

SUPREME COURT
FILED

JUN 24 2013

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	
Plaintiff and Respondent,)	Supreme Court
)	No. S113421
v.)	
)	Los Angeles County
WARREN JUSTIN HARDY,)	Super. Ct. No.
)	NA039436-02
Defendant and Appellant.)	
)	AUTOMATIC
)	APPEAL
)	

**MOTION FOR JUDICIAL NOTICE; DECLARATION IN SUPPORT
THEREOF; PROPOSED ORDER**

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF
JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF
THE CALIFORNIA SUPREME COURT:

Appellant Warren J. Hardy hereby respectfully requests this Court to
take judicial notice, pursuant to California Rules of Court, rule 8.25(a)(1),

DEATH PENALTY

and Evidence Code sections 452 and 459, of pages 4883 through 4903 of the reporter's transcript of October 2, 2003 in the trial of Hardy's severed co-defendant Kevin Pearson. The transcript reports the penalty phase argument by Los Angeles County Deputy District Attorney Corene Locke-Noble who was the prosecutor assigned to the trials of Hardy and his co-defendant Kevin Pearson, who were tried in the Los Angeles County Superior Court, South Division, 415 West Ocean Boulevard, Long Beach, CA 90802. Attachment A hereto is a true and accurate copy of those pages 4883 through 4903. The reporter's transcript relates to Argument XIX in Appellant's Opening Brief. Judicial notice of this reporter's transcript is authorized and appropriate, and will permit this Court's attention and consideration of information relevant to Hardy's direct appeal. (Cf., *People v. Jurado* (1981) 115 Cal.App.3d 470, 482.)

The transcript of the prosecutor's penalty phase argument on October 2, 2003, is relevant to Argument XIX in Hardy's Appellant's Opening Brief. The issue is whether the prosecutor used wholly inconsistent theories at the penalty phases of Hardy's and Pearson's respective trials in order to obtain a sentence of death against each defendant. For example, to obtain the death penalty against Hardy, the prosecutor argued that, "He was the leader . . ." of the other two co-defendants. (14RT 3146, lines 12-13.) The

majority of the prosecution's evidence against all defendants derived from their respective statements to law enforcement following their arrests shortly after the crimes. There was no newly discovered evidence concerning leadership among the three defendants. Nevertheless, in Pearson's trial, again to obtain a sentence of death, the same prosecutor argued that Pearson, not Hardy, was the leader. The transcripts contain the prosecutor's closing argument at the penalty phase of Pearson's trial. The transcripts are necessary to permit complete direct appeal of Hardy's death sentence. Hardy's Appellant's Opening Brief refers to three pages reporting the prosecutor's argument. For the sake of continuity, and to avoid any hint that Hardy has misrepresented or misunderstood the prosecutor's argument, judicial notice of the transcript of the complete prosecutor's closing argument is requested.

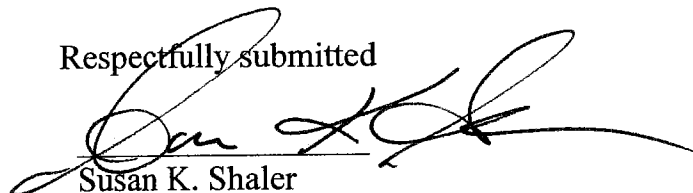
Evidence Code section 459 authorizes a reviewing court to take judicial notice of any matter specified in section 452. "Records of . . . any court of this state" are matters which may be judicially noticed under section 452. (Evid. Code, § 452, subd. (d)(1); see also *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 359; *People v. Connor* (2004) 115 Cal.App.4th 669, 681, fn.3.) Under longstanding practice in California court, transcripts are a type of document or record that is routinely noticed

judicially. (*Knoff v. San Francisco* (1969) 1 Cal.App.3d 184, 200 [proper judicial notice of testimony in grand jury transcript]; *People v. Buckley* (1986) 185 Cal.App.3d 512, 525 [proper judicial notice of preliminary hearing transcript].) In *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 719, footnote 7, the Second Appellate District, Division Eight, took judicial notice of a case management order and a request for a jury instruction in another case. In *In re Nicole H.* (2011) 210 Cal.App.4th 388, 392, the Third Appellate District involved judicial notice of the record in a different appeal, including the reporter's transcript. This approach is consistent with that of federal courts. (See e.g., *Scherr v. Marriott International* (7th Cir. 2013) 703 F.3d 1069, 1073 [judicial notice of documents part of the public record, including transcripts].)

Rule 8.252, California Rules of Court provides that "To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order." A proposed order is attached.

Dated: June 21, 2013

Respectfully submitted



Susan K. Shaler
Attorney for Warren J.Hardy

DECLARATION IN SUPPORT OF MOTION.

I, SUSAN K. SHALER, without waiving the attorney client privilege, do hereby declare that I have personal knowledge of the matters set forth below. If called to testify, I could and would testify as follows:

1. On June 12, 2013, I filed the Appellant's Opening Brief.

Argument XIX raises the issue of the prosecution presenting wholly inconsistent theories in the trial of Hardy's co-defendant in order to obtain the death sentence against each defendant.

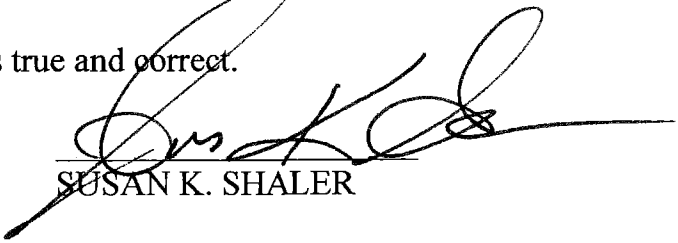
2. At diverse times during my representation of Hardy, I obtained the reporter's transcripts of the prosecutor's closing argument in the penalty phase of co-defendant Pearson's trial from Pearson's appellate attorney, the Los Angeles Superior Court, and confirmed the accuracy of those transcripts by comparing them to the electronic transcripts in the possession of the Attorney General.

3. Attachment A hereto is a true and accurate copy of pages 4883 through 4903 of the prosecutor's closing argument during the penalty phase of Pearson's trial.

