentence of death. (AOB 235-241) Respondent argues that there was no duty to appoint a second attorney in a capital case absent a request by defense counsel. (RB 168-170)

Appellant considers this issue to be fully joined by the briefs on file with this Court.

XII. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE PHOTOGRAPHIC AND VIDEO TAPE EVIDENCE THAT WAS MORE PREJUDICIAL THAN PROBATIVE.

In his Opening Brief, Appellant argued that five photographs of the bodies of the victims (Exhibits 11, 19, 89, 90, and 91) were substantially more prejudicial than probative and should not have been admitted into evidence at the penalty trial. (AOB 241-250) Respondent argues to the contrary on the substance of the claims, and also argues that Appellant had waived any claim as to one of the photographs (Exhibit 91). (RB 175-177 [substance]); (RB 174-175 [waiver].) As to the question on the merits of whether the photographs were more prejudicial than probative and should have been excluded, Appellant will rely on the argument in the Opening Brief. Regarding waiver, Appellant maintains that a fair examination of the proceedings does not support Respondent's conclusion that the objection to Exhibit 91 (the photograph of Mr. Sonke) was forfeited.

Respondent states: "Specifically, a defendant who fails to object to the admission of a victim's photograph at trial forfeits for purposes of appeal any claim that the photograph should have been excluded." (RB 175) The proposition seems unremarkable. However, it simply does not apply to this case, because Appellant did not fail to object to the photograph of Mr. Sonke.

The Respondent Brief cites to the Motion to Limit Photographic Evidence filed by the defense on June 2, 1995, and to the argument and denial of that motion

on June 13, 1995. (RB 171-173, citing 6 CT 1515-1522 and 6 RT 1583-1587.)

Defense counsel specified during the argument that the objectionable exhibits were 11, 19, 89, 90, and 91. (6 RT 1584) When the court ruled these items admissible on June 13, it said:

The objection is overruled, and the court would allow those photographs to be used. And the court will deem the objection to be made at the time that they're – or deem that the objection is renewed at the time the photographs are shown and would overrule the objection on the same grounds stated.

(6 RT 1587) The trial judge then agreed that the prosecutor would be able to use the photographs in his opening statement. (*Id.*)

The next “relevant proceeding” involving the photographs, according to Respondent, was on August 16, 1995, when the trial court formally admitted them. (RB 174) In the course of that proceeding, defense counsel, referring to Exhibit 91, said:

Actually, you know, I have -- given the court's ruling on the other things I have no objection. If there's no mention to it, we can stipulate to that one; so you can remove my asterisks from it.

(13 RT 4257)

On the face of Respondent’s narrative, it would seem that the defendant objected to an exhibit, the trial judge overruled the objection, and then the defendant withdrew the objection. But Respondent’s brief omits what happened

between June 13 and August 16, 1995: the jury trial itself. The judge had told counsel that there was no need to renew the objections as the exhibits came up during the trial. At the ministerial conference of August 16, it could not have made any difference whether defense counsel objected or acquiesced.

Appellant urges that the failure to object to the evidence again, at the end of trial, should not be deemed a forfeiture. This Court should rule on the merits of this argument.

**XIII. THE TRIAL COURT ERRED IN FAILING TO DISCHARGE
A JUROR WHO REPEATEDLY COMMITTED
MISCONDUCT.**

Respondent argues that there was no juror misconduct and that the claim was forfeited. (RB 178-183) Present appellate counsel has reviewed the record, and it is apparent that trial counsel in fact stated that he had no reason to disbelieve the jurors' testimony before the trial judge and that the matter was not worth pursuing. (16 RT 4914)

Without taking any position on whether there was in fact any juror misconduct, Appellant agrees that the matter does not present an appellate issue. Argument XIII is withdrawn.

XIV. THE TRIAL COURT ERRED IN FAILING TO MODIFY THE DEATH SENTENCE BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SHOW THAT AGGRAVATING FACTORS OUTWEIGHED MITIGATING FACTORS TO JUSTIFY A SENTENCE OF DEATH.

Appellant will respond here to one aspect of Respondent's discussion of the trial judge's analysis. Appellant disputed the trial judge's view that Mr. Cunningham had never sought treatment for his post-traumatic stress disorder, citing to facts from the testimony of Diana Jamison. (AOB 265, fn. 26.)

Respondent replies:

Cunningham argues "the trial court was factually incorrect in its assessment that [he] never sought treatment for his mental health problems." (AOB 266-267.) In support of his argument, Cunningham cites testimony from Jamison that Cunningham merely went to the Veteran's Center for help with a sleep problem and asked Jamison *three weeks after* the current offenses to call his counselor at the Center. (AOB 265, Fn. 26.) Thus, the trial court was correct that Cunningham made no efforts to address any mental problems from past abuse, molest and abandonment, or PTSD symptoms (stress violence, dissociation) which he claimed as extenuating factors *prior to* committing the murders.

(RB 190; emphasis in original.) This is a startlingly stilted view of PTSD and of the law of mitigation generally. Appellant certainly did seek help with his sleep problems prior to the murders. Respondent seems to think that the Veteran's Center could have "merely" advised Mr. Cunningham to refrain from spicy foods and coffee prior to bedtime. In fact, the testimony of both Alana Costello and Diana Jamison made it clear that Mr. Cunningham's sleep problems consisted

primarily of waking from nightmares in the middle of the night in a cold sweat. (4 RT 835-837; 4 RT 1005-1005; 12 RT 2983-2985; 13 RT 4310.) It was equally clear from Dr. Baker's testimony that this sleep disorder was integrally related to PTSD. (14 RT 4479) Dr. Baker was asked specifically whether people come to treatment "just because they have difficulty sleeping." He answered: "No, not usually. Usually their whole life is a mess." (14 RT 4482)

Respondent's triumphant declaration that Mr. Cunningham sought the additional help from his Veteran's Center counselor "*three weeks after* the current offenses" (RB 190, emphasis in original) offers no logical support to the trial judge's assertion that Mr. Cunningham "never sought treatment or counseling for his feelings or his problems." 19 RT 5755. Further, the law is clear that it would have been error to preclude the jury from considering post-crime evidence as mitigation. (*Skipper v. North Carolina* (1986) 476 U.S. 1.) The trial judge's disregard of this evidence had the same effect.

Having added these few comments on Respondent's argument, Appellant will rely on the on the points raised and argued in the Opening Brief.

XV. A PENALTY OF DEATH IS DISPROPORTIONATE TO MR. CUNNINGHAM'S INDIVIDUAL CULPABILITY.

Appellant argued that the death sentence in this case was disproportionate, in that Mr. Cunningham likely committed this crime in a dissociative state brought

on by years of trauma and disoriented flashbacks. (AOB 267-270) Respondent maintained that the death sentence does not shock the conscience and is not grossly disproportionate to the crimes, in light of the circumstances of the murders and Mr. Cunningham's personal characteristics. (RB 191-194) Accordingly, the issue is joined and no reply is necessary to Respondent's argument.

XVI. THE DEATH PENALTY AS APPLIED IN MR. CUNNINGHAM'S TRIAL VIOLATES THE UNITED STATES CONSTITUTION.

In his opening brief, Appellant argued that many features of California's capital-sentencing scheme, both on their face and as applied in this case, violate the United States Constitution and international law. (AOB 270-312) Respondent disagrees. (RB 194-197) Appellant considers this issue to be fully joined by the briefs on file with this Court. For all of the reasons set forth in the Opening Brief, Appellant's death judgment violates international law and the federal Constitution and must be reversed.

CONCLUSION

For the reasons expressed herein and in the Appellant's Opening Brief, the convictions of murder, the findings of special circumstances, and the sentence of death should be reversed.

Dated: June 3, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mordecai Garelick", written over a horizontal line.

MORDECAI GARELICK

Attorney for Appellant

John Lee Cunningham



APPENDIX A
JUROR QUESTIONNAIRE #216

216
Juror Number

Perez, Gregorio
Print Name

INSTRUCTIONS TO PROSPECTIVE JURORS

If you need help (hard to read, forgot glasses) tell judge.

This questionnaire is designed to obtain information about your qualifications to sit as a juror in this case. Its use will permit jury selection to proceed smoothly and rapidly, if you fully and completely answer all the questions.

There will be individual questioning later in the courtroom where you will have an opportunity to explain or expand your answers, if necessary.

Because completion of this questionnaire is part of the jury selection process, the answers must be your own; and made subject to your oath as a juror to respond fully and truthfully under penalty of perjury.

The information contained in this questionnaire will become part of the court's permanent record, and as such is public record and not confidential. Some of these questions may call for information of a personal nature that you may not want to discuss in public. If you do not wish your answers to any personal questions disclosed to the public, you should circle the number of the question and write confidential in the left margin next to the place where the answer would go. The court will then grant a private hearing for your response. If the trial court determines a legitimate privacy interest deserves protection, the transcript of your private hearing will be sealed.

If an answer requires more space than is provided, do not use the back of the page. Instead, please use the lined blank pages at the end of the questionnaire. Be sure to indicate the number of the question(s) you are answering and sign the last page.

As you answer the questions which follow, please keep in mind that there are no "right" or "wrong" answers, only complete and incomplete answers. Complete answers are far more helpful, because they will shorten the time necessary for the later oral questioning, and the total time it will take to select a jury.

When you have completed the Jury Questionnaire, you should give it to the court staff person as directed. Do not discuss the subjects covered in the questionnaire, or any facts you have learned about this case with anyone--that includes your fellow panelists, members of your family, your friends, co-workers or neighbors. In fact, it is against the law for you to discuss this case. However, you may inform your employer and members of your family that you are a potential juror in this case and indicate the estimated length of the trial. Beyond that you may not discuss anything about this case with anyone.

