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SUPREME COURT - STATE OF CALIFORNIA

THE PEOPLE OF THE  
STATE OF CALIFORNIA,

Plaintiff-Respondent,

vs.

KEVIN COOPER,

Defendant-Appellant.

SUPREME COURT NO. *Crim 24552*

FROM SAN DIEGO COUNTY

HON. RICHARD C. GARNER,  
JUDGE

San Diego County Superior Court Case No. CR 72787

REPORTERS' TRANSCRIPT

VOLUME *107*

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO  
DEPARTMENT NO. 30 HON. RICHARD C. GARNER, JUDGE

THE PEOPLE OF THE STATE  
OF CALIFORNIA,

Plaintiff,

vs.

KEVIN COOPER,

Defendant.

NO. OCR-9319

REPORTERS' TRANSCRIPT  
February 11, 13, 19 and 20, 1985

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COMPUTERIZED TRANSCRIPT

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1        SAN DIEGO, CALIFORNIA. MONDAY. FEBRUARY 11, 1985, 11:55 A.M.

3                                --ooOoo--

4                                (The following proceedings were held in  
5                                the presence of the jury:)

6                THE COURT: For the record, I'm in the jury deliberation  
7 room now.

8                                I guess you know by now that it takes some time for  
9 us to respond to your questions. When I get a question from you  
10 I must convey it to counsel and discuss with them. And then,  
11 also, the record had to be searched to some extent.

12                                Now, let me explain to you how we're going to do  
13 this. I'm in the midst of another trial as a matter of fact,  
14 I'm doing other things. I do not now wish to bring you all back  
15 into court. We will not simply hand you a transcript when you  
16 ask for testimony to be read to you.

17                                Mr. Nugent, you are the foreman I take it, and the  
18 way we are going to do it, instead of doing it in open court I'm  
19 going to put Mrs. Beard in the jury deliberation room with you  
20 here. She has all of these records that we carried in. And she  
21 is going to refer to certain portions of them. And she is going  
22 to go to the testimony of Daniel Gregonis when he was under oath  
23 in open court and read selected portions, and there are many  
24 pages. You recognize that he testified on many different days,  
25 and there was direct examination, cross-examination, redirect,  
26 recross.

27                                You direct her to the extent that you tell her when  
28 to stop; otherwise, she will continue on with all portions of

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1 the record that we have been able to find with reference to  
2 A-41. Do you understand?

3 THE FOREMAN: Yes.

4 THE COURT: While she is here, sir, and everybody, do not  
5 discuss the case while she is here at all. Do not ask her any  
6 questions. Do not make any comment. Do not let her in any  
7 way -- she is not a member of the jury -- effect you. This is a  
8 more efficient way than to bring everybody together and this  
9 could take some time.

10 Any question?

11 Thank you very much.

12 (Jury returned to deliberations.)

13

14 (The following pages and lines were read to the  
15 jury from the transcript on February 11, 1985:  
16 Page 4423 Line 27 through 4424 Line 20;  
17 Page 4426 Line through 4445 Line 1;  
18 Page 4480 Line 23 through 4496 Line 21;  
19 Page 4503 Line 17 through 4528 Line 14.)

20

21 (The following pages and lines were read to the  
22 jury from the transcript on February 14, 1985:  
23 Page 4534 Line 24 through 4550 Line 19;  
24 Page 4557 Line 1 through 4562 Line 7 at which time  
25 the foreman indicated reading of transcript was to  
26 stop.)

27

28

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1 SAN DIEGO, CALIFORNIA, WEDNESDAY, FEBRUARY 13, 1985, 3:15 P.M.

2  
3 --ooOoo--

4 (Chambers conference reported.)

5 THE COURT: Good afternoon, counsel. Mr. Kochis  
6 Mr. Negus, Mr. Cooper, Detective Arthur, Mr. Forbush in chambers  
7 out of the presence of the jurors.

8 I have had the clerk make copies for you of the  
9 message from the foreman, Mr. Nugent, indicating something  
10 perhaps prejudicial was indicated to the jurors, something not  
11 in evidence. I don't know what it is; I haven't the foggiest.

12 I have kind of thought about it and I think we must  
13 do something, and I would think that it would be necessary for  
14 us to get to the bottom of what it was first before we can do  
15 anything. To do that, I think we need to examine at least Mrs.  
16 LaPage and Mrs. Doxey privately, but I'm open to suggestions.

17 MR. NEGUS: Why don't we just first ask Mrs. LaPage what  
18 she said?

19 THE COURT: That was my first step as well and then we  
20 will decide from there.

21 What I would suggest, frankly, that we do first is  
22 that perhaps I take the -- I'd rather this not hit the  
23 newspapers because they wouldn't stop until they found out  
24 whatever it was and perhaps blow it up big -- I would like to  
25 step to the jury deliberation room with counsel, if you wish,  
26 with the reporter, and tell them that we must get to the bottom  
27 of what was said, and to do that we need to examine at least one  
28 or two of them perhaps individually and so we're going to break

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1 up deliberations ask them to terminate deliberations and discuss  
2 and have a recess, but remain in that area there until we advise  
3 them further, and then pull Mrs. LaPage in here first.

4 Is that satisfactory?

5 MR. NEGUS: Yes.

6 MR. KOCHIS: The other alternative would be to have Mrs.  
7 LaPage, Mrs. Doxey and Mr. Nugent simply write out what was  
8 said.

9 THE COURT: Well, that's going to take us some long  
10 period of time, and I'm not sure that that would be sufficient  
11 without inquiry, depends upon how it goes.

12 In there in one place he indicates considerable  
13 discussion was had, as I recall, and I don't know how  
14 extensive -- Just a minute.

15 MR. KOCHIS: I don't recall that in the note. I recall  
16 it being mentioned and that he polled the jury.

17 THE COURT: He says, "After lengthy discussion, Mrs.  
18 Doxey stated she would like some quiet time for reflection."

19 I don't know, "lengthy discussion," how extensive  
20 that writing out would be. I think it would be more expeditious  
21 at this time to pull her straight in here.

22 Is that satisfactory?

23 MR. KOCHIS: Yes.

24 THE COURT: I will set Mrs. LaPage here. Let's go to the  
25 room first, please.

26 (Chambers conference concluded.)

27

28 (The following proceedings were held in

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1 the presence of the jury:)

2 THE COURT: It everybody here?

3 MR. NUGENT: Yes, sir.

4 THE COURT: For the record, I'm in the jury deliberation  
5 room with. I see twelve of you deliberating jurors.

6 Mr. Nugent, I've received your message relating to  
7 perhaps something that wasn't in evidence being mentioned or  
8 discussed by the jurors. I have counsel immediately outside the  
9 door; Mr. Cooper is in chambers. We've discussed it to some  
10 extent.

11 Before any guidance or assistance can be given to  
12 you we have to find out what it was that was said or done, and  
13 to do that I think it's safer that we examine individually. We  
14 would like perhaps Mrs. LaPage first to come into chambers.  
15 Perhaps we will be guided there as to whether or not we want to  
16 go individually. I just can't say at the moment until we find  
17 out what it was.

18 So at this time I would ask you to, One, terminate  
19 any deliberation since you no longer will have twelve jurors  
20 here;

21 Two, terminate any discussion about the case;

22 Three, take a recess but don't leave.

23 I don't want this to get to the newspapers or  
24 anything like that, and so I would rather you hang close to this  
25 vicinity, but relax and talk about the nice weather we are  
26 having or something else if you would, please.

27 JUROR MERCHANT: Your Honor, could we leave that door  
28 open?

1 THE COURT: That's fine.

2 JUROR MERCHANT: Just for a few minutes.

3 THE COURT: We can leave both doors. Be sure you talk  
4 about other things.

5

6 (Chambers conference reported.)

7 THE COURT: I think they are getting ready to clean the  
8 carpets or something. They put little pieces of paper under all  
9 the furniture.