4. Based on the foregoing, I seek an order from this Court taking judicial notice of the attached reporter's transcript.

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

DATED: June 21, 2013



SUSAN K. SHALER

[PROPOSED] ORDER GRANTING JUDICIAL NOTICE

The motion of appellant Warren J. Hardy for judicial notice of portions of the record, that is the reporter's transcript pages 4883 through 4903 in the case of *People v. Pearson* (NA039436), having been considered by the Court, and on good cause appearing, pursuant to Evidence Code sections 452 and 459, and California Rules of Court, rule 8.25(a)(1), IT IS HEREBY ORDERED that judicial notice will be, and is, taken of the following portion of the court record of the reporter's transcript in *People v. Pearson* on October 2, 2003, found at pages 4883 through 4903.

DATE: _____

CHIEF JUSTICE

1 FOLLOWING CRIMINAL ACTS OF ASSAULT AND BATTERY OR ACTIVITIES
2 OF BEATING PEOPLE WITH STICKS, BEATING PEOPLE WITH FIST
3 KICKING PEOPLE, KICKING PEOPLE OFF THEIR BIKES OR KNOCKING
4 PEOPLE OFF OF THEIR BIKES, WHICH EXPRESSES OR IMPLIES USE OF
5 FORCE OR VIOLENCE OR THE THREAT OF FORCE OR VIOLENCE.

6 BEFORE A JUROR MAY CONSIDER ANY CRIMINAL ACTS OR
7 ACTIVITY AS AN AGGRAVATING CIRCUMSTANCE, IN THIS CASE, A
8 JUROR MUST FIRST BE SATISFIED BEYOND A REASONABLE DOUBT THAT
9 THE DEFENDANT, KEVIN PEARSON, DID, IN FACT, COMMIT THE
10 CRIMINAL ACTS OR ACTIVITIES.

11 A JUROR MAY NOT CONSIDER ANY EVIDENCE OF ANY OTHER
12 CRIMINAL ACTS OR ACTIVITY AS AN AGGRAVATING CIRCUMSTANCE.

13 IT IS NOT NECESSARY FOR ALL JURORS TO AGREE.

14 IF ANY JUROR IS CONVINCED BEYOND A REASONABLE
15 DOUBT, THAT THE CRIMINAL ACTIVITY OCCURRED, THAT JUROR MAY
16 CONSIDER THAT ACTIVITY AS A FACT IN AGGRAVATION.

17 IF A JUROR IS NOT CONVINCED IF A JUROR IS NOT SO
18 CONVINCED, THAT JUROR MUST NOT CONSIDER THAT EVIDENCE FOR
19 ANY PURPOSE.

20 CLOSING MS. LOCKE-NOBLE.

21 MS. LOCKE-NOBLE: THANK YOU.

22 AS HIGH AS YOU CAN GO OR SHOULD I SAY AS LOW.

23 AS LOW, WHAT HE DID TO PENNY WAS INHUMANE.

24 LADIES AND GENTLEMEN, THIS IS A HARD DECISION,
25 BUT THE DEFENDANT'S ACTIONS HAVE MADE IT EASY.

26 THIS PORTION OF THE TRIAL, AS YOU KNOW, IS KNOWN
27 AS PENALTY PHASE. WHAT I SAY OR WHAT COUNSEL SAYS IS NOT
28 TO BE CONSIDERED BY YOU AS EVIDENCE.

ATTACHMENT A

1 DURING THE COURSE OF THIS PARTICULAR PORTION OF
2 THE TRIAL EVIDENCE WAS PRESENTED CONCERNING THE PENALTY OF
3 WHICH YOU SHALL DECIDE WHEN YOU GO BACK INTO THE JURY ROOM.

4 THE PENALTIES AVAILABLE AT THIS TIME ARE DEATH OR
5 LIFE WITHOUT THE POSSIBILITY OF PAROLE.

6 THE LAW PROVIDES FOR YOU A SET OF FACTORS BY WHICH
7 YOU ARE TO BE GUIDED IN DETERMINING WHICH PENALTY SHOULD BE
8 IMPOSED. YOU ARE TO USE THOSE FACTORS AND THE EVIDENCE
9 PRESENTED IN THIS COURTROOM TO GUIDE YOU TO YOUR DECISION
10 AND THAT'S ALL YOU ARE TO USE.

11 YOU DON'T HAVE TO AGREE. AS YOU WILL REMEMBER
12 DURING JURY SELECTION, I TOLD EACH AND EVERY ONE OF YOU THAT
13 THERE WOULD BE AGGRAVATING FACTORS AND MITIGATING FACTORS,
14 AND YOU PERSONALLY HAD TO DECIDE WHAT FACTORS YOU FELT WERE
15 AGGRAVATING AND WHAT FACTORS YOU FELT WERE
16 MITIGATING.

17 YOU DO NOT HAVE AGREE WITH EACH OTHER AS TO WHICH
18 ARE AGGRAVATING OR WHICH ARE MITIGATING. ONCE YOU HAVE
19 DECIDED WHICH THE FACTORS, THAT IS THE EVIDENCE THOSE WHICH
20 ARE AGGRAVATING AND THOSE WHICH ARE MITIGATING. AND SOME OF
21 YOU MAY DECIDE THERE ARE NO MITIGATING, OTHERS OF YOU MAY
22 DECIDE THAT THERE ARE.

23 ONCE YOU HAVE MADE THAT DECISION THEN YOU MUST
24 ASSIGN A WEIGHT TO EACH ONE OF THOSE FACTORS. AND IT'S NOT
25 A SCALE OF 1 TO 10. IT'S NOT A PERCENTAGE, NOR IS IT A
26 PYRAMID. IT'S YOUR OWN PERSONAL DECISION AS TO HOW MUCH
27 WEIGHT TO GIVE THIS EVIDENCE.

28 ONCE YOU HAVE DECIDED THE WEIGHT TO GIVE THE

1 EVIDENCE THAT WAS PRESENTED, IT IS IN THAT WAY THAT YOU
2 DECIDE WHAT THE PENALTY SHALL BE IN THIS PARTICULAR CASE.

3 LET'S TAKE A LOOK AT THE LAW. THE PENALTY
4 INSTRUCTIONS ARE AS FOLLOWS:

5 YOU, THE JURY, MUST DETERMINE THE FACTS, FROM THE
6 EVIDENCE RECEIVED DURING THE ENTIRE TRIAL, THAT INCLUDES THE
7 GUILT PHASE. YOU MUST ACCEPT AND FOLLOW THE LAW THAT THE
8 JUDGE HAS STATED TO YOU.

