No. S026634



IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>PAUL SODOA WATKINS,<br><br>Defendant and Appellant. | L. A. Sup. Ct.<br>No. KA005658-02 |

# APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

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**APPELLANT'S SUPPLEMENTAL OPENING BRIEF**

**THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *KENNEDY V. LOUISIANA* MAKES UNMISTAKABLY CLEAR THAT WATKINS'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT**

In both his opening brief and his reply brief, Watkins challenges his death sentence as unconstitutionally rendering him death-eligible based on the commission of a felony murder *simpliciter*. (Appellant's Opening Brief [hereafter "AOB"], Argument XV, at pp. 211-225; Appellant's Reply Brief [hereafter "ARB"], Argument VIII, at pp. 55-60.) As he demonstrates in those briefs, the lack of any requirement that the prosecution prove that he, although an actual killer, had a culpable state of mind with regard to the killing violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.

More specifically, Watkins argues that *Tison v. Arizona* (1987) 481 U.S. 137 established a minimum mens rea of acting with reckless indifference to human life for actual felony murderers as well as their accomplices. (AOB at pp. 216-219.) The United States Supreme Court's recent decision in *Kennedy v. Louisiana* (2008) ___ U.S. ___, 128 S.Ct. 2641, not only underscores that California's outlier practice of imposing the death penalty for felony murder *simpliciter* is disproportionate under the Eighth and Fourteenth Amendments, but also calls into question whether *Tison* itself remains good law and instead strongly suggests that the death penalty is unconstitutional for any unintentional murder.

In *Kennedy*, the high court held that the Eighth and Fourteenth Amendments prohibit the death penalty for the rape of a child because the penalty is disproportionate to the crime. (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at pp. 2646, 2651.) Although *Kennedy* addressed the ultimate penalty for a person who raped, but did not kill, a child, and this case involves a person who did kill, the Court's proportionality analysis applies with equal force here.

In *Kennedy*, the high court applied its two-part "evolving standards of decency" test to determine whether death is disproportionate to the crime of child rape. The Court first considered whether there is a national consensus about the challenged penalty by looking at penal statutes and the record of executions (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at pp. 2650, 2651-2658), and then brought its own judgment to bear on the question of the constitutionality of the penalty, i.e. whether either of the social purposes of the death penalty – retribution or deterrence – justifies capital punishment for the crime (*id.* at pp. 2650, 2658-2664). However, the Court prefaced its traditional analysis with a discussion of the cruel and unusual

punishments clause. This introduction is not a pro forma recitation of the law. Rather, the Court delineated essential principles that animate its proportionality jurisprudence.

The Court began with a reminder that the Eighth Amendment's prohibition of cruel and unusual punishments proscribes all excessive punishments and "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2649, quoting *Weems v. United States* (1910) 217 U.S. 349, 367.) The high court emphasized that the standards for determining whether the Eighth Amendment proportionality requirement is met are "the norms that 'currently prevail[,]" since the measure of excessiveness or extreme cruelty "necessarily embodies a moral judgment." (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2649.) The Court did not stop there. It cautioned that retribution, as a justification for punishment, "most often can contradict the law's own ends," particularly in capital cases. The high court was blunt: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Id.* at p. 2650.)

To guard against this danger, the high court admonished that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2650., quoting *Roper v. Simmons* (2005) 543 U.S. 551, 568, internal quotation marks omitted). The Court forthrightly acknowledged that the more crimes that are subject to capital punishment, the greater the risk that the penalty will be arbitrarily imposed. (*Id.* at pp. 2658-2661.)

Thus, under the Eighth Amendment, "the Court insists upon confining the instances in which the punishment can be imposed." (*Id.* at pp. 2650; see *id.* at p. 2659 [repeating the point].) The Court's message is unmistakable: the use of capital punishment must be restricted. This mandate informs the Court's ensuing Eighth Amendment analysis.

The proportionality analysis in *Kennedy* confirms the correctness of Watkins's argument that imposing the death penalty for felony murder *simpliciter* is unconstitutional. The evidence regarding a national consensus against imposing the death penalty for child rape was nearly identical to the showing Watkins presents about the national consensus against imposing death for felony murder *simpliciter*. Only six states authorized the death penalty for child rape, and 44 states did not. (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2651.) The high court repeatedly drew an analogy between this six-state showing and that in *Enmund v. Florida* (1982) 458 U.S. 752, where eight states imposed death on vicarious felony murderers, and 42 states did not. (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at pp. 2653, 2657.) In *Kennedy*, as in *Enmund*, the exceedingly lopsided tally established a national consensus against the death penalty for the crimes considered in those cases. (*Id.* at p. 2653.)