Judge of the Superior Court

PLEASE USE BLACK PEN ONLY

DO NOT WRITE ON BACK SIDE OF PAGES

1. Please state:

A. Your full name: GREGORIO L. PEREZ, JR.
B. Date of birth: 2-21-52 Sex: M Place of birth: PHILIPPINES
C. Place(s) where you were raised: MANILA, PHILIPPINES

D. Race and ethnic origin: FILIPINO / ASIAN

E. Present marital status:

1. Single and never married _____
2. Divorced and was married for _____ years*
3. Separated and was married for _____ years
4. Widowed and was married for _____ years
5. Married currently for 14 years
6. Living with another for _____ years**
7. Engaged to be married

* Please state length of each marriage: married only once with current wife

** Please state your relationship: Husband

2. If you have children or step-children, please list the following:

Age & Sex	Level of Education	Occupation if Adult	Who Child Lives With
<u>11 F</u>	<u>5th Grade</u>		<u>us - Parents</u>
<u>6 M</u>	<u>1st</u>		<u>"</u>
<u>2 M</u>			<u>"</u>

3. The city of your present residence:

A. Length of residence in the city: 4 yrs.

B. General area in which you reside: China Hills, CA

C. Other towns or cities you have lived in, if any, in this state: (Include length of time in each)

WALNUT, CA 9 yrs
LOS ANGELES, CA 1 yr

D. Length of residence in county: 4 yrs.

E. If you have lived in another state or country, please state when and where:

PHILIPPINES, FROM BIRTH TILL 1981

4. Please describe your educational background:

A. Completed high school: Yes No G.E.D.? Yes No

If not, state last grade completed: _____

B. Attended trade, technical, or business school: Yes No

School attended, type of study, and certificates received:

DON BOSCO TECHNICAL SCHOOL, VOCATIONAL STUDY IN ELECTRONICS
(RAN BY SALESIAN CATHOLIC PRIESTS)

C. Attended college and/or graduate school: Yes No

School attended, type of study, and certificated received:

UNIVERSITY OF THE PHILIPPINES - ENGINEERING
- DID NOT COMPLETE COLLEGE.

D. Educational goals for the future:

CURRENTLY TAKING REAL ESTATE CLASSES

E. Are you currently a student? Yes No

What are you studying? REAL ESTATE LICENSING COURSE -

5. A. Do you have any philosophical, religious, or moral feeling that would make it difficult or impossible for you to sit in judgement of another person? Yes No

If so, please explain: Being educated and raised in strict Catholic teachings and standards, I find it hard to be a judge of another.

B. If you are a member of a religious organization, does that organization have a stated position regarding the death penalty? Yes No

1. If so, what is the stated position? Catholics do not agree with the death penalty.

2. Do you agree with the stated position? Yes

3. What influence, if any, will that have on your decision in this case between the two possible penalties of death or life without the possibility of parole? _____

It will have a great influence. I have always been taught to try to understand why people become the way they are and that one must always forgive and that one must never lose hope. Somehow, these teachings have become my own and has influenced my decisions in life.

6. Please state your present and past occupations beginning with the most current. If you are retired, indicate your occupations before retirement. Indicate whether each job was full time (FT) or part time (PT).

Name of Business	Dates Employed	City	Title	Job Description
APEX PROFESSIONAL SERVICES	'91-'95	L.A.	MANAGER	MANAGE BUSINESS
CITIBANK	'89-'90	PASADENA	LOAN OFFICER	SIGN-UP LOANS
VIVA VIDEO	'86-'89	L.A.	SPECIAL PROJECTS	MA TV SHOWS/CONCERTS
INSURANCE AGENT	'82-'86	L.A.		SELL INSURANCE

A. If you are considering a job or career change, please describe:
Currently studying to be licensed as a Real Estate Agent.

B. Have you supervised other people at your present or past place of employment?

Yes No

Please describe, including number of persons supervised:

*Supervised daily operations of Apex Prof. Services.
 I supervise 5 people.*

C. Please list any professional licenses, certificates, or registrations you may hold:

D. Are you, or have you ever been, in business for yourself? Yes No

Please explain: *Partner in Current Business I manage*

7. Please state the present and past occupations of your mate or spouse, beginning with the most current. If he/she is retired, indicate his/her occupations before retirement. Indicate whether each job was full time (FT) or part time (PT).

Name of Business	Dates Employed	City	Title	Job Description
CIGNA HEALTHPLAN	'86 - Present	W. COVINA	Reg. Nurse	Nurse
CALIF. HOSPITAL MED. CTR.	80-'86	L.A.	"	"

A. If your mate or spouse is considering a job or career change, please describe: _____

N/A

B. If your spouse has had military experience, please state branch of service, dates, locations, and highest rank achieved: _____

N/A

C. If you were previously married, please state the occupations(s) of your previous spouse(s): _____

N/A

D. If your ex-spouse had military experience, please state branch of service, dates, locations, and highest rank achieved: N/A

8. Please state the occupations (past, if retired or deceased) of your parents and/or step-parents:

Mother - Housewife
Father - Military Man } both deceased

9. Please state the occupations (past, if retired or deceased) of your sisters/step-sisters and/or brothers/step-brothers:

Elder sister - Unemployed; Second Sister - ground Stewardess
Third Sister - business woman; Fourth Sister - Housewife; Fifth Sister - housewife
Sixth Sister - Manager a Business; Only Brother - warehouse man
- I have 6 sisters & 1 Brother.

10. If you ever had military experience, please indicate:

A. Which branch _____
B. Dates of service _____
C. Locations _____
D. Rank/rate/specialty NONE
E. Duties _____

F. If you have ever been stationed in a combat zone, or have had combat experience, please describe circumstances, including area, dates, and activity: N/A

G. While in the service, what medals and/or commendations did you receive? _____
N/A

H. If during military service, you were ever involved in any way with law enforcement, please explain: _____

I. If during military service, you were ever involved in any way in a courts martial, please explain: N/A

J. Did you ever avoid, or attempt to avoid, service in the military? Yes ___ No ___
Please explain: N/A

11. Have you or anyone close to you ever been involved in any group, or organization whose main focus is victim rights or crime prevention?
Yes ___ No

A. If you have ever belonged to any such group or organization, please state name of group, and your participation:
N/A

12. Please describe your reading habits:

A. What newspapers do you read regularly: None

B. Which magazines do you read regularly? Golf Magazine

C. Do you read books: Frequently Occasionally Hardly ever

(1) Please list the titles of a few books you have enjoyed the most:
The Prophet, Atlas Shrugged, Fountain Head

(2) Are you reading a book now? Yes No

If so, what book? N/A

If not, what was the name of the last book you read?
I read children's books to my kids -

13. This case involves the murder of three persons which occurred on June 27, 1992, at S.O.S Office Equipment on Baker Street in Ontario. The persons killed were Wayne Sonke, Jose Silva, and David Smith.

The defendant, John Lee Cunningham, was arrested on July 23, 1992, in Deadwood South Dakota. Mr. Cunningham is a combat veteran of the Vietnam War.

At the court trial of the guilt phase of his case, Mr. Cunningham waived his presence for the trial.

Since 1993, all proceedings in this case have occurred in San Bernardino. Since 1993, the Judge assigned has been Michael Smith of San Bernardino Superior Court. Since the case was filed, the prosecutor has been Robert Guzzino, of Rancho Cucamonga District Attorney Office, and the defense lawyer has been David Negus, of the Rancho Cucamonga Public Defender Office.

~~Please search in your memory before answering the following questions regarding possible prior awareness of this case. It is very important that you alert the Court if you even suspect that you have such prior awareness from any source, including casual conversation.~~

A. Do you know anything about this case other than what you have heard in open court?
Yes No

B. What have you seen, read, or heard about this case or about the defendant?
None or I don't remember.

C. Please indicate where you learned this information:
N/A

D. Please describe your initial reaction to anything you saw, read, or heard about this case from any source: N/A

E. Did what you have seen or heard about this case cause you to have a position or negative impression of anyone involved?

Positive ___ Negative ___ Not Sure

F. Do you have any feeling about the nature of the charges in this case that would make it difficult or impossible for you to be fair and impartial? Yes ___ No

If so, what: _____

14. Can you assure the Court that you will avoid any outside influence on this case, via the media or other person? YES

WITNESSES

15. The following persons are witnesses, parties, or other persons who may be mentioned in connection with this case. If you are acquainted with or know of any of these persons, please indicate how you know them, and what your relationship to them is:

John Lee Cunningham _____

Dennis L. Stout, District Attorney _____

Robert Guzzino, Deputy District Attorney _____

David Negus, Deputy Public Defender _____

David Durdines, Deputy Public Defender _____

Sandra L. Waite, Deputy Public Defender _____

From S.O.S., Ontario

Wayne Sonke _____

Jose Silva _____

David Smith _____

Betty Flodter _____

Evelyn Eriksen _____

Michael Ray _____

From Ontario Police Dept.

Susan Bennett Quesada _____

Adriana Darko _____

Stephen Hall _____

Terri Powers _____

Greg Nottingham _____

Don McGready _____

Pat Ortiz _____

From Ontario Fire Dept.

Michael Mondino _____

Dennis Pattie _____

James Pettigrew _____

From San Bernardino Sheriff Dept.

William Matty _____

From San Bernardino Coroner

Nenita Duazo, M.D. _____

From South Dakota

Douglas Grell _____

Jim Charles _____

Robert Overturf _____

Dwayne Russell _____

Troy Boone _____

From Los Angeles Sheriff Department

Dan Scott _____

Pierre Nadeau _____

Kevin Goran _____

Alana Costello _____

Diana Jamison _____

Myrna Torres Cunningham _____

Samira Sepulveda Nicholson _____

Ada Feliciano _____

Herta Gill _____

Michelle Irrazary _____

Ron Forbush _____

Lois Backe _____

Betty Sonke _____

Mimi Smith _____

Ed Smith _____

Jesus Silva _____

Alicia Ramirez _____

Josephine Gomez _____

Wesley Michael Cunningham _____

Jerry Crawford _____

Sunda McIver _____

Daniel Negrón _____

Olivia Negrón _____

Damarie Hassouneh _____

Kary English, M.D. _____

LOCATIONS

16. The following locations may be mentioned during this case. If you are familiar with any of them please indicate the nature of your familiarity:

S.O.S., 2303 S. Baker, Ontario _____
Paramount High School _____
Fort Hood, Texas _____
Fort Benning, Georgia _____
Fort Ord, California _____
Deadwood, South Dakota _____
Ashau Valley, Vietnam _____
Long Binh, Vietnam _____
Xuan Loc, Vietnam _____
An Khe, Vietnam _____
Hue, Vietnam _____
Da Nang, Vietnam _____
F.S.B. Nancy, III Corps, Vietnam _____
F.S.B. Tomahawk, I Corps, Vietnam _____
F.S.B. Birmingham, I Corps, Vietnam _____

MILITARY UNITS

17. The following military units may be mentioned during this case. If you are familiar with any of them please indicate the nature of your familiarity:

101st Airborne Division, "Screaming Eagles" _____
2nd Battalion, 327th Infantry (Airmobile), "No Slack" or "Bastogne Bulldogs" _____
4th Infantry Division _____
2nd Battalion, 35th Infantry _____
199th Light Infantry Brigade, "Redcatchers" _____
4th Battalion, 12th Infantry, "Warriors" or "Eagle Warriors" _____

JURY SERVICE

18. If you have ever been a juror before, please state, for each case:

DO NOT STATE WHAT VERDICT WAS, IF ONE WAS REACHED

<u>Municipal Superior or Federal</u>	<u>Year</u>	<u>Civil or Criminal</u>	<u>Nature of Case</u>	<u>Submitted to Jury</u>	<u>Verdict Reached Yes or No</u>
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

- A. Have you ever been a foreperson of a jury? Yes ___ No ___
- B. At the conclusion of your service on the above case(s), did you have, or were you present at any discussion with the prosecutor(s), defense attorney(s), Judge, or other person related to the case?