9 YOU MUST DISREGARD ALL OTHER INSTRUCTIONS THAT THE
10 COURT HAS TOLD YOU THAT DO NOT APPLY.

11 YOU MUST NEITHER BE INFLUENCED BY BIAS NOR
12 PREJUDICE AGAINST THE DEFENDANT OR SWAYED BY PUBLIC OPINION
13 OR PUBLIC FEELINGS.

14 YOU MUST CONSIDER ALL OF THE EVIDENCE, FOLLOW THE
15 LAW AND EXERCISE YOUR DECISION, CONSCIENTIOUSLY AND REACH A
16 JUST VERDICT.

17 YOU ARE TO BASE YOUR DECISION ON WHAT HAS OCCURRED
18 DURING THE COURSE OF THIS PARTICULAR TRIAL AND NOTHING
19 ELSE.

20 IN DETERMINING WHICH PENALTY IS TO BE IMPOSED ON
21 THE DEFENDANT, YOU SHALL CONSIDER ALL OF THE EVIDENCE WHICH
22 HAS BEEN RECEIVED DURING ANY PART OF THE TRIAL IN THIS CASE.

23 YOU SHALL CONSIDER AND TAKE INTO ACCOUNT AND BE
24 GUIDED BY THE FOLLOWING FACTORS IF APPLICABLE.

25 SO, FIRST OF ALL, YOU HAVE TO DECIDE WHICH FACTORS
26 APPLY. THEN YOU DECIDE IF THAT FACTOR IS AGGRAVATING OR
27 MITIGATING, AND THEN YOU ASSIGN A WEIGHT TO EACH ONE OF
28 FACTORS.

1 THE FACTORS ARE AS FOLLOWS:

2 THE CIRCUMSTANCES OF THE CRIME OF WHICH THE
3 DEFENDANT WAS CONVICTED IN THE PRESENT PROCEEDING; AND
4 EXISTENCE OF ANY SPECIAL CIRCUMSTANCES TO BE TRUE.

5 THAT MEANS THE, MURDER THE ROBBERY, THE
6 KIDNAPPING, THE KIDNAPPING FOR RAPE, THE RAPE WITH THE
7 STAKE, AND THE TORTURE. ALL OF THOSE YOU MAY TAKE INTO
8 CONSIDERATION, ALSO THE PERSONAL USE OF THE DANGEROUS OR
9 DEADLY WEAPON, THE WOODEN STAKE.

10 B. THE PRESENCE OR ABSENCE OF CRIMINAL ACTIVITY
11 BY THE DEFENDANT, OTHER THAN THE CRIMES FOR WHICH THE
12 DEFENDANT HAS BEEN TRIED IN THE PRESENT PROCEEDINGS WHICH
13 INVOLVED THE USE OR ATTEMPTED USE FORCE OR VIOLENCE OR THE
14 EXPRESS OR APPLIED THREAT TO USE FORCE OR VIOLENCE.

15 C. THE PRESENCE OR ABSENCE OF ANY PRIOR FELONY
16 CONDUCT, OTHER THAN THE CRIMES FOR WHICH THE DEFENDANT HAS
17 BEEN TRIED IN THE PRESENT PROCEEDINGS.

18 THERE ARE ACTUALLY ELEVEN FACTORS BY WHICH YOU
19 WILL MAKE YOUR DECISION.

20 D. WHETHER OR NOT THE OFFENSE WAS COMMITTED WHILE
21 THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR
22 EMOTIONAL DISTURBANCE.

23 E. WHETHER OR NOT THE VICTIM WAS A PARTICIPANT IN
24 THE DEFENDANT'S HOMICIDAL CONDUCT OR CONSENTED TO THE
25 HOMICIDAL ACT.

26 F. WHETHER OR NOT THE OFFENSE WAS COMMITTED UNDER
27 CIRCUMSTANCES WHICH THE DEFENDANT REASONABLY BELIEVES TO BE
28 MORAL JUSTIFICATION OR EXTENUATION FOR HIS CONDUCT.

1 G. WHETHER OR NOT THE DEFENDANT ACTED UNDER
2 EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF
3 ANOTHER PERSON.

4 H. WHETHER OR NOT, AT THE TIME OF THE OFFENSE,
5 THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY
6 OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS
7 OF THE LAW WAS IMPAIRED AS A RESULT OF MENTAL DISEASE OR
8 DEFECT OR THE EFFECTS OF INTOXICATION.

9 I. THE AGE OF THE DEFENDANT AT THE TIME OF THE
10 CRIME.

11 J. WHETHER OR NOT THE DEFENDANT WAS AND
12 ACCOMPLICE TO THE OFFENSE AND HIS PARTICIPATION IN THE
13 COMMISSION OF THE OFFENSE WAS RELATIVELY MINOR.

14 K. ANY OTHER CIRCUMSTANCE WHICH EXTENUATED THE
15 GRAVITY OF THE CRIME EVEN THROUGH ITS NOT A LEGAL EXCUSE FOR
16 THE CRIME AND ANY SYMPATHETIC OR OTHER ASPECT OF THE
17 DEFENDANT'S CHARACTER THAT THE DEFENDANT OFFERS AS A BASIS
18 OF A SENTENCE FOR LESS THAN DEATH, WHETHER OR NOT RELATED TO
19 THE OFFENSE FOR WHICH HE IS ON TRIAL.

20 YOU MUST DISREGARD ANY JURY INSTRUCTIONS GIVEN IN
21 THE GUILT OR INNOCENCE PHASE OF THIS TRIAL WHICH CONFLICTS
22 WITH THIS PRINCIPAL.

23 SO THESE ARE THE FACTORS WHICH YOU ARE TO BE
24 GUIDED BY IN MAKING YOUR DECISION TO AS WHETHER OR NOT TO
25 IMPOSE DEATH IN THIS PARTICULAR CASE.

26 MS. SPERBER: YOUR HONOR, I'M GOING TO OBJECT.
27 PARAGRAPH K IS NOT A CORRECT STATEMENT OF THE WHAT THE LAW
28 IS THAT THE COURT READ TO THE JURY.

