SUPREME COURT COPY

SUPREME COURT No. **S073205** **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	)
	) Riverside County
v.	) Superior Ct.
	) No. CR49662
JACK EMMIT WILLIAMS,	)
Defendant and Appellant.	)

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Riverside

HONORABLE TIMOTHY HEASLETT , JUDGE

OPENING BRIEF FOR APPELLANT JACK E. WILLIAMS

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Penalty Phase Issues
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SUPREME COURT
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DEPUTY

DEATH PENALTY

PENALTY PHASE ISSUES

XIII.

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

Introduction

Appellant was subject to the death penalty solely because of the robbery-murder special circumstance. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. Because the death penalty law lacks of any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder before a death sentence may be imposed, it violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.

California Authorizes The Imposition Of The Death Penalty Upon A Person Who Kills During An Attempted Felony Without Regard To His Or Her State Of Mind At The Time Of The Killing

Appellant was death-eligible solely because he was convicted as an aider and abetter or conconspirator to an attempted robbery during which Ms. Los was killed. (See Penal Code sections 189, 190.2, subd. (a)(17)(i).) While a murder conviction normally requires the

prosecution to prove that the defendant had the subjective mental state of malice (either express or implied), in the case of a killing committed during an attempted robbery, or any attempted felony listed in section 189, the prosecution can convict a defendant of first degree felony murder without proof of any mens rea with regard to the actual murder.

"[F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*People v. Dillon, supra*, 34 Cal.3d at p. 477.) This rule is reflected in the standard jury instruction for felony murder:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] [as a direct causal result of __________] is murder of the first degree when the perpetrator had the specific intent to commit that crime.

(CALJIC No. 8.21, italics added.)

Except in one rarely-occurring situation, under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is

the actual killer in a robbery felony murder, the defendant also is death-eligible under the robbery-murder special circumstance. (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the reach of the felony-murder special circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'"].)

The key case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, where the Court held that under section 190.2, "intent to kill is not an element of the felony-murder special circumstance" (Id. at p. 1147.) When the defendant is an aider and abetter rather than the actual killer, however, the jury must find either an intent to kill or that the defendant acted with reckless disregard and was a major participant in the underlying felony [although not necessarily the actual murder]. (See CALJIC 8.80.1.) The Anderson majority did not disagree with Justice Broussard's summary of the holding: "Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing." (Id. at p. 1152 (*dis. opn.* of Broussard, J.).)

Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the killing. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, this Court rejected the defendant's argument that, to prove a

felony-murder special circumstance, the prosecution was required to prove malice. In *People v. Earp* (1999) 20 Cal.4th 826, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This Court held that the defendant's argument was foreclosed by *Anderson*. (*Id.* at p. 905, fn.15.) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life.

The Robbery-Murder Special Circumstance Violates The Eighth Amendment's Proportionality Requirement And International Law Because It Permits Imposition Of The Death Penalty Without Proof That The Defendant Had A Culpable Mens Rea As To The Killing

The Eighth Amendment prohibits the imposition of "cruel and unusual punishment," (U.S. Const. Amend. VIII), and is applicable to the States through the Fourteenth Amendment. (*Roper v. Simmons* (2005) 125 S. Ct. 1183, 1190, *Furman v. Georgia* (1972) 408 U.S. 238, 239 (per curiam); *Robinson v. California* (1962) 370 U.S. 660, 666-667.) In a series of cases beginning with *Gregg v. Georgia, supra*, 428 U.S. 153, the Supreme Court recognized that the Eighth Amendment prohibition embodies a proportionality principle, and has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia, supra,* 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982)

458 U.S. 782 [death penalty for getaway driver to a robbery felony-murder]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded defendant]; *Roper v. Simmons* (2005) 543 U.S. 551 [death penalty for defendant under 18 - years old) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia, supra*, 428 U.S. at p. 183.)

The Supreme Court has addressed the proportionality of the death penalty for unintended felony-murders in *Enmund v. Florida, supra,* 458 U.S. 782, and in *Tison v. Arizona, supra,* 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on the "getaway driver" to an armed robbery murder because he did not take life, attempt to take life, or intend to take life. (*Enmund, supra*, 458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. Justice O'Connor, writing for the majority, held that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (*Tison, supra*, 481 U.S.

at pp. 158.) Justice O'Connor explained the rationale of the holding as follows:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane or all–the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional. . . . Enmund held that when "intent to kill" results in its logical though not inevitable consequence – the taking of human life – the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(Id. at pp. 157-158.)