___ Prosecutor ___ Defense Attorney
 ___ Judge ___ Other

Please describe what was discussed: _____

- C. Did anything occur during or after the trial(s) that would cause you to be reluctant to serve here? Yes ___ No ___
- D. Have you ever been in court for any reason other than jury duty? Yes ___ No ___
 If "yes", please explain: _____

19. Please explain any feelings or thoughts you may have at the prospect of being called upon to judge the conduct of another: I have no problem in judging as to whether or not a person is guilty or has done wrong. I have a problem...

20. Have you ever had a bad experience with any type of attorney (for example, subjected to a lawsuit, contracted for services not satisfactorily performed, felt justice not served)?
 Yes No ___

Please explain: I also work for an attorney processing personal injury claims. He is too old to practice now and I think some of his clients are not being served well.

21. If you have ever had a dispute with any type of lawyer, please describe the circumstances:
None that I can remember -

22. Have you or any friend or relative ever been arrested or charged with a crime?
 Yes ___ No

A. If so, what is the relationship of this person to you? _____

- B. What were the offense(s) involved? N/A
- C. Was this person prosecuted? Yes ___ No NA
- D. If so, what was the outcome? NA
- E. How do you feel this person was treated by the criminal justice system? N/A

23. Have you or any friend or relative ever been the victim of a violent crime, for example, assault, murder, rape, domestic violence? Yes ___ No ✓

A. If "Yes", please explain; state relation of person to you:

B. If the crime committed was an assault of any sort, reported or unreported, was there anything at all about this experience and its aftermath that would cause you to feel that you may not be an impartial juror on a case where violence is alleged?

Yes ___ No ___ Unsure ___

Please explain: _____

24. Have you or any friend or relative ever been the victim of any other crime reported or unreported: Yes ___ No ✓

A. If "Yes", please explain, state relation of person to you:

25. Have you or any friend or relative ever had a violent act, not necessarily a crime, happen to you? Yes ___ No ✓

A. If "Yes", please explain, state relation of person to you:

26. Have you or any friend or relative ever testified in any proceeding? Yes ✓ No ___

A. If "Yes", please explain I testified in a civil case against defendant's to a copyright infringement lawsuit.

B. Please state the outcome of this proceeding, if you know: I believe it was settled thru bargaining.

C. If this was a criminal proceeding, what were your general impressions of:

1. The prosecuting attorney(s): _____

2. The defense attorney(s): N/A

27. Have you or any friend or relative ever witnessed a crime in progress, not resulting in courtroom participation? Yes No

Please explain: when i was new in this country, I witnessed a black man being beaten by 2 policemen and 1 police woman.

It was actually the policewoman who really started the beating of the blackman. The black man, i thought, did not deserve. *continued*

28. Have you or any friend or relative ever witnessed a violent act, not necessarily a crime? Yes No

Please explain: _____

29. If you answered "Yes", to any of the above, did the occasion cause you to have fear for your personal safety? Yes No

If "Yes", please explain: I just don't like seeing violence

A. The safety of others? Yes No

If "Yes", please explain: I'd like to live in a peaceful community where everyone respects each other.

30. Have you ever felt you were the potential victim of a violent act of any sort, whereby you feared injury or death, or were threatened with bodily injury?

Yes No

If so, please explain: _____

31. Have you or any friend or relative ever felt you were being stalked or surveilled by another person? Yes No

If "Yes", please explain: _____

What was the outcome: _____

32. Have you or any friend or relative ever obtained a restraining order, or had a restraining order obtained? Yes No

If "Yes", please explain: _____

33. If you have any friends, relatives, associates, or other persons close to you who are employed in any occupation related to the court system, please describe: Except for me and

the people I work with who watches for an Attorney, none.

34. If you know any judges or attorneys, please furnish their names, position, area of practice, and the nature of your relationship: Ronald Papel, Scott Dinsmore, Charles Carpenter, Sylvia Harris, Karen Griberton are all attorneys associated w/ John Weaver,
A. How often do you talk about law-related subjects? Very often. *To Adv. I work for*

35. Are you or anyone close to you in any way associated with any prosecutor's office?
Yes ___ No
If "Yes", please explain: _____

36. Are you or anyone close to you in any way associated with any public defender's office?
Yes ___ No
If "Yes", please explain: None that I know of.

37. Are you or anyone close to you in any way associated with any private attorney's office?
Yes No ___
If "Yes", please explain: Same as # 33 answers.

38. What purpose do you think lawyers serve in our society?
They are officers of the law and must abide by and implement them to the best they could.

39. Do you have any reason to be biased either for or against criminal prosecutors?
Not particularly. Prosecutors are people too just like everyone.

40. Do you have any reason to be biased either for or against criminal defense attorneys?
No.

41. If you are required to view photographs of the deceased that are disturbing, do you feel that the viewing of such will affect your ability to objectively evaluate the evidence in this case?
Very much ___ Somewhat Not at all ___
Please explain: I really don't know. I've never seen much.

42. If you are required to view coroner's photographs of the victims in this case, could you separate any unpleasant reactions you may have from the task of objectively evaluating the evidence presented regarding the overall circumstances of death?
Not at all ___ Somewhat ___ Mostly Totally ___
Please explain: I have my own feelings but I think I can be objective if I have to.

43. Do you have any undue or excessive fear of firearms? Yes ___ No
If "Yes", will this affect your ability to serve as a juror in this case?

44. Do firearms make you uncomfortable, by their mere presence?
Yes No ___

If "Yes", how will this affect your ability to serve as a juror in this case?

Not really. if they are worn by law enforcement officers.

45. Do you now, or have you ever owned any type of non-lethal self-defense weapon, such as mace, pepper spray, a stun gun, or any item carried in case of attack by another?

If "Yes", what type? NO

46. Have you ever had any direct contact with any city, county, state, or federal law enforcement agent, including the filing of reports, lodging complaints, being questioned regarding yourself or others, being cited, and so on? Yes No ___

If "Yes", what type of contact was it? In the course of working for an Attorney.

47. Have you or a friend or relative sought employment or been employed (paid or volunteer) by any of the following:

1. Ontario Police Department
2. City of Ontario
3. San Bernardino County Sheriff's Department
4. San Bernardino County Jail
5. County of San Bernardino
6. California Department of Corrections
7. Federal Bureau of Investigations
8. Any District Attorney's Office
9. Any Attorney General's Office
10. Any Public Defender's Office
11. Any Jail or Prison Facility
12. Any Parole or Probation Agency
13. Any Prosecuting Office Agency (Not Mentioned)
14. Any Private Law Office
15. Any Private Investigative or Security Office
16. Any Business Service the Legal Community
17. Any Local Law Enforcement (Not Mentioned)
18. Any State Law Enforcement
19. Any Federal Law Enforcement (Not Mentioned)

A. Relation to you: Employer
Name of agency(s): Law office of John C. Warner

Position(s) held or applied for: Legal Assistant

Duties and responsibilities: Interview prospective clients. Investigate accidents. Negotiate settlement of claims.

B. If the person or persons listed above are sworn officers of the law or court, how often do you communicate with them regarding work-related subjects?

Very often.

48. Do you have any neighbors, coworkers, or acquaintances who are or have been employed in law enforcement or corrections? Yes ___ No

If "Yes", describe their relationship to you, the nature of their work, and how often you communicate regarding their work as peace officers: _____

49. Have you ever considered working in or with law enforcement, security, corrections, or private investigations? Yes No

If "Yes", please explain: I wanted to take up law in college. I was advised by my counselor that I might not make it. I took

If "Yes", what attracted you to such a career? I liked watching courtroom TV/ Movie situations.

If "Yes", what were your reasons for not pursuing such a career? I was told it didn't have the character for such. I believed it.

Engineering instead.

50. Have you ever belonged to any organization that has as its goal the promotion or enforcement of any specific law? Yes No

If "Yes", what groups: _____

51. Have you ever belonged to any organization that has as its goal the abolishment of any specific law? Yes No

If "Yes", what groups? _____

52. In your opinion, what are the three (3) most important problems in the current criminal justice system:

1. Too Complicated 2. Expensive 3. Inefficient

53. Please state what, if any, suggestions you might have for improvement of the criminal justice system:

Couldn't think of any.

54. If you were born and/or raised outside of the United States, how does our criminal justice system differ from the country of your origin?

Pretty much similar. Our system was basically patterned to the U.S. system except that there are no juries. The judge decides on everything.

55. Please state whether your attitudes on our criminal justice system are such that you would be leaning towards the prosecution or the defense stance before hearing both sides:

They're not such.

56. What is your opinion, in general, of the mental health professions, namely:

PSYCHIATRY:

PSYCHOLOGY:

COUNSELING:

I find all these very interesting. A better understanding of everything should improve this world.

57. Do you feel that psychological or psychiatric evaluations are valuable in understanding human behavior?

Always Usually Sometimes Rarely Never

Please explain: *A logical explanation of how things happen gives a better understanding on how & why people behave or don't behave.*

58. Do you know of anyone, without mentioning names, who has had mental health problems that required treatment? Yes No

A. If "Yes", did knowledge of this treatment impress you:

Favorably Unfavorably Not sure

B. Did you feel that treatment resolved that person's difficulties?

Yes No

59. Without mentioning names, have you ever felt that someone you knew would possibly benefit from mental health counseling? Yes No

60. If you ever had any personal experience with psychiatrist, psychologists, or counselors, did this experience impress you: Favorably Unfavorably Does not apply

61. If you sit as a juror on this case, would you be willing to consider psychiatric or psychological testimony? Yes No

Please explain: *Again, a better understanding on how people behave makes it easier to comprehend a situation. It does not necessarily justify or make things right for an action.*

62. Would you tend to distrust psychiatric or psychological testimony in a criminal case?

Yes No

Please explain: *These testimony by themselves have to prove their ~~its~~ credibility.*

63. Do you feel that you are predisposed to giving little or no weight to the testimony of psychiatrists or psychologists?

Yes No

Please explain: *I take or see things the way I understand them and not ~~the~~ necessarily the way other people do.*

64. You have had an opportunity to briefly observe John Lee Cunningham, the defendant in this case, how would you describe him? None

A. Is there anything about the appearance of John Lee Cunningham that might bias you against him? Yes ___ No ___ N/A
Please explain: _____

B. Is there anything about the appearance of John Lee Cunningham that might bias you towards him? Yes ___ No ___ N/A
Please explain: _____

65. Do you think it's true that all persons have biases of some sort on some subject matter?
Yes No ___

Please explain: Different people have different influences & beliefs in life. Biases come natural.

A. If "No", do you think it's possible for a person to be free of biases? Yes ___ No
Please explain: _____

B. Would you say that you were raised in an atmosphere free of biases? Yes ___ No
Please explain: I cannot honestly say I've ever seen an unbiased atmosphere. People have egos.

C. Have you been exposed to persons who exhibit, or have exhibited racial, sexual, religious, and/or ethnic prejudice? Yes No ___
Please explain: I think this is a natural tendency stemming from ignorance of other cultures, religions, etc.

D. Please list any biases you might have: I don't like smelly things. Bad breath especially.

E. Would you say that you have some racist or ethnic attitudes?
Strong ___ Moderate ___ Mild None ___

If so, please explain (if you know) how they originated:

Mainly from my ignorance of how other people think.

If so, how do you compensate for these attitudes?

I try to talk to them if I could and most of the time I prove my attitude as wrong.

66. Do you believe that there will come a time, in this country, when race and ethnic background will have no significance? Yes No

Please explain: I almost said no. As I've stated, there is always hope.

67. Can you think of any reasons you might be biased or prejudiced either for, or against, Native-Americans, Hawaiians, or persons of mixed race?

My ignorance.

68. What is it about yourself that makes you feel you can be an impartial juror on this case?

Honestly, not on the issue of punishment.

69. Given what you know about the nature of this case, please list any biases you may have which could interfere with your ability to be an impartial juror, if selected to sit on this case:

My belief in the Death Penalty or even life imprisonment without parole.

70. Can you think of any reason that you might not be an impartial juror, if selected to serve on this case? Yes No

Please explain: Same as 69

71. Have you any specific health problems of a serious nature that might make it difficult for you to sit as a juror on this case? Yes No

If so, please describe them: There's a possibility though that I might have another gum surgery. I have gum disease.

72. Are you taking any medications regularly that might make it difficult for you to concentrate? Yes No

If so, please state what type of medication: _____

73. Do you have any type of physical disability, handicap, or any other reason that might make it difficult for you to sit through this trial and give it your full and complete attention?

Yes No

If "Yes", please describe: _____

A. What is the condition of your hearing?
Excellent Good Fair Poor Bad

B. What is the condition of your eyesight?
Excellent Good Fair Poor Bad

74. What is your native language? Filipino (Tagalog)

A. Do you have any trouble being understood when you speak in English?
Not at all Some Much Very much

B. Do you have any trouble understanding others when they speak in English?
Not at all Some Much Very much

75. Do you have any pressing business or is there anything pressing in your personal life that might cause you to "hurry along" the process of decision-making in the jury room?

Yes No

If "Yes", please explain: I have a property in the Philippines wife is trying to sell. It might push through sometime July - September. This might compel me to leave the country if it pushed through.

76. Please state why you might like to or not like to sit on this case:

I like to sit on cases because the law has always fascinated me. It just so happens that sentencing someone is against my beliefs.

77. Is there any information not asked in this questionnaire you feel the Court should know about you? Yes No

If "Yes", what is that information:

78. The jury selected in this case will determine whether to give the death penalty to Mr. Cunningham, or sentence him to spend the rest of his life in prison without the possibility of parole.

Do you think the death penalty should be automatic for anyone who intentionally commits murder (not in self defense)? Yes No

79. As a penalty selection juror:

A. Do you understand that the only two sentences you will be choosing between will be the death penalty and life in prison without the possibility of parole?

yes

B. If you are unclear as to the above, please state precisely what it is that you would like the Court to clarify: _____

80. What is your opinion regarding the death penalty?

The reason why it is there is because the system has lost all hope. That should not be the case in any system. One must never stop to improve itself.

81. What is your opinion regarding life in prison without the possibility of parole?

I will only agree to it if it's the only solution for a person who has committed a crime so severely again.

82. What purpose, if any, do you think the death penalty serves?
Economics. And yet the appeals system still makes it expensive for that law to be implemented.
83. What purpose, if any, do you think the penalty of life in prison without the possibility of parole serves?
None. It drains the economy. There should be something more productive than this.
84. What types of crimes, if any deserve the death penalty?
I couldn't think of one -
85. Please choose one from the following that best reflects your feelings about the death penalty:
 (A) Automatically vote for the death penalty _____
 (B) Strongly favor the death penalty _____
 (C) Neither favor nor oppose the death penalty _____
 (D) Strongly oppose the death penalty _____
 (E) Never vote for the death penalty _____
86. If you answered (A) or (B) to above (that you would automatically vote for the death penalty, or strongly favor the death penalty) would it go against your nature to vote for life imprisonment without the possibility of parole under any circumstances?
 Yes ___ No ___ Unsure ___ Please explain:

87. If you answered either (D) or (E) above (that you would either strongly oppose the death penalty, or never vote for the death penalty) would it go against your nature to vote for the death penalty under any circumstances?
 Yes ___ No ___ Unsure Please explain:
I've never been subjected to this before.
88. Do you think that the death penalty should be automatic for anyone who commits certain types of murders, or multiple murders?
 Yes ___ No Unsure ___ Please explain:
Be more understand why the crime was committed first.

89. In this case, three deaths occurred in a single incident. Depending upon all of the circumstances of this case and all the evidence presented in the penalty phase, could you consider as a realistic and practical possibility:

A. Imposing life without possibility of parole in such a case?

Yes ___ No ___ Unsure Please explain:

I have to hear the case first.

B. Imposing the death penalty in such a case?

Yes ___ No ___ Unsure Please explain:

I have to hear the case first.

90. If you have spiritual and/or religious beliefs, please state any advisement and/or written quotes or passages which you have seen or heard that you feel may pertain to the issue of the death penalty vs. life in prison without the possibility of parole:

I have no specificity. It was at my elementary and highschool exposure to Catholic teachings that has influenced my feelings & beliefs.

91. Do you feel that someone convicted of murder with special circumstances:

A. Should be sentenced to death without consideration of background information?

Always ___ Probably ___ Possibly ___ Never Unsure ___

Please explain: _____

B. Should be sentenced to life in prison without the possibility of parole without consideration of background information?

Always ___ Probably ___ Possibly ___ Never Unsure ___

Please explain: *There always has to be background info.*

92. In deciding the penalty to be imposed in this case, how do you feel about considering the following factors:

A. Prior incidents of violence:

yes

B. Prior felony convictions:

yes

C. The feelings of the families of the victims:

no

D. The feelings of the family of Mr. Cunningham: *no.*

E. Mr. Cunningham's service to America in combat overseas:

yes

F. Mr. Cunningham's childhood experiences:

yes

G. Mr. Cunningham's past good behavior in prison:

yes

93. Overall, in considering general issues of punishment, which do you think is worse for a defendant:

Death Life in prison without the possibility of parole

Please explain: *Life sentence is like death, you don't call it a life. Death may bring something else (life after death which may be a better life)*

94. When a jury votes that a person be sentenced to life in prison without the possibility of parole, what does that mean to you?

That he can never go out of jail.

95. When a jury votes that a person be sentenced to death in the gas chamber or by lethal injection, what does that mean to you?

That he is going to be killed.

96. Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a death sentence on a person convicted of murder with special circumstances?

None

97. Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a sentence of life without the possibility of parole on a person convicted of murder with special circumstances?

None

98. Do you feel that life in prison without the possibility of parole is a severe punishment?

Yes No

Please explain:

It's not a life at all.

99. Do you believe that a person who is sentenced to life imprisonment with the possibility of parole will be released from prison some day?

Yes No Unsure Please explain:

I'm ignorant of this.

A. If you chose "yes", would that belief keep you from voting for a punishment of life in prison without the possibility of parole?

Yes No Unsure Please explain:

100. Could you consider as a realistic and practical possibility imposing the death penalty on a person who was a combat veteran?

Yes No

Please explain:

I don't know. It seems to be not a basis.

101. Could you consider as a realistic and practical possibility imposing the life without parole on a person who was a combat veteran?

Yes No

Please explain:

I don't know. S/A

102. Do you feel that death in the gas chamber or by lethal injection is a severe punishment?

Yes No

Please explain:

The person is not given any chance.

103. Do you feel the death is imposed:

Too often Too seldom Randomly About right

No opinion

Please explain:

104. Are you aware that a person was executed in California's gas chamber in the recent past?

Yes ___ No ✓

A. Please describe what you saw or heard:

B. What was your reaction to what you saw or heard:

105. What, if anything, would you want to know about John Lee Cunningham, or about the crimes he is charged with, in order to decide the possible punishment in this case?

I want to hear him speak and talk
about the case.

106. There are no circumstances under which a jury is instructed by the court that it must return a verdict of death. No matter what the evidence, the jury is always given the option in the penalty phase of choosing either life without the possibility of parole or the death penalty.

(a) Given the fact that you will have both options of life or death available, can you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole?

Yes ✓ No ___ Unsure ___

Please explain:

Very possible because of my beliefs.

(b) Given the fact that you will have both options of life or death available, can you see yourself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty?

Yes ✓ No ___ Unsure ___

Please explain:

It's a possibility. If he himself requests it
and if he is in sound mind and body.

107. Do you believe in the saying, "An eye for an eye"?

Yes ___ No ✓

A. What does this saying mean to you?

Revenge. It's counterproductive.

108. If your opinion about the death penalty has changed over the past years, please explain how and why:

NA

109. Do you belong to any group or organization which is either opposed or in favor of the death penalty?

Yes ___ No

If yes, please explain:

110. Is there any information not asked in this questionnaire you feel the Court should know about your attitudes towards the two sentences you will be asked to consider?

Yes ___ No

If "Yes", what is that information?

=====
I certify, under penalty of perjury, that the foregoing is true and correct, and that I have received no assistance from any other person in completing this questionnaire.

Executed in the County of San Bernardino

[Handwritten Signature]
Signature

Extra pages. Please remember to include the question number and sign your name at the end. Thank you for taking the time to answer all the questions truthfully and completely.

5A. Person. I was thought that God is the only rightful judge.