1 THE COURT: ALL RIGHT. OBJECTION IS NOTED, LADIES AND
2 GENTLEMEN.

3 CONTINUE PLEASE.

4 MS. LOCKE-NOBLE: EVIDENCE HAS BEEN INTRODUCED FOR
5 PURPOSE OF SHOWING THAT THE DEFENDANT HAS COMMITTED
6 FOLLOWING CRIMINAL ACTS WHICH INVOLVE EXPRESS APPLIED USE OF
7 FORCE OR VIOLENCE. BEFORE YOU MAY CONSIDER ANY CRIMINAL ACT
8 AS AN AGGRAVATING CIRCUMSTANCES IN THIS CASE, YOU, THE JURY,
9 MUST FIRST BE SATISFIED BEYOND A REASONABLE DOUBT THAT THE
10 DEFENDANT DID, IN FACT, COMMIT THE CRIMINAL ACTS.

11 YOU DON'T HAVE TO AGREE. SOME OF YOU MAY BELIEVE
12 THAT JANISHA WILLIAMS' TESTIMONY CONCERNING THE BEATING OF
13 OTHER PEOPLE WITH STICKS WAS TRUE. THAT'S ENOUGH
14 EVIDENCE TO PROVE IT TO YOU BEYOND A REASONABLE DOUBT. SOME
15 OF YOU MAY NOT BELIEVE IT.

16 SOME OF YOU MAY BELIEVE THE FACT THAT THEY JUMPED
17 PEOPLE ON THEIR BICYCLES OR BEAT THEM OFF OR KNOCKED THEM
18 OFF THEIR BICYCLES AND SOME OF YOU MAY NOT. THAT'S UP TO
19 YOU EACH INDIVIDUALLY. YOU DON'T ALL HAVE TO AGREE ON
20 THAT.

21 IT IS NOT NECESSARY FOR ALL JURORS TO AGREE. IF
22 ANY JUROR IS CONVINCED BEYOND A REASONABLE DOUBT THAT THE
23 CRIMINAL ACTIVITY OCCURRED, THAT JUROR MAY CONSIDER THAT
24 ACTIVITY AS A FACTOR IN AGGRAVATION.

25 IF A JUROR OR IS NOT SO CONVINCED, THAT JUROR MUST
26 NOT CONSIDER THAT EVIDENCE FOR ANY PURPOSE.

27 LADIES AND GENTLEMEN, WHAT I'M GOING TO DO NOW IS
28 TO THROUGH EACH FACTOR, AND I'M GOING TO GO THROUGH THEM IN

1 REVERSE ORDER IN REGARD TO WHAT EVIDENCE WAS PRESENTED
2 DURING THE COURSE OF THIS TRIAL IN THIS PENALTY PHASE AND
3 DETERMINING WHAT EVIDENCE FITS EACH FACTOR.

4 FACTOR K. WHAT CIRCUMSTANCES EXTENUATE THE
5 GRAVITY OF THE CRIME?

6 LADIES AND GENTLEMEN OF THE JURY, THERE WERE NONE,
7 ABSOLUTELY NONE, EVEN DR. ROTHBERG, ABSOLUTELY NONE WAS
8 PRESENTED. THERE WAS NO LEGAL CAUSE FOR THE CRIME,
9 SYMPATHETIC OR OTHER ASPECT OF THE DEFENDANT'S LIFE OR
10 RECORD THAT THE DEFENSE OFFERS AS A BASIS FOR A SENTENCE
11 LESS THAN DEATH. WHETHER OR NOT IT RELATES TO THE OFFENSE
12 FOR WHICH HE IS ON TRIAL, WHAT FACTORS OR ANY SYMPATHETIC
13 ASPECT OF THE DEFENDANT'S LIFE WAS SHOWN. HE HAD A GREAT
14 STEP-FATHER, WHOM THE DEFENDANT HAD NO FEELINGS FOR WHEN HE
15 DIED.

16 HIS MOM TAUGHT HIM RIGHT FROM WRONG. HIS MOM HAS
17 BREAKDOWNS, THE DEFENDANT DID CHORES. HE TOOK CARE OF HIS
18 SIBLINGS. THE DEFENDANT WAS IN FOSTER CARE. THE
19 DEFENDANT'S MOTHER HAD DISADVANTAGES AND DEFENDANT'S BROTHER
20 HAD DISADVANTAGES, BUT THEY ARE NOT ON TRIAL FOR MURDER.
21 THEY HAD A BAD LIFE. THEY DID NOT COMMIT MURDER.

22 THERE HAS BEEN NOTHING PRESENTED UNDER THIS
23 FACTOR.

24 THE DEFENDANT MADE A CHOICE.

25 FACTOR J. WHETHER OR NOT THE DEFENDANT WAS AN
26 ACCOMPLICE TO THE OFFENSE AND HIS PARTICIPATION IN THE THEN
27 OFFENSE WAS RELATIVELY MINOR.

28 HE WAS IMMEDIATELY INVOLVED IN THE ROBBERY. HE

1 STARTED SEARCHING, LOOKING FOR MONEY, MONEY WAS DEMANDED, HE
2 WAS RIGHT THERE. HE RAPED HER AND DESCRIBED THE RAPE IN
3 GREAT DETAIL, BECAUSE HE DID IT.

4 IT WAS HIS IDEA TO DESTROY ANY FINGERPRINTS BY
5 ROLLING THE VICTIM DOWN THE HILL. HE USED HIS SHIRT TO WRAP
6 IT AROUND HER WRIST AND ROLL HER IN THAT MULCH SO THAT HE
7 COULD REMOVE THE FINGERPRINTS.

8 IT WAS HIS IDEA TO COLLECT ALL THE INCRIMINATING
9 EVIDENCE, HER CLOTHING, HE WAS WORRIED ABOUT THE SHOE, THE
10 STAKE, ALL OF THAT WAS COLLECTED UP. AND HE WAS THE ONE
11 THAT WORRIED ABOUT IT. HE WAS THE ONE THAT WAS IN CONTROL.
12 HE WAS ONE DIRECTING IT.

13 HE MADE SURE THAT THE BUS DRIVER DID NOT CALL THE
14 POLICE. HE WAS THE ONE THAT MADE SURE THINGS RAN SMOOTHLY
15 UNTIL THEY GOT TO HARDY'S HOME.