As Watkins demonstrates, the evidence of a national consensus against executing actual felony murderers when there has been no proof of a culpable mental state with regard to the killing is just as stark as that presented in *Kennedy*. At most six states, including California, permit the death penalty for such felony murders, and 44 states and the federal government do not. (AOB at pp. 219-220 [reporting five states other than California]; ARB at pp. 56-57 [reporting only five states including California because Nevada no longer imposes death for felony murder

simpliciter]; see also Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 Fla.L.Rev. 719, 761 [adding Idaho to the list of states that along with California, Florida, Georgia, Maryland, and Mississippi authorize death for felony murder *simpliciter*].) Under the analysis used in *Kennedy* and the high court's other recent proportionality cases, *Atkins v. Virginia* (2002) 536 U.S. 304 and *Roper v. Simmons* (2005) 543 U.S. 551, the death penalty for felony murder *simpliciter* is inconsistent with our society's national standards of decency and justice.

The high court's decision on the second part of the "evolving standards of decency" test further supports Watkins's claim. In determining that, in its own independent judgment, the death penalty is excessive for the crime of child rape, the Court drew a clear distinction between "intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2660.) The Court repeated this distinction between "intentional murder" and child rape in comparing the number of reported incidents of each crime. (*Ibid.*) These references cannot be considered inadvertent or incidental. They build upon the Court's understanding in *Hopkins v. Reeves* (1998) 524 U.S. 88, 99, that there must be a finding that an actual killer had a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder (see AOB at pp. 217-218), and the Court's decision in *Tison v. v. Arizona*, *supra*, 481 U.S. at pp. 157-158, in which the Court drew no distinction between the mental state required to impose death on actual killers and accomplices for a felony murder (see AOB at pp. 216-217). They also are consonant with the understanding of individual justices about the limits of

the death penalty for murder. (See AOB at pp. 218, fn. 103, citing *Graham v. Collins* (1993) 506 U.S. 461, 501 [conc. opn. of Stevens, J., stating that an accidental homicide, like the one in *Furman v. Georgia* (1972) 408 U.S. 238, may no longer support a death sentence]; see also *Lockett v. Ohio* (1978) 438 U.S. 586 621) [conc. & dis. opn. of White, J., stating that "the infliction of death upon those who had no intent to bring about the death of the victim is . . . grossly out of proportion to the severity of the crime"].) Just as the death penalty is excessive for child rape, it is excessive for felony murder *simpliciter.*

The decision in *Kennedy* not only supports Watkins's challenge to felony murder *simpliciter*, but goes further and signals that the death penalty is disproportionate for any unintentional murder. The high court's repeated references to intentional murder indicate another step toward "confining the instances in which the punishment can be imposed." (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2650.) As *Kennedy* reveals, the high court now considers intentional murder as the constitutional norm for capital punishment. The decision pointedly suggests that under the Eighth Amendment, *Tison*'s requirement of reckless disregard for human life is no longer sufficient. To impose a death sentence, there must be proof that the defendant, whether the actual killer or an accomplice, acted with an intent to kill.

Under the traditional Eighth Amendment analysis used in *Kennedy*, there is now a national consensus that the death penalty may not be applied to unintentional robbery felony murderers. As discussed above, at most six states, including California, make a defendant death-eligible for felony murder *simpliciter*. Only seven other jurisdictions – Arkansas, Delaware, Illinois, Kentucky, Louisiana, Tennessee, and the United States military –

authorize the death penalty for a robbery felony murderer who acts with a mental state less than intent to kill. (See Shatz, *supra*, at pp. 761-762.)[1] Thus, only 13 jurisdictions of a total 52 jurisdictions (the 50 states, the United States military, and the United States government) impose the death penalty without requiring proof of an intent to kill.[2] Of the remaining 39 jurisdictions, 14 jurisdictions do not use capital punishment at all.[3] The remaining 25 death penalty jurisdictions (1) do not make robbery murder or attempted robbery murder – Watkins's crime – a capital crime,[4] do not make felony murder a death-eligibility circumstance,[5] or do not permit the prosecution to use the robbery to prove both the murder and death eligibility,[6] or (2) require proof of an intent to kill.[7] In this way, at least 39

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[1] See Shatz, *supra*, at p. 770, fn. 248, citing Ark. Code Ann. § 5-10-101(a)(1) (2006); Del. Code Ann. tit. 11, § 4209(e) (2007); 720 Ill. Comp. Stat. Ann. 5/9-1(6)(b) (West 2007); Ky. Rev. Stat. Ann. §§ 532.025, 507.020 (West 20067); La. Rev. Stat. Ann. § 14:30(A)(1) (20067); Tenn. Code Ann. §§ 39-13-202, 39-13-204(i)(7) (2007); Manual for Courts-Martial, United States, R.C.M. 1004(c) (2005).