In choosing actual killers as examples of "reckless indifference" murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor eschewed any distinction between actual killers and accomplices. In fact, it was Justice Brennan's dissent which argued that there should be a distinction for Eighth Amendment

purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices (*Id.* at pp. 168-179 (dis. opn. of Brennan, J.), but that argument was rejected by the majority.

That *Tison* established a minimum mens rea for actual killers as well as accomplices was confirmed clearly in *Hopkins v. Reeves* (1998) 524 U.S. 88. In *Reeves*, a case involving an actual killer, the Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under *Enmund/Tison*, but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because *those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder*, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a mens rea requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in Enmund does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." For this reason, we held that a State could

> comply with *Enmund's* requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, so long as their requirement is satisfied at some point thereafter.

(*Reeves, supra*, 524 U.S. at 99, citations and fns. omitted; italics added.)

Every lower federal court to consider the issue – both before and after *Reeves* – has read *Tison* to establish a minimum mens rea applicable to all defendants. (See *Lear v. Cowan* (7th Cir., 2000) 220 F.3d 825, 828; *Pruett v. Norris* (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn.9. The *Loving* court explained its thinking as follows:

> As highlighted by Justice Scalia in the Loving oral argument, the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in Enmund and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio*, 438 U.S. 586 (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624.
>
> Without speculating on the views of the current membership of the Supreme Court, we conclude that when Enmund and Tison were decided, a majority of the

> Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.
>
> (*Loving, supra*, 220 F.3d at p. 443.)

Moreover, As the *Roper* majority notes, the death penalty 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." (*Roper* at p. 1186). Like mentally retarded people and children, persons who commit unaggravated, unplanned murders do not fall into this category. The *Roper* and *Atkins* courts recognize that lesser mental states lessen the mens rea of the offender, and that the Constitution requires that the death penalty be reserved for the offenders with the greatest moral culpability. Similarly, the vast majority of states recognize that an offender whose crime was found by the trial court to be unintentional and unaggravated by any fact other than the robbery underlying his felony murder conviction, lacks the requisite mens rea to be deserving of society's harshest punishment.

Another way to conceptualize this problem with the lack of mens rea is that the felony murder rule serves either as a means of presuming malice in order to find a homicide, or it constitutes a

distinct form of homicide (akin to strict liability), based solely upon the intent to commit the underlying felony. (See generally Nelson E. Roth and Scott E. Sundby, Article: *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446 (1985).) The strict liability version of the rule articulates a distinct crime from traditional malice murder and does not include a mental state element for the homicide itself. (*Id.* at 448.) Conceived as an irrebuttable presumption, on the other hand, the felony-murder rule operates to conclusively "impute" the mental state required for murder from the commission of a felony, while at least theoretically retaining the mens rea for the homicide as a formal element of the crime. (*Id* at 455-457.)

Under either view however, felony murder is unconstitutional as a mechanism for presuming malice. The Due Process Clause of the Fourteenth Amendment requires that the State prove every element of a criminal offense beyond a reasonable doubt. *(Sandstrom v. Montana* (1979) 442 U.S. 510, 512.) Conclusive presumptions have been expressly held to violate this requirement as they "would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." *Sandstrom*, 442 U.S. at 522 (quoting *Morissette v. United States* (1952) 342 U.S. 246, 274-275.) Because the constructive malice theory of felony murder formally retains a mens rea element for a homicide, the presumption of innocence must apply to the homicide aspect of the rule. The felony-murder rule, however, completely

bypasses the presumption of innocence as to this element upon proof of a different element, the occurrence of a killing in the commission of a felony.

The Sixth and Fourteenth Amendments to the United States Constitution indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *(Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 (quoting *United States v. Gaudin* (1995) 515 U.S. 506, 510.) To require a jury to find an element of a crime solely on the basis of a presumption would unconstitutionally relieve the jury of that function. (*Sandstrom*, 442 U.S. at 523.)