16 HE MADE SURE THAT HARDY STAYED UNDER HIS CONTROL
17 SO THE POLICE WOULD NOT BE CALLED, AND HE WOULD NOT BE
18 CAUGHT. HE WAS THE FIRST ONE TO SPEND HIS SHARE OF THE
19 LOOT. HE BOUGHT THAT BLACK AND MILD. JAMELLE GOT GAVE HIM
20 THE MONEY. THEY GOT SIX DOLLARS, TWO DOLLARS A PERSON AND
21 HE WANTED THAT BLACK AND MILD CIGAR, A SMOKE AFTER SEX.

22 HE SAID, "WE KILLED A WHITE WOMAN." THIS IS A
23 FACTOR FOR YOU TO TAKE INTO CONSIDERATION.

24 HIS PARTICIPATION WAS NOT RELATIVELY MINOR. HE
25 WAS A MAJOR PARTICIPANT.

26 FACTOR I. THE AGE OF THE DEFENDANT AT THE TIME
27 OF THE CRIME. HE WAS 21. HE WAS OLD ENOUGH TO KNOW
28 BETTER. OR YOU CAN SAY IT'S EITHER AGGRAVATING OR

1 MITIGATING. IT'S NEUTRAL, BUT HE WAS OLD ENOUGH TO KNOW
2 RIGHT FROM WRONG. HE WENT TO SCHOOL. HIS MOTHER TAUGHT
3 HIM, HE EVEN TAUGHT HIS BROTHER RIGHT FROM WRONG. HE KNEW
4 BETTER.

5 H. WHETHER OR NOT AT THE TIME OF THE OFFENSE THE
6 CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF
7 HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF
8 THE LAW WAS IMPAIRED AS A RESULT OF MENTAL DISEASE OR DEFECT
9 OR THE AFFECTS OF INTOXICATION.

10 NO EVIDENCE WAS PRESENTED, NONE. IN FACT, THE
11 DEFENDANT KNEW WHAT HE WAS DOING WAS WRONG. DR. ROTHBERG
12 TESTIFIED TO THAT HE KNEW WHAT HE WANTS DOING. HE HAD A
13 CHOICE. HE CHOOSE TO PARTICIPATE IN THESE ACTS.

14 FACTOR G. WHETHER OR NOT THE DEFENDANT ACTED
15 UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF
16 ANOTHER PERSON. THE DEFENDANT WAS THE LEADER. HE WAS
17 LOOKED UP TO BY OTHER PEOPLE. THE DEFENDANT WAS SCRAPPY
18 CAPONE OF THE CAPONE THUG SOLDIERS.

19 THE DEFENDANT ASKED MONTE IF HE COULD PUT CHRIS ON
20 THE BLOCK AND HIM JUMP INTO THE GANG OF C.T.S., CHRIS, WHAT
21 IS THAT? BEATING SOMEONE UP. A VERY SHORT TIME BEFORE
22 PENNY WAS MURDERED THERE HE IS ENGAGING IN VIOLENT
23 ACTIVITY. WHAT IS HIS MINDSET.

24 THE DEFENDANT WAS BIGGER THAN WARREN AND HE WAS
25 ABOUT THE SAME SIZE AS JAMELLE. THE DEFENDANT IMMEDIATELY
26 PARTICIPATED IN THE ROBBERY. THE DEFENDANT WAS FIRST ONE TO
27 RAPE THE VICTIM. AND HOW DO WE KNOW THAT, BECAUSE HE TOLD
28 WARREN THAT WAS DISGUSTING, THAT HE COULD GET AIDS AND WHAT

1 DOES WARREN? DO HE LISTENED TO HIM AND HE STOPPED WHAT HE
2 WAS DOING BECAUSE HE WAS THE LEADER.

3 IT WAS DEFENDANT'S IDEA TO COLLECT THE CLOTHES.
4 IT WAS THE DEFENDANT'S IDEA TO WRAP THE SHIRT AROUND HER
5 WRIST DRAG HER UP THE HILL AND ROLL HER DOWN THE HILL TO
6 DESTROY FINGERPRINTS IN THE MULCH, AND WHO FOLLOWED HIM?
7 JAMELLE. HE SEES HIS LEADER WRAPPING HIS SHIRT AROUND THE
8 ARMS AND WRISTS OF THE VICTIM, AND JAMELLE TAKES HIS SHIRT
9 OFF AND WRAPS THEM AROUND THE LEGS OF THE VICTIM AND THEY
10 DRAG HER UP THE HILL.

11 THE DEFENDANT APOLOGIZED TO THE BUS DRIVER TO
12 PREVENT POLICE FROM BEING CALLED AND DEFENDANT KEPT CONTROL
13 OVER WARREN HARDY'S BEHAVIOR ON THAT BUS. HE WAS THE
14 LEADER. HARDY WAS THE SAME AGE AS THE DEFENDANT, BUT
15 JAMELLE WAS YOUNGER.

16 F. WHETHER OR NOT THE OFFENSE WAS COMMITTED UNDER
17 THE CIRCUMSTANCES WHICH THE DEFENDANT REASONABLY BELIEVED TO
18 BE A MORAL JUSTIFICATION OR EXTENUATION FOR HIS CONDUCT.

19 THERE WAS NO EVIDENCE PRESENTED. THIS IS NEITHER
20 AGGRAVATING OR MITIGATING. IT DOESN'T APPLY. THE DEFENDANT
21 KNEW RIGHT FROM WRONG. HE KNEW WHAT HE WAS DOING WAS WRONG,
22 ABSOLUTELY WRONG.

23 E. WHETHER OR NOT THE VICTIM WAS A PARTICIPANT IN
24 THE DEFENDANT'S HOMICIDAL CONDUCT OR CONSENTED TO THE
25 HOMICIDAL ACT. PENNY NEVER PARTICIPATED OR CONSENT TO THE
26 DEFENDANT RAPING HER, KIDNAPPING HER, KIDNAPPING HER FOR
27 RAPE, RAPPING HER WITH A WOODEN STAKE, RAPPING HER,
28 TORTURING HER OR MURDERING HER. SHE FOUGHT. SHE STRUGGLED.

1 SHE RESISTED FOR HER LIFE. THE VICTIM PLEADED AND BEGGED
2 THE DEFENDANT TO LET HER LIVE. SHE KEPT SAYING, "HELP ME,
3 HELP ME."

4 NO ONE HEARD, BUT YOU CAN.

5 FACTOR D. WHETHER OR NOT THE OFFENSE WAS
6 COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF
7 EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

8 WHAT WE HAVE AS EVIDENCE IS THAT THE DEFENDANT
9 SHARED ALCOHOL AND DRUGS WITH FOUR TO SIX OTHERS OVER A SIX
10 TO EIGHT HOUR PERIOD OF TIME. THE DEFENDANT JUST CAME FROM
11 MONTE'S HOUSE WHERE HE ENGAGED IN VIOLENT CONDUCT, THEY
12 JUMPED CHRIS IN TO C.T.S., AND THAT MEANS THEY HAD A MINDSET
13 FOR VIOLENCE. THEY HAD JUST BEAT HIM UP.

14 WHO WAS IT THAT ASKED MONTE, CAN WE USE YOUR
15 ROOM?" THE DEFENDANT ASKED MONTE GMUR IF THEY COULD USE HIS
16 BACK ROOM TO PUT CHRIS ON THE BLOCK. RIGHT THERE, THAT
17 SHOWS THAT HE IS A LEADER. THAT HE IS THE ONE THAT STARTED
18 THIS VIOLENT BEHAVIOR IN ACTION.

19 THE DEFENDANT COULD CARRY ON A CONVERSATION, HE,
20 WALKED FINE. HE COULD BE UNDERSTOOD. HE HAD A PRESENCE OF
21 MIND. HE COLLECTED THE VICTIM'S CLOTHING. HE WAS WORRIED
22 ABOUT HER FINGERPRINTS. HE PREVENTED THE BUS DRIVER FROM
23 CALLING THE POLICE. HE KEPT HARDY UNDER CONTROL. HE WAS
24 THE LEADER.

25 DR. ROTHBERG, LADIES AND GENTLEMEN, BELIEVE HIM OR
26 NOT. HE DIDN'T VERIFY ANYTHING BUT, YET HE BELIEVES THE
27 DEFENDANT. EVEN WHEN HE VERIFIED WHAT THE DEFENDANT SAID TO
28 HIM THROUGH THE AUTOPSY REPORT IN WHICH THE CORONER

1 TESTIFIED AND IN HIS REPORT STATED, THAT ALL OF THE WOUNDS
2 WERE INFLICTED DURING LIFE, HE STILL BELIEVES THE DEFENDANT
3 WHEN HE SAYS I ONLY STOMPED ON HER AFTER SHE WAS DEAD.

4 HE ONLY BELIEVES THE DEFENDANT. HE LIKES THE
5 DEFENDANT. DESPITE INCONSISTENT STATEMENTS WITH OTHER
6 WITNESS'S TESTIMONY AND EVIDENCE, HE STILL BELIEVES THE
7 DEFENDANT.

8 THAT'S WHAT HE IS PAID TO DO. WHO HAS A GREAT
9 DEAL TO GAIN BY LYING AND MANIPULATING? DR. ROTHBERG HAS
10 MONEY TO AGAIN. BY TESTIFYING --

11 MS. SPERBER: OBJECTION, YOUR HONOR, THAT'S IMPROPER.

12 MS. LOCKE-NOBLE: -- BY TESTIFYING IN THE WAY THAT HE
13 DID --

14 THE COURT: OBJECTION SUSTAINED.

15 MS. LOCKE-NOBLE: DR. ROTHBERG WON'T BE HIRED AGAIN --

16 MS. SPERBER: OBJECTION, THAT IS SPECULATION.

17 MS. LOCKE-NOBLE: -- IF HE DOESN'T TESTIFY.

18 THE COURT: THE OBJECTION IS OVERRULED. YOU MAY
19 COMMENT ON THE CLOSING. CONTINUE PLEASE.

20 MS. LOCKE-NOBLE: DR. ROTHBERG WON'T BE HIRED AGAIN IF
21 HE DOESN'T GIVE THE OPINION THAT IS EXPECTED OF HIM. THAT'S
22 HOW HE MAKES HIS MONEY.

23 MS. SPERBER: OBJECTION YOUR HONOR, MISSTATES THE
24 EVIDENCE.

25 THE COURT: OBJECTION IS NOTED FOR THE RECORD CONTINUE.

26 MS. LOCKE-NOBLE: THE DEFENDANT HAS A GREAT DEAL TO
27 GAIN BY LYING AND MANIPULATING, AND THAT'S WHAT HE DID. HE
28 LIED AND MANIPULATED.

1 WHO HAS BLOCKED ALL EMOTION AT A YOUNG AGE AND
2 STILL HAS NO FEELINGS FOR OTHERS? THE DEFENDANT. HE HAD NO
3 FEELING WHEN HE WAS LITTLE AND HIS STEP-FATHER DIED, WHO HE
4 SAID, WAS A GREAT MAN.

5 WHO HAS NO FEELINGS OR CONSCIOUS THE DEFENDANT.
6 WHO BLAMES OTHER AND SHIFTS BLAME? THE DEFENDANT. HE BLAMED
7 ALL OF THIS ON EVERYONE ELSE BUT HIMSELF.

8 WHO IS THE SOCIOPATH HERE? THE DEFENDANT. HE
9 TREATED PENNY LIKE AN OBJECT. AN OBJECT TO TAKE THIS STAKE
10 AND BEAT HER WITH IT OVER AND OVER, AND OVER AGAIN. AND
11 STOMP ON HER WITH HIS BOOTS. THAT'S WHAT HE DID. WITH
12 ABSOLUTELY NO FEELING, NO CONSCIOUS, OVER AND OVER AGAIN
13 UNTIL THERE WAS NOTHING LEFT.

14 C. THE PRESENCE OR ABSENCE OF ANY PRIOR FELONY
15 CONVICTION OTHER THAN CRIMES FOR WHICH THE DEFENDANT HAS
16 BEEN TRIED IN THESE PRESENT PROCEEDINGS.

17 THIS IS A NEUTRAL. IT IS NEITHER AGGRAVATING OR
18 MITIGATING. LADIES AND GENTLEMEN, MOST PEOPLE DON'T HAVE
19 FELONY CONVICTIONS. THIS REALLY DOESN'T APPLY AS EITHER
20 AGGRAVATING OR MITIGATING.

21 I SUPPOSE WHAT I COULD SAY IS FOLLOWING THE LAW
22 IS NEITHER AGGRAVATING OR MITIGATING, THAT'S JUST DOING WHAT
23 YOU ARE SUPPOSED TO DO AS A CITIZEN, FOLLOW THE LAW.