10 Mr. Cooper is again present with Mr. Negus and Mr.  
11 Kochis.

12 I take you back, apparently from Mr. Nugent's note,  
13 to Monday, the 11th of February, when he indicates that  
14 something was said by you that was not mentioned during the  
15 trial. Be as factual as you can, if you would, tell us what was  
16 said.

17 JUROR LaPAGE: We had a piece of evidence in there that  
18 was used as evidence regarding -- I can't remember the exact  
19 number of it, but it was in regard to a hearing at -- in Los  
20 Angeles on a burglary charge.

21 THE COURT: A hearing in Los Angeles on what?

22 JUROR LaPAGE: On a burglary charge. And in that  
23 piece --

24 THE COURT: You mean you had a piece of documentary  
25 evidence?

26 JUROR LaPAGE: Yeah, documented evidence.

27 THE COURT: Okay.

28 JUROR LaPAGE: One of the jurors made the -- read part of

1 a few words of these -- a paragraph of this particular, which  
2 there was two words that was used in testimony by the lawyer  
3 which indicated headaches and hallucinations by Mr. Cooper.

4 One of the other jurors says, "I think we should  
5 take this into consideration."

6 And one of the other jurors says, "No, I don't  
7 think so."

8 And I said, "Yes, I believe that, you know,  
9 that" -- I knew personally that there was supposed to have been  
10 a mental problem with Mr. Cooper, and being as it wasn't --

11 THE COURT: Then what happened what was said?

12 JUROR LaPAGE: Mrs. Doxey, Kahloah, she just felt we  
13 shouldn't because we didn't have any guidelines of our personal  
14 knowledge, should it be used in deliberation or were we just not  
15 supposed to use it in the courtroom or outside our  
16 deliberation,, what can we use right in our deliberation,  
17 personal knowledge or not personal knowledge. And --

18 THE COURT: Did this type of conversation continue? Did  
19 Mr. Nugent at some point stop you? What happened?

20 JUROR LaPAGE: Oh, yes; yes, uh-huh, that we should not.  
21 And he polled all the rest of the jurors and said, "Will any of  
22 this information interfere with your judgment?"

23 Everybody says -- I had said, "No, that it  
24 wouldn't," because we went out to discuss the fact as far as  
25 that's concerned it could be a nervous breakdown, it could have  
26 been a bunch of --

27 THE COURT: Counsel, are you aware of the document she is  
28 referring to, since you are more familiar with the exhibits than

1 I am?

2 MR. KOCHIS: It would be the Los Angeles County Court  
3 exhibits that had to do with his prior convictions for burglary  
4 and perhaps some statements he made under oath. I think Mr.  
5 Negus and would I like to examine those before we go any  
6 further.

7 THE COURT: Why don't I take you back in and have you  
8 continue your recess out there, so to speak, and I will send the  
9 clerk to pick up that exhibit and bring it in here and counsel  
10 and I will discuss further and advise further.

11 Anything before she goes back, gentlemen, any other  
12 thoughts?

13 MR. NEGUS: Not right now.

14 MR. KOCHIS: Not right now, but I do have some out of her  
15 presence.

16 THE COURT: Would you kindly go back to the room. Don't  
17 talk about it or anything.

18 JUROR LaPAGE: Okay.

19 THE COURT: Just say we are in recess.

20 JUROR LaPAGE: Okay.

21 (Juror LaPage returned to the deliberation room.)

22 THE COURT: Would you go in and get it for us, please.

23 THE CLERK: I don't know what exhibit it is?

24 MR. NEGUS: I can figure out what exhibit it is. It  
25 shouldn't be in there.

26 THE CLERK: By the exhibit list --

27 MR. NEGUS: Unless he --

28 THE CLERK: Let me get my exhibit list.



1 THE COURT: You can go to the juryroom.

2 THE CLERK: But there is no list in there.

3 THE COURT: They will know the document.

4 MR. KOCHIS: They may know.

5 THE COURT: They will be able to pull the document  
6 straight out.

7 Keep this on the record unless it's just between  
8 counsel.

9 MR. KOCHIS: If Mr. Negus and I could go off the record.

10 THE COURT: You two are off the record. When I get  
11 involved I want to be on the record.

12 MR. KOCHIS: It doesn't matter.

13 For the record, the clerk has handed me Exhibit  
14 689, which is a reporter's transcript of proceedings dated  
15 Wednesday, January 19, 1983, People versus David Anthony  
16 Trautman.

17 THE COURT: Is that in evidence?

18 MR. NEGUS: According to the slip it is, but it sure  
19 shouldn't be.

20 MR. KOCHIS: I think this was offered into evidence.

21 MR. NEGUS: No, it shouldn't have been.

22 MR. KOCHIS: I believe it had to do with the prior --

23 MR. NEGUS: The document that I saw on that was shown to  
24 me by Mr. Kottmeier. It was only -- actually I don't know where  
25 that came from.

26 THE CLERK: That's the one that was given to me to mark.

27 MR. NEGUS: It sure was.

28 MR. KOCHIS: What would be the fastest way for the court

1 reporter to find out if this particular exhibit was offered into  
2 evidence and what the arguments for and against it were?

3 MR. NEGUS: There is an index.

4 Was the last -- Where is the last?

5 THE COURT: Do you show the date in your minutes as to  
6 when it was received?

7 MR. KOCHIS: February 4th, 1985. It would have been the  
8 day prior to the closing argument.

9 THE CLERK: Right here.

10 MR. KOCHIS: The day prior to the recess.

11 THE REPORTER: Your Honor, if we may go off the record I  
12 could find it.

13 THE CLERK: I show when you did a whole bunch of them all  
14 at once at the end of the case. Is that 689?

15 MR. KOCHIS: This is 689.

16 THE COURT: The reporter can, of course, get that part if  
17 you want to get off the record for a few minutes if you desire.

18 MR. KOCHIS: Your Honor, I'm looking at Page 8 of the  
19 document and it said:

20 "Mr. Peck: When I talked to Mr. Trautman yesterday  
21 he complained of headaches. Today he is complaining with  
22 hallucinations that interfere with his ability to participate.  
23 I am just making a record pursuant to 1368."

24 And that apparently was a statement made prior to  
25 the calling of the first witness in the preliminary hearing.

26 THE COURT: Anything by way of records that you want to  
27 search further? Do you want the reporter to find out if there  
28 has been any inadvertence as far as getting it in evidence?

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1 MR. NEGUS: I'm sure there has been.

2 MR. KOCHIS: Yes.

3 MR. NEGUS: I mean, that's what it appears, that there  
4 was inadvertence in getting it into the evidence. This was  
5 marked by the prosecution in their cross-examination of Mr.  
6 Cooper. I wasn't even aware that it had been marked actually.  
7 At least I wasn't -- and I certainly didn't --

8 THE COURT: I remember one time I asked you to be  
9 particularly careful so we didn't get into this.

10 MR. NEGUS: That's true, you did.

11 MR. KOCHIS: If we could have the court reporter perhaps  
12 locate in her notes what took place on February 4th when this  
13 document was offered, if there was argument, if there were  
14 objections, and then we will go from there.

15 THE COURT: All right. We will be off the record till  
16 you return.

17 (Recess.)

18 MR. KOCHIS: Your Honor, directing the Court's attention  
19 to two things, the first of which will be a portion of the  
20 proceedings outside of the jury's presence which took place on  
21 February the 4th, the day before the recess of one day which the  
22 Court gave us to prepare our closing arguments, on Page 7596  
23 Lines 15 through 16, Mr. Negus offers into evidence "Exhibits  
24 667 through 693 are being offered by the defense without  
25 objection," and then he moves on.

26 Mr. Negus also has a copy of the index of exhibits  
27 and that jumps from 688 to 690, it does not list 689.

28 And when Mr. Negus was offering into evidence a

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1 series of exhibits that covered his portion of the defense, he  
2 apparently inadvertently offered that exhibit into evidence as  
3 well.

4 THE COURT: It doesn't -- my reaction is frankly I'm  
5 relieved that it's no more serious than it appears to me at the  
6 moment.

7 I think there is several things we can do. One of  
8 the things I think we can do by way of stipulation is to simply  
9 inform the jurors that it was received into evidence through an  
10 inadvertence and that I instruct them now to disregard it, not  
11 weigh it, don't consider it, and strike it all from the record  
12 and do that initially. That's my first reaction.

13 MR. NEGUS: I don't think that will help. I mean, I  
14 think we should have a mistrial.

15 THE COURT: Okay. Do you wish to amplify on that or do  
16 you want to stop at that point?

17 MR. NEGUS: Certainly. The particular -- the particular  
18 information that got to the jury is stuff that was carefully  
19 kept out by both sides. Hallucinations and things of that  
20 nature suggests --

21 THE COURT: Not "things of that nature," just mentions  
22 headaches and hallucinations is the only thing.

23 MR. NEGUS: 1368.

24 THE COURT: The jurors don't what that is.

25 MR. NEGUS: I'm not sure whether they do or they don't.  
26 And this particular document here is not only that it's a  
27 complete transcript of a taking of a plea, if I could --

28 MR. KOCHIS: I don't believe it's a taking of a plea. I

1 believe it's the preliminary hearing at which witnesses  
2 testified, witnesses -- burglary --

3 MR. NEGUS: Okay. I see. It's the testimony of the  
4 transcript of the burglary in which there's a whole bunch of  
5 stuff which -- which came into evidence. There was -- the  
6 prosecution over my objection attempted to get in evidence about  
7 that particular burglary to begin with. And I don't believe  
8 that this is the kind of evidence which the jurors can wipe out  
9 of their mind.

10 THE COURT: Excuse me. Evidence about what now, Mr.  
11 Negus? What else is mentioned other than the burglaries?

12 MR. NEGUS: They have -- there is -- it's testimony of  
13 three witnesses, two victims and a police officer from the  
14 preliminary hearing of the Los Angeles prosecution. It was  
15 attempted to get in some of that evidence. I think they got in  
16 some of it over my objection, other did not come in. It has to  
17 do with Mr. Cooper's allegedly perpetrating the burglary and --  
18 of two different burglaries in Los Angeles and also his arrest  
19 therefore. It also has the --

20 THE COURT: That was all admitted into court anyhow.

21 MR. NEGUS: I don't believe so, certainly not in the  
22 detail in which it's contained in the --

23 THE COURT: The fact that he was convicted of the two  
24 burglaries out of Los Angeles is somewhere in the, record  
25 replete with it.

26 What's prejudicial there?

27 MR. NEGUS: What's prejudicial is the details of the  
28 burglary and the -- the evidence of mental instability. Mr.

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1 Cooper does not in fact have mental instability. Had the  
2 prosecution tried to bring that in I would have rebutted with  
3 evidence of psychiatrists who have examined Mr. Cooper and say  
4 he has no mental instability whatsoever.

5 I think when the -- when the witness, that is, Mrs.  
6 LaPage, further amplified on that by bringing in material that  
7 was outside even this particular document in that she had heard  
8 of apparently his escape from a mental institution in  
9 Pennsylvania and she brought that to the people's attention --

10 MR. KOCHIS: I don't believe she said anything like that  
11 on the record. She didn't mention mental institution for  
12 escape; she mentioned something about he had a mental problem.

13 MR. NEGUS: That implies -- the only publicity about that  
14 that was the escape.

15 THE COURT: You are talking about which witness now?

16 MR. KOCHIS: We are talking about the juror, your Honor,  
17 Shirley LaPage, when she told us what she said. I don't recall  
18 her saying anything about telling the jurors he escaped from a  
19 mental institution.

20 MR. NEGUS: But she did mention apparently in her factual  
21 knowledge, she said from her own personal knowledge Mr. Cooper  
22 had a mental problem, I think that was the word she used.

23 THE COURT: Counsel, we can easily cure this.

24 MR. NEGUS: How can you cure it?

25 THE COURT: We can easily cure it by telling the jurors  
26 that it came in by inadvertence and mistake. No. 1 it was  
27 withdrawn from evidence, they are to disregard anything. No. 2  
28 both sides agree and they can accept it as being conclusively

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1 proved that the defendant has no mental instability period.

2 Mr. Kochis's, can't you agree to that?

3 MR. KOCHIS: No, I can't agree to that.

4 THE COURT: Think about it.

5 MR. KOCHIS: I'm thinking about it. I can't agree to  
6 something as blanket as that.

7 THE COURT: How can it hurt you? A mistrial can hurt  
8 you.

9 MR. NEGUS: The reason it hurts them is because they have  
10 implied that Mr. Cooper has a mental instability because that  
11 supplies them a missing motive which they don't have. That's  
12 why it's prejudicial, it supplies a missing motive which they  
13 don't have.

14 MR. KOCHIS: Your Honor, I could agree on a statement  
15 that you must as jurors base your decision on the law and the  
16 evidence as it pertains to this trial, and in this trial there  
17 has been no specific evidence as to Mr. Cooper's mental state.

18 MR. NEGUS: But that's not good enough because now we  
19 have Mrs. LaPage's supposed personal knowledge of his mental  
20 instability and the statement by his own attorney at the -- at  
21 the -- at the preliminary hearing. I mean, it says he is  
22 complaining with hallucinations which interfere with his ability  
23 to participate, and that certainly is not the sort of thing  
24 which can be cleared by -- there has been no evidence of that  
25 sort of thing that the jurors are led --

26 THE COURT: Has there been any evidence in the trial  
27 relating to mental instability?

28 MR. NEGUS: Except for this?

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1 THE COURT: Apart from that?

2 MR. NEGUS: No.

3 MR. KOCHIS: Well, there has been no expert but I think  
4 lay persons can draw certain deductions from a person who  
5 testifies as Mr. Cooper did to the way he conducts himself what  
6 he does.

7 THE COURT: Mr. Kochis, you are not arguing your case  
8 now. Has there been any evidence?

9 MR. KOCHIS: That's evidence.

10 THE COURT: No reference to mental problem? No reference  
11 to mental instability? No reference to institutions as such?

12 MR. KOCHIS: That's correct. I agree with that.

13 MR. NEGUS: I didn't notice the door was open.

14 MR. KOCHIS: Could we have the door closed?

15 MR. NEGUS: Are the jurors out in the hall?

16 MR. ARTHUR: Their door is shut.

17 THE COURT: Now if I simply withdraw that from the  
18 evidence because of the inadvertence, admonish them strongly to  
19 disregard it, further poll the jurors to see if any of them have  
20 any trouble doing that and go from there.

21 MR. NEGUS: I don't see how they can put it out of their  
22 mind. Mrs. LaPage has already testified about her personal  
23 knowledge. She didn't mention that in voir dire.

24 THE COURT: How do you know? There were a number of them  
25 that did, and some of them perhaps are sitting on the jury.

26 MR. NEGUS: I looked it up. I looked it up. She didn't  
27 mention that in voir dire according to the notes that I took.  
28 We can check her transcript of her voir dire. She has already

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1 brought in things that are outside the record.

2 Given the fact that we have so many jurors that  
3 have been exposed to the publicity about this case before being  
4 asked to sit on the jury and the stuff that's already been in  
5 the publicity, I don't think it can be cured by an admonition.

6 THE COURT: Mr. Kochis.

7 MR. KOCHIS: I don't agree with Mr. Negus' proposition  
8 that a document that is in evidence because he offered it into  
9 evidence should cause us at this point to undo the year and a  
10 half that we spent in pretrial motions and trial.

11 THE COURT: It's regrettable that it got in there, but I  
12 don't think there is any such thing as estoppel on defendant  
13 because of counsel's inadvertence, so I won't base the decision  
14 upon the fact he is the one that let the cat out of bag, so to  
15 speak.

16 MR. KOCHIS: My position would be that we should admonish  
17 the jury to disregard the document, withdraw it, give them  
18 further instructions that they should base their decision only  
19 on the evidence that is admitted into the courtroom, poll them  
20 individually and see if they can put it out of their minds and  
21 base their decision on the facts and the law.

22 THE COURT: Okay. That's another. Anything further,  
23 counsel?

24 MR. NEGUS: That doesn't strike me as a suitable solution  
25 for the reasons I stated earlier. I don't think that people can  
26 put that out of their mind. It's the kind of thing because it  
27 supplies a missing element in the prosecution's case --

28 THE COURT: You know what -- Well, you say that and

1 somehow you're able to use the circumstantial evidence to make  
2 an inference that you want to use for your purposes, I believe.  
3 now. But in all candor I really don't see it being prejudicial.  
4 I really don't see it as amounting to a hill of beans as far as  
5 the way that jury is going to decide the case.

6 MR. NEGUS: Well, the thing is that --

7 THE COURT: If anything you could argue just as strongly  
8 inferentially that this is going to elicit sympathy and  
9 prejudice in favor of the defendant or make them seek to hold  
10 him less culpable or responsible for the acts.

11 MR. NEGUS: There's -- there is no rational reason for  
12 saying that diminished capacity is a defense, which no jurors  
13 like. They have not been instructed on it. There is no way to  
14 assume that it will make them any less -- that it will give them  
15 any sort of sympathy for the defendant. They have already been  
16 instructed not to take into account sympathy whatsoever in their  
17 deliberations at the guilt phase anyway, so it's not the sort of  
18 thing that will have any effect favorably to Mr. Cooper. And  
19 they have been instructed that the absence of motive is evidence  
20 which they can consider as a circumstance tending to show that  
21 he's not guilty. This supplies a motive which, had it been  
22 brought out by the prosecution in the course of the trial, I was  
23 prepared to rebut. As they didn't try and bring it out I didn't  
24 get to rebut.

25 THE COURT: Okay. Anything further?

26 Your motion for a mistrial is denied at the moment  
27 subject to renewing later on.

28 Let's bring the total jurors back into open court.

1 Let's exclude the public and press.

2 MR. NEGUS: You are going -- you are going to question  
3 them in the presence of each other?

4 THE COURT: Oh, I think so.

5 MR. NEGUS: Well, what you're doing is -- you realize  
6 that part of this -- the answers to this has to do with the  
7 effect of prejudicial pretrial publicity on them, and jurors may  
8 not be able to answer the questions without blurting out  
9 something that they have heard in the paper beforehand.

10 THE COURT: We are not about to go through all that  
11 again.

12 MR. NEGUS: The thing about it --

13 MR. KOCHIS: Your Honor, could I make a suggestion? In  
14 open court could you tell them about the exhibit, that it was a  
15 mistake; it wasn't intentionally offered by either party; it's  
16 being withdrawn; they are not to consider it; they are not to  
17 consider the comments of Mrs. LaPage; they are to base their  
18 decision only on the facts and the law and not any facts they  
19 have from -- not any items they have from anywhere else. Then  
20 could we individually ask them if they could be fair, so if  
21 someone says something it doesn't pollute the other twelve, and  
22 to tell them we are briefly going to talk to them individually  
23 in chambers to make sure there's no problem.

24 MR. NEGUS: There is another problem.

25 THE COURT: I think that what Mr. Negus wants us to do is  
26 to come back here and say, "Do you now remember reading anything  
27 in the papers about mental institutions or escape therefrom."  
28 or any of that.

1 MR. KOCHIS: We wouldn't do that. I'm sure he wouldn't  
2 do that.

3 THE COURT: That's what he --

4 MR. NEGUS: I didn't mean to imply that whatsoever. That  
5 wasn't what I was intending. It strikes me there is another  
6 problem that that last comment just brings up.

7 Apparently the foreman of the jury acted as judge  
8 and has already gone through --

9 THE COURT: Very properly so. He said, "Hey, stop it.  
10 That wasn't in evidence. Let's talk about what was in  
11 evidence."

12 MR. NEGUS: What I'm talking about is his polling of the  
13 jury and the lengthy discussion that they talked about about,  
14 the legal effects of this. I mean, that in itself would seem  
15 improper, and it seems like the foreman has usurped the roll of  
16 judge which is further grounds for a mistrial.

17 THE COURT: We have only one bailiff?

18 THE BAILIFF: The other one is in the courtroom.

19 THE CLERK: She's in the courtroom.

20 THE COURT: All right. Let's pull -- let's -- I will go  
21 out and tell them to clear the courtroom and it will be an  
22 extension of chambers, and we will pull all the jurors in court  
23 on the record and I will admonish them and we will put them back  
24 in the deliberation room and we will bring them in individually.

25 (Chambers conference concluded.)

26

27 (The following proceedings were held in  
28 open court in the presence of the jury:)

021761

1 THE COURT: Ladies and gentlemen, we are going to have to  
2 inquire from each of you individually once again. Go back in  
3 chambers, and I regret to tell you that, but bear with us and  
4 permit it please.

5 First, I will tell you that the exhibit, the  
6 transcript document that was referred to apparently by Mrs.  
7 LaPage at one point was received into evidence inadvertently and  
8 through mistake. It should not have gone to you at all. It has  
9 now been withdrawn. I order it stricken from the record.

10 I instruct you strongly to disregard it and  
11 anything contained in it. Strike it from your mind, no longer  
12 discuss it nor consider it in weighing the evidence on either  
13 side of an issue in this trial.

14 Okay. So that's out. Now I'd like to have you go  
15 back once again into the deliberation room, continue your  
16 recess. And I don't particularly care about in what order, but  
17 I'd like to have you all come back in once again. I think we  
18 might start with you, Mrs. LaPage, since we had you first. Why  
19 don't you go back on. We will have you essentially come into  
20 chambers.

21 Mr. Foreman, you can send them in as you desire.

22 A JUROR: You want me to go out?

23 THE COURT: Everybody settle down in the deliberation  
24 room and then when we come back. I would like to have you in  
25 chambers individually please.

26 Let's go back in chambers.

27

28 (Chambers conference reported.)

1 THE COURT: All right. Bring Mrs. LaPage right in,  
2 please.

3 Counsel, I don't want to open it up to grueling  
4 cross-examination, but if you have some pointed questions after  
5 I finish with them, feel free so far to ask them.

6 MR. NEGUS: I would just as soon you did it.

7 MR. KOCHIS: So would I.

8 THE COURT: But you might suggest. I sometimes overlook  
9 things.

10 Mrs. LaPage, would you amplify a little bit more  
11 when you read that in the transcript, that was about the  
12 hallucinations I take it?

13 JUROR LaPAGE: Yes, uh-huh.

14 THE COURT: How much further did you -- did you read that  
15 out loud?

16 JUROR LaPAGE: No, sir. One of the other jurors read it  
17 out loud.

18 THE COURT: One of the other jurors?

19 JUROR LaPAGE: Yeah.

20 THE COURT: Did they go on through the book? Was the  
21 whole transcript read?

22 JUROR LaPAGE: I don't think so, your Honor, maybe --

23 THE COURT: Out of that one exhibit how much do you  
24 remember that was said that came out of that one exhibit? I  
25 mean, what all was referred to?

26 JUROR LaPAGE: To tell you the truth, the only -- the  
27 only thing that I read was just maybe the first eight, nine  
28 pages. It referred to --

1 THE COURT: But as far as what you recall about any  
2 hallucinations or mental thing --

3 JUROR LaPAGE: No. That was the only mention of it, just  
4 that one thing.

5 THE COURT: Just that one thing?

6 JUROR LaPAGE: That one thing.

7 THE COURT: All right. Now, when I responded you said  
8 something about mental, is that true?

9 JUROR LaPAGE: Uh-huh, yes.

10 THE COURT: What did you say about it?

11 JUROR LaPAGE: I can't really remember my exact words,  
12 but it was something to the effect that I had understood from  
13 when this happened a year and a half ago from the papers and  
14 stuff that there -- that they -- because of the trouble at Chino  
15 of why he was put in minimum security, I think it was, that I  
16 had to remember reading that they felt that there was some kind  
17 of a mental or something, -- to the extent I don't have any idea  
18 but I could just vaguely remember that there was supposed some  
19 kind of a --

20 THE COURT: Do you remember on what that recollection was  
21 based?

22 JUROR LaPAGE: Yeah. There was supposed to be some  
23 mental problem.

24 THE COURT: Do you have a recollection of reading  
25 something about that?

26 JUROR LaPAGE: I think it was something about a hospital.

27 THE COURT: Where?

28 JUROR LaPAGE: Pennsylvania.

00217764

1 THE COURT: Were you asked that question when we examined  
2 you individually on jury selection?

3 JUROR LaPAGE: No, I don't believe so. I think they  
4 asked me if I -- now what I knew what I remembered, a few  
5 things, but I don't recall and I don't recall that I remembered  
6 that particular thing.

7 THE COURT: Mrs. LaPage, outside of that one reference  
8 that was brought out in that transcript, I don't think there has  
9 been any other reference in this trial to any such evidence; do  
10 you understand?

11 JUROR LaPAGE: No, that's right.

12 THE COURT: Can you put that aside?

13 JUROR LaPAGE: Oh, yes, yes.

14 THE COURT: You are sure of that now?

15 JUROR LaPAGE: I'm sure, uh-huh.

16 THE COURT: I mean, just decide the case on the evidence  
17 that was received in court?

18 JUROR LaPAGE: Yes; yes, uh-huh.

19 THE COURT: All right.

20 Anything, counsel?

21 MR. KOCHIS: No.

22 MR. NEGUS: No.

23 THE COURT: All right. We will have further instructions  
24 for everybody towards the end of the day. Would you go back and  
25 have them bring in the next person, please?

26 JUROR LaPAGE: Okay.

27 (Juror LaPage was excused.)

28 THE CLERK: Want the list?

0021765



1 THE COURT: I think I will remember them. You can prod  
2 me if I don't remember them, will you?

3 THE CLERK: I will get one for you.

4 THE COURT: Mr. Sergeant (sic), have a seat please.

5 Do you recall who it was that read the pertinent  
6 portion out of that one exhibit?

7 JUROR SAWYER: I believe it was Rita. I don't know  
8 her --

9 THE COURT: What is that?

10 MR. KOCHIS: Lister, your Honor.

11 THE COURT: Lister?

12 JUROR SAWYER: Yes, I believe it was.

13 THE COURT: And do you recall how much of the -- how  
14 deeply they went into the transcript or anything?

15 JUROR SAWYER: To be honest I was not paying attention to  
16 that. I was -- I was looking at some other testimony.

17 THE COURT: Now that I've stricken that out of the  
18 record, Mr. Sergeant, it's not in evidence -- you can't hear me?

19 MR. FORBUSH: It's Sawyer.

20 THE COURT: Sawyer. I didn't have any list. I know  
21 that. I've stricken that out of the record.

22 Can you absolutely put that aside and decide this  
23 case just on the evidence that was received in court?

24 JUROR SAWYER: I can, yeah.

25 THE COURT: Any question about that in your mind?

26 JUROR SAWYER: I didn't give it any credence at all.

27 THE COURT: Well, you don't weigh it at all?

28 JUROR SAWYER: No.

021766

1 THE COURT: You don't consider it at all; it's as if it  
2 was never said?

3 JUROR SAWYER: No. Our charter is to weigh the evidence  
4 that is on hand, that's all.

5 THE COURT: Okay. Don't talk about it any more until we  
6 instruct you further then.

7 Anything, counsel?

8 MR. NEGUS: No.

9 MR. KOCHIS: No, your Honor.

10 THE COURT: Please go back and wait for us. We are going  
11 to pull you all back in open court before the day is over.

12 I said I thought I could do it and the first one I  
13 missed.

14 (Juror Sawyer was excused.)

15 THE COURT: Mrs. Lopez, do you recall who it was that  
16 first mentioned anything that was read anything in that  
17 particular transcript?

18 JUROR LOPEZ: Who read it?

19 THE COURT: Yes. First who first publically mentioned  
20 it?

21 JUROR LOPEZ: Oh, I think it was Rita.

22 THE COURT: I've now ordered that stricken from the  
23 record because of mistake and inadvertence. Can you absolutely  
24 put that out of your mind when you weigh the scales and the  
25 evidence disregard it?

26 JUROR LOPEZ: Yes.

27 THE COURT: Are you quite confident of that?

28 JUROR LOPEZ: Yes.

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1 THE COURT: Do you believe that the other people can do  
2 so as well?

3 JUROR LOPEZ: Yes, except maybe Kahloah.

4 THE COURT: Except maybe who?

5 JUROR LOPEZ: I don't know her real name, Kahloah.

6 THE COURT: Mrs. Doxey?

7 JUROR LOPEZ: Yes. I think it's Jetalyn. Everybody  
8 calls her Kahloah.

9 THE COURT: Okay. All right. We will get to her  
10 eventually, please, keep the cool.

11 Go back and wait for us we're going to talk to you  
12 again.

13 (Juror Lopez was excused.)

14 THE COURT: Mrs. Doxey, I hope that you don't in any way  
15 feel that we are putting special pressure on you or embarrassing  
16 you or anything at all by talking to you individually. We  
17 always hate to do this, but sometimes the circumstances require.

18 JUROR DOXEY: Uh-huh.

19 THE COURT: Tell us what was said and done that might --  
20 apparently you were more concerned than the other people, I  
21 gather, so tell us why you are so concerned.


22 JUROR DOXEY: Well, because of the brutalities of the  
23 murders, and he would -- one would think that a person who did  
24 this might have been a crazy person and. Then that statement  
25 was read and then the other statement was said and that bothered  
26 me.

27 THE COURT: Did Mr. Nugent stop you going into any  
28 details right away as far as details?

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1 JUROR DOXEY: Well, it was already said. It was already  
2 said.

3 THE COURT: That is, Mrs. Lister read the statement and  
4 then Mrs. LaPage said something about "I think that he has a  
5 mental problem," or something like that?

6 JUROR DOXEY: No, it wasn't that. She said, "He is an  
7 escaped mental patient." That's the way I heard it. 

8 THE COURT: She said what?

9 JUROR SDOXEY: He was a former mental patient. I don't  
10 know if "escape" came in there or not, but I know she said  
11 "former mental patient".

12 THE COURT: Okay. If I, as I have, take that exhibit  
13 away from you and I say, "Strike it. Disregard it. Don't  
14 discuss it. Don't put it in the scales of justice when you  
15 weigh and consider the evidence," can you do it?

16 JUROR DOXEY: Oh, yes.

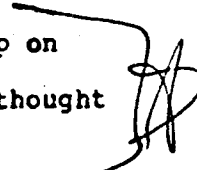
17 THE COURT: I mean, can you really?

18 JUROR LaPAGEDOXEY Yeah, I can do it. That was  
19 discussed, too, but I -- to let that go by, I couldn't live with  
20 myself.

21 THE COURT: Hey, we appreciate your telling us.

22 JUROR DOXEY: Right; right.

23 THE COURT: We are not criticizing in any way.

24 JUROR DOXEY: I would hope this trial wouldn't stop on  
25 that account. I didn't do this to stop a trial. I just thought  
26 it should be known. 

27 THE COURT: Well, for instance, now if I strike that from  
28 the record, as I have, you're going to have to deal with just

1 the evidence that you have.

2 JUROR DOXEY: Right.

3 THE COURT: Can you go ahead and apply the law that I've  
4 given to you to the evidence and the facts as you find them  
5 based upon considerations other than any reference in that  
6 exhibit or what was said by Mrs. LaPage?

7 JUROR DOXEY: Yes.

8 THE COURT: You are sure of that?

9 JUROR DOXEY: I'm positive.

10 THE COURT: Okay.

11 Any questions, counsel?

12 MR. NEGUS: No.

13 MR. KOCHIS: No, your Honor.

14 THE COURT: Thank you, Mrs. Doxey. Please go back and  
15 relax a few more minutes till I go through everybody.

16 (Juror Doxey was excused.)

17 THE COURT: Mrs. Bradley, have a seat please.

18 I have now taken an exhibit away from you for your  
19 consideration, told you to strike it from your memory, from the  
20 record and disregard it. Don't discuss it, consider it. Don't  
21 weigh it in the scales of evidence.

22 Do you have any trouble following that instruction?

23 JUROR BRADLEY: No.

24 THE COURT: Can you completely disregard that as if it  
25 were never read nor said nor reference made to any so-called  
26 mental thing?

27 JUROR BRADLEY: Yes.

28 THE COURT: Anything you want to tell us based upon that,

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1 the whole incident?

2 JUROR BRADLEY: I don't believe so.

3 THE COURT: Do you think the whole jury can do the same  
4 as you have indicated that you can?

5 JUROR BRADLEY: Yes, I do.

6 THE COURT: Including Mrs. Doxey?

7 JUROR BRADLEY: Yes.

8 THE COURT: She so indicated.

9 JUROR BRADLEY: Uh-huh.

10 THE COURT: Okay. Anything, gentlemen?

11 MR. NEGUS: No.

12 MR. KOCHIS: No, your Honor.

13 THE COURT: Please go back and send somebody else in.

14 JUROR BRADLEY: Thank you.

15 (Juror Bradley was excused.)

16 THE COURT: Mr. Woods.

17 JUROR WOODS: Yes, sir.

18 THE COURT: Have a seat, please.

19 Mr. Woods, did you draw any conclusions that we  
20 can't erase from your mind because of the mistake and  
21 inadvertence?

22 JUROR WOODS: No, I have not.

23 THE COURT: I have now ordered that exhibit removed from  
24 your presence, directed you to strike all reference to it, to  
25 disregard it, don't consider it in the scales of justice, so to  
26 speak, don't weigh it and discuss it in any manner. Can you  
27 follow that instruction?

28 JUROR WOODS: I will follow the instruction.

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1 THE COURT: Did you think you do so?

2 JUROR WOODS: I can do so.

3 THE COURT: Can you decide the case based on the evidence  
4 received in court and the law that I have given to you?

5 JUROR WOODS: I can.

6 THE COURT: Do you feel that the other jurors will be  
7 able to do the same?

8 JUROR WOODS: I hope we can work together.

9 THE COURT: Are you concerned with anybody being not able  
10 to disregard it outside?

11 JUROR WOODS: I am.

12 THE COURT: With whom?

13 JUROR WOODS: The black lady. I don't know her name so I  
14 said the black lady.

15 THE COURT: Well, she has assured us that she could. We  
16 are actually happy, sir, that it was brought out, as I will tell  
17 the rest of the jurors, at this stage. But you think that you  
18 can --

19 JUROR WOODS: I can.

20 THE COURT: Everybody can only speak what's in their own  
21 mind.

22 JUROR WOODS: Right. I can myself.

23 THE COURT: If there is nothing else, gentlemen, I will  
24 excuse him.

25 MR. NEGUS: No.

26 MR. KOCHIS: No.

27 THE COURT: Thank you, Mr. Woods. Please go back and  
28 send in the next.

1 JUROR WOODS: Okay.

2 (Juror Woods was excused.)

3 THE COURT: Mrs. Favero, were you strongly affected by  
4 any of the inadvertence or mistake?

5 JUROR FAVERO: No.

6 THE COURT: I have now removed the exhibit and ordered  
7 the record stricken, so to speak, of any reference to what came  
8 out of that transcript or the comments pertaining to it.

9 Can you put that completely aside and weigh and  
10 consider the rest of the evidence in deciding this case only?

11 JUROR FAVERO: Yes, sir.

12 THE COURT: And work just with the evidence that came out  
13 in court that remains and disregard that completely?

14 JUROR FAVERO: Yes.

15 THE COURT: Do you have any questions about your ability  
16 to do that?

17 JUROR FAVERO: No, I don't.

18 THE COURT: Do you think the rest of the jurors can?

19 JUROR FAVERO: I think so.

20 THE COURT: Anything?

21 MR. NEGUS: No.

22 MR. KOCHIS: No, your Honor.

23 THE COURT: Thank you. Please send in somebody else.

24 (Juror Favero was excused.)

25 THE COURT: Mr. Manthei?

26 JUROR MANTHEI: Yes.

27 THE COURT: Just a few questions, sir. Sometimes they  
28 say you can't unring a bell once something has happened, and yet

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1 that's what I have attempted to do.

2 I have ordered the exhibit taken from your  
3 presence, ordered the record stricken of anything that was read  
4 to you out of the exhibit and for you to disregard anything that  
5 was said pertaining to that.

6 Can I have you then put that aside completely and  
7 to determine and decide this case based only upon the remaining  
8 evidence?

9 JUROR MANTHEI: Yes, uh-huh.

10 THE COURT: And weigh and consider that in the light of  
11 the legal instructions that I have given to you determine the  
12 case?

13 JUROR MANTHEI: Yes.

14 THE COURT: Without any reference to that exhibit?

15 JUROR MANTHEI: Right.

16 THE COURT: Or what went on? You really feel that you  
17 can honestly do that?

18 JUROR MANTHEI: Yeah. I've already disregarded it and so  
19 had everybody else.

20 THE COURT: Do you think everybody else can disregard it  
21 too?

22 JUROR MANTHEI: I think so.

23 THE COURT: Anything?

24 MR. NEGUS: No.

25 MR. KOCHIS: No, your Honor.

26 THE COURT: Thank you, sir. Please send somebody else  
27 in.

28 (Juror Manthei was excused.)

1 THE COURT: Mrs. Lister?

2 JUROR LISTER: Yes.

3 THE COURT: Apparently you are the more erudite member of  
4 the panel who got into reading the exhibit before anybody else  
5 did or something like that; is that correct?

6 JUROR LISTER: That's right.

7 THE COURT: I'm going to thank you publically outside  
8 later on for bringing it out the at this time. Frankly, you  
9 know it's, certainly not the jurors' fault nor your fault nor  
10 Mrs. Doxey's fault. It's our fault for letting the matter get  
11 before you. But now I have ordered it stricken from the record,  
12 taken the exhibit away from you and told you to disregard it.  
13 Can you do that?

14 JUROR LISTER: Yes, I can.

15 THE COURT: As you look in your own conscience and look  
16 inwardly, can you honestly do that and then just decide the case  
17 on the evidence that is remaining and the law that was given to  
18 you?

19 JUROR LISTER: Yes.

20 THE COURT: Do you believe the rest of the panel can as  
21 well?

22 JUROR LISTER: Yes, I do.

23 THE COURT: Anything?

24 MR. NEGUS: No.

25 MR. KOCHIS: No, your Honor.

26 THE COURT: Please go back and send somebody else in.  
27 I'm going to have you all in open court after a bit, then let  
28 you go home.

0021775

1 JUROR LISTER: Thank you.

2 (Juror Lister was excused.)

3 THE COURT: Come in.

4 JUROR MERCHANT: Want me to sit?

5 THE COURT: Please, Mrs. Merchant. I've asked each one  
6 of them how strongly the inadvertence, so to speak, affected  
7 them. Did it effect you strongly that you wouldn't be able to  
8 disregard it hereafter?

9 JUROR MERCHANT: No.

10 THE COURT: I have told everybody when we were in open  
11 court that the exhibit is taken away from you. It got there by  
12 mistake and inadvertence. Now you are to disregard it put it  
13 out of your mind. Don't discuss it nor consider it or any of  
14 the comments pertaining to it. Can you honestly do that?

15 JUROR MERCHANT: Yes.

16 THE COURT: Are you confident that you can do so?

17 JUROR MERCHANT: Yes, I am.

18 THE COURT: Do you think the rest of the panel can as  
19 well?

20 JUROR MERCHANT: I do.

21 THE COURT: Anything?

22 MR. KOCHIS: No, your Honor.

23 MR. NEGUS: No.

24 THE COURT: Thank you. Please go back and send in  
25 another one.

26 (Juror Merchant was excused.)

27 THE COURT: Mr. Stesienko, I'm keep keeping you overtime  
28 today. It's about twelve after 4:00 o'clock. Bear with us a

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1 little longer please.

2 JUROR STESIENKO: Yes, sir.

3 THE COURT: I've basically been asking everybody how  
4 strongly they were affected by discussion about the stricken  
5 evidence, so to speak, the exhibit that was taken away from you.  
6 Did it leave a great impact upon you?

7 JUROR STESIENKO: No, sir, it did not.

8 THE COURT: Will you be able to follow my instruction now  
9 that the exhibit is taken away from you and you have been  
10 admonished to disregard it and any comments pertaining to it,  
11 can you completely disregard it?

12 JUROR SETSIENKO: Yes, sir, I sure can.

13 THE COURT: And decide the case only upon the evidence  
14 remaining and the law that I've given to you?

15 JUROR STESIENKO: Yes, sir.

16 THE COURT: Do you think you truly can?

17 JUROR STESIENKO: I surely can.

18 THE COURT: Do you think the other jurors can as well?

19 JUROR SETESIENKO I think so. I believe so. I think  
20 they have got it out of there hair. I think it will be  
21 forgotten.

22 THE COURT: Okay. Anything, gentlemen?

23 MR. NEGUS: No.

24 MR. KOCHIS: No, your Honor.

25 THE COURT: Thank you. Send in Mr. Nugent, I guess.

26 (Juror Stesienko was excused.)

27 THE COURT: Mr. Nugent, while you have been selected as  
28 foreman to preside over the deliberation, you are still simply a

1 co-equal member of the jury so I'm asking you the same questions  
2 I asked everybody else. And I have been trying to find out one  
3 way or another what impact the discussion of the now stricken  
4 exhibit had upon them individually. Did it leave any strong  
5 impact upon you?

6 JUROR NUGENT: No.

7 THE COURT: Is there anything there that you can't now  
8 put out of your mind?

9 JUROR NUGENT: No, not a bit, no.

10 THE COURT: I have taken the exhibit away from you, told  
11 you to disregard it, stricken it from the record as far as  
12 evidence is concerned as well as all the comments pertaining to  
13 it. And if we continue on you will be required to decide the  
14 case based upon the remaining evidence and the law that I've  
15 given to you.

16 JUROR NUGENT: Yes, sir.

17 THE COURT: Can you strictly follow that?

18 JUROR NUGENT: Yes, sir.

19 THE COURT: Do you believe the rest of the members of the  
20 panel can as well?

21 JUROR NUGENT: I do.

22 THE COURT: Any questions, gentlemen?

23 MR. NEGUS: No.

24 MR. KOCHIS: No, your Honor.

25 THE COURT: Mr. Nugent, would you go back.

26 (Juror Nugent was excused.)

27 THE COURT: And, bailiff, give me just a minute and we  
28 will have further instructions for you. Have them all wait just

021778

1 a brief time.

2 Counsel, anything further?

3 MR. KOCHIS: I'm going to have something further, not on  
4 Mr. Negus' motion but on what may take place when we are in open  
5 court, when we are in court and after we leave court.

6 THE COURT: Anything with reference to the motion first,  
7 Mr. Negus?

8 MR. NEGUS: Just I would note that according to Mrs.  
9 Doxey that there was at least mention made of being a former  
10 mental patient if not an escaped mental patient, so apparently  
11 that has come up. I think that again accentuates the need for  
12 mistrial.

13 THE COURT: Okay. Counsel, again I do not see the  
14 gravamen of the situation. I think it's harmless beyond a  
15 reasonable doubt. I just don't think it's going to effect those  
16 jurors at all, particularly considering their individual  
17 answers.

18 From the beginning I've thought that we had an  
19 intelligent jury here, a notch above the usual intellectual  
20 level of most jurors. And I think this jury is showing its  
21 maturity and intelligence and I think they can do it. I know  
22 the judges do it it all the time.

23 We are members of the community -- Well, I don't  
24 need to make argument. The appellate judges can do that if it  
25 gets that far.

26 All right. The motion for mistrial will remain  
27 denied. I'd like to pull them back into court before we -- and  
28 get this matter buried and over before we adjourn for the day.

1 Anything?

2 MR. KOCHIS: Two requests. One, that we do it without  
3 the press as you did the first instruction. Second, that you  
4 would impose a gag order on myself, Mr. Negus, the court  
5 personnel, that we not discuss what took place in chambers with  
6 the press so that it's not splashed all over the news.

7 THE COURT: With reference to those two requests, Mr.  
8 Negus, any objection to either?

9 MR. NEGUS: No, I don't. I have no objection to that.

10 In addition, I have been requested on innumerable  
11 occasions to comment upon jury's notes. Apparently one of the  
12 juror's notes made it at least in part to the press. I guess  
13 that was because it was read in open court.

14 THE COURT: Juror's note?

15 MR. NEGUS: The AP dispatch for -- that had to do with  
16 this morning's proceedings, talked about Mr. Gregonis, having to  
17 have the testimony Mr. Gregonis read.

18 I have made a point of saying whenever I have been  
19 asked --

20 THE COURT: I think that that's my -- I think that they  
21 asked me that and I told them that. I thought that was of no  
22 import.

23 MR. NEGUS: Well, I was going to suggest that perhaps we  
24 all -- I don't know whether gag orders are particularly  
25 appropriate -- we all take a voluntary denial not to mention any  
26 notes or the contents thereof to the press.

27 THE COURT: So let's be selective about it if they want  
28 more testimony reread. That is not going to cause any flap,

021780

1 that's matters --

2 MR. KOCHIS: Your Honor, the only problem I have with  
3 that is I got phone calls Tuesday and Monday after I had gone  
4 back to Upland informing me that it had been broadcast over the  
5 news that the jury wanted something, that all the lawyers were  
6 ordered back into court by 5:00 p.m.. I arrived home at 6:00 or  
7 6:30 and I feel that all of a sudden I violated my obligation to  
8 the court, and I'm trying to track someone down --

9 THE COURT: Counsel, what's that got to do with the point  
10 in issue?

11 MR. KOCHIS: That's how it starts.

12 MR. NEGUS: The point in issue, there is rumors  
13 circulating like mad around the courthouse. I got phoned today,  
14 asked if Mr. Cooper was trying to get married by people -- there  
15 has been all kind of statements by people that Mr. Cooper has  
16 allegedly made to the bailiffs, some of which were published in  
17 the Riverside paper. There is all kinds of stuff. The people  
18 out there in the press have nothing to do while Mr. Hedgecock's  
19 case and Mr. Cooper's case are out. They have to manufacture  
20 news. Anything that happens gets blown out of proportion.

21 I would suggest we take a self-denying ordinance  
22 not to discuss the contents. I think, I'm sure Mr. Kochis has  
23 done that. So far I have. And I would request it not be coming  
24 out selectively.

25 THE COURT: Okay. Okay.

26 Then the instructions that I gave you earlier, Mrs.  
27 Bennett, are stricken. I told her that she could give that kind  
28 of a note to the press that certain testimony was to be reread.



1 Any such communication with the jurors unless you get my  
2 specific approval shall not be given. And I won't say boo to  
3 them as well.

4 I'm not going to make a gag order counsel, but  
5 since Mr. Negus is apparently, except for my staff and all of  
6 you people in this courtroom, then don't speak or relate what  
7 went on in this hearing, you have no objection to it, I will  
8 include you and myself as well. Then all of us are forbidden  
9 from disclosing to the public or media what transpired at this  
10 hearing or future hearings with the jury unless it's expressly  
11 ordered or approved. I don't see that happening at the moment,  
12 but I never can see the future.

13 All right. Let's bring them back into open court.

14 While we are on the record, counsel, they did get  
15 ahold of you, I guess, and the jurors wanted -- you can go ahead  
16 and put them back in there.

17 THE BAILIFF: Okay.

18 THE COURT: Wanted to change their lunch period 12:30 to  
19 3:30 type of thing.

20 MR. KOCHIS: Is that every day from now now on?

21 THE COURT: I guess so.

22 MR. NEGUS: I have no objection.

23 THE CLERK: They are not going home at 3:30 today.

24 THE COURT: Dodie, make sure that the courtroom is  
25 closed, no press, public.

26 THE CLERK: Okay.

27 (Chambers conference concluded.)

28

1 (The following proceedings were held in  
2 open court in the presence of the jury:)

3 THE COURT: All right. We are back in open court, both  
4 counsel and Mr. Cooper.

5 I've got about four points I want to tell you  
6 about.

7 No. 1. I want to thank you, Mrs. LaPage, Mrs.  
8 Doxey, particularly for bringing the matter to our attention and  
9 bringing it on early on, letting us go into it and find out the  
10 depth of it and strike it and get it over with and buried and  
11 forgotten, hopefully so. There is nothing wrong with what  
12 anybody did. And I appreciate that and I'm glad it came out.  
13 It's over with now.

14 No. 2. Certainly can't blame the jurors for any of  
15 this. This is through our own inadvertence. I've never had a  
16 case with 780 some odd exhibits, something like that, in 19  
17 years on the bench, so it's understandable. And counsel and I  
18 discussed it we tried to avoid it, but it happened. I regret it  
19 but we will move on.

20 Ladies and gentlemen, you have all assured me that  
21 you can disregard what was said and to decide this case only  
22 upon the evidence received in court sans that bit of withdrawn  
23 evidence that is out now, that's stricken, disregard it and any  
24 comments made pertaining to it, and go ahead and work and  
25 deliberate considering only the evidence that was received in  
26 court and no other such information or any other information,  
27 together of course with the instructions of law that I've given  
28 to you.

021703

1           While I can't fault you in any way, in an abundance  
2 of caution let me spell out for you once again the admonition.  
3 I'm not going to you every time you break for lunch or take a  
4 recess or out in the corridors or something, if that's what  
5 you're doing in the afternoon, and I'm not giving you that  
6 admonition, so don't get blase or too comfortable about it in  
7 any way don't let down your guard. Be particularly careful at  
8 the later stages. Don't discuss the case outside of that  
9 deliberation room with any person don't let anybody make a  
10 comment to you about it. So maintain your relationship in other  
11 respects, but just don't talk about the case or make any  
12 comment.

13           I'm sorry I have held you late. Break it at this  
14 time. Return tomorrow morning. Are you coming in at 9:30?

15           JUROR NUGENT: Yes, sir.

16           THE COURT: All right. We will see you then. Continue  
17 with your deliberation.

18           Good night everybody. See you tomorrow, or be on  
19 call.

20           Off the record.

21           (The following proceedings were held in  
22 open court out of the presence of the jury:)

23           MR. NEGUS: Judge, before you -- I don't know if this has  
24 to be on the record. If the jury remains out, I mean, if they  
25 remain deliberating for any length of time are you going to want  
26 us to stay down here, you know, all next week?

27           My office is down many attorneys and they would  
28 much like if I could go back and try and set it right for a

021784

1 period of time. I can get -- I timed it. I can get down from  
2 my office to the court in two hours and five minutes.

3 THE COURT: Without some judge getting involved,  
4 hopefully.

5 Well, I'm sympathetic to the request and yet I  
6 thought this was very important today.

7 MR. NEGUS: I agree.

8 THE COURT: And I needed you.

9 MR. NEGUS: But I could have been -- if I had been in my  
10 own office --

11 THE COURT: You would have been able to get here?

12 MR. NEGUS: I would have been here at the same time any  
13 way.

14 THE COURT: All right. Mr. Kochis, can you and Mr. Negus  
15 both assure us that you will be reachable by telephone at all  
16 times in your office in Ontario?

17 MR. KOCHIS: Yes.

18 THE COURT: All right. Then we will try and take care of  
19 things and keep you informed.

20 MR. NEGUS: Okay. I will -- I have some movers coming to  
21 move my stuff tomorrow morning, but I will call before I leave  
22 and be back in Ontario tomorrow afternoon if that's agreeable.

23 THE COURT: Okay.

24 (Adjournment.)  
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(Jury in deliberation on February 14 and 15, 1984;  
nothing reported.)

0021706

1 SAN DIEGO, CALIFORNIA, TUESDAY, FEBRUARY 19, 1985 1:30 P.M..

2 --oo0oo--

3  
4 (Chambers conference reported.)

5 THE COURT: We are in chambers, Mr. Negus, Mr. Kottmeier,  
6 Mr. Kochis and Mr. Cooper, Detective Arthur and Mr. Forbush.

7 Mr. Negus.

8 MR. NEGUS: Yeah. I just wanted to ask, assuming that  
9 there is going to be a penalty phase, when would we start,  
10 before we tell anything to the jurors?

11 THE COURT: I just really --

12 MR. KOCHIS: Why don't we take the verdict.

13 THE COURT: I'm not in the mood to presume at the moment.  
14 It was my intent to anticipate them both ways. If by chance we  
15 do, then, counsel, I will come back and discuss it with you. I  
16 will put the jurors back in the deliberation room and then we  
17 will come back here and discuss it. Let's not take the time to  
18 discuss it right now. It seems to be presumptive. Frankly, I'm  
19 not sure one way or the other.

20 MR. NEGUS: Once we get out there we are liable to be  
21 mobbed by the press or something or other. I would -- I was  
22 going to make two suggestions, if you want.

23 THE COURT: I would rather take it up later. We have got  
24 enough bailiffs to keep you from being mobbed and bring them  
25 immediately back to chambers, right? As soon as we follow the  
26 jurors out, while Ernie takes the jurors out you can have Mr.  
27 Cooper and his counsel get up and escort them back here as I  
28 leave the bench.

021787

1 THE BAILIFF: Very good.

2 THE COURT: We will prevent that. Then we will go back  
3 into open session and I will say it for the benefit of the media  
4 and public.

5 MR. NEGUS: Okay.

6 THE COURT: Okay. Thank you.

7 (Chambers conference concluded.)

8

9 (The following proceedings were held in  
10 open court out of the presence of the jury:)

11 THE COURT: Ladies and Gentlemen, good afternoon.

12 Just a couple of brief words before we bring the  
13 jurors in. I understand we have a verdict in the People versus  
14 Kevin Cooper case, but when that verdict is read and received, I  
15 would simply caution you all against any demonstrations or  
16 exclamations that might be disruptive in any way of the judicial  
17 process. So, please, try and restrain yourself to where we can  
18 move on in a reasonably orderly fashion.

19 Secondly, to the media here, there's still a  
20 possible second phase to this trial. I don't know how the  
21 verdicts are going to turn out, so please do not yet take any  
22 pictures of the jurors. When the last verdict is received, at  
23 that time we may modify it to where you can go take pictures of  
24 the jury; but until then please do not.

25 Bailiff, you can bring the jurors in, please.

26

27 (The following proceedings were held in  
28 open court in the presence of the jury:)

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1 THE COURT: Counsel, it appears that all the jurors are  
2 present and in their respective seats; none of the alternates  
3 are present.

4 The Court notes the defendant is present with all  
5 three counsel as mentioