No. S026634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

PAUL SODOA WATKINS,

Defendant and Appellant.

L. A. Sup. Ct.
No. KA005658-02

APPELLANT'S REPLY BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PAUL SODOA WATKINS, Defendant and Appellant.	No. S026634 L. A. Sup. Ct. No. KA005658

APPELLANT'S OPENING BRIEF

I.

INTRODUCTION

Appellant, Paul Sodoa Watkins (hereafter "Watkins"), was unconstitutionally sentenced to death for felony murder *simpliciter*, which is a capital crime in only five states. (See AOB Argument XV.) Watkins testified that he shot Raymond Shield accidentally, and only conjecture and innuendo, unsupported by any solid evidence, suggests otherwise. The prosecutor tried this case on a felony murder theory, arguing that Watkins was guilty and should be executed because he shot Mr. Shield in the course of an attempt to rob him. (RT 1661-1664, 2069-2070.) The evidence, however, is insufficient to prove the prosecution's theory of first degree murder and death-eligibility – i.e., that the killing occurred during an attempted robbery. (See AOB Argument V.) Moreover, it is unsurprising that the prosecutor never argued that the homicide was a premeditated and deliberated murder; the evidence does not prove that the shooting was intentional, let alone premeditated.

This was a close case on penalty. Watkins, who was 21 years old at the time of the homicide, did not have a long or exceptionally aggravated criminal record. He had prior convictions for nonviolent offenses – grand theft, possession of a controlled substance, and possession of a weapon by an ex-felon. Undeniably, he committed three robberies the same day as the homicide, all of which he admitted at the guilt phase, and he later participated in three jailhouse brawls while confined pending the trial in this case. But this evidence was balanced by mitigating evidence about the difficulties he encountered growing up and his family's pleas for mercy.

The jury reached a life verdict for Watkins's cousin and codefendant, Lucien Martin, without apparent trouble. However, the penalty decision regarding Watkins was another matter. The jury announced it was having difficulty reaching a verdict and asked about the consequences if it could not decide his fate. (CT 791; RT 2161.) Two improper actions by the prosecutor likely influenced the jury's decision ultimately to impose death: the prosecutor's attack on Watkins's expression of remorse at the guilt phase by cross-examining him about his laughing outside the presence of the jury (AOB Argument VI), and the prosecutor's injecting impermissible racial factors into the evidence of the jailhouse fights (AOB Argument XIV).

In a close case with strongly conflicting evidence, such as this one, "'substantial and serious errors . . . must be regarded as prejudicial and grounds for reversal'" under state law. (*People v. Dail* (1943) 22 Cal.2d 642, 650; accord, *People v. Weatherford* (1945) 27 Cal.2d 401, 403.) The errors here are substantial and violate both state law and the federal Constitution. They include not only the insufficiency of the evidence for first degree murder and the robbery-murder special circumstance, the

unconstitutional application of the robbery-murder special circumstance, and repeated prosecutorial misconduct, but also the unconstitutional exclusion of prospective juror Julia Almeyda (AOB Argument XII), numerous instructional errors at both the guilt and penalty phases (AOB Arguments VII-XI, XVI, XVIII-XX), and the lack of procedural safeguards that are essential for the reliability of capital trials (AOB Arguments XIII, XVII.) Reversal is required.

In this brief, Watkins replies to the State's arguments that necessitate an answer in order to present the issues fully to this Court. However, he does not address the arguments regarding each claim raised in the opening brief. (See, e.g., AOB, Arguments VIII, IX, X, XIII, XVII, XIX, XX, and XXII.) In large part, the State urges this Court to reject these claims because the Court has rejected similar claims before. (See, e.g., RB 65, 68, 70, 83, 98, 99, 100.) On these matters, Watkins believes that his arguments already have been adequately presented, and the positions of the parties fully joined. Nor does Watkins reply to every contention made by the State with regard to the claims he does discuss. Rather, Watkins focuses only on the most salient points not already covered in the opening brief. The failure to address any particular argument or allegation made by the State, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment, waiver or forfeiture of the point by Watkins. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)[1]

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[1] Watkins notes one mistake in the State's presentation of the facts. Watkins was with his sister, Kimberly, when she was wounded – not killed as the State asserts – in a drive-by shooting which claimed the lives of five other teenagers. (Compare RT 1966-1968, 1987-1988 with RB 16.) In an unrelated event, Watkins's aunt (his mother's sister) was murdered. (RT 1964-1965.)

II.

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

Insufficiency-of-the-evidence claims are hard to win. Watkins grants that much. But the evidence that he attempted to rob Mr. Shield is too thin to sustain his capital murder conviction. And the evidence that he committed a premeditated and deliberated killing is nonexistent. Did Watkins shoot and kill Mr. Shield? Yes. Is he guilty of first degree murder under either a felony-murder theory or a premeditation theory and death-eligible? No. The State, of course, disputes this claim.

Before answering the State's assertions, Watkins notes that the State in part misinterprets his argument. First, contrary to the State's assertion, Watkins does not argue that the evidence of the other robberies was *inadmissible* under Evidence Code section 1101. (See RB 26-27, 33.) Rather, Watkins shows that this evidence is *insufficient* to prove that he attempted to rob Mr. Shield. (AOB 40-45, 46-48.) Second, contrary to the State's contention, Watkins does not argue that jury must have accepted or rejected all of his testimony. (See RB 37-40.) Rather, Watkins demonstrates that even if the jury rejected Watkins's testimony that he did not intend or attempt to rob Mr. Shield, the record still lacked substantial evidence of an attempted robbery. (See AOB 52.)[2] The disputed issues are

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[2] "Disbelief of a witness does not establish that the contrary is true, only that the witness is not credible." (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 704.) Thus, the jury's rejection of Watkins's testimony that he did not attempt to rob Mr. Shield, standing alone, does not prove an (continued...)

whether the evidence is sufficient to establish that Watkins harbored a specific intent to rob Mr. Shield and took a direct, unequivocal act toward robbing him and whether the evidence is sufficient to establish that Watkins shot Mr. Shield with premeditation and deliberation. The evidence is insufficient on both theories, rendering Watkins's convictions and the sole special-circumstance finding a violation of the due process clause of the Fourteenth Amendment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 323-324.) Therefore, reversal of the first degree murder conviction, the robbery-murder special circumstance finding, and the attempted robbery conviction is required. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

A. The Evidence is Insufficient to Sustain the Attempted Robbery Conviction, the First Degree Murder Conviction Based on a Felony Murder Theory, and the Robbery-Murder Special Circumstance Finding

The State argues that the evidence of the other robberies Watkins committed on July 17, 1990, was decisive in proving that he intended to rob Mr. Shield (RB 24, 27-29, 37) and that his act of getting out of the truck, lifting its hood, and waving at Mr. Shield was a direct but ineffectual act sufficient to move his conduct beyond the preparation stage. (RB 25-26, 29, 33-34, 35-36.) Watkins decidedly disagrees. His argument about the insufficiency of the evidence regarding the intent element for attempted robbery is set forth in his opening brief. (See AOB 45-49, 53-55). The parties obviously read the relevant authorities and view the proof required differently. Watkins asserts that his plan to rob some as-yet unidentified person, even when coupled with the fact of the other robberies, was too

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[2] (...continued)
attempted robbery beyond a reasonable doubt.

insubstantial to prove the intent requirement for an attempted robbery of Mr. Shield. (See AOB 53-55.) The State argues that Watkins's prior robberies and plan to rob someone else at some point that morning were enough to establish the required mental state. (RB 27-29, 30, 36.) The issue is fully joined. Although Watkins does not, in any way, concede the intent prong of his claim, repeating his prior argument will not elucidate the issue further.

However, even assuming, arguendo, that the evidence of Watkins's plan to rob someone else after robbing Jihad Muhammed (count 3) were sufficient to establish the requisite intent for an attempted robbery, there is no substantial evidence to prove beyond a reasonable doubt that Watkins took an unequivocal act toward robbing Mr. Shield.[3]

Watkins's acts had not progressed far enough, nor were they sufficiently unequivocal, to establish the actus reus of attempted robbery. The point at which mere preparation becomes a direct but ineffectual act toward committing robbery is not always easy to determine and must be made on a case-by-case basis. However, for at least 70 years, this Court has held that the line between preparation and overt act is not crossed if the

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[3] In its brief, the State moves back and forth between discussing the separate elements of (1) a specific intent to rob and (2) a direct and unequivocal act toward committing a robbery. (See RB 25-26 [discussing act element]; RB 26 [referring to intent element]; RB 27-29 [discussing intent element]; RB 29-30 [discussing act element]; RB 30-31 [discussing intent element]; RB 31 [discussing act element]; RB 32 [discussing both intent and act elements]; RB 33-34 [discussing act element].) These are separate and distinct elements, both of which must be supported by substantial, credible evidence in order to sustain the attempted robbery and felony murder convictions and the robbery-murder special circumstance finding. The State's commingled discussion tends to obscure this point.

defendant's conduct is equivocal. (*People v. Buffum* (1953) 40 Cal.2d 709, 718, overruled on other grounds in *People v. Morante* (1999) 20 Cal.4th 403; *People v. Miller* (1935) 2 Cal.2d 527, 531-532.) The fatal defect in this case, as the magistrate judge recognized in dismissing the robbery-murder special circumstance allegation, is that the evidence about Watkins's conduct at the Holiday Inn was too equivocal to prove a direct act toward a robbery. Contrary to the State's repeated suggestion (see, e.g. RB 29, 31, 32, and 33, fn. 12), the fact that Watkins committed other robberies the same day cannot compensate for the insubstantiality of the evidence going to the overt act requirement on the Shield attempted robbery charge.

The State argues that its "ruse" theory – that Watkins and Martin pretended to have mechanical trouble and lifted the hood of the truck in order to lure Mr. Shield to them so they could rob him – establishes the necessary act. As a preliminary matter, the prosecutor never argued this point to the jury. (See RT 1668-1675, 1680-1681, 1684-1685.) He argued that Watkins and Martin "actively" attempted to rob Mr. Shield. (RT 1661.) The prosecutor urged the jury to find an attempted robbery on the speculative inference that Watkins must have said to Mr. Shield, "'buddy, give me your money' or 'this is a robbery' . . . [or] 'I want your wallet.'" (RT 1674.)

In any event, the conduct supporting this theory is itself insubstantial. The only evidence suggesting that Watkins initiated any contact with Mr. Shield was Watkins's waving to Mr. Shield, who kept looking at Watkins and Martin. (RT 1486-1487.) It was Mr. Shield who approached Watkins and Martin and offered his assistance. (*Ibid.*) There is no evidence whatsoever about what transpired under the hood of the truck,

as the judge who dismissed the robbery-special circumstance before trial found. (CT 275.) Neither Watkins's possession of a concealed weapon nor Mr. Shield's act of walking briskly away from Watkins and Martin establishes an overt act toward a robbery. The entire feigned-friendliness construct thus rests on one thin piece of evidence – Watkins's testimony that he waved at Mr. Shield. Even if the record supports an inference of "false friendliness," it does not establish, with evidence "which is reasonable, credible, and of solid value[,]" an unequivocal act toward committing a robbery. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.)

The State's attempt to superimpose the purported "ruse of false friendliness" onto the Muhammed and Lee robberies does not transform the equivocal nature of Watkins's conduct at the Holiday Inn into the direct and unequivocal act required for an attempt. (RB 29.) At trial the prosecutor did not even suggest to the jury that feigned friendliness was part of the Muhammed and Lee robberies. Rather, it is an appellate creation that "reeks of afterthought." (*Miller-El v. Dretke* (2005) ___ U.S. ___, 125 S.Ct. 2317, 2328.) Nor does the evidence of those robberies establish this purported modus operandi. With regard to Mr. Muhammed, Watkins and Martin drove up to him; Watkins asked where he was going, commented that he must have money, pulled out his gun and demanded Mr. Muhammed's money. (RT 1101-1105.) With regard to Mr. Lee, Watkins went into Steve's Market apparently to case the store before returning to rob the owner. (Rt 1220-1230.) Neither of these scenarios suggests friendliness, feigned or otherwise. As discussed in detail in the opening brief, the differences between each of the robberies and the Shield crime are far greater than the general similarities of having occurred on the same day not far from freeways and having involved the use (but in the case of the

robberies not the firing) of a gun. (See AOB 42-43.)

The State's argument glosses over the important distinction between the robberies and the Shield homicide. In the robberies, Watkins and Martin targeted one or two people who were alone and not visible to other people, initiated contact with the victims, approached them directly, pointed a gun at them and demanded their money. Nothing close to this kind of unequivocal conduct occurred with regard to Mr. Shield. Rather, Watkins and Martin parked the truck near the entire Shield family – consisting of five people – in front of a hotel lobby and did not approach anyone. There is no evidence that when Mr. Shield came to the truck, Watkins or Martin demanded money or property, threatened Mr. Shield or displayed the gun that was concealed in Watkins's pants. (See AOB 43.) In short, the State's "ruse of false friendliness" theory is too tenuous to sustain the convictions and special circumstance finding resting on attempted robbery.[4]

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[4] On the one hand, the State tries to manufacture a "ruse of false friendliness" that is unsupported by the record as a common trait among the Muhammed and Lee robberies and the Shield homicide. On the other hand, in attempting to refute Watkins's citation to *People v. Balcom* (1994) 7 Cal.4th 414 (see AOB 44, fn. 18), the State applies an impossibly rigorous and wholly unjustified standard for deciding when the two crimes bear common marks. (RB 29, fn. 11.) Without any explanation, the State simply dismisses as "not especially distinctive" the many similarities between the uncharged and charged rapes in *Balcom*. In each instance, the defendant, wearing dark clothing and a cap, sought out lone woman unknown to him in apartment complex in the early morning, gained control over her at gunpoint, initially professed only an intention to rob the victim, stole the victim's ATM card, obtained her personal identification number, then announced his intention to rape the victim, forcibly removed her clothing, committed a single act of intercourse, and escaped in the victim's car. (*Balcom*, *supra*, at p. 424.) If these common traits are "not especially distinctive," then neither are the same-day, near-the-freeway and gun-use

(continued...)

This Court's decision in *People v. Anderson* (1934) 1 Cal.2d 687 fully supports Watkins's claim that the evidence in his case was insufficient to prove the actus reus element of attempted robbery. In *Anderson*, the defendant admitted that he intended to rob the ticket office of the Curran Theater in San Francisco, but he argued that his conduct was insufficient to establish an attempted robbery. In rejecting the claim, this Court carefully delineated when the defendant's conduct crossed the line from preparation to a direct but ineffectual act toward the commission of a robbery. The "[d]efendant's conduct in concealing the gun on his person and going to the general vicinity of the Curran theater with the intent to commit a robbery" was "mere acts of preparation." (*Id.* at p. 690.) The Court considered the defendant's conduct to be preparation, not an overt act, notwithstanding his admission that he intended to rob the theater box office. However, the defendant's conduct went further. The defendant walked into the entrance of the theater, pulled out the gun when he was about two feet from the ticket window and, according to defendant's own testimony, was putting the gun up to ticket window when it went off, killing the person in the ticket office. (*Id.* at p. 689.) This Court was clear that this additional conduct "passed far beyond the preparatory stage and constituted direct and positive overt acts" that established an attempted robbery. (*Id.* at p. 690.)

Unlike *Anderson*, in this case Watkins's conduct did not go beyond the preparatory stage. His conduct at the Holiday Inn, at most, was analogous to the defendant in *Anderson* approaching the vicinity of the

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[4] (...continued)
similarities between the robberies and the homicide in this case.

theater armed with a concealed weapon.[5] But Watkins did not do anything more than approach the vicinity of the Shield family in front of the Holiday Inn. He did not approach Mr. Shield. He did not make any demand. He did not remove his gun from his pants until he got back into the truck. Under *Anderson*, this evidence is insufficient to establish the overt act necessary for attempted robbery.

The State's argument that there is sufficient evidence of an unequivocal act does not withstand scrutiny. The State criticizes Watkins's reliance on *People v. Johnson* (1993) 6 Cal.4th 1 and *People v. Raley* (1992) 2 Cal.4th 870, but does not meaningfully distinguish either case. (See RB 31-32.) In *Johnson*, the defendant was convicted of murdering two women, Castro, whom he had been dating, and her mother, Holmes, during a burglary of their home. Defendant contested the sufficiency of the evidence of rape or attempted rape to support felony murder with regard to Holmes, but not with regard to Castro. The State attempts to distinguish *Johnson* on the ground that the "evidence concerning the prior [Castro] rape was ambiguous, and there were no prior (or subsequent) rapes to substantiate the inference of a common plan." (RB 32.) The State's characterization of that evidence as "ambiguous" is curious given that the defendant (1) did not contest the sufficiency of the rape or attempted rape theory regarding Castro, (2) admitted he had sex with her and (3) without anyone accusing him of rape, volunteered that "'rape would be hard to

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[5] The evidence on intent was stronger in *Anderson* than in this case. The defendant in *Anderson* testified that he intended to rob a specific target, the Curran theater's ticket office; in contrast, Watkins's testified that he was looking for someone else to rob but did not intend to rob Mr. Shield because the area was too well lit and there were many people including children present. (RT 1479, 1482-1485, 1487, 1554, 1561.)

prove" because the issue would be consent. (*Id.* at p. 39.) The evidence of the rape or attempted rape of Castro would be a prior or concurrent crime that could support an inference of common plan or design.

More important, with regard to the overt act element of an attempt, the evidence of attempted rape in *Johnson* is stronger that the evidence of attempted robbery arising from Watkins's actions at the Holiday Inn. As this Court in *Johnson* noted, "[s]ome physical evidence indicated that victim Holmes may have been sexually assaulted in the course of her murder. Her body was dressed only in a sweatshirt and bra; she was wearing nothing from the waist down. . . . The officers found a pair of pantyhose on the floor of her room. Holmes had been beaten severely." (*Id.* at p. 39.) The Court also observed that there were no circumstances "inconsistent with a finding that defendant raped, or attempted to rape, victim Holmes" and acknowledged that "defendant's specific intent to commit rape possibly could be inferred from the fact he earlier had sex with Holmes's daughter, Castro." (*Id.* at p. 41.) Nevertheless, the Court found the evidence of attempted rape of Holmes to be an insufficient. The proof in *Johnson* – held to be insufficient by this Court – was more certain than the unobserved interaction between Watkins and Mr. Shield behind the hood of the truck.

In discussing *People v. Raley*, 2 Cal.4th 870, as in discussing *Johnson*, the State tries to minimize the evidence found to be insufficient. The State's conclusory assertion that "there was no evidence that the defendant had committed the charged sexual offense against the other victim" (RB 32) again ignores the full record. As set forth previously (AOB 44-45), the surviving victim testified that the defendant said the girls would have to "'fool around'" with him and led the murder victim away.

The surviving victim heard the murder victim scream and described her as frightened when she returned. The defendant then orally copulated the surviving victim. Before the murder victim died, she told her rescuer that she had been sexually assaulted but not raped. (*Raley*, *supra*, 2 Cal.4th at p. 890.) Contrary to the State's description, this record does not present "no evidence" of oral copulation. Rather, as this Court explained, the evidence was too speculative to support the oral copulation conviction. (*Id.* at p. 890.) The same conclusion should apply here. Given the dearth of evidence about what occurred behind the truck hood at the Holiday Inn, it is "far too speculative" to infer that because Watkins robbed other victims that morning, he attempted to rob Mr. Shield. (*Id.* at p. 890.)[6]

Similarly, the decisions in *People v. Birden* (1986) 179 Cal.App.3d 1020 and *People v. Vizcarra* (1980) 110 Cal.App.3d 858, do not support the result the State urges. *Birden* contains two essential facts missing in this case: unlike Watkins, the defendant there admitted an intent to rob not simply someone at some point but the victim who was killed, and unlike Watkins, the defendant took "an overt and unequivocal act towards the robbery he intended to commit" – his "brief but forcible entry into the victim's apartment." (*Birden*, *supra* at p. 1026.) The evidence of both intent and overt act was far stronger in *Birden* than in this case.

Vizcarra also is fundamentally different from this case. As noted already (AOB 38, fn.15), *Vizcarra* contains the kind of clear, concrete overt act that is absent here. The defendant "[a]pproach[ed] the liquor store with

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[6] The State does not distinguish or otherwise address the reversal of the robbery special-circumstance finding for insufficient evidence in *People v. Morris* (1988) 46 Cal.3d 1, which Watkins discussed in his opening brief at 38-39.

a rifle and attempt[ed] to hide on the pathway immediately adjacent to the liquor store when observed by a customer" which was held to be "a sufficient direct act toward the accomplishment of the robbery." (*Vizcarra*, *supra* at p. 862.) Again, Watkins's actions of stopping the truck and standing behind its hood without approaching anyone or making any demand is far removed from the unmistakable movement towards committing a robbery present in these two cases.

For these reasons, as well as those presented in the opening brief, the evidence is insufficient to sustain Watkins's convictions for first degree murder under a felony-murder theory (count 1) and attempted robbery (count 2) and the true finding of the robbery-murder special circumstance (count 1). All those verdicts should be reversed.

B. The Evidence is Insufficient to Sustain the First Degree Murder Conviction Based on a Theory of Premeditation and Deliberation

In showing that the evidence was insufficient to prove that he killed Mr. Shield with premeditation and deliberation, Watkins noted that the prosecutor relied solely on the felony-murder theory and never argued that the murder was premeditated and deliberated, thus tacitly conceding that the evidence did not prove the premeditation theory of first degree murder. (AOB 58-59.) The State contests this characterization, asserting that "the prosecution repeatedly argue[d] both theories," (RB 41, citing RT 1656-1657, 1675, 1686). However, the State's citations to the record prove Watkins's point – the prosecutor did not argue that the evidence proved premeditation and deliberation.

In the first passage cited by the State, the prosecutor simply reviewed the homicide instructions that the jury would be given. (RT 1656-1657.) While he mentioned the two theories of first degree murder, he did not

apply the law – including that of premeditated and deliberated murder – to the facts of this case and did not assert that he proved a premeditated murder. (*Ibid.*) The second and third cited passages are part of the prosecutor's argument that the killing occurred during an attempted robbery. (See RT 1670-1686.) In both passages, the prosecutor disputed Watkins's testimony that the shooting was accidental. (RT 1675, 1686.) And in the third passage, the prosecutor suggested that the killing was intentional without the slightest mention of premeditation and deliberation.[7] (RT 1686.) But an intentional killing without proof of premeditation and deliberation is a second degree murder, as the jury explicitly was instructed. (RT 1795.)

The record is plain: the prosecutor never argued the premeditation theory. In his closing argument, Watkins's attorney pointed out to the jury that the prosecutor did not argue that the shooting was premeditated and deliberated. (RT 1728.) In his rebuttal, the prosecutor had ample opportunity to refute this assertion, but he did not. Instead, he repeatedly addressed the robbery-murder theory. (See RT 1751-1754, 1756-1957, 1760.) The prosecutor apparently recognized what the State's current attorney cannot accept – that the evidence was insufficient to prove that

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[7] Before the lunch break, the prosecutor referred to Watkins having "told you that this was an accidental shooting" and asserted that "[t]he manner in which they took off from that crime is not consistent with an accidental shooting." (RT 1675.) After the lunch break, the prosecutor returned to Watkins's testimony that "the gun went off accidentally" and submitted to the jury that "what happened is consistent with the refusal of Mr. Shield to part with any money and an intentional slaying by Mr. Watkins." (RT 1686.) This record does not show that the prosecutor argued that the evidence supported a conviction under a theory of premeditation and deliberation.