[2] The District of Columbia, which does not have the death penalty, is excluded from this list.

[3] As of March 1, 2009, these states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey , New York, North Dakota, Rhode Island, West Virginia, Vermont, and Wisconsin. http://www.deathpenaltyinfo.org/FactSheet.pdf.

[4] See, Shatz, *supra*, at p. 770, fn. 249 citing Mo. Rev. Stat. § 565.020 (2007) as an example.

[5] See Shatz, *supra*, at p. 770, fn. 250, citing Ariz. Rev. Stat. Ann. § 13-703(F) (2006); S.D. Codified Laws § 23A-27A-1 (2006) as examples.

[6] See Shatz, *supra*, at p. 770, fn. 251, citing *McConnell v. State* (Nev. 2004) 102 P.3d 606, 620-24; *State v. Gregory* (N.C. 1995) 459 S.E.2d

(continued...)

jurisdictions (38 states and the federal government) – three-quarters of all jurisdictions – do not follow California's practice of subjecting to execution a defendant who unintentionally kills during a robbery or attempted robbery. This showing reflects a substantially stronger "national consensus against the death penalty" than the high court found in striking down the death penalty as disproportionate for mentally retarded murderers in *Atkins v. Virginia* (2002) 536 U.S. 304, 314-316 (30 states and the federal government) and for juvenile murderers in *Roper v. Simmons* (2005) 543 U.S. 551, 664 (30 states and the federal government). In short, the national consensus, as evidenced by state and federal legislation, establishes that the death penalty for an unintentional murder is a cruel and unusual punishment under the Eighth and Fourteenth Amendments.

In addition, exacting death for an unintentional murder is excessive to both the deterrence and retribution justifications for capital punishment. To be sure, in *Tison v. Arizona*, *supra*, 481 U.S. at pp. 156-157, the high court held that being a major participant and acting with reckless indifference to human life, rather than with an intent to kill, was enough to impose a death sentence on a felony murder accomplice. But more than 20 years have passed since *Tison*. As noted above, in *Kennedy* the high court appears to have raised the death-eligibility bar to intentional murder, which

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[6](...continued)
638, 665 as examples..

[7] See Shatz, *supra*, at p. 770, fn. 252, citing Ohio Rev. Code Ann. § 2903.01(D) (West 2007); Tex. Penal Code Ann. § 19.03(a)(2) (Vernon 2007) as examples.

is wholly consistent with its emphasis on the need to restrain the reach of the ultimate penalty.

With regard to the deterrence rationale, common sense dictates that fear of execution will not deter a person from committing a murder he did not intend to commit. Precisely because of the unintentional nature of the murder, executing a felony murderer like Watkins will not likely deter others from engaging in similar crimes. Indeed, in *Enmund*, the high court concluded that "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation[.]'" (*Enmund v. Florida, supra,* 458 U.S. at 798-799, quoting *Fisher v. United States* (1946) 328 U.S. 463, 484 (dis. opn of Frankfurter, J.).)

In *Enmund*, the high court went further. It found the death penalty for felony murder had no deterrent value with regard to the underlying felony. The Court posited that the deterrent value of the death penalty might be different if the likelihood of a killing in the course of a robbery were substantial. *Enmund v. Florida*, *supra*, 458 U.S. at p. 799. But the empirical data refuted this hypothesis. Both historical data and then-recent data from 1980 "showed that only about one-half of one percent of robberies resulted in homicide." (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 799-800 & fn. 23 & 24.) As a result, the high court concluded "there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." (*Enmund v. Florida*, *supra*, 458 U.S. at p. 799.)[8]

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[8] In *Tison*, the Court glossed over the deterrence justification and (continued...)

Moreover, as a general matter, the validity of the deterrence rationale is questionable. As Justice Stevens has observed, "[d]espite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment." (*Baze v. Rees* (2008) ___ U.S. ___, 128 S.Ct. 1520, 1547 (conc. opn. of Stevens, J.); see also Shatz, *supra*, at p. 767 & fn. 275 [noting the scholarly debate and empirical data on the deterrence question].) Even assuming that capital punishment may deter some murders, its deterrent value is lost when, as Justice White noted in *Furman*, the penalty is seldomly imposed. (*Furman v. Georgia*, *supra*, 408 U.S. at p. 312.) As an empirical matter, in California the death penalty is rare for robbery felony murder. Only five percent of death-eligible robbery felony murderers (who had no more aggravating special circumstances) are sentenced to death. (Shatz, *supra*, at p. 745.)[9] Consequently, the deterrence rationale cannot justify executing a robbery felony murderer like Watkins.

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[8](...continued)
minimized *Enmund*'s discussion of the deterrence data, including its conclusion that the death penalty did not deter robberies or robbery murders. (See *Tison v. Arizona*, *supra*, 481 U.S. at p. 148 ; see also *id.* at p. 173, fn. 11 (dis. opn. of Brennan, J.)

[9] This very infrequent use of the death penalty for robbery felony murder death penalty raises both risk of arbitrariness and proportionality concerns and suggests that the imposition of the death penalty even for an intentional robbery felony murder is barred by the Eighth Amendment. (See, Shatz, *supra*, at pp. 745-768.)

With regard to the retribution rationale, *Tison*'s conclusion that intent to kill was "a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous murderers" (*id.* at p. 157) has been called into question by *Kennedy*'s assumption that intentional murder is the sine qua non for imposing capital punishment for crimes against individuals. The heart of the retribution rationale is that the criminal penalty must be related to the offender's personal culpability (*Tison v. Arizona*, *supra*, 481 U.S. at p. 149), which is determined by the acts he committed and the mental state with which he committed them. Notwithstanding *Tison*, intentional and unintentional murderers are not similarly culpable. As the high court previously had noted, "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund v. Florida*, *supra*, 458 U.S. at p. 798, quoting H. Hart, Punishment and Responsibility 162 (1968); see *Tison v. Arizona*, *supra*, 481 U.S. 137 at p. 156 ["Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."].) Moreover, the high court's Eighth Amendment narrowing jurisprudence already holds that not all murders can be classified as "the most serious of crimes" (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2650) so as to warrant the death penalty. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 327 [to avoid arbitrary and capricious sentencing, the states must limit the death penalty to those murders "which are particularly serious or for which the death penalty in particularly appropriate"].)

Certainly, an unintentional murder is a very serious crime calling for a very serious penalty. But there is neither logic nor justice in punishing a

person who, like Watkins, kills unintentionally during an attempted robbery when his gun accidentally goes off with the same penalty as a person who kills intentionally. A person who kills unintentionally does not exhibit the kind of "extreme culpability" that makes him among "the most deserving of execution." (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2650.) Rather, unintentional felony murderers like Watkins can be adequately "repaid for the hurt he caused" by a lesser punishment. (*Ibid.*) Retribution "does not justify the harshness of the death penalty here." (*Id.* at p. 2662.)

In sum, the death penalty is disproportionate to the crime of felony murder *simpliciter*. The national consensus is overwhelmingly against imposing the death penalty for an unintentional felony murder, and there is no constitutional justification for inflicting the death penalty for that crime. To uphold Watkins's death sentence risks California's "descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Id.* at p. 2650.) This Court should reverse his death judgment.

Dated: March 12, 2009

Respectfully Submitted,

MICHAEL J. HERSEK
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Supervising Deputy State Public Defender

Attorneys for Appellant
PAUL SODOA WATKINS

**CERTIFICATE OF COUNSEL**
**(CAL. RULES OF COURT, RULE 8.520(d)(2))**

I, Nina Rivkind, am the Supervising Deputy State Public Defender who represents 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 3,263 words in length including footnotes and excluding the tables and certificates.

Dated: March 12, 2009

Nina Rivkind
NINA RIVKIND

## DECLARATION OF SERVICE

People v. Paul Sodoa Watkins No. S026634

I, Glenice Fuller, 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 SUPPLEMENTAL OPENING BRIEF**

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

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Paul S. Watkins
(Appellant)

Each said envelope was then, on March 13, 2009, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on March 13, 2009, at San Francisco, California.

Glenice Fuller
DECLARANT