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. Applying the first part of the test, "contemporary values" the Court looks to the "evolving standards of decency" standard when analyzing the "cruel and unusual" clause of the Eighth Amendment to the United States Constitution. (*Trop v. Dulles* (1958) 356 U.S. 86; *Weems v. United States* (1910) 217 U.S. 349.) That is, the Court looks "to objective evidence of how our society views a particular punishment today." (*Penry v. Lynaugh* (1989) 492 U.S. 302.) In *Atkins v. Virginia*, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the

country's legislatures." (*Atkins, supra*, 536 U.S. at p. 312.) The United States Supreme Court's recent decision in the case *Roper v. Simmons, supra,* once again applies the "evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." In *Roper*, the Court held that the execution of juvenile offenders is prohibited by the Eighth and Fourteenth Amendments, basing its decision in substantial part upon the fact that thirty states do not permit the execution of juveniles. In *Atkins v. Virginia, supra* ,536 U.S. 304, the Court held that the execution of mentally retarded persons is barred by the Eighth and Fourteenth Amendments, because at the time of its decision thirty states did not engage in that practice. Likewise, evolving standards of decency should preclude appellant's execution. At least thirty-nine states would not execute an offender convicted of appellant's crime.

It is undisputed that the prosecution's only theory of criminal culpability in this case was felony murder. (8 R.T. 813.) Thus, appellant became eligible for a death sentence – and a death sentence was imposed – based solely on the commission of an unintentional killing, with no other fact about him or the crime making it aggravated.

There is presently a national consensus against the execution of an offender whose crime was not intentional and was aggravated only by the felony underlying the death sentence – the robbery. At least twenty-six states would not impose a death penalty under these

circumstances. Another thirteen states do not impose the death penalty. Therefore, in at least thirty-nine states, appellant would not be on death row, but would be serving a term of years or life in prison.

Seven death penalty states – Montana, New Jersey, Ohio, Pennsylvania, Washington, Missouri and South Carolina - do not recognize felony murder as a capital offense. These states require a finding of mens rea - intent, premeditation and deliberation, or "malice aforethought" – in order for a murder to be eligible for the death penalty. Ten others – Alabama, Kansas, Louisiana, New Hampshire, Utah, Virginia, Texas, Oregon, Indiana and Illinois – have effectively abolished simple felony murder as an offense punishable by death by requiring a finding of specific intent to kill; the felony simply serves to aggravate the murder charge to a capital offense. Connecticut's capital felony statute limits the death penalty to felony murder that occurs during the course of a kidnapping or sexual assault.

Three other states – Tennessee, Wyoming and Nevada – have felony murder statutes on their books, but their appellate courts have decided that duplicate consideration of the underlying felony at both the guilt and sentencing phases does not adequately narrow the class of death-eligible murderers such that the death penalty would be reserved for the "worst" murderers. (See *Engberg v. Wyoming* (Wyo. 1991) 820 P.2d 70; *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317; *McConnell v. Nevada* (Nev. 2004) 102 P.3d 606.) That is precisely the factual situation presented in appellant's case. As the *Middlebrooks* court noted:

> "A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability."

(Id. at 345.)

Because so many states (and the federal government) reject felony murder simpliciter as a basis for death eligibility, that tally reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).

Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values" (*Atkins, supra*, 536 U.S. at p. 312), professional opinion as reflected in the *Report of the Governor's Commission on Capital Punishment* (Illinois) and international opinion also weigh against finding felony murder simpliciter a sufficient basis for death-eligibility. The most comprehensive recent study of a state's death penalty was conducted by the *Governor's Commission on Capital Punishment in Illinois*, and its conclusions reflect the current professional opinion about the administration of the death penalty. Even though Illinois's "course of a felony" eligibility factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(b)(6)(b)), the Commission recommended eliminating this factor.

(Report of the Former Governor Ryan's Commission on Capital Punishment, April 15, 2002, at pp. 72-73, <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.pdf >.) The Commission stated, in words which certainly apply to the California statute:

> " Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view f Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.
>
> A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal."

(Id. at p. 72.)