Watkins committed a premeditated and deliberated murder.

Not only does the State distort the record of the prosecutor's closing argument, but its attempt to recast the evidence according to the *Anderson* (*People v. Anderson* (1968) 70 Cal.2d 15) criteria twists the meaning of premeditation and deliberation beyond recognition. In a nutshell, the State conflates felony murder with premeditated murder by arguing that the facts that establish the purported attempted robbery also establish that Watkins shot Mr. Shield with premeditation and deliberation. Its position is altogether misguided.

With regard to planning activity, the State contends that the fact that Watkins carried a concealed weapon, which he had used during his robbery spree, shows "'he planned a violent encounter' with his victim." (RB 43, quoting *People v. Marks* (2003) 31 Cal.4th 197, 230.) But generally intending a violent encounter does not establish that "the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing." (*People v. Anderson*, *supra*, 70 Cal.2d at p. 26.) Carrying a concealed weapon may be consistent with a plan to kill, but it also is consistent with lesser criminal intents. In short, the fact of being armed does not establish a defendant's ultimate intention. (See Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference* (2000) 36 U.S.F. L.Rev. 261, 309 [making a similar point with regard to the planning activity in child abduction-murders].) As explained previously, the only evidence of planning in this case goes to robbery, not killing. (See AOB 63.) And as also argued previously, the evidence that Watkins intended or attempted to rob Mr. Shield is insufficient. (See AOB 33-59 and *ante* at pages 5-6.)

But even setting aside the insufficiency-of-the-evidence problem, the

State attempts to inflate Watkins's July 17, 1990, robbery spree into an premeditated and deliberated intent to kill. Under the State's argument, any time a person attempts an armed robbery, he necessarily acts with a preconceived design to kill or is fully prepared to do so. (RB 43-44.) The State thus invites this Court to convert all armed felonies that result in death into premeditated and deliberated murders. This Court should not take the radical step of abrogating the Legislature's clear distinction in Penal Code section 189 between first degree felony murder and first degree premeditated and deliberated murder. The Constitution vests the Legislature with the power to make law by enacting statutes and the courts with the authority to interpret and apply those laws. (*People v. Bunn* (2002) 27 Cal.4th 1, 14.) The courts may not usurp the Legislature's role by expanding, contracting or rewriting those statutes. (*Bernard v. Foley* (2005) 130 Cal.App.4th 1109, 1120.)

Moreover, the State's attempt to conflate felony murder with premeditated murder is effectively foreclosed by *Tison v. Arizona* (1987) 481 U.S. 137. *Tison* held that an accomplice in felony murder may be death-eligible if he was a major participant and acted with reckless indifference to human life. Although the high court found that the conduct of the two defendants in *Tison* met the Court's new standard, it did not hold, or even suggest, that being armed during a robbery per se constitutes reckless indifference to human life. Although one of the defendants, along with three others, was armed during the kidnaping-robbery that resulted in the killing of four people, the Court relied on other circumstances, such as the defendants providing an arsenal of lethal weapons to their incarcerated father, a convicted murderer, and his cellmate to effectuate a prison escape, one defendant admitting that he was prepared to kill to further the prison

break, and the other defendant flagging down the family that was killed and turning them over to known killers that he had armed. (*Id.* at pp. 153-154, 158.) Thus, since under *Tison* participating in a kidnap-robbery while armed, by itself, does not prove reckless indifference for human life, the fact that Watkins was armed during the purported attempted robbery, by itself, is insufficient to prove the more culpable mental state of premeditation and deliberation.

With regard to motive evidence, the State piles conjecture on top of conjecture to offer another post-hoc theory that the prosecutor at trial never suggested, i.e., that Watkins's motive was to eliminate Mr. Shield as a witness to the attempted robbery. (RB 45.) The suggestion that the jury drew an inference from the evidence that did not even occur to the prosecutor stretches the definition of "reasonable," "credible" and "solid" evidence – which is required to sustain a conviction (*Hillhouse, supra*, 27 Cal.4th at p. 496) – beyond the breaking point. The Court should summarily reject the argument.

Even assuming, arguendo, there were sufficient evidence of an attempted robbery, neither the timing of the shooting – as Watkins and Martin fled from the hotel parking lot – nor Watkins's suspicion that Mr. Shield would call the police establish that Watkins's motive was to eliminate Mr. Shield as a witness. The entire encounter between Watkins and Mr. Shield – from the time Mr. Shield approached Watkins to the shooting – took at most two minutes. (See RT 1148 [Mr. Shield was behind the hood of the truck with Watkins and Martin for about a minute]; RT 1562 [it took less than a minute for Watkins and Martin to leave the Holiday Inn after Mr. Shield walked away from the truck].) The fact that Mr. Shield was shot as he retreated and Watkins fled no more indicates a

witness-elimination motive than if Mr. Shield had been shot before he retreated and Watkins fled. Moreover, the State's motive argument makes no sense given that there were other witnesses, Pamela Coryell and Jeneane Shield, close at hand. The State thus grasps at any fact in an attempt to attribute a motive to Watkins that would support premeditation. But the State overreaches. Under the State's argument, the motive to eliminate the victim as a witness could be attributed to all killings during a felony – no matter how unplanned, random or accidental they may be – and thus could convert any felony murder into a premeditated murder.

With regard to manner evidence, under the State's theory any killing of an unarmed victim by a single shot from a gun would prove premeditation and deliberation. Whatever credence this argument may have in an execution-style killing (see *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957), it has no force here. Although the jury was not required to accept Watkins's testimony that the gun went off accidentally as he closed the truck door (RT 1493), the evidence is too ambiguous and insubstantial to sustain an inference that the manner of the killing shows that Watkins shot Mr. Shield with premeditation and deliberation. (See AOB 64-66.)

The State never disputed Watkins's testimony that he was left-handed but was holding the gun in his right-hand when it fired (RT 1558, 1573, 1576), which undercuts the notion of a premeditated and deliberated killing. Pamela Coryell, who witnessed the shooting, testified as to the details about the truck (RT 1138-1139), Watkins's position in the truck (RT 1155, 1168), and the position of the truck door (RT 1155, 1624-1625) when the gun fired, but did not see him aim or shoot and never saw the gun. (RT 1625, 1628-1629.) Only through speculation, conjecture and surmise, can the State argue that Watkins premeditated and deliberated the shooting.

Unlike other cases reviewed by this Court, in this case, there simply are no solid *facts* from which to infer premeditation and deliberation. (Contrast *People v. Lenart* (2004) 32 Cal.4th 1107, 1127-1128 [premeditation found inter alia in appellant's acts of forcing victim to lie on the floor and shooting her at close range; *People v. Silva* (2001) 25 Cal.4th 345, 368-369, 371 [premeditation found in appellant's act of taking one victim to isolated spot and shooting her multiple times and his admission that he formed intent to kill other victim before going to her house and strangling her].) This Court's observation, in a different evidentiary context, applies to the evidence here: "'The sum of zeroes is always zero.'" (*People v. Guerrero* (1976) 16 Cal.3d 719, 729, quoting *People v. Haston* (1968) 69 Cal.2d 233, 246, fn.15.)

As the above analysis shows, the evidence does not support a finding that Watkins killed Mr. Shield with premeditation and deliberation. Undeterred by the limitations of the factual record, the State argues for a theory of murder that the trial prosecutor, who never argued premeditation as a basis for a first degree murder conviction, apparently believed had no factual basis. Moreover, the State's overreaching argument would eliminate the difference between felony murder and premeditated murder. Bluntly put, the State's argument is "'nonsense on stilts.'" (*Arave v. Creech* (1993) 507 U.S. 463, 479 (Blackmun, J., dis. opn.), quoting J. Bentham, Anarchical Fallacies, in 2 Works of Jeremy Bentham 501 (1843).)

For these reasons, as well as those stated in the opening brief, there is insufficient evidence to sustain Watkins's conviction for first degree murder under a theory of premeditation and deliberation (count 1). That verdict should be reversed.

III.

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

During his guilt-phase testimony, Watkins expressed remorse for killing Mr. Shield and explained that he was deeply affected by the testimony of Mr. Shield's daughter, Pamela Coryell. (RT 1496.) Attempting to impeach Watkins, the prosecutor had Watkins's restate his regret and then asked why, when outside the presence of the jury, Watkins and his codefendant, Lucien Martin, "are laughing and carrying on all the time?" (RT 1502.) The question was a deliberate ploy calculated to suggest to the jury that Watkins's remorse was contrived and insincere. (See RT 1503 [both defense counsel object and express their outrage at the prosecutor's misconduct].) In response to Watkins's objection and motion for a mistrial, the trial judge agreed that the question was improper, struck the question from the record, and admonished the jury to disregard it. (RT 1508.)

On appeal, Watkins has argued that the prosecutor's highly improper cross-examination violated the due process clause of Fourteenth Amendment, the confrontation and cross-examination clause of the Sixth Amendment, and the requirement of reliability in capital sentencing under the Eighth Amendment, as well as state law, and require reversal of his convictions and death judgment. (AOB 69, 79, 81.) The State defends with the assertion that the prosecutor's questioning was perfectly permissible. (RB 50-52.) In essence, the State seeks a rule that in a capital trial, the prosecutor may use a testifying defendant's laughter and other non-disruptive behavior *outside* the presence of the jury and during breaks in the proceedings to show that the defendant is not only unbelievable as a witness

but has no remorse for his homicidal act. The State's position is as offensive as it is insupportable.

As a preliminary matter, it is important to clarify what is *not* at issue. First, Watkins does not dispute that a testifying witness may be impeached with evidence of his demeanor and manner *before* the jury, as the trial court instructed in this case. (Evid. Code, § 780, subd. (a); *People v. Jackson* (1989) 49 Cal.3d 1170, 1204; RT 1775.) But that is not what occurred here. The prosecutor did not seek to cross-examine Watkins about his behavior while testifying. Second, Watkins does not dispute that during the *penalty* phase of a capital case, the prosecutor may, in some circumstances, comment on the defendant's off-the-stand demeanor in the courtroom before the jury. (*People v. Heishman* (1988) 45 Cal.3d 147, 197.) Again, that is not what happened in this case. The misconduct here occurred during the *guilt* phase and, in any event, the prosecutor did not seek to cross-examine Watkins about his conduct in the courtroom before the jury. Third, Watkins does not dispute that "'[w]hen a defendant testifies on his own behalf, his character *as a witness* may be impeached in the same manner as any other witness.'" (RB 51, quoting *People v. Wagner* (1975) 13 Cal.3d 612, 618, italics in original.) Once more, that is not what the prosecutor here attempted to do.

To impeach Watkins like any other witness, the prosecutor would have had to elicit evidence "relevant to the credibility of a witness," i.e. evidence having a "tendency in reason to prove or disprove a disputed and consequential fact." (Evid. Code, § 210.) The prosecutor's cross-examination about Watkins's "laughing and carrying on" outside the presence of the jury had no such tendency. The fact that Watkins laughed at certain points during trial recesses does not tend to disprove his expression

of remorse or otherwise show him to have testified untruthfully. As defense counsel explained in moving for a mistrial, Watkins's laughter was a mechanism for releasing tension during the incredibly stressful circumstances of his capital trial. (RT 1505.) Watkins was not the only participant in the trial to find relief in laughter. (See AOB 73.) The prosecutor, the prosecutor's investigating officer, the defense counsel, and the jurors all were observed laughing and joking during breaks in the proceedings. (RT 1504-1505, 2156-2158, 2160.) The trial court itself recognized that "laughter and levity are a gift to mankind to cope in difficult situations." (RT 2160.)

Nevertheless, the State now asserts Watkins's very human reaction was relevant and proper evidence that he was a liar in a case where his guilt-phase defense rested on his own testimony and that he was a remorseless killer in a case where the jury ultimately would decide if he should live or die.[8] The State has not explained the probative link between Watkins's laughing outside the presence of the jury and the alleged untruthfulness of his testimony or his alleged lack of remorse. And the State has cited no authority for its rather astounding principle that such laughter is relevant to a witness's credibility. These failures are telling. The prosecutor sought to elicit evidence that "was undoubtedly collateral and irrelevant." (*People v. Watson* (1956) 46 Cal.2d 818, 834 [finding error in prosecutor's questioning defendant in murder case on his reasons for

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[8] It is highly unlikely that the State would argue that any other witness – whether the victims of the robberies, the ballistics expert or the mitigation witnesses at the penalty phase – could have been impeached with allusions to their laughter or other conduct during trials recesses on the theory that their extrajudical conduct somehow reflected on the credibility of their in-court testimony.

wearing an Army uniform that he was entitled to wear and offering evidence to show defendant's attempt to get a discharge from the Army which had no bearing on his motive or credibility in relation to the crime charges].)[9]

The State's proposed rule is not only unjustified, but it also is unworkable. This new impeachment principle would place any defendant, who exercises his constitutional right to testify on his own behalf, in an emotional straightjacket for the pendency of the prosecution. If, as the State propounds, "laughing and carrying on" during a break in the trial is fair-game impeachment, then presumably so would "laughing and carrying on" on the transport bus to and from court or "laughing and carrying on" inside the county jail. The rule urged by the State would create a mini-trial on the defendant's non-courtroom conduct. The prosecutor would call a sheriff deputy, a court clerk, or a jailhouse cellmate to testify that they observed the defendant laughing and carrying on. The defense attorney, in turn, would call his paralegal, cocounsel, other jail inmates, or mental health experts to explain the context of the defendant's conduct, e.g., that they told the defendant a joke to help him relax or that he was experiencing a manic

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[9] But even assuming, arguendo, there were any minimal relevance to Watkins's "laughing and carrying on," its probative value would be far outweighed by its prejudicial impact. (Evid. Code, § 352.) The question was prejudicial because it "tend[ed] to evoke an emotional bias against defendant" and had "very little effect on the issues." (*People v. Coddington* 2000) 23 Cal.4th 529, 588.) And the highly inflammatory meaning of the prosecutor's question rendered the trial fundamentally unfair under the due process clause of the Fourteenth Amendment. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 710; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [stating rule that admission of relevant evidence offends due process when it is so prejudicial as to render the defendant's trial fundamentally unfair].)

phase of bipolar disorder. To describe the potential scenario shows the ridiculousness of the State's position.

Finally, the State's argument ignores the capital context of this case. Watkins was on trial for his life. He testified at the guilt phase but not at the penalty phase. The penalty instructions, however, told the jury that, in determining the appropriate penalty, it "shall consider all the evidence which has been received during any part of the trial" in determining the appropriate penalty. (RT 2117.) Moreover, toward the end of his penalty phase argument, the prosecutor launched a preemptive strike on the remorse issue. He told the jury:

> Again, I don't know what the defense is going to argue. . . . Mr. Uhalley [Watkins's attorney] may argue that Mr. Watkins is very sorry. He told you he was very sorry, he was very remorseful. Remember, is that real?

(RT 2079.) The prosecutor thus exploited his own inadmissible cross-examination to damn Watkins before the jury. He did not need to risk direct reference to his stricken cross-examination question. It likely echoed at least in some jurors' ears. (See *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 ["The human mind is not so constructed as to permit a registered fact to be unregistered at will."].)

Whether the jury perceived Watkins as remorseful probably played a significant role in its sentencing decision. Empirical studies have found the a defendant's remorse or lack of remorse has a potent influence on a jury's life or death decision. (See Garvey, The Emotional Economy of Capital Sentencing (2000) 75 N.Y.U. L.Rev. 26, 59 [finding that jurors' fear or disgust toward the defendant tends to recede in the face of his remorse]; Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* (1998) 98 Colum. L.Rev. 1538, 1560-1561 [finding lack of remorse

is "highly aggravating . . . second only to the defendant's prior history of violent crime and future dangerousness."]; Sundby, *The Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty* (1998) 83 Cornell L.Rev. 1557, 1560 [finding that 69% of the 78 California jurors interviewed pointed to the defendant's lack of remorse as a reason, and often the most compelling reason, they voted for the death penalty]; Eisenberg, Garvey & Wells (1998) *But Was he Sorry: The Role of Remorse in Capital Sentencing*, 83 Cornell L.Rev. 1599, 1631 [finding that jurors' belief that the defendant is remorseful makes a difference when they do not think the crime is extremely vicious].)

Given the importance of remorse, the prosecutor's inflammatory questioning of Watkins at the guilt phase not only unfairly tainted Watkins's credibility with regard to his defense at the guilt phase, but very likely prejudiced his chances for a sentence of life imprisonment without the possibility of parole. Indeed, the jury had difficulty reaching a penalty verdict as to Watkins (CT 784, 790-791), and rendered a death sentence after deliberations spanning four days. (CT 793.) The prosecutor's misconduct thus rendered the penalty phase as well as the guilt phase fundamentally unfair under the Fourteenth Amendment (*Darden v. Wainwright* (1986) 477 U.S. 168, 181) and arbitrary and unreliable under the Eighth Amendment (see *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330 [recognizing heightened reliability demanded in capital cases by the Eighth Amendment]), especially when considered cumulatively with the other errors in his trial. (See AOB 302-305.) Watkins's convictions and death sentence should be reversed.

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IV.

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

Watkins has challenged the consciousness-of-guilt instructions (CALJIC Nos. 2.03, 2.06 and 2.52) given at the guilt phase. (AOB 83-104.) The State disputes his arguments, relying on this Court's decisions rejecting similar claims. (RB 54-64.)[10] The issues are fully joined, and, with one exception, further discussion will shed no new light on them. The exception is the State's assertion that Watkins has forfeited all his arguments, save the challenge to the sufficiency of the evidence for CALJIC 2.06, because he did not object to the instructions at trial. (RB 56, 58.)

As Watkins pointed out in his opening brief, the claimed errors are cognizable on appeal, even in the absence of an objection, under Penal Code sections 1259 and 1469 and this Court's decisions. (AOB 84-85, fn. 43.) The State asserts that the forfeiture exception for instructional claims affecting a defendant's "substantial rights" under sections 1259 and 1469 does not apply because this Court already has rejected the merits of the constitutional claims he raises. (RB 58.) In short, the State would limit appellate review only to winning claims. The Court's decisions plainly foreclose the State's new twist to the "substantial rights" doctrine.

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[10] The State twice uses a quotation it attributes to *People v. Jackson* (1996) 13 Cal.4th 1164, 1224 ("The inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction") which does not appear in that case. (RB 61, 63-64.) Rather, the quotation comes from *People v. Holloway* (2004) 33 Cal.4th 96, 142.

In *People v. Benavides* (2005) 35 Cal.4th 69 and *People v. Prieto* (2003) 30 Cal.4th 226, the Court reviewed multiple claims of instructional error that had not been raised by objection at trial. Citing Penal Code section 1259 as authorizing review, the Court rejected all the claims on the merits, finding either no error or the error to be harmless. (*Benavides*, *supra*, 35 Cal.4th at pp. 111-112; *Prieto*, *supra*, 30 Cal.4th at pp. 248-259.) Contrary to the State's suggestion, the trigger for application of section 1259 is asserting an instructional error that affects substantial rights, not prevailing on the claim. (*Benavides*, *supra*, at p. 111 ["to the extent defendant asserts instructional error affected his substantial rights, he is not precluded from raising the claim on appeal even absent an objection in the trial court."].) This Court has been quite explicit on this point. Rejecting the State's forfeiture argument with regard to a claim of instructional error, the Court ruled: "This issue is cognizable despite the failure to object because if [defendant] were correct, the instruction would have affected his substantial rights." (*People v. Cleveland* (2004) 32 Cal.4th 704, 750; accord, *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

The State's position not only is foreclosed by precedent, but it makes no sense. Under the State's reading of section 1259, the reviewing court would have to examine the merits of an instructional claim and decide whether the asserted error requires relief in order to determine whether the claim is even cognizable on appeal. Such a convoluted process would serve no purpose.

Watkins's claims regarding the consciousness-of-guilt instructions are preserved for review, and for the reasons stated in his opening brief, this Court should reconsider its position on these instructions and find Watkins's claims to be meritorious.

V.

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

The trial court instructed the jury at the guilt phase on both premeditated murder and felony murder. Watkins has argued that these instructions were incorrect in that they allowed the jury to convict Watkins of murder without deciding unanimously that the crime was either premeditated murder or felony murder. (AOB 139-148.)

Watkins acknowledged in his opening brief that this Court has rejected similar arguments. (AOB 140.) For example, this Court has held that "[t]here is only a 'single, statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, citing *People v. Pride* (1992) 3 Cal.4th 195, 249; but see *People v. Dillon* (1983) 34 Cal.3d 441, 471-472, 476, fn. 23 [felony murder is a separate and distinct crime from malice murder].) At the same time, the Court also has acknowledged that premeditated murder and felony murder do not have the same elements. (See e.g., *People v. Carpenter*, *supra*, 15 Cal.4th at p. 394; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 465, 475, 477, fn. 24.) Specifically, malice is an element of murder under section 187 (malice murder), and it is not an element of felony murder under section 189. Furthermore, premeditation and deliberation are elements of first degree malice murder but not first degree felony murder. It is the fact that these crimes are not simply separate *theories* of murder, but have separate *elements*, that is the basis for appellant's argument. (See AOB 139-148.)

The State ignores the fact that premeditated (malice) murder and

felony murder have separate elements and simply relies on this Court's cases rejecting this issue without analysis. (RB 73-74.) The State also relies on *Schad v. Arizona* (1991) 501 U.S. 624, 631-632, which, as Watkins explained in the opening brief, does not answer his claim because in Arizona premeditated murder and felony murder do not have separate elements, but in California they do. (AOB 145-146.)

Recent decisions by this Court offer further support for Watkins's argument. In *People v. Seel* (2004) 34 Cal.4th 535, the defendant was convicted of attempted premeditated murder (Pen. Code, § 664, subd. (a) and § 187, subd. (a)). The Court of Appeal reversed the finding of premeditation and deliberation due to insufficient evidence and remanded for retrial on that allegation. In holding that double jeopardy barred retrial on the premeditation allegation under *Apprendi v. New Jersey* (2000) 530 U.S. 466, this Court endorsed the view that "'[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."'" (*Seel, supra*, 34 Cal.4th at p. 549, citing *Apprendi v. New Jersey, supra*, 530 U.S. at p. 493.) Intent, of course, is an element which makes malice murder a different crime from felony murder.

In *Burris v. Superior Court* (2005) 34 Cal.4th 1012, this Court held that under Penal Code section 1387, the dismissal of a misdemeanor prosecution does not does not bar a subsequent felony prosecution based on the same criminal act when new evidence comes to light that suggests a crime originally charged as a misdemeanor is, in fact, graver and should be charged as a felony. (*Id.* at p. 1020.) In reaching this conclusion, the Court compared the elements of the offenses at issue. "When two crimes have the same elements, they are the same offense for purposes of Penal Code section 1387." (*Burris, supra*, 34 Cal.4th at p. 1016, fn.3, citing *Dunn v.*

Superior Court (1984) 159 Cal.App.3d 1110, 1118 [applying "same elements" test to determine whether new charge is same offense as previously dismissed one for purposes of section 1387].) The negative implication is obvious: when two crimes have different elements, they are not the same offense.

Seel and *Burris* thus reaffirm the principle that because premeditated (malice) murder and felony murder have different elements in California, they are different crimes, not merely two theories of the same crime. The jury should not have been permitted to convict Watkins of murder without being required to determine unanimously that the crime was either a premeditated (malice) murder under section 187 or felony murder under section 189. The conviction and judgment therefore must be reversed.

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VI.

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

The trial court granted the prosecutor's challenge for cause and excluded prospective juror Julia Almeyda, who unequivocally stated that she could impose a death sentence although the decision would be "hard" and would not be made without feeling some "guilt." Watkins has shown that this exclusion constitutes reversible error under the state and federal Constitutions. (AOB 149-172.) The State contends that the excusal of Almeyda was justified because "Juror Almeyda testified that she was not merely afraid to impose a death sentence, but that she was conscientiously predisposed against voting to impose such a sentence." (RB 75.) The record simply does not support the State's conclusion. Almeyda never said she was predisposed against the death penalty. Although she was reluctant to judge anyone and to impose *any* sentence, she unambiguously stated that she could return a death verdict. Her voir dire simply shows that she would be reluctant, and it would be difficult for her, to impose the ultimate penalty.

Contrary to the State's assertion, Watkins does not ignore the applicable standard of review. (Compare AOB 154 with RB 74-75.) The parties agree that the governing standard is whether there is substantial evidence to support the trial court's finding that Almeyda's views about capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with the court's instructions and the juror's oath. (See AOB 153; RB 75.) The State does not contest that a trial court's finding of substantial impairment must be fairly supported by the record considered as a whole. (See AOB 154.) Moreover, the State does

not dispute that:

- Almeyda had no opinion and no conscientious scruples about capital punishment (AOB 155; RT 866, 867);
- Almeyda was reluctant to judge people with regard to both guilt and penalty and with regard to both sentences of life and death (AOB 156; RT 868);
- The trial court made no findings about Almeyda's demeanor or credibility. (AOB 161, fn.79);
- Prospective juror Bush was as reluctant as, or more reluctant than, Almeyda to impose a death sentence and was not challenged or excluded for cause (AOB 159-160, fn.78);
- To qualify for jury service in a capital case, a prospective juror need not be able to state under oath that she *would* return a death sentence but only that she *could* return a death sentence (AOB 166, fn.81); and
- A prospective juror's reluctance to impose the death penalty, when the juror has stated she could return a death sentence, is not grounds for exclusion from jury service (AOB 163-166).

The State argues that because Almeyda's statements were conflicting and ambiguous, "the trial court's determination as to [her] true state of mind is binding on this Court" (RB 74; see also RB 75, 78), and thus this Court must defer to the trial court's ruling (RB 75). There are two flaws in this argument. First, Almeyda's statements were neither conflicting nor ambiguous. Second, deference to the trial court's only determination about Almeyda's state of mind – that "she would feel guilty if she were to impose a death sentence" (RT 894) – does not insulate the trial court's implicit legal conclusion that her ability to serve as a juror was substantially

impaired from reversal when that finding is not supported by the record.

Watkins has demonstrated that Almeyda's statements were neither conflicting nor ambiguous. (See AOB 149-152, 155-157, 158.) As the State itself recognizes, Almeyda said unequivocally that she could vote for the death penalty. (RB 76.) She was consistent on two points: she could return a death verdict (RT 869), and it would be hard for her to do so (RT 889-890). Nonetheless, the State attempts – but fails – to manufacture ambiguity where there was none. (RB 76.)

In arguing that Almeyda's statements were conflicting and ambiguous, the State points to only one statement that is even arguably ambiguous, and it only appears ambiguous because the State repeatedly yanks it out of context. The State asserts that Almeyda was "not sure" whether "she could vote for the death penalty if the evidence supported that verdict." (RB 76, citing RT 867, see also RB 78, citing RT 867.) As discussed in the opening brief, Almeyda's complete response shows that her position was unambiguous and consistent and quite different than the State's rendition of the record. (See AOB 150.) The voir dire transcript reads as follows:

> THE COURT: If you were a juror on a capital case, and if you had heard the evidence in the guilt phase, found an individual guilty of first degree murder with special circumstances and you considered the manner in which the crime was committed, the extent of the participation of that individual, you heard evidence about his background, about his upbringing, and after that you felt that the death penalty was appropriate, *could* you vote for the death penalty?
>
> PROSPECTIVE JUROR ALMEYDA: I'm not sure I *would.*

(RT 866-867.) Contrary to the State's misrepresentation, Almeyda did not

say she was "not sure" she "could" return a death verdict. Rather, she said she was "not sure" she "would" return a death sentence. (*Ibid.*) Impartiality to serve on a capital jury does not require a declaration that a juror *would* impose death in the case at trial but only an assurance that the jury would follow the law and *could* in an appropriate case impose the ultimate punishment. (See AOB 166 & fn. 81; *People v. Kaurish* (1990) 52 Cal.3d 648, 698-699 [juror may not be excluded for death penalty views unless they would "preclude" him from returning a death verdict such as juror's statement that he could not return a death sentence under any circumstances].) When next asked if she could impose death, Almeyda was unequivocal:

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

(RT 869.) The rest of her voir dire establishes that the decision to impose a death sentence would be "hard" and would make her feel "guilt." (RT 890.) But she never retracted or contradicted her statements that she could and would be able to return a death verdict. Almeyda's statements on both points – her ability to return a death sentence and her reluctance to do so – were consistent and unequivocal.[11]

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[11] The State suggests that Almeyda's understanding of issues was limited because she did not understand some of the questions on the juror

(continued...)

The State's argument is mistaken further. The State erroneously equates deference to the trial court's determinations as to the state of mind of a prospective juror who has given conflicting or ambiguous statements with affirmance of the trial court's exclusion. That is not the law. Rather, as the State itself acknowledges, on appeal this Court "will uphold the trial court's ruling *if it is fairly supported by the record*, accepting as binding other trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (RB 75, quoting *People v. Stewart* (2004) 33 Cal.4th 425, 441, internal quotation marks omitted and emphasis added.) Thus, whether a prospective juror's voir dire is conflicting or consistent, ambiguous or emphatic, a trial court's exclusion can be affirmed only if it is supported by substantial evidence. In this case, it is not.

The trial court here ruled that with "the last round of questions Mrs. Almeyda indicated she would feel guilty if she were to impose a death sentence. And based on that guilt she couldn't." (RT 894.) As shown previously, the record does not support the trial court's conclusion that Almeyda could not impose a death sentence. (See AOB 157-172.) Even reading the prosecutor's less-than-clear final question to Almeyda, to which the trial court referred, in the light most favorable to the State (see AOB 156-157), the record at most establishes that Almeyda could not return a

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[11] (...continued)
questionnaire and asked the trial court to repeat a question. (RB 78, citing RT 868-869.) Neither the prosecutor nor the trial judge apparently perceived a problem with her comprehension; neither mentioned it as a reason for disqualifying her. There certainly is no support for the State's post-hoc insinuation that the exclusion was based on any reason other than her death penalty views.

death verdict with a clear conscience. (RT 890-891.) She never retracted nor contradicted her previous statements that she could impose a death sentence. (RT 869, 890-891.) As Watkins has explained, in light of Almeyda's repeated and unequivocal statements that she could vote for a death verdict, her sense of guilt does not render her a biased juror under the substantial impairment under *Wainwright v. Witt* (1985) 469 U.S. 412, 421. (See AOB 163-171.)[12]

The State presents no persuasive authority for the holding it urges, i.e., that a prospective juror who has no preference for either a life-without-parole sentence or a death sentence and who could impose a death sentence, but who would feel some guilt in returning a death verdict, is not qualified to sit as a juror in a capital case. None of the cases the State cites supports such a rule. (See RB 79-80.)

In *People v. Wader* (1993) 5 Cal.4th 610, which the State asserts is "materially indistinguishable" from this case, the excused prospective juror, Kosmatka, made clear that due to his Catholic beliefs, he could not vote for a death sentence. This Court's opinion shows that *Wader* is not, in any

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[12] The State appears to criticize Watkins's trial counsel for not questioning Almeyda. (RB 79.) Of course, he had no obligation to do so. The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Witt, supra*, 469 U.S. at p. 424; accord, *Morgan v. Illinois* (1992) 504 U.S. 719, 733.) Since the record showed that Almeyda was qualified to sit as a juror, there was no reason for Watkins's attorney to pursue voir dire. Moreover, when a prospective juror's death penalty views appeared to impair her ability to sit as a juror, such as in the case of Miss Hook (RT 763-765), Watkins's attorney stipulated to the prosecutor's challenge for cause. (RT 775-777.)

way, analogous to this case:

> Kosmatka replied he was a Catholic, explaining, "I do not know if I can reconcile a death penalty along with my faith." In response to a question by the court regarding a hypothetical premeditated murder of a nun to eliminate her as a witness, Kosmatka said he did not think he could vote for the death penalty in that case. In later questioning, Kosmatka said he could possibly vote for the death penalty in a case that was "outrageous" and involved the murder of a member of his family or a close friend, but that would involve violating his beliefs. Finally, the trial court asked Kosmatka: "[Y]ou are saying 'Judge, I am telling you I have charged my conscience and I know at this point that I would not vote for the death penalty in this case. Period, end of report.' Are you telling me that?" Kosmatka answered, "Yes."

(*Wader*, 5 Cal.4th at p. 653.) *Wader* simply has no bearing on the exclusion in this case. Unlike Almeyda, Kosmatka never affirmatively stated that he could return a death verdict; rather, in contrast to Almeyda, he stated unequivocally that he would *not* vote for the death penalty.

The other cases on which the State relies also are inapposite. In *People v. Box* (2000) 23 Cal.4th 1153, 1181, the excluded prospective juror, Esther J., stated that she could not agree with imposing the death penalty in any circumstances. Again, this Court's opinion shows the stark difference between the views of the prospective juror in *Box* and those of Almeyda in this case:

> While in chambers, Esther J. volunteered, "I couldn't vote for [the] death penalty. I just - it's just something that I have never believed in it. A life, whether it's taken by legal means or otherwise, is just wrong; that's how I feel within me." In response to inquiry by the court, Esther J. stated, "[O]ne thing that I think is so horrible is when a small child is mutilated and killed, but then I think the person who did it must be absolutely insane and they-they should be put away for life without a chance of getting out again, not that this-death, I

> can't-even for that I can't quite bring myself to feel that that's right." She further stated, "I know that if I did vote for capital punishment, I would live with a sense of guilt for the rest of my life." While Esther J. indicated she would try to follow the law, she also agreed with the prosecutor that it was wrong for the state to execute people "for any circumstance," and that she "could think of no situation where [she] would be able to agree with the death penalty."

(*Id.* at p. 1181.)

The situation is similar in *People v. Samayoa* (1997) 15 Cal.4th 795, where the five prospective jurors excluded for their death penalty views all believed the death penalty was wrong and their voir dire showed that they either could not be fair to the prosecution or could not vote for death. (*Id.* at pp. 822-823.) As the State readily acknowledges about the sole exclusion it discusses, the prospective juror admitted that there was no case in which he would be able to vote for death. (*Id.* at p.. 823; see RB 80.)

The State's final case fares no better. In *People v. Garceau* (1993) 6 Cal.4th 140, the excluded prospective juror "explained she had a 'bias' against the death penalty and did not believe she could vote in favor of a death verdict." (*Id.* at p. 175.) The record in *Garceau* is starkly different from that in this case, where Almeyda stated that she had no opinion about death penalty (RT 867) and could impose a death sentence (RT 869).

The State's reliance on cases that do not even remotely support its position suggests that there is no justification for Almeyda's exclusion from the jury. So does the State's failure to offer a genuine response to Watkins's discussion of the exclusions held to be insufficient under the substantial impairment standard in *Gray v. Mississippi* (1987) 481 U.S. 648 and *Adams v. Texas* (1980) 448 U.S. 38. (See AOB 167-171.) The State says nothing at all about *Gray*; it does not even try to dispute Watkins's

showing that there was less reason for the exclusion of Almeyda in this case than for the exclusion of prospective juror Bounds in *Gray*. (See AOB 167-168.) And the State only cursorily tries to distinguish *Adams* as excluding jurors who "acknowledged that their views of the death might 'affect' their deliberations, but only to the extent that they would view their task with greater gravity." (RB 81-82.)

The record in *Adams* belies the State's facile representation. For example, prospective juror White, who believed in the death penalty, did not indicate that she would approach her duty as a juror with "greater gravity" but rather she stated that she didn't "want to have anything to do with it [imposing the death penalty]" and "didn't think" she could vote for a death sentence. (*Adams v. Texas*, No. 79-5175, Brief for Petitioner, Appendix [AOB Appendix B] at pp. 26-28.) Similarly, prospective juror Ferguson, who strongly opposed capital punishment, stated that voting to execute a person would be "too hard for me to do" (*id.* at p. 15) and that he did not believe he could in good conscience consider a death sentence. (*Id.* at p.18.) The reluctance and equivocal views of these prospective jurors was insufficient to sustain their exclusion for cause. (See AOB 170, citing *Adams*, *supra*, 448 U.S. at pp. 49-50.) The State does not dispute the central teaching of *Adams* – that a prospective juror's extreme reluctance to sentence a person to death and difficulty to do so with a clear conscience do not establish that his or her views would "prevent of substantially impair the performance of [their] duties as a juror.

In *People v. Stewart* (2004) 33 Cal.4th 425, 440-455, decided after Watkins filed his opening brief, this Court made the same point. The Court held that the trial court had committed reversible error by excusing five prospective jurors for cause based solely upon their written answers on a

jury questionnaire which expressed general objections to the death penalty. The Court expressly ruled that difficulty, even extreme difficulty, in imposing death is *not* a disqualifying impediment to jury service:

> [T]he circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412, . . . A juror might find it very difficult to vote to impose *the death penalty*, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 447, emphasis in original.) Even though Almeyda was questioned, neither the trial court nor the prosecutor asked her "constitutionally pertinent" questions, i.e., whether she could follow the trial court's instructions, could weigh the aggravating and mitigating circumstances and could determine whether death is the appropriate penalty. (*Ibid.*) There is no evidence that Almeyda would not be able or willing to undertake these tasks. To the contrary, the voir dire in this case plainly shows Almeyda could impose a death sentence. (RT 869.)[13]

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[13] Other recent decisions of this Court rejecting *Witt* claims are readily distinguishable from this case because the excluded juror admitted he or she would not be able to impose a death sentence. (See *People v. Wilson* (2005) 36 Cal.4th 309 [when asked, "And so under no circumstances would you ever consider voting for the death penalty?" the excluded juror replied, "I don't think I could send somebody to his death.

(continued...)

In short, Almeyda was qualified to sit as a juror in this case, and the trial court's decision to excuse her for cause is not supported by the record. Accordingly, Watkins's death sentence must be reversed.

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[13] (...continued)
Ever."]; *People v. Samuels* (2005) 36 Cal.4th 96, 132 [juror requested that she be removed from the jury because she concluded that she would not be able to impose death]; *People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [excused juror "said she could not vote for the death penalty, although she hedged her answer by stating that 'maybe' she could not do so" and later equivocated: "'I would find it very, very difficult [to vote for the death penalty], but I could probably do it.'"]; *People v. Griffin* (2004) 33 Cal.4th 536, 559-561 [excluded jurors stated, respectively, that she believed death penalty wrong and could not vote for death; did not know whether they ever could vote to impose death; and due to job as warden of prison incarcerating condemned women did not know if she could impose death].)

VII.

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

At the penalty phase, the prosecutor deliberately elicited evidence of racial overtones regarding two of the three group fights in which Watkins participated while confined in jail, and this evidence impermissibly tainted his death sentence. The prosecutor carefully elicited the race of the victims – one white and the other Hispanic – and the race of the assailants including Watkins – all black. This evidence invited the jury, which was predominantly white with few Hispanics, to conclude that Watkins was a violent black man who preyed on people like them. And this subtle but pernicious ploy played out in Los Angeles County against the backdrop of the racially-charged and highly-publicized trial of the police officers accused of beating Rodney King. (AOB 185-210.) Although Watkins moved for a mistrial, the State argues that the claim is forfeited and that, in any event, the prosecutor's focus on the racial identities of the victims and assailants in the fights was proper and non-prejudicial. (RB 89-94.) The State is wrong on both counts: Watkins's claim is preserved for appeal and is meritorious. His death sentence should be reversed.

A. The Mistrial Motion Preserved The Prosecutorial Misconduct Claim For Review

Brushing aside the mistrial motion, the State declares that Watkins forfeited his claim of prosecutorial misconduct because he failed to make a timely objection and request a curative admonition. (RB 91.) It is true that a defendant ordinarily must object and request an admonition to preserve prosecutorial error for review. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) However, the general rule does not apply when the harm caused by the

misconduct is incurable. (*Ibid.*; *People v. Harrison* (2005) 35 Cal.4th 208, 243-244; *People v. McDermott* (2002) 28 Cal.4th 946, 1001.) In that situation, a mistrial motion seeks the appropriate remedy and thus preserves the issue for appeal. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 985-986; *People v. Haskett* (1982) 30 Cal.3d 841, 854.) In cases with what might be described as run-of-the-mill misconduct, some justices and courts have recognized the curative power of judicial admonitions to be an "unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453 [conc. opn. of Jackson, J.]; see also (*People v. Roof* (1963) 216 Cal.App.2d 222, 225 ["facts that have been impressed upon the minds of jurors which are calculated to materially influence their consideration of the issues cannot be forgotten or dismissed at the mere direction of a court."]; *People v. Ozuna*, *supra,* 213 Cal.App.2d at p. 342 ["The human mind is not so constructed as to permit a registered fact to be unregistered at will.")

The inefficacy of curative instructions becomes even more troublesome when the misconduct involves the highly-charged issue of race which may resonate with jurors' conscious or subconscious prejudices. Indeed, verdicts resulting from trials contaminated by improper racial considerations have been reversed in this and other jurisdictions in the absence of a contemporaneous objection. (*People v. Simon* (1927) 80 Cal.App. 675, 679; *United States v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 595; *United States ex rel. Haynes v. McKendrick* (2nd Cir. 1973) 481 F.2d 152, 156.) And when, as here, the misconduct injects impermissible racial considerations into a capital-sentencing trial, where "the range of discretion entrusted to a jury in a capital sentencing hearing" creates "a unique opportunity for racial prejudice to operate but remain undetected" (*Turner v. Murray* (1986) 476 U.S. 28, 35), curative admonitions are completely

impotent. (See *State v. Hightower* (N.J. 1990) 577 A.2d 99, 118-119 [reversing death sentence even though trial court struck and admonished jury to disregard offending racial reference]; *Robinson v. State* (Fla. 1988) 520 So.2d 1, 6 [reversing death sentence where mistrial motion challenged prosecutor's attempt to insinuate that appellant had habit of preying on white women and no curative instruction was requested or given].)[14]

In this case, defense counsel moved for a mistrial soon after the offending evidence was elicited. (RT 1912-1913.) In the context of deciding whether Watkins should live or die, the prosecutor's introduction of evidence that focused the predominantly-white jury on Watkins's being black and the victims of the jail assaults being white and Hispanic incurably tainted the penalty trial, especially since the jury was sentencing Watkins for the murder of a white man. Because the motion for a mistrial was adequate to bring the irremediable error to the trial court's attention, there was no forfeiture.

Furthermore, the Court should hear Watkins's claim even if a contemporaneous objection and request for an admonition were required to preserve the misconduct issue for appeal as a matter of right. This Court may exercise its discretion to review a claim that involves important

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[14] Watkins apologizes for the typographical error in his citation to *Hightower* in his opening brief. (See AOB 196.) The correct citation is given above. The cases cited by the State, *People v. Valdez* (2004) 32 Cal.4th 73, 123, *People v. Cunningham* (2001) 25 Cal.4th 926, 1001, and *People v. Mayfield* (1997) 14 Cal.4th 668, 783, do not defeat Watkins's argument. (See RB 91.) They involved guilt-phase claims of prosecutorial misconduct and did not, as here, involve the infusion of irrelevant racial factors at the penalty phase. Moreover, in none of the cases did the defendant, like Watkins, seek to remedy the error in the trial court with a motion for a mistrial.

constitutional rights (see *People v. Williams* (1998) 17 Cal.4th 148, 161-162, n. 6; *People v. Hill*, *supra*, 17 Cal.4th at p. 843 and fn. 8), important public policy issues (*Hale v. Morgan* (1978) 22 Cal.3d 388, 393-394), or implicates the integrity of the judiciary (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649-650). These concerns call for full review here.

The paramount importance of eliminating the risk of racial prejudice in capital-sentencing is beyond dispute. As discussed in the opening brief, the high court's modern capital jurisprudence stems from the concern with the risk of a racially-discriminatory application of the death penalty. (See AOB 189-192.) And this Court, and other courts across the country, have been emphatic – there is *no* place for gratuitous references to race in criminal trials in general and capital trials in particular. (See AOB 192, citing inter alia *People v. Cudjo* (1993) 6 Cal.4th 585, 525-626-626 and *Aliwoli v. Carter* (7th Cir. 2000) 225 F.3d 826, 831.) The infusion of impermissible racial considerations into the question of who shall live and who shall die violates the defendant's fundamental right to a fair trial, equal protection and reliable, non-arbitrary penalty determination (U.S. Const. Amends. 8 & 14) and tends to corrupt the integrity of the judicial process leading to a death sentence. Given the importance of the underlying issue, exercise of this Court's discretion to reach the merits of the claim, rather than rigid application of the contemporaneous objection rule, is appropriate. As the United States Supreme Court has emphasized:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules procedure do not require sacrifice of the rules of

fundamental justice.

(*Hormel v. Helvering* (1941) 312 U.S. 552, 557 [permitting the government in an income tax case to assert an argument that it did not present to the administrative review board].) In light of the judicial zero-tolerance policy regarding racial prejudice in capital-sentencing, this Court should review Watkins's claim that the prosecutor impermissibly interjected racial considerations into the aggravating evidence he presented to the jury in support of his plea that Watkins be executed.

B. The Prosecutor's Deliberate Introduction Of Extraneous Racial Evidence Into The Decision Of Whether Watkins Would Live Or Die Requires Reversal Of The Death Verdict

The State does not dispute that the prosecutor deliberately elicited evidence about the race of the victims of the jailhouse assaults. Nor does the State disagree that the introduction of gratuitous racial factors into a capital-sentencing trial would violate deny Watkins his right to equal protection and due process under the Fourteenth Amendment and create a substantial risk of an arbitrary and capricious death sentence in violation of the Eighth Amendment. (See RB 89-94.) Rather, the State defends the prosecutor's actions arguing (1) that the evidence was relevant to explain the circumstances of and Watkins's motive for the assaults (RT 89, 91-93) and (2) that the evidence was harmless. (RT 93.) Both responses are wrong.

The race of the victims of the jailhouse fights was wholly irrelevant to the violent crimes aggravating factor. Whether the inmate-victims were white, black or Hispanic had no "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The jailhouse fights were admitted to prove the

aggravating factor (b) in Penal Code section 190.3 – that Watkins had engaged in criminal activity that involved the use of force or violence. As the jury was instructed, "an aggravating factor is any fact, condition or event attending the commission of the crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself." (RT 2150-2151; CT 856 [CALJIC 8.88 1989 Rev.)].) The fact that Watkins participated in the jailhouse brawls may increase the guilt or enormity of his crime which, in turn, may influence "the jury's moral assessment" of whether Watkins "should be put to death." (*People v. Brown* (1985) 40 Cal.3d 512, 540.) However, the race of his victims has absolutely no probative value as to his moral culpability or deathworthiness.

Other state supreme courts unequivocally have rejected similar "circumstances" and "motive" justifications. (See AOB 194-195.) The State ignores these cases. Thus, the Nevada Supreme Court "unhesitantly declare[d]" that the reference at the sentencing hearing to defendant's admitted "preference for white women" was not justified as showing that the defendant's "plan to capture, rape and murder a white victim." (*Dawson v. State* (1987) 734 P.2d 221, 223.)

The Florida Supreme Court similarly held that the prosecutor's eliciting testimony about defendant's hostility toward and sexual encounters with "white women" "had no bearing on any aggravating and mitigating factors." (*Robinson v. State*, *supra*, 520 So.2d at p. 7.) The court flatly rejected the argument that references to the victim's race were justified as showing that the defendant's crimes were racially motivated." (*Id.* at p. 7,

fn. 3.).[15]

In short, as Watkins has shown, a prosecutor's insinuation of the race of the victim *or* the defendant through either examination of witnesses *or* closing argument is wholly irrelevant to capital-sentencing trials and violates the equal protection, due process and cruel and unusual punishment clauses of the federal Constitution. (See AOB 194-197.)

The State's circumstances-and-motive rationale is a ruse to cover up the interjection of irrelevant racial factors into the sentencing equation. In arguing for the relevance of race of the victims and assailants, the State relies on inapposite cases, makes untenable assertions, and ignores the cases supporting Watkins's claim.

First, the State's reliance on *People v. Scott* (1997) 15 Cal.4th 1188 is misplaced. *Scott* involved the admission of the defendant's own threatening statement to a woman he later assaulted and raped. The woman was the mother of a teenager whom the defendant had impregnated; the mother told the defendant she wanted him to end his relationship with her daughter. Uttering a threat, the defendant referred to himself as a "black

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[15] Despite the State's indignation about Watkins's "baseless attempts to demonize the prosecutor's conduct" (RB 89), the record shows that the prosecutor's strategy was to lay before the jury evidence that would stir up racial prejudice and step back and let the jury connect the dots. Any doubt about this approach was dispelled at the jury instruction conference, where the prosecutor was transparent about his plan: "*whether I make the argument or not* it could be an inference could be drawn from the facts of the assaults that . . . have been testified to at this point that they were racially motivated." (RT 2012, emphasis added.) By eliciting irrelevant racial evidence and then requesting an instruction that would permit the jury to rely on that evidence, the prosecutor orchestrated the racial inferences he wanted to jury to weigh in its penalty deliberations without the risks associated with explicitly arguing the point.

man." (*Id.* at p. 1219 ["I will make sure she'll never, ever want to be near or around a black man again."].) The introduction of the defendant's threat, in which he referred to his own race, in no way supports the prosecutor's repeated elicitation of the races of the victims and assailants of the jailhouse fights. While, as the State suggests, the statement in *Scott* would not make sense unless admitted in its entirety (see RB 92), the fact that Watkins is black and those he struck were white or Hispanic is not necessary to understand what transpired in the jailhouse fights. Race was not an integral or relevant aspect of the other-crimes aggravation. (Cf. *Barclay v. Florida* (1983) 463 U.S. 939 [defendants were members of the "Black Liberation Army" whose purpose was to start a race war by kidnaping and killing a white person].) Under the State's argument, any inter-racial crime is automatically racially motivated. That certainly cannot be the law in California.

Second, the State distorts Watkins's claim, erroneously asserting that he "contends that the prosecution was required to present a bowdlerized version of the incidents." (RB 92.) This argument is a classic red herring. Nothing in Watkins's argument even remotely suggests that the prosecution is prevented from presenting the facts and circumstances of a defendant's prior violent crimes under Penal Code section 190.3, factor (b). Indeed, the prosecutor did so here. (See RT 1871-1886-1894, 2022-2025 [witnesses describe in detail the jail fights and Watkins's role in them].) Rather, Watkins's point, which was clearly delineated in his opening brief, is that the prosecution may not do what the prosecutor did here – infuse those facts and circumstances with gratuitous racial innuendos.

Third, distinguishing only one of the dozen cases Watkins cites, the State dismisses the racial references in this case as having "no tendency to

stir up racial prejudice against appellant" because they did not invite the jury to judge Watkins differently on account of his race. (RB 93, discussing *Moore v. Morton* (3d Cir. 2001) 255 F.3d 95.) Although the prosecutor's misconduct here was more subtle than that in *Moore*, it was pernicious nonetheless. The State simply blinks reality to suggest that the prosecutor's evidence did not invite the white-and-Hispanic jury to sentence Watkins to death in part because he, as a black man, killed a white man and then in jail assaulted white and Hispanic inmates. The prosecutor is on record as stating that he wanted the jury to conclude that the assaults were racially motivated even though the only evidence to that effect was the races of the victims and the assailants. (RT 2012.) The residue of our nation's history of racism still reverberates in capital cases with the race of victims as well as the race of the defendant affecting decisions as to who lives and who dies. (See, e.g., *McCleskey v. Kemp* (1987) 481 U.S. 279, 286-287.) As the death penalty reversals in both *Dawson v. State*, *supra*, 734 P.2d at pp. 80-81, and *Robinson v. State*, *supra*, 520 So.2d at pp. 7-8, establish, even passing references to the victim's race at the penalty trial of a black-defendant/white-victim crime are intolerable under the federal Constitution. In this case, the repeated references to race of the assault victims and the race of the assailants were irrelevant under Evidence Code section 210 and unconstitutional under the Eighth and Fourteenth Amendments.

Finally, the misconduct here prejudiced Watkins's chances for a sentence of life imprisonment without the possibility of parole. In his opening brief, Watkins set forth multiple factors proving prejudice: (1) a predominantly white jury was deciding the appropriate sentence for a black defendant in an interracial murder; (2) the case for death was far from overwhelming given the evidence that the homicide was unintentional and

that the other aggravating evidence – the robberies committed the same day as the homicide and the subsequent fights in jail – was not so egregious as to make a death sentence a certainty; (3) the aggravating circumstances were balanced by the mitigating evidence of Watkins's remorse, the problems in his life, and the pleas for mercy by his family and a former teacher; (4) nothing in the penalty instructions counteracted the misconduct while the erroneous motive instruction exacerbated the prejudice; and (5) the jury had difficulty in reaching a penalty verdict as to Watkins. (AOB 207-210.)

The State does not address any of these factors. Instead, it asserts that the racial references were harmless for two misguided reasons. First, the State points to the third jail fight in which Watkins and others assaulted a black inmate as showing that appellant's conduct was not "solely motivated by race." (RB 93.) This begs the issue. The fact that some of Watkins's actions may not have been consistent with the prosecutor's racial ploy does not render his stratagem harmless. The risk that the irrelevant references to racial violence triggered racially-biased deliberations about Watkins's fate remains. Indeed, the State on appeal conveniently ignores the prosecutor's own statement at the instructional conference that he wanted the jury to draw the inference his carefully-elicited evidence suggested, i.e. that the fact that Watkins is black and the assault victims were white or Hispanic, in and of itself, proves a racial motive. (RT 2012; see AOB 198-199.) Simply stated, white and Hispanic jurors who were vulnerable to racial bias because Watkins, a black man, assaulted white and Hispanic people would not be miraculously released from their prejudice because he also committed acts of violence against black men.

Second, the State suggests that the gratuitous racial references were

harmless because the prosecutor did not attribute a racial motive to the killing of Mr. Shield. (RB 94.) Certainly, such a baseless argument would have exacerbated the misconduct already committed. But its absence does not negate the prejudice flowing from the infusion of impermissible racial overtones into the penalty phase. The risk of prejudice influencing the sentence in an inter-racial capital crime exists, whether the race aspect is expressly argued or not. (See *Turner v. Murray* (1986) 476 U.S. 28, 35.) Empirical studies establish that race has the greatest influence in capital sentencing where, as here, there is a black defendant and a white victim. (Bowers, Steiner & Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in Acker, Bohm & Lanier (eds.), America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction (2nd ed. 2003) pp. 458-462.) And given the particular facts making this a close case on penalty, the impermissible racial cast given to the jail assaults was prejudicial. (*Dawson v. State*, *supra*, 734 P.2d at p. 81; *Robinson*, *supra*, 520 So.2d at p. 8.)[16]

In sum, the State has not carried its burden under *Chapman v. California* (1967) 386 U.S. 18, 24, to show the misconduct harmless beyond a reasonable doubt and has not show that the misconduct did not render the

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[16] As the Nevada Supreme Court has observed:

> Because of the delicate task which the trier of fact has in weighing the mitigating circumstances against the aggravating circumstances, the kind and level of prejudice which might not requires reversal of a conviction may be sufficient to require reversal of a death penalty.

(*Dawson v. State*, *supra*, 734 P.2d at p. 221.)

penalty trial fundamentally unfair under *Darden v. Wainwright* (1986) 477 U.S. 168, 181. The death sentence should be reversed.

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VIII.

WATKINS'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Watkins was sentenced to die for a killing he testified was accidental. The prosecution did not prove otherwise, nor did it have to. In 45 other states, Watkins could not be executed for this crime. In California, he can. California's imposition of the death penalty for felony murder *simpliciter* is out of step with the Nation. It violates the Eighth Amendment and international law. (AOB 211-225.)

The State answers that this Court already has rejected similar claims, but does not meet Watkins's arguments. (RB 95-96.) The State brushes aside Watkins's reliance on *Hopkins v. Reeves* (1998) 524 U.S. 88, without even attempting to refute or discuss that the United States Supreme Court in that case assumed that the *Enmund/Tison* requirement of a culpable mental state applies to the actual killer in a felony murder. (See RB 96-97, discussing *Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137.) The State similarly avoids Watkins's argument that even if the United States Supreme Court's decisions do not already require a finding of intent to kill or reckless indifference to human life in order to impose the death penalty on defendant who actually kills, the Eighth Amendment's proportionality principle would dictate the same requirement. (See AOB 219-225.) In light of Watkins's showing on both points, the State has presented no reason why this Court should not reconsider its prior rulings on this issue and no justification for holding Watkins's death sentence for felony murder *simpliciter* constitutional under the Eighth and Fourteenth Amendments and international law.

Two cases decided after the filing of the opening brief further bolster Watkins's claim. First, in *McConnell v. State* (Nev. 2004) 102 P.3d 606, the Nevada Supreme Court, overruling its prior case law, unanimously held that Nevada's felony murder statute violated the Eighth and Fourteenth Amendments, as well as the state Constitution, because it "fails to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendant to whom it applies." (*Id.* at p. 624.) Accordingly, the Nevada court held that an aggravating circumstance – the basis for death eligibility in Nevada – could not be based "on the felony upon which a felony murder is predicated." (*Ibid.*) Although *McConnell* is based on the Eighth Amendment's narrowing principle rather than on its proportionality principle asserted in this case, the decision still is instructive.[17]

As a preliminary matter, *McConnell* reduces the number of states that permit imposition of death on a felony murderer without regard to his state of mind. As Watkins noted in his opening brief, before *McConnell*, felony murder *simpliciter* was the basis for death eligibility in only six states – California, Florida, Georgia, Maryland, Mississippi and Nevada. (AOB 219.) That number now stands at five. This dwindling number underscores that capital punishment for felony murderers without proof of a culpable mental state is inconsistent with contemporary standards of decency that inform the Eighth Amendment's proportionality principle.

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[17] In Watkins's view, the narrowing question is, by necessity, an empirical question which must await development in habeas corpus. (See, Shatz & Rivkind, *The California Death Penalty: Requiem for Furman?* (1997) 72 N.Y.U. Law. Rev. 1283, 1288-1290, 1326.) In contrast, resolution of the proportionality question does not rely on empirical data about the operation of California's death penalty statute.

(See *Atkins v. Virginia* (2002) 536 U.S. 304, 311-312; *Trop v. Dulles* (1958) 356 U.S. 86, 100-101 (plur. opn. of Warren, J.).)