24 B. THE PRESENCE OR ABSENCE OF ANY CRIMINAL
25 ACTIVITY BY THE DEFENDANT OTHER THAN THE CRIMES FOR WHICH
26 THE DEFENDANT HAS BEEN TRIED IN THE PRESENT PROCEEDINGS
27 WHICH INVOLVE THE USE OR ATTEMPTED USE OF FORCE OR VIOLENCE
28 OR EXPRESS OR IMPLIED THREAT TO USE FORCE OR VIOLENCE.

1 THE NAME OF HIS GROUP IS CAPONE THUG SOLDIERS.
2 THEY JUMPED CHRIS IN THE NIGHT OF MURDER. HE IS ENGAGING IN
3 CRIMINAL ACTIVITY RIGHT THEN AND THERE.

4 HE BEAT OR HIT PEOPLE WITH STICKS, ACCORDING TO
5 JANISHA WILLIAMS, KNOCKED PEOPLE OFF THEIR BIKES. HE BEAT
6 PEOPLE WITH HIS FISTS. HE KICKED PEOPLE FOR THE FUN OF IT,
7 BECAUSE THAT'S THE KIND OF GUY HE IS. FOR THE FUN OF IT,
8 THAT'S WHAT HE DID.

9 FACTOR A. THE CIRCUMSTANCES OF THE CRIME OF
10 WHICH THE DEFENDANT WAS CONVICTED IN THE PRESENT PROCEEDINGS
11 AND THE EXISTENCE OF ANY SPECIAL CIRCUMSTANCES FOUND TO BE
12 TRUE.

13 THE CRIMES THAT HE WAS CONVICTED OF ARE MURDER,
14 ROBBERY, KIDNAP, KIDNAP FOR RAPE, RAPE IN CONCERT, RAPE,
15 RAPE WITH A STAKE IN CONCERT, RAPE WITH A STAKE AND TORTURE.

16 ALL OF THESE WERE ARE FACTORS IN AGGRAVATION THAT
17 YOU MAY CONSIDER. THE SPECIAL CIRCUMSTANCES THAT WERE FOUND
18 TRUE ROBBERY, KIDNAPPING, KIDNAP FOR RAPE, RAPE WITH THE
19 STAKE, RAPE AND TORTURE YOU MAY CONSIDER ALL OF THESE AS
20 CIRCUMSTANCES IN AGGRAVATION.

21 YOU MAY ALSO CONSIDER THE FACT THAT YOU FOUND TRUE
22 THE PERSONAL USE OF THE WOODEN STAKE AS A FACTOR IN
23 AGGRAVATION.

24 THE VICTIM WAS WALKING ALONE LATE AT NIGHT. THE
25 DEFENDANT AND HIS COMPANIONS APPROACHED HER AND DEMANDED
26 MONEY, THEY ROBBED HER OF HER FOOD STAMPS, HER CLOTHING, AND
27 HER DIGNITY.

28 THEY PUNCHED HER AND THREW OVER A FENCE. SHE

1 TRIED TO DEFEND HERSELF. THEY TOOK FROM HER -- TOOK HER
2 FROM A PLACE WHERE SHE COULD HAVE GOTTEN HELP, RIGHT THERE
3 ON THE PUBLIC SIDEWALK TO A SECLUDED DARK AREA BY THE
4 FREEWAY WHERE ALL OF HER SCREAMS WERE DROWNED OUT. AND I
5 MEAN SCREAMS OF TERROR, AND CRIES FOR HELP THAT WENT
6 UNANSWERED BY THE DEFENDANT AND HIS COMPANIONS.

7 WELL, LADIES AND GENTLEMEN THOSE CRIES CAN BE
8 ANSWERED BY YOU.

9 THEY TOOK TURNS RAPING HER. HE STOMPED ON HER
10 WITH HIS 10 POUND STEEL TOED BOOTS, PUNCHED AND KICKED HER
11 UNTIL THAT STAKE WAS FOUND. AND THEN THEY TOOK THAT STAKE
12 AND USED IT OVER AND OVER AGAIN TO INFLICT PAIN AND TORTURE
13 AND TO END PENNY'S LIFE.

14 114 WOUNDS, 94 EXTERNAL, 20 INTERNAL INCLUDING A
15 SLIVER IN HER VAGINA.

16 LADIES AND GENTLEMEN YOU HEARD DR. ROTHBERG
17 TESTIFY, THE COURT INSTRUCTED YOU AT ONE POINT IN TIME
18 DURING THE COURSE OF THE TESTIMONY THAT THE ATTORNEYS
19 QUESTIONS ARE NOT EVIDENCE. THE COURT HAS ALSO INSTRUCTED
20 YOU THAT AN ATTORNEY'S QUESTIONS ARE NOT EVIDENCE EXCEPT FOR
21 HOW IT GIVES CONTEXT TO THE ANSWERS GIVEN BY THE WITNESS.

22 YOU SAW HIS DEMEANOR ON THE WITNESS STAND. YOU
23 HEARD HIM HESITATE. YOU HEARD HIM SAY OVER AND OVER AGAIN
24 THAT HE BELIEVED THE DEFENDANT.

25 IN SPITE OF YOUR VERDICT, HE STILL BELIEVED THE
26 DEFENDANT OVER YOU. HE DIDN'T DO ANY INTERVIEWS OF ANYBODY
27 TO VERIFY ANY INFORMATION WHATSOEVER. EVEN THOUGH HE COULD
28 HAVE.

1 MS. SPERBER: OBJECTION, YOUR HONOR, SPECULATION.

2 THE COURT: SUSTAINED.

3 MS. LOCKE-NOBLE: I BELIEVE I ASKED HIM ABOUT THAT ON
4 THE WITNESS STAND.

5 MS. SPERBER: OBJECTION, YOUR HONOR.

6 THE COURT: MOVE ON.

7 MS. LOCKE-NOBLE: I ASKED HIM IF HE HAD A PHONE, IF HE
8 HAD A PHONE IN HIS OFFICE. REMEMBER THAT QUESTION? HE SAID
9 HE DID. I ASKED HIM IF HE USED THE PHONE, HE SAID HE
10 DIDN'T. I ASKED HIM IF HE CALLED MONTE GMUR OR ANYBODY ELSE
11 LISTED IN THE WITNESS BOOK, EVEN THOUGH HE HAD THE PHONE
12 NUMBERS OF THOSE PEOPLE SO HE COULD HAVE DONE SOME
13 INVESTIGATION ON HIS OWN. IT WOULD HAVE BEEN -- HE COULD
14 HAVE USED --

15 MS. SPERBER: OBJECTION, SPECULATION.

16 MS. LOCKE-NOBLE: HE CHOOSE NOT TO

17 THE COURT: OVERRULED.

18 MS. SPERBER: ALSO MISSTATES THE EVIDENCE.

19 THE COURT: OVERRULED. YOU MAY COMMENT IN YOUR
20 CLOSING.

21 NEXT PLEASE.

22 MS. LOCKE-NOBLE: REMEMBER, WHEN I WAS ASKING HIM THE
23 SERIES OF QUESTIONS, LET ME GET THIS RIGHT. I ASKED HIM,
24 YOUR REPORT INDICATES THAT THE DEFENDANT DID NOT DENY HIS
25 INVOLVEMENT IN AND I LISTED A CRIME. FOR EXAMPLE, RAPE,
26 CORRECT? AND HE WOULD SAY, "CORRECT."

27 I WENT THROUGH ALL THE CRIMES THAT THE DEFENDANT
28 WAS CONVICTED OF. WHEN I GOT TO THE CRIME OF TORTURE, WHICH

1 WAS RIGHT BEFORE LUNCH, THE EXACT SAME WORDS, "YOUR REPORT
2 INDICATES THAT THE DEFENDANT DID NOT DENY HIS INVOLVEMENT IN
3 THE CRIME OF TORTURE, CORRECT?" "I DON'T UNDERSTAND YOUR
4 QUESTION." ALL OF SUDDEN HE DOESN'T UNDERSTAND MY QUESTION.

5 WE HAVE THIS LONG DISCUSSION. HE SAYS TO THE
6 JUDGE, HE DOESN'T UNDERSTAND MY QUESTION. WE GO TO LUNCH.
7 WE COME BACK.

8 "YOUR REPORT INDICATES THAT THE DEFENDANT DID NOT
9 DENY HIS INVOLVEMENT IN TORTURE, CORRECT?" ANSWER,
10 "CORRECT."

11 LADIES AND GENTLEMEN THERE ARE SOME THINGS THAT HE
12 TESTIFIED TO THAT FIT WITH THE EVIDENCE THAT IS PRESENTED
13 DURING THE COURSE OF THIS TRIAL, THAT IS DEFENDANT WAS
14 INTOXICATED. THE DEFENDANT WAS NOT UNDER SOME MENTAL
15 ILLNESS OR DISEASE OR DEFECT. THERE HAS BEEN NO TESTIMONY
16 THAT HE WAS, AND DR. ROTHBERG TESTIFIED TO THAT, BUT THERE
17 HAS BEEN EVIDENCE PRESENTED THAT HE WAS, IN FACT, THE
18 RAPIST, THAT HE PARTICIPATED IN THESE CRIMES.

19 DR. ROTHBERG CHOSE TO DISREGARD ALL OF THAT IN
20 FORMING HIS OPINION AND ONLY BELIEVED THE DEFENDANT. NOW
21 IT'S UP TO YOU LADIES AND GENTLEMEN TO DETERMINE WHETHER OR
22 NOT YOU BELIEVED HIM.

23 THE COURT WILL GIVE YOU THIS INSTRUCTIONS IN A
24 FEW MINUTES AFTER DEFENSE COUNSEL HAS HAD AN OPPORTUNITY TO
25 ARGUE.

26 IT IS NOW YOUR DUTY TO DETERMINE WHICH OF THE TWO
27 PENALTIES DEATH OR CONFINEMENT IN THE STATE PRISON WITHOUT
28 POSSIBILITY OF PAROLE SHALL BE IMPOSED ON THE DEFENDANT.

1 HAVING HEARD ALL OF THE EVIDENCE AND AFTER HAVING HEARD AND
2 CONSIDER THE ARGUMENTS OF COUNSEL YOU SHALL CONSIDER AND
3 TAKE INTO ACCOUNT THEN AND BE GUIDED BY THE APPLICABLE
4 FACTORS OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UPON
5 WHICH YOU HAVE BEEN INSTRUCTED.

6 AN AGGRAVATING FACTOR IS ANY FACT, CONDITION, OR
7 EVENT ATTENDING THE COMMISSION OF A CRIME, WHICH INCREASES
8 ITS GUILT OR ENORMITY, AND ADDS TO INJURIOUS CONSEQUENCES
9 WHICH IS ABOVE AND BEYOND THE ELEMENTS OF THE CRIME ITSELF.

10 THE FACTORS AND CIRCUMSTANCES CONCERNING THESE
11 CRIMES GO ABOVE AND BEYOND ANYTHING.

12 A MITIGATING CIRCUMSTANCE IS ANY FACT OR CONDITION
13 OR EVENT WHICH DOES NOT CONSTITUTE A JUSTIFICATION OR EXCUSE
14 FOR THE CRIME IN QUESTION BUT MAY BE CONSIDERED AS AN
15 EXTENUATING CIRCUMSTANCE IN DETERMINING THE APPROPRIATENESS
16 OF THE DEATH PENALTY.

17 LADIES AND GENTLEMEN, THERE WERE NO MITIGATING
18 CIRCUMSTANCES IN THIS CASE. WHAT THE DEFENDANT DID WAS
19 INTOLERABLE. IT WAS INHUMANE CRUELTY THAT SHOULD NEVER BE
20 INFLICTED ON ANYONE.

21 THE WEIGHING OF AGGRAVATING AND MITIGATING
22 CIRCUMSTANCES DOES NOT MEAN A MERE MECHANICAL COUNTING OF
23 FACTORS ON EACH SIDE OF AN IMAGINARY SCALE OR THE ARBITRARY
24 ASSIGNMENT OF WEIGHTS TO ANY OF THEM. YOU ARE FREE TO
25 ASSIGN WHATEVER MORAL OR SYMPATHETIC VALUE YOU TO DEEM
26 APPROPRIATE TO EACH AND ALL OF THE VARIOUS FACTORS YOU ARE
27 PERMITTED TO CONSIDER. IN WEIGHING THE VARIOUS
28 CIRCUMSTANCES YOU DETERMINE UNDER THE RELEVANT EVIDENCE