19. As to whether or not punishment or appropriate punishment is right or wrong.

28. To be beaten like that when he was not even fighting back or even defending himself. He just stood there. I really don't know the reason why they beat him. He struck the back of his head to a steel bumper of a car. Its very possible that he may have suffered serious brain injury or may even have died. My mother died in an accident bumping the back of her head while falling into a paved sidewalk.



APPENDIX B
JUROR QUESTIONNAIRE #426

426
Juror Number

ADAM M. LARSON
Print Name

INSTRUCTIONS TO PROSPECTIVE JURORS

If you need help (hard to read, forgot glasses) tell judge.

This questionnaire is designed to obtain information about your qualifications to sit as a juror in this case. Its use will permit jury selection to proceed smoothly and rapidly, if you fully and completely answer all the questions.

There will be individual questioning later in the courtroom where you will have an opportunity to explain or expand your answers, if necessary.

Because completion of this questionnaire is part of the jury selection process, the answers must be your own, and made subject to your oath as a juror to respond fully and truthfully under penalty of perjury.

The information contained in this questionnaire will become part of the court's permanent record, and as such is public record and not confidential. Some of these questions may call for information of a personal nature that you may not want to discuss in public. If you do not wish your answers to any personal questions disclosed to the public, you should circle the number of the question and write confidential in the left margin next to the place where the answer would go. The court will then grant a private hearing for your response. If the trial court determines a legitimate privacy interest deserves protection, the transcript of your private hearing will be sealed.

If an answer requires more space than is provided, do not use the back of the page. Instead, please use the lined blank pages at the end of the questionnaire. Be sure to indicate the number of the question(s) you are answering and sign the last page.

As you answer the questions which follow, please keep in mind that there are no "right" or "wrong" answers, only complete and incomplete answers. Complete answers are far more helpful, because they will shorten the time necessary for the later oral questioning, and the total time it will take to select a jury.

When you have completed the Jury Questionnaire, you should give it to the court staff person as directed. Do not discuss the subjects covered in the questionnaire, or any facts you have learned about this case with anyone--that includes your fellow panelists, members of your family, your friends, co-workers or neighbors. In fact, it is against the law for you to discuss this case. However, you may inform your employer and members of your family that you are a potential juror in this case and indicate the estimated length of the trial. Beyond that you may not discuss anything about this case with anyone.

Judge of the Superior Court

PLEASE USE BLACK PEN ONLY

DO NOT WRITE ON BACK SIDE OF PAGES

1. Please state:

- A. Your full name: ADAM MICHAEL LARSON
B. Date of birth: 10-24-66 Sex: M Place of birth: ONTARIO, CA.
C. Place(s) where you were raised: POMONA, CHINO, CALIFORNIA.

D. Race and ethnic origin: CAUCASIAN "DANISH" DANE

E. Present marital status:

1. Single and never married
2. Divorced and was married for ___ years*
3. Separated and was married for ___ years
4. Widowed and was married for ___ years
5. Married currently for ___ years
6. Living with another for ___ years**
7. Engaged to be married

* Please state length of each marriage: _____

** Please state your relationship: _____

If you have children or step-children, please list the following:

Age & Sex	Level of Education	Occupation if Adult	Who Child Lives With
-----------	--------------------	---------------------	----------------------

3. The city of your present residence:

- A. Length of residence in the city: CHINO ; 18 YEARS
B. General area in which you reside: SOUTHERN CALIFORNIA ? NOT CLEAR AREA
C. Other towns or cities you have lived in, if any, in this state: (Include length of time in each)

ROGUE RIVER, OR 3/89 - 2/89 GRANDPARENTS RESIDENCE.

D. Length of residence in county: 18 YEARS

E. If you have lived in another state or country, please state when and where:

ROGUE RIVER, OR 3/89 - 9/89

4. Please describe your educational background:

A. Completed high school: Yes No G.E.D.? Yes No

If not, state last grade completed: _____

B. Attended trade, technical, or business school: Yes No

School attended, type of study, and certificates received:

C. Attended college and/or graduate school: Yes No

School attended, type of study, and certificated received:

MT SAN ANTONIO COLLEGE, ENGR, ASSOC SCIENCE

D. Educational goals for the future:

BACHELOR DEGREE - UNDECIDED

E. Are you currently a student? Yes No

What are you studying? _____

5. A. Do you have any philosophical, religious, or moral feeling that would make it difficult or impossible for you to sit in judgement of another person? Yes No

If so, please explain: _____

B. If you are a member of a religious organization, does that organization have a stated position regarding the death penalty? Yes No

1. If so, what is the stated position? _____

2. Do you agree with the stated position? _____

3. What influence, if any, will that have on your decision in this case between the two possible penalties of death or life without the possibility of parole? _____

6. Please state your present and past occupations beginning with the most current. If you are retired, indicate your occupations before retirement. Indicate whether each job was full time (FT) or part time (PT).

Name of Business	Dates Employed	City	Title	Job Description
NOVA QUEST	3/95 - PRESENT	TORRANCE	CSR	CUST SERVICE
EGGHEAD SOFTWARE	8/86 - 2/95	CULVER CITY	CSR	CUST SERVICE
RAGING WATERS	5/85 - 10/86	SAN DIMAS	RSC	INVENTORY CONTROL

- A. If you are considering a job or career change, please describe:

- B. Have you supervised other people at your present or past place of employment?
 Yes ___ No
 Please describe, including number of persons supervised:

- C. Please list any professional licenses, certificates, or registrations you may hold:

- D. Are you, or have you ever been, in business for yourself? Yes ___ No
 Please explain: _____

Please state the present and past occupations of your mate or spouse, beginning with the most current. If he/she is retired, indicate his/her occupations before retirement. Indicate whether each job was full time (FT) or part time (PT).

Name of Business	Dates Employed	City	Title	Job Description

- A. If your mate or spouse is considering a job or career change, please describe: _____

- B. If your spouse has had military experience, please state branch of service, dates, locations, and highest rank achieved: _____

- C. If you were previously married, please state the occupations(s) of your previous spouse(s): _____

D. If your ex-spouse had military experience, please state branch of service, dates, locations, and highest rank achieved: _____

8. Please state the occupations (past, if retired or deceased) of your parents and/or step-parents:

CAL POLY, POMONA PERSONNEL DEPT MOTHER
SIMPSON PAPER, POMONA AUTO SHOP TECH FATHER

9. Please state the occupations (past, if retired or deceased) of your sisters/step-sisters and/or brothers/step-brothers:

LINFORD SERVICE, POMONA OFFICE MGR SISTER

10. If you ever had military experience, please indicate:

- A. Which branch _____
- B. Dates of service _____
- C. Locations _____
- D. Rank/rate/specialty _____
- E. Duties _____

F. If you have ever been stationed in a combat zone, or have had combat experience, please describe circumstances, including area, dates, and activity: _____

G. While in the service, what medals and/or commendations did you receive? _____

H. If during military service, you were ever involved in any way with law enforcement, please explain: _____

I. If during military service, you were ever involved in any way in a courts martial, please explain: _____

J. Did you ever avoid, or attempt to avoid, service in the military? Yes ___ No ___
Please explain: _____

11. Have you or anyone close to you ever been involved in any group, or organization whose main focus is victim rights or crime prevention?

Yes ___ No

A. If you have ever belonged to any such group or organization, please state name of group, and your participation: _____

12. Please describe your reading habits:

A. What newspapers do you read regularly? NONE

B. Which magazines do you read regularly? MOTOR TREND

C. Do you read books: Frequently Occasionally Hardly ever

(1) Please list the titles of a few books you have enjoyed the most:
VAMPIRE CHRONICLES, MAYFAIR WITCHES

(2) Are you reading a book now? Yes No

If so, what book? TALTO

If not, what was the name of the last book you read?

13. This case involves the murder of three persons which occurred on June 27, 1992, at S.O.S Office Equipment on Baker Street in Ontario. The persons killed were Wayne Sonke, Jose Silva, and David Smith.

The defendant, John Lee Cunningham, was arrested on July 23, 1992, in Deadwood South Dakota. Mr. Cunningham is a combat veteran of the Vietnam War.

At the court trial of the guilt phase of his case, Mr. Cunningham waived his presence for the trial.

Since 1993, all proceedings in this case have occurred in San Bernardino. Since 1993, the Judge assigned has been Michael Smith of San Bernardino Superior Court. Since the case was filed, the prosecutor has been Robert Guzzino, of Rancho Cucamonga District Attorney Office, and the defense lawyer has been David Negus, of the Rancho Cucamonga Public Defender Office.

Please search in your memory before answering the following questions regarding possible prior awareness of this case. It is very important that you alert the Court if you even suspect that you have such prior awareness from any source, including casual conversation.

A. Do you know anything about this case other than what you have heard in open court?
Yes No

B. What have you seen, read, or heard about this case or about the defendant?
NOTHING

C. Please indicate where you learned this information:

D. Please describe your initial reaction to anything you saw, read, or heard about this case from any source: _____

- E. Did what you have seen or heard about this case cause you to have a position or negative impression of anyone involved?
 Positive Negative Not Sure
- F. Do you have any feeling about the nature of the charges in this case that would make it difficult or impossible for you to be fair and impartial? Yes No
 If so, what: _____

14. Can you assure the Court that you will avoid any outside influence on this case, via the media or other person? YES

WITNESSES

15. The following persons are witnesses, parties, or other persons who may be mentioned in connection with this case. If you are acquainted with or know of any of these persons, please indicate how you know them, and what you relationship to them is:

- John Lee Cunningham _____
 Dennis L. Stout, District Attorney _____
 Robert Guzzino, Deputy District Attorney _____
 David Negus, Deputy Public Defender _____
 David Durdines, Deputy Public Defender _____
 Sandra L. Waite, Deputy Public Defender _____
From S.O.S., Ontario
 Wayne Sonke _____
 Jose Silva _____
 David Smith _____
 Betty Flodter _____
 Evelyn Eriksen _____
 Michael Ray _____
From Ontario Police Dept.
 Susan Bennett Quesada _____
 Adriana Darko _____
 Stephen Hall _____
 Terri Powers _____
 Greg Nottingham _____
 Don McGready _____
 Pat Ortiz _____
From Ontario Fire Dept >
 Michael Mondino _____
 Dennis Pattie _____
 James Pettigrew _____
From San Bernardino Sheriff Dept.
 William Matty _____
From San Bernardino Coroner
 Nenita Duazo, M.D. _____

From South Dakota

Douglas Grell _____

Jim Charles _____

Robert Overturf _____

Dwayne Russell _____

Troy Boone _____

From Los Angeles Sheriff Department

Dan Scott _____

Pierre Nadeau _____

Kevin Goran _____

Alana Costello _____

Diana Jamison _____

Myrna Torres Cunningham _____

Samira Sepulveda Nicholson _____

Ada Feliciano _____

Herta Gill _____

Michelle Irrazary _____

Ron Forbush _____

Lois Backe _____

Betty Sonke _____

Mimi Smith _____

Ed Smith _____

Jesus Silva _____

Alicia Ramirez _____

Josephine Gomez _____

Wesley Michael Cunningham _____

Jerry Crawford _____

Sunda Melver _____

Daniel Negron _____

Olivia Negron _____

Damarie Hassouneh _____

Kary English, M.D. _____

LOCATIONS

16. The following locations may be mentioned during this case. If you are familiar with any of them please indicate the nature of your familiarity:

S.O.S., 2303 S. Baker, Ontario _____
Paramount High School _____
Fort Hood, Texas _____
Fort Benning, Georgia _____
Fort Ord, California _____
Deadwood, South Dakota _____
Ashau Valley, Vietnam _____
Long Binh, Vietnam _____
Xuan Loc, Vietnam _____
An Khe, Vietnam _____
Hue, Vietnam _____
Da Nang, Vietnam _____
F.S.B. Nancy, III Corps, Vietnam _____
F.S.B. Tomahawk, I Corps, Vietnam _____
F.S.B. Birmingham, I Corps, Vietnam _____

MILITARY UNITS

17. The following military units may be mentioned during this case. If you are familiar with any of them please indicate the nature of your familiarity:

101st Airborne Division, "Screaming Eagles" _____
2nd Battalion, 327th Infantry (Airmobile), "No Slack" or "Bastogne Bulldogs" _____
4th Infantry Division _____
2nd Battalion, 35th Infantry _____
199th Light Infantry Brigade, "Redcatchers" _____
4th Battalion, 12th Infantry, "Warriors" or "Eagle Warriors" _____

JURY SERVICE

18. If you have ever been a juror before, please state, for each case:

DO NOT STATE WHAT VERDICT WAS, IF ONE WAS REACHED

Municipal Superior or Federal	Year	Civil or Criminal	Nature of Case	Submitted to Jury	Verdict Reached Yes or No
<u>M</u>	<u>1989</u>	<u>CIVIL</u>	<u>LISC?</u>	<u>YES?</u>	<u>YES</u>

- A. Have you ever been a foreperson of a jury? Yes ___ No
- B. At the conclusion of your service on the above case(s), did you have, or were you present at any discussion with the prosecutor(s), defense attorney(s), Judge, or other person related to the case?

___ Prosecutor ___ Defense Attorney
___ Judge ___ Other

Please describe what was discussed: _____

- C. Did anything occur during or after the trial(s) that would cause you to be reluctant to serve here? Yes ___ No
- D. Have you ever been in court for any reason other than jury duty? Yes No ___
If "yes", please explain: TRAFFIC INFRACOCTIONS

19. Please explain any feelings or thoughts you may have at the prospect of being called upon to judge the conduct of another: _____

20. Have you ever had a bad experience with any type of attorney (for example, subjected to a law suit, contracted for services not satisfactorily performed, felt justice not served)?
Yes ___ No

Please explain: _____

21. If you have ever had a dispute with any type of lawyer, please describe the circumstances:
NO.

22. Have you or any friend or relative ever been arrested or charged with a crime?
Yes ___ No

A. If so, what is the relationship of this person to you? _____

- B. What were the offense(s) involved? _____
 C. Was this person prosecuted? Yes ___ No ___
 D. If so, what was the outcome? _____
 E. How do you feel this person was treated by the criminal justice system? _____

23. Have you or any friend or relative ever been the victim of a violent crime, for example, assault, murder, rape, domestic violence? Yes ___ No

A. If "Yes", please explain; state relation of person to you:

B. If the crime committed was an assault of any sort, reported or unreported, was there anything at all about this experience and its aftermath that would cause you to feel that you may not be an impartial juror on a case where violence is alleged?

Yes ___ No ___ Unsure ___

Please explain: _____

24. Have you or any friend or relative ever been the victim of any other crime reported or unreported: Yes No ___

A. If "Yes", please explain, state relation of person to you:

VANDALISM - RIMS & TIRE STOLEN FROM MY CAR.

25. Have you or any friend or relative ever had a violent act, not necessarily a crime, happen to you? Yes No ___

A. If "Yes", please explain, state relation of person to you:

"BEAT-UP" BY A MAN IN HIGH SCHOOL. HE WAS HEAVILY INTOXICATED, MY FRIENDS MOUTHED OFF, I TRIED TO SEPARATE THE TWO PARTIES, I GOT "BEAT-UP"

26. Have you or any friend or relative ever testified in any proceeding? Yes ___ No

A. If "Yes", please explain _____

B. Please state the outcome of this proceeding, if you know: _____

C. If this was a criminal proceeding, what were your general impressions of:

1. The prosecuting attorney(s): _____

2. The defense attorney(s): _____

27. Have you or any friend or relative ever witnessed a crime in progress, not resulting in courtroom participation? Yes ___ No
Please explain: _____

28. Have you or any friend or relative ever witnessed a violent act, not necessarily a crime?
Yes No ___
Please explain: MAN BEATING HIS WIFE (A WOMAN) IN PUBLIC,

29. If you answered "Yes", to any of the above, did the occasion cause you to have fear for your personal safety? Yes ___ No
If "Yes", please explain: I WAS NOT CLOSE ENOUGH.

A. The safety of others? Yes No ___
If "Yes", please explain: IF SOMEONE WOULD HAVE INTERVIEWED.

30. Have you ever felt you were the potential victim of a violent act of any sort, whereby you feared injury or death, or were threatened with bodily injury?
Yes ___ No
If so, please explain: _____

31. Have you or any friend or relative ever felt you were being stalked or surveilled by another person? Yes ___ No
If "Yes", please explain: _____

What was the outcome: _____

32. Have you or any friend or relative ever obtained a restraining order, or had a restraining order obtained? Yes ___ No
If "Yes", please explain: _____

33. If you have any friends, relatives, associates, or other persons close to you who are employed in any occupation related to the court system, please describe: MY FRIEND'S AUNT IS
A MARSHALL.

34. If you know any judges or attorneys, please furnish their names, position, area of practice, and the nature of your relationship: _____

A. How often do you talk about law-related subjects? _____

35. Are you or anyone close to you in any way associated with any prosecutor's office?

Yes ___ No

If "Yes", please explain: _____

36. Are you or anyone close to you in any way associated with any public defender's office?

Yes ___ No

If "Yes", please explain: _____

37. Are you or anyone close to you in any way associated with any private attorney's office?

Yes ___ No

If "Yes", please explain: _____

38. What purpose do you think lawyers serve in our society?

TO PROSECUTE AND DEFEND AGAINST PROSECUTION.

39. Do you have any reason to be biased either for or against criminal prosecutors?

NO.

40. Do you have any reason to be biased either for or against criminal defense attorneys?

NO.

41. If you are required to view photographs of the deceased that are disturbing, do you feel that the viewing of such will affect your ability to objectively evaluate the evidence in this case?

Very much ___ Somewhat ___ Not at all

Please explain: _____

42. If you are required to view coroner's photographs of the victims in this case, could you separate any unpleasant reactions you may have from the task of objectively evaluating the evidence presented regarding the overall circumstances of death?

Not at all ___ Somewhat ___ Mostly ___ Totally

Please explain: _____

43. Do you have any undue or excessive fear of firearms? Yes ___ No
If "Yes", will this affect your ability to serve as a juror in this case?

44. Do firearms make you uncomfortable, by their mere presence?
Yes ___ No
If "Yes", how will this affect your ability to serve as a juror in this case?

45. Do you now, or have you ever owned any type of non-lethal self-defense weapon, such as mace, pepper spray, a stun gun, or any item carried in case of attack by another?
If "Yes", what type? NONE

46. Have you ever had any direct contact with any city, county, state, or federal law enforcement agent, including the filing of reports, lodging complaints, being questioned regarding yourself or others, being cited, and so on? Yes No ___
If "Yes", what type of contact was it? TRAFFIC INFRACTIONS

47. Have you or a friend or relative sought employment or been employed (paid or volunteer) by any of the following:

1. Ontario Police Department
2. City of Ontario
3. San Bernardino County Sheriff's Department
4. San Bernardino County Jail
5. County of San Bernardino
6. California Department of Corrections
7. Federal Bureau of Investigations
8. Any District Attorney's Office
9. Any Attorney General's Office
10. Any Public Defender's Office
11. Any Jail or Prison Facility
12. Any Parole or Probation Agency
13. Any Prosecuting Office Agency (Not Mentioned)
14. Any Private Law Office
15. Any Private Investigative or Security Office
16. Any Business Service the Legal Community
17. Any Local Law Enforcement (Not Mentioned)
18. Any State Law Enforcement
19. Any Federal Law Enforcement (Not Mentioned)

A. Relation to you: FRIEND
Name of agency(s): CHP CA. HWY PATROL

Position(s) held or applied for: _____

Duties and responsibilities: _____

B. If the person or persons listed above are sworn officers of the law or court, how often do you communicate with them regarding work-related subjects?

DID NOT MAKE EMPLOYMENT (AFFIRMATIVE ACTION)

48. Do you have any neighbors, coworkers, or acquaintances who are or have been employed in law enforcement or corrections? Yes ___ No

If "Yes", describe their relationship to you, the nature of their work, and how often you communicate regarding their work as peace officers: _____

49. Have you ever considered working in or with law enforcement, security, corrections, or private investigations? Yes ___ No

If "Yes", please explain: _____

If "Yes", what attracted you to such a career? _____

If "Yes", what were your reasons for not pursuing such a career? _____

50. Have you ever belonged to any organization that has as its goal the promotion or enforcement of any specific law? Yes ___ No

If "Yes", what groups: _____

51. Have you ever belonged to any organization that has as its goal the abolishment of any specific law? Yes ___ No

If "Yes", what groups? _____

52. In your opinion, what are the three (3) most important problems in the current criminal justice system:

1. _____ 2. _____ 3. _____

53. Please state what, if any, suggestions you might have for improvement of the criminal justice system:

54. If you were born and/or raised outside of the United States, how does our criminal justice system differ from the country of your origin?