In addition, the Nevada Supreme Court imposes the very constitutional requisite that Watkins advocates – that there must be proof of a culpable mental state before a felony murderer can be death eligible. The Nevada felony-murder aggravating circumstance, unlike the Nevada felony murder statute, "requires that the defendant '[k]illed or attempted to kill' the victim or '[k]new or had reason to know that life would be taken or lethal force used.'" (*McConnell, supra*, 102 P.3d at p. 623, emphasis omitted.) The Nevada Supreme Court found this requirement to be inadequate, because it permits a jury to impose death on a defendant who killed the victim accidentally. (*Id.* at p. 623, fn. 67.) Consequently, the court held that the mens rea requirement statutorily provided for an accomplice also applies to the actual killer:

> Jurors should be instructed that even if the defendant killed the victim, they must still find that the defendant intended to kill or at least knew or should have known that a killing would take place or lethal force would be applied.

(*Ibid.*) Even with this new proportionality limitation, the Nevada Supreme Court held the felony murder aggravating circumstance failed to genuinely narrow the death eligibility of felony murderers. (*Id.* at p. 624.) Like the Nevada Supreme Court, this Court should recognize the constitutional infirmity of its felony-murder special circumstance.

Second, the United States Supreme Court's decision in *Roper v. Simmons* (2005) ___ U.S. ___, 125 S.Ct. 1183, supports Watkins's Eighth Amendment proportionality argument. In declaring the death penalty for juvenile offenders unconstitutional, the high court reaffirmed that in determining whether a punishment is so disproportionate as to be cruel and

unusual, the Court first considers "'the evolving standards of decency'" as reflected in laws and practices of the States and then exercises its own independent judgment about whether the challenged penalty furthers the goals of retribution and deterrence. (*Simmons*, 125 S.Ct. at p. 1190.)

Applying this Eighth Amendment framework, the Court found a national consensus against capital punishment for juveniles in large part from the fact the majority of states prohibit the practice. By the Court's calculations, 30 states preclude the death penalty for juveniles (12 non-death penalty states and 18 death-penalty states that exclude juveniles from this ultimate punishment) and 20 permit the penalty. (*Id.* at p. 1192.) Even though the rate of abolition of the death penalty for juveniles was not as dramatic as the rate of abolition of the death penalty for the mentally retarded chronicled in *Atkins v. Virginia*, *supra*, 536 U.S. 304, the Court found that "'the consistency of the direct of the change'" was constitutionally significant in terms of demonstrating a national consensus against executing people for murders they committed as juveniles. (*Simmons*, *supra*, 125 S.Ct. at pp. 1193-1194.) The Court further held that because of the diminished culpability resulting from the adolescents' lack of maturity and underdeveloped sense of responsibility, their vulnerability to negative influences and outside pressures, and their still-developing characters, the penological justifications of retribution and deterrence are inadequate to sustain the death penalty for juvenile offenders. (*Id.* at pp. 1195-1198.)

Simmons, like *Atkins*, leaves no doubt that, at least with regard to capital punishment, the proportionality limitation of the Eighth Amendment is the law of the land and that the most compelling objective indicia of the nation's evolving standards of decency about the use of the death penalty

are the laws of the various states. In this regard, Watkins has made a far stronger showing of a national consensus against the death penalty for felony murder *simpliciter* than either Simmons or Atkins made in their respective cases. As noted above, there are now only five states, including California, that permit execution of a person who killed during a felony without any showing of a culpable mental state whatsoever as to the homicide. Forty-five states – 90% of the nation – prohibit the death penalty in this situation. The national consensus on this issue is beyond dispute. Moreover, as shown in the opening brief and unanswered by the State, the imposition of the death penalty on a person who killed accidentally or negligently during a felony furthers the goals of neither retribution nor deterrence. (AOB 223-224.)

Watkins asserts a significant challenge to his own death sentence and to the California's felony-murder special circumstance. The State disputes the claim but does not respond to, let alone refute, the arguments presented. This Court should revisit its previous decisions upholding the felony-murder special circumstance and should hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant, whether the actual killer or an accomplice, had an intent to kill or acted with reckless indifference to human life. Because that factual finding is a prerequisite to death eligibility, which increases the maximum statutory penalty, it must be found unanimously and beyond a reasonable doubt by a jury. (*Ring v. Arizona* (2002) 536 U.S. 584, 602-603; see also *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 2537-2538; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 493-494.) There is no jury finding in this case that Watkins intended to kill Mr. Shield or acted with reckless indifference to human life. (Cf. *McConnell, supra*, 102 P.3d at pp. 620, 623 [reversal of

death sentence not required where the defendant admitted he premeditated the intentional killing and evidence supported his admission].) Therefore, Watkins's death sentence must be reversed.

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IX.

THE TRIAL COURT ERRONEOUSLY FAILED TO DEFINE THE PENALTY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Watkins challenges the trial court's failure to instruct the jury on the true meaning of the sentence of life imprisonment without the possibility of parole ("LWOP"). In his opening brief, Watkins acknowledged that this Court previously has rejected similar claims to California's standard LWOP instruction, but asked this Court to reconsider this issue in light of recent United States Supreme Court decisions. (See AOB 227, fn. 110.) The State simply cites to this Court's prior decisions rejecting similar claims. (RB 97.)

Watkins has demonstrated that California juries are confused about the meaning of an LWOP sentence. (AOB 228, citing empirical studies of California capital juries.) An additional study confirms that such juror misunderstanding is a significant problem. (See Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. Law Rev. 605, 650, 694-702.) This empirical evidence undercuts the Court's ruling that in CALJIC No. 8.84 "[th]e term 'life without the possibility of parole' is clear and unambiguous and does not require 'a sua sponte definitional instruction.'" (*People v. Prieto* (2003) 30 Cal.4th 226, 270, internal quotation marks and citation omitted.)

Two justices of this Court recently addressed this issue in a straightforward fashion in *People v. Samuels* (2005) 36 Cal.4th 96. In that case, Justice Werdegar, joined by Justice Kennard, recognized the shortcomings in the standard LWOP instruction. (*Id.* at pp. 138-141 (conc. opn. of Werdegar, J.) Justice Werdegar observed, "although CALJIC No.

8.84 seems clear on its face, some jurors may nevertheless believe a life prisoner will still be able to obtain release on parole sometime in the future." (*Id.* at p. 140.) Justice Werdegar suggested that when a jury asks a question about this topic, the trial court respond with a short and direct answer. (*Ibid.*) This proposal, however, does not fully cure the deficiency in CALJIC 8.84. In light of the empirical evidence regarding juror confusion and misunderstanding about the meaning of LWOP, the Court should, as the Sixth, Eighth and Fourteenth Amendment to the federal Constitution demand, require that the trial court instruct a capital jury before it begins its penalty deliberations that: (1) a sentence of life imprisonment without the possibility of parole means that the defendant will not be released from prison except in the highly unusual event that the judiciary or the Governor makes the defendant eligible for parole; (2) this unlikely possibility applies whether the jury imposes a sentence of death or LWOP; and (3) the jury must not speculate on the possibility of such future parole eligibility but must assume that the sentence it imposes will be carried out.

As set forth in the opening brief, the trial court's failure to give such an instruction sua sponte resulted in an unfair, arbitrary, and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments and requires reversal of the death sentence.

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X.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

Watkins challenges the constitutionality of California's capital-sentencing statute because it fails to assign the State the burden of proving beyond a reasonable doubt the critical penalty-phase findings regarding the aggravating and mitigating factors and fails to require juror unanimity on the aggravating factors. (See AOB 242-257.) The State answers Watkins's argument with a quotation from one of this Court's decisions summarily rejecting similar contentions. (See RB 98-99.) Since the State has not presented any substantive arguments in support of the constitutionality of the statute or in contradiction to the arguments contained in the opening brief, no further response is required by Watkins except to reiterate his request that this Court reconsider its prior rulings (see AOB 243, 250, 252-253) and, accordingly, reverse the death judgment.

Watkins only adds that the United States Supreme Court's decisions in *Blakely v. Washington, supra*, 542 U.S. 296 and *United States v. Booker* (2005) __ U.S. ___ , 125 S.Ct. 738, decided after Watkins filed his opening brief, buttress his argument regarding the requirement of findings beyond a reasonable doubt and by a unanimous verdict. He acknowledges, however, that this Court has held that *Blakely* does not undermine the Court's prior rulings. (*People v. Cornwell* (August 18, 2005) 2005 C.D.O.S. 7378, 7393, 2005 WL 1981465, * 37; *People v. Morrison* (2004) 34 Cal.4th 698, 730.) Watkins respectfully differs with the Court's conclusion.

The decisions in *Blakely* and *Booker* reaffirm that there are two decisive questions in applying the *Apprendi* (*Apprendi v. New Jersey, supra*, 530 U.S. 466) principle to California's capital weighing process.

(See *Blakely*, *supra*, 124 S.Ct. at pp. 2536-2538; *Booker*, *supra*, 125 S.Ct. at pp 748-750.) First, what is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as set forth in Penal Code section 190.3? The maximum sentence would be life imprisonment without the possibility of parole. Second, what is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? Life imprisonment without the possibility of parole still would be the maximum sentence unless the jury made the additional finding that the aggravating circumstances substantially outweigh the mitigating circumstances. Thus, a jury must make this additional finding – and make it *unanimously beyond a reasonable doubt* – before the maximum sentence can be death. (See also AOB 244-247.)

For all these reasons as well as those in Watkins's opening brief, the proof beyond-a-reasonable-doubt and unanimity standards must be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence. Because this standard was not required in this case, Watkins's death sentence must be reversed.

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XI.

WATKINS'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT

Watkins challenges the punishment of death for ordinary crimes as violative of international law and the Eighth Amendment. (See AOB 296-301.) The State's entire response is a single quotation from *People v. Brown* (2004) 33 Cal.4th 382, 403-404, asserting that the United States, although a signatory to the International Covenant on Civil and Political Rights ("ICCPR"), reserved the right to execute its criminals, and noting that the same claim has been rejected previously. (See RB 102-103.) The State's truncated argument ignores Watkins's explanation that the Senate's attempt to place reservations on the language of the ICCPR does not defeat Watkins's claim (see AOB 297, fn. 155) and the substance of his claim that using the death penalty as a regular punishment violates the Eighth and Fourteenth Amendments because international law considers that practice improper and international law is part of our law. (See AOB 298-301.)

Recent developments in Eighth Amendment jurisprudence further support Watkins's claim. As noted already, *ante* at page 57, in *Roper v. Simmons*, *supra*, 125 S.Ct. 1183, the United States Supreme Court struck down death as a constitutional penalty for juvenile offenders. In holding that execution of juvenile criminals is cruel and unusual punishment, the Court looked to international law standards as informing the Eighth Amendment:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for

> the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime").

(*Id.* at pp. 1198.)

The State has not answered the merits of Watkins's claim that the use of death as a regular punishment violates international law as well as the Eighth and Fourteenth Amendments. Watkins asks this Court to reconsider its position on this issue and to reverse his death judgment.

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XII.

CONCLUSION

For all the reasons stated above and in his opening brief, the judgment of conviction and sentence of death in this case should be reversed.

Dated: August 31, 2005.

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender

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Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Nina Rivkind, am the Supervising Deputy State Public Defender assigned to represent appellant, Paul Sodoa Watkins, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 18,471 words in length excluding the tables and certificates.

Dated: August 31, 2005

Nina Rivkind

DECLARATION OF SERVICE

Re: *People v. Paul Sodoa Watkins* No. S026634

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main St., 10th Floor, San Francisco, California 94105; that on I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Attn: Stephanie Miyoshi, D.A.G.
300 South Spring Street, Ste. 5212
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Paul S. Watkins
(Appellant)

Each said envelope was then, on August 31, 2005, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on August 31, 2005, at San Francisco, California.

_____
DECLARANT