There is, however, another norm involved in this issue as well. The United States Supreme Court has long recognized the relevance of international norms in determining "the acceptability of a particular punishment."(*Enmund v. Florida* (1982) 458 U.S. 782, 796 n.22 (quoting *Coker v. Georgia* (1977) 433 U.S. 584, 596 n.10.)) International norms are persuasive authority in interpreting the Eighth Amendment's ban on cruel and unusual punishment. *(Roper v.*

Simmons, 543 U.S. at 1198 (opinion of Kennedy, Stevens, Souter, Ginsber, and Breyer, J.J.) and id. at 1224 (opinion of O'Connor, J. dissenting). The United States is "virtually the only western country still recognizing a rule which makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide.'" Roth and Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 447-48 (1985). England, where the doctrine originated, abolished the felony-murder rule in 1957. (The Homicide Act, 5& 6 Eliz. 2, ch. 11 Section 1.) The rule apparently never existed in France or Germany. (*Id.*, note 12 citing Fletcher, *Reflections on Felony Murder*, 12 SW. U.L. REV. 413, 415, note 11 (1981).

Article 6 (2) of the *International Covenant on Civil and Political Rights* ("ICCPR"), to which the United States is a party, also provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be "read restrictively" because death is a "quite exceptional measure." (*Human Rights Committee, General Comment* 6(16), ¶ 7; see also *American Convention on Human Rights*, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996) ["In countries that have not abolished the death penalty, it may be imposed only for

the most serious crimes . . . ."].) In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*) The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (*Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. CCPR/C/79/Add.85, November 19, 1997, ¶ 13.)

For these reasons, the imposition of the death penalty on a person who has killed negligently or accidentally fails the first part of the proportionality test. It is simply contrary to evolving standards of decency and does not comport with contemporary values.

Equally important, however, imposition of the death penalty for felony murder simpliciter fails the second part of the proportionality test as well. That is, the death penalty for murder simpliciter does not serve either of the penological purposes required by the Supreme Court – retribution and deterrence. With regard to these purposes, "[u]nless the death penalty ... measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund, supra*, 458 U.S. at pp. 798-799, quoting

Coker, supra, 433 U.S. at p. 592). With respect to retribution, the Supreme Court has made clear that retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said: "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" *(Enmund, supra*, 458 U.S. at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Court further explained:

> "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of ... Clergy" would be spared."

(*Tison, supra*, 481 U.S. at p. 156.) Plainly, treating negligent and accidental killers on a par with intentional and reckless-indifference killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Court said in *Enmund*:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious

> felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia, supra*, 428 U.S., at 186, 96 S.Ct., at 2931 (fn. omitted).

(*Enmund, supra*, 458 U.S. at pp. 798-99; accord, *Atkins, supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never foresaw.

Since imposition of the death penalty for robbery murder simpliciter clearly is contrary to the judgment of the overwhelming majority of the states, recent professional opinion and international norms, it does not comport with contemporary values. Moreover, because imposition of the death penalty for robbery murder simpliciter serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." As interpreted and applied by this Court, the robbery-murder special circumstance is unconstitutional under the Eighth Amendment, and Williams' death sentence must be set aside.

Finally, California law making a defendant death-eligible for felony murder simpliciter violates international law. Article 6(2) of the ICCPR restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional crimes. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2) In light of the international law principles discussed previously, appellant's death sentence without any requirement of proof that he

intended any homicide violates the ICCPR as well as customary international law and, therefore, must be reversed.

XIV.

THE TRIAL COURT VIOLATED APPELLANT SIXTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO CORRECT AN OBVIOUS CONFLICT SITUATION.

Introduction

Reversal is automatic when a trial court requires conflicted representation over a timely objection. During the prosecution's penalty phase presentation, the Public Defender himself declared a conflict with a primary prosecution witness previously represented by the public defender's office. The Public Defender revealed that there was confidential information in the office files on that witness; information that would be advantageous to appellant on cross examination. Upon discovering that defense counsel was not personally aware of the information, the judge ordered trial defense counsel not to seek the advantageous information from any office source and ordered the office not to reveal it to defense counsel. The trial judge then refused to allow defense counsel to withdraw.

The trial court's refusal to allow the public defender to withdraw violated appellant's Sixth Amendment right to conflict free counsel, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his Fifth and Fourteenth Amendment right to due process.