55. Please state whether your attitudes on our criminal justice system are such that you would be leaning towards the prosecution or the defense stance before hearing both sides:

NEITHER

56. What is your opinion, in general, of the mental health professions, namely:
PSYCHIATRY: _____
PSYCHOLOGY: _____
COUNSELING: _____

57. Do you feel that psychological or psychiatric evaluations are valuable in understanding human behavior?
Always ___ Usually ___ Sometimes Rarely ___ Never ___
Please explain: DEPENDS UPON THE EVALUATOR.

58. Do you know of anyone, without mentioning names, who has had mental health problems that required treatment? Yes ___ No
A. If "Yes", did knowledge of this treatment impress you:
Favorably ___ Unfavorably ___ Not sure ___
B. Did you feel that treatment resolved that person's difficulties?
Yes ___ No ___

59. Without mentioning names, have you ever felt that someone you knew would possibly benefit from mental health counseling? Yes ___ No

60. If you ever had any personal experience with psychiatrist, psychologists, or counselors, did this experience impress you: Favorably ___ Unfavorably ___ Does not apply

61. If you sit as a juror on this case, would you be willing to consider psychiatric or psychological testimony? Yes No ___
Please explain: THE QUALIFIED EVALUATORS' FINDINGS MAY BE OF RELEVANCE

62. Would you tend to distrust psychiatric or psychological testimony in a criminal case?
Yes ___ No
Please explain: _____

63. Do you feel that you are predisposed to giving little or no weight to the testimony of psychiatrists or psychologists?
Yes ___ No
Please explain: _____

64. You have had an opportunity to briefly observe John Lee Cunningham, the defendant in this case, how would you describe him? MEDIUM TO LARGE BUILD, REDDISH BLACK HAIR, MAUVE SHIRT, GLASSES (SPECIALLES).

A. Is there anything about the appearance of John Lee Cunningham that might bias you against him? Yes ___ No
Please explain: _____

B. Is there anything about the appearance of John Lee Cunningham that might bias you towards him? Yes ___ No
Please explain: _____

65. Do you think it's true that all persons have biases of some sort on some subject matter? Yes No ___

Please explain: THE REVERSE IS UNTRUE
HOW COULD SOMEONE HAVE NO BIAS ABOUT NOTHING EVER?

A. If "No", do you think it's possible for a person to be free of biases? Yes No ___
Please explain: ON SUBJECTS TO WHICH THEY ARE IGNORANT

B. Would you say that you were raised in an atmosphere free of biases? Yes ___ No
Please explain: SUBTLE BIASES, COLORS, FOODS, ENTERTAINMENT

C. Have you been exposed to persons who exhibit, or have exhibited racial, sexual, religious, and/or ethnic prejudice? Yes No ___
Please explain: RACIAL PREJUDICE IN MOVIES, TELEVISION.

D. Please list any biases you might have:
I DONT BELIEVE GOD HAS A RELIGION.

E. Would you say that you have some racist or ethnic attitudes?
Strong ___ Moderate ___ Mild None ___

If so, please explain (if you know) how they originated:
CERTAIN RACES FORCE EXTREME PREJUDICES ON THEMSELVES BY DEMONSTRATING STEREOTYPICAL BEHAVIOR.

If so, how do you compensate for these attitudes?
AWARENESS, OPEN MIND.

66. Do you believe that there will come a time, in this country, when race and ethnic background will have no significance? Yes No ___

Please explain: EVENTUALLY PEOPLE WILL DISCOVER THEIR SIMILARITIES AMONG THEIR DIFFERENCES.

EVERYONE HAS A GOD THAT IS RIGHT.
EVERYONE HAS A RELIGION IN WHICH GOD ONLY RECOGNIZES THEIR BELIEFS.

IT MIGHT SOMEDAY "SWIRL", EVERYONE IS SAYING THE SAME THING.

67. Can you think of any reasons you might be biased or prejudiced either for, or against, Native-Americans, Hawaiians, or persons of mixed race?

NONE

68. What is it about yourself that makes you feel you can be an impartial juror on this case?

OPEN-MINDED, LACK HARSH PREJUDICE, OR ANY IGNORANT PREJUDICE.

69. Given what you know about the nature of this case, please list any biases you may have which could interfere with your ability to be an impartial juror, if selected to sit on this case:

NONE

70. Can you think of any reason that you might not be an impartial juror, if selected to serve on this case? Yes ___ No

Please explain: DIAS IS KNOWLEDGE-BASED.
IGNORANCE IS FREE OF BIAS.

71. Have you any specific health problems of a serious nature that might make it difficult for you to sit as a juror on this case? Yes ___ No

If so, please describe them: _____

72. Are you taking any medications regularly that might make it difficult for you to concentrate?

Yes ___ No

If so, please state what type of medication: _____

73. Do you have any type of physical disability, handicap, or any other reason that might make it difficult for you to sit through this trial and give it your full and complete attention?

Yes ___ No

If "Yes", please describe: _____

A. What is the condition of your hearing?

Excellent Good ___ Fair ___ Poor ___ Bad ___

B. What is the condition of your eyesight?

Excellent Good ___ Fair ___ Poor ___ Bad ___

74. What is your native language? ENGLISH

A. Do you have any trouble being understood when you speak in English?

Not at all Some ___ Much ___ Very much ___

B. Do you have any trouble understanding others when they speak in English?

Not at all Some ___ Much ___ Very much ___

75. Do you have any pressing business or is there anything pressing in your personal life that might cause you to "hurry along" the process of decision-making in the jury room?

Yes ___ No

If "Yes", please explain: _____

76. Please state why you might like to or not like to sit on this case:

TO LEARN ABOUT THE PROCESS WOULD BE A GREAT EXPERIENCE.

77. Is there any information not asked in this questionnaire you feel the Court should know about you? Yes ___ No

If "Yes", what is that information: _____

78. The jury selected in this case will determine whether to give the death penalty to Mr. Cunningham, or sentence him to spend the rest of his life in prison without the possibility of parole.

Do you think the death penalty should be automatic for anyone who intentionally commits murder (not in self defense)? Yes ___ No

9. As a penalty selection juror:

A. Do you understand that the only two sentences you will be choosing between will be the death penalty and life in prison without the possibility of parole?

YES

B. If you are unclear as to the above, please state precisely what it is that you would like the Court to clarify: _____

80. What is your opinion regarding the death penalty?

I AM CURIOUS, WITH REGARDS TO THE PROCESS, HOW A JURY COMES TO THAT DECISION.

81. What is your opinion regarding life in prison without the possibility of parole?

THE SAME "80."

82. What purpose, if any, do you think the death penalty serves?
 - DETERANT BY EXAMPLE FOR OTHERS.
 - THE SAVINGS IN COST TO SUPPORT "LIFE" IN PRISON.
 - QUICK DISMISSAL FROM LIFE FOR THE CONVICTED'S SAKE.
83. What purpose, if any, do you think the penalty of life in prison without the possibility of parole serves?
 - REMOVAL FROM SOCIETY, AS AN EXAMPLE TO
DETER OTHERS FROM COMMITTING SUCH CRIMES.
84. What types of crimes, if any deserve the death penalty?
SAFE AND CLEAR DANGER TO SOCIETY AND
ONE'S SELF.
DANGER BEING LIFE-THREATNING W/CLARITY TO DO SO.
85. Please choose one from the following that best reflects your feelings about the death penalty:
 (A) Automatically vote for the death penalty _____
 (B) Strongly favor the death penalty _____
 (C) Neither favor nor oppose the death penalty ✓ _____
 (D) Strongly oppose the death penalty _____
 (E) Never vote for the death penalty _____
86. If you answered (A) or (B) to above (that you would automatically vote for the death penalty, or strongly favor the death penalty) would it go against your nature to vote for life imprisonment without the possibility of parole under any circumstances?
 Yes ___ No ___ Unsure ___ Please explain:

87. If you answered either (D) or (E) above (that you would either strongly oppose the death penalty, or never vote for the death penalty) would it go against your nature to vote for the death penalty under any circumstances?
 Yes ___ No ___ Unsure ___ Please explain:

88. Do you think that the death penalty should be automatic for anyone who commits certain types of murders, or multiple murders?
 Yes ___ No ✓ Unsure ___ Please explain:

89. In this case, three deaths occurred in a single incident. Depending upon all of the circumstances of this case and all the evidence presented in the penalty phase, could you consider as a realistic and practical possibility:

A. Imposing life without possibility of parole in such a case?

Yes ___ No ___ Unsure Please explain:

THE PROCESS FOR DECIDING THIS IS UNKNOWN.

B. Imposing the death penalty in such a case?

Yes ___ No ___ Unsure Please explain:

90. If you have spiritual and/or religious beliefs, please state any advisement and/or written quotes or passages which you have seen or heard that you feel may pertain to the issue of the death penalty vs. life in prison without the possibility of parole:

91. Do you feel that someone convicted of murder with special circumstances:

A. Should be sentenced to death without consideration of background information?

Always ___ Probably ___ Possibly ___ Never ___ Unsure

Please explain: _____

B. Should be sentenced to life in prison without the possibility of parole without consideration of background information?

Always ___ Probably ___ Possibly ___ Never ___ Unsure

Please explain: _____

~~92. In deciding the penalty to be imposed in this case, how do you feel about considering the following factors:~~

A. Prior incidents of violence:

RELAVENT

B. Prior felony convictions:

RELAVENT

C. The feelings of the families of the victims:

NOT RELAVENT

D. The feelings of the family of Mr. Cunningham:

NOT RELAVENT

E. Mr. Cunningham's service to America in combat overseas:

RELAVENT

F. Mr. Cunningham's childhood experiences:

RELAVENT

G. Mr. Cunningham's past good behavior in prison:

RELAVENT

93. Overall, in considering general issues of punishment, which do you think is worse for a defendant:

Death ___ Life in prison without the possibility of parole

Please explain: HUMAN BEING FULLY UNDERSTAND THE COMPLEX CONCEPT OF "FUTURE". KNOWING THAT THE ENTIRE LIVING FUTURE, BEING DEPRIVED FREEDOM TO SOCIETY.

94. When a jury votes that a person be sentenced to life in prison without the possibility of parole, what does that mean to you?

THE POSSIBLE FREEDOMS AND POTENTIALS OF THE PERSON HAVE BEEN SEVERELY FOR SHORTENED. THE ANGUISH OF GOING NOWHERE, WITH NO CHANCE TO EFFECTIVELY CHANGE ANYTHING.

95. When a jury votes that a person be sentenced to death in the gas chamber or by lethal injection, what does that mean to you?

CLOSURE, FREEDOM FOR THE ANGUISHED CONVICTED TO "MOVE ON"

96. Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a death sentence on a person convicted of murder with special circumstances?

"SPECIAL CIRCUMSTANCES" IS UNCLEAR AND WITHOUT MEANING TO ME. I HAVE NOT CONSIDERED ANYTHING AT ALL ABOUT IMPOSING THE DEATH SENTENCE.

97. Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a sentence of life without the possibility of parole on a person convicted of murder with special circumstances?

I HAVE NOT THOUGHT ABOUT IT PRIOR TO TODAY. THE COST TO SOCIETY, TO MAINTAIN SUCH A SENTENCE, INCREASES, AS DOES THIS CONVICTED PERSON'S FREEDOM TO CHANGE ANYTHING.

98. Do you feel that life in prison without the possibility of parole is a severe punishment?
Yes No

Please explain:

SOCIETY PAYS TO FEED, CLOTH, AND HOUSE SOMEONE
THEY CONVICTED AWAY FROM SOCIETY. THE CONVICTED
PERSON REMAINS PRESENT AND CONTINUES TO BE.

99. Do you believe that a person who is sentenced to life imprisonment with the possibility of parole will be released from prison some day?

Yes No Unsure Please explain:

TO BELIEVE SOMETHING CONTRARY TO THE LAW
WOULD DEMONSTRATE "CRIMINAL" THINKING.

"DO YOU BELIEVE YOU CAN COMMIT A CRIME AND GET AWAY WITH IT?"

A. If you chose "yes", would that belief keep you from voting for a punishment of life in prison without the possibility of parole?

Yes No Unsure Please explain:

100. Could you consider, as a realistic and practical possibility, imposing the death penalty on a person who was a combat veteran?

Yes No

Please explain:

THE EMPHASIS ON "COMBAT VETERAN" IS UNCLEAR TO ME.
"AS OPPOSED TO HAVING NEVER SERVED?"
MAYBE THIS QUESTION IS BEFORE MY TIME. (10-24-66)

101. Could you consider as a realistic and practical possibility imposing the life without parole on a person who was a combat veteran?

Yes No

Please explain:

SAME "100."

102. Do you feel that death in the gas chamber or by lethal injection is a severe punishment?

Yes No

Please explain:

DEATH IS DEATH.
IF, AFTER GOING THROUGH THE PROCESS OF DECIDING ON
DEATH, IF THIS IS SEVERE? NO.

103. Do you feel the death is imposed:

Too often Too seldom Randomly About right

UNCLEAR

Please explain:

104. Are you aware that a person was executed in California's gas chamber in the recent past?

Yes No

A. Please describe what you saw or heard:

THE JUDGE, TODAY, INFORMED US.

B. What was your reaction to what you saw or heard:

NO REACTION.

CURIOSITY.

105. What, if anything, would you want to know about John Lee Cunningham, or about the crimes he is charged with, in order to decide the possible punishment in this case?

WHAT EVIDENCE WOULD BEAR RELEVANCE TO THE PROCEEDINGS. BEING IGNORANT, I WOULD NOT KNOW WHAT TO ASK.

106. There are no circumstances under which a jury is instructed by the court that it must return a verdict of death. No matter what the evidence, the jury is always given the option in the penalty phase of choosing either life without the possibility of parole or the death penalty.

(a) Given the fact that you will have both options of life or death available, can you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole?

Yes No Unsure

Please explain:

(b) Given the fact that you will have both options of life or death available, can you see yourself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty?

Yes No Unsure

Please explain:

107. Do you believe in the saying, "An eye for an eye"?

Yes No

A. What does this saying mean to you?

AS A REPLACEMENT, MEDICALLY SPEAKING, YES.

AS A VENGEANCE, CLOUDED JUDGEMENT, ETC. NO.

108. If your opinion about the death penalty has changed over the past years, please explain how and why:

109. Do you belong to any group or organization which is either opposed or in favor of the death penalty?

Yes ___ No

If yes, please explain:

110. Is there any information not asked in this questionnaire you feel the Court should know about your attitudes towards the two sentences you will be asked to consider?

Yes ___ No

If "Yes", what is that information?

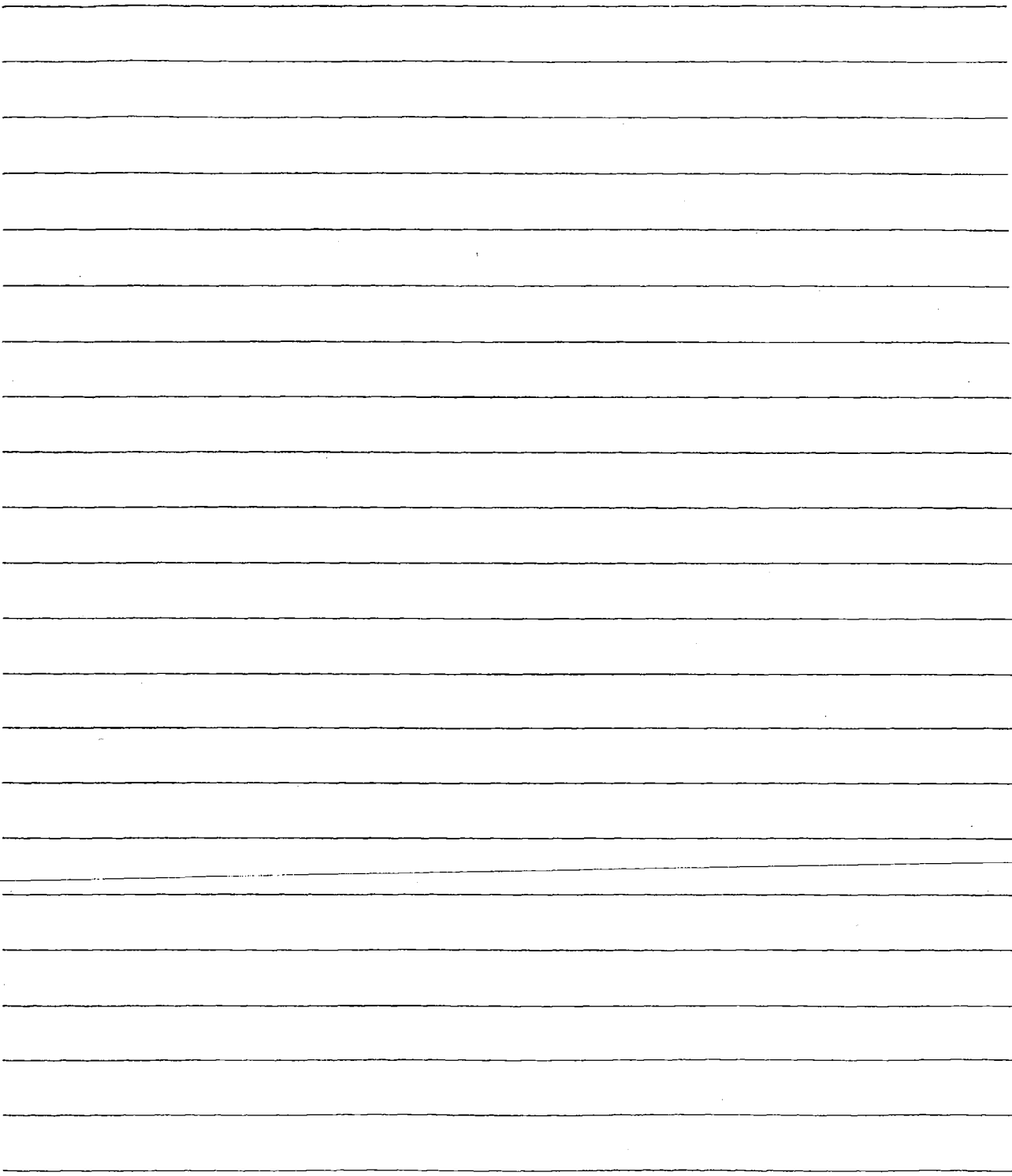
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I certify, under penalty of perjury, that the foregoing is true and correct, and that I have received no assistance from any other person in completing this questionnaire.

Executed in the County of San Bernardino

William M. Sacron
Signature

Extra pages. Please remember to include the question number and sign your name at the end. Thank you for taking the time to answer all the questions truthfully and completely.



DECLARATION OF SERVICE BY MAIL

People v. John Lee Cunningham, S051342.

I, Joshua Zapata, declare that I am over the age of 18 years and not a party to the above entitled cause; my business address is 101 Second Street, San Francisco, CA 94105. I served a true copy of the attached:

APPELLANT’S REPLY BRIEF

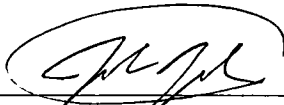
on each of the following by placing same in an envelope addressed as follows:

Ronald A. Jakob Deputy Attorney General P.O. Box 85266-5299 San Diego, CA 92186-5266	John Cunningham, J-92425 CSP – San Quentin NBN-9 San Quentin, CA 94974
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Each envelope was on June 3, 2014, sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

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

Executed on June 3, 2014, at San Francisco, California.



Joshua Zapata

June 4, 2014

SUPREME COURT
FILED

JUN 10 2014

Frank A. McGuire Clerk

Deputy

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94105

Re: *People v. John Lee Cunningham*, S051342

Dear Clerk:

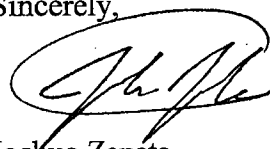
Attached please find an original and 8 copies of the following document pertaining to Appellant's Reply Brief in the above entitled case:

- CERTIFICATE OF COUNSEL (CAL. RULES OF COURT, RULE 8.360(b)(1))

If you have any questions, please feel free to contact me. My direct line at CAP-SF is 415-536-1124 or you may call the office main line at 415-495-0500.

Thank you.

Sincerely,



Joshua Zapata
Executive Administrative Coordinator

Cc: John Cunningham
Ronald A. Jakob

:jz
Encls.

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.360(b)(1))

I, Mordecai Garelick, am an attorney licensed to practice before all the courts of the State of California, a staff attorney with the California Appellate Project in San Francisco, and counsel for appellant John Lee Cunningham on direct appeal proceedings in his automatic appeal from the judgment of death, No. S051342. I conducted a word count of Appellant's Reply Brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 11,322 words in length excluding the tables and certificates.

Dated: June 3, 2014

Respectfully submitted,



MORDECAI GARELICK

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People v. John Lee Cunningham, S051342.

I, Joshua Zapata, declare that I am over the age of 18 years and not a party to the above entitled cause; my business address is 101 Second Street, San Francisco, CA 94105. I served a true copy of the attached:

**CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.360(b)(1))**

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Executed on June 4, 2014, at San Francisco, California.



Joshua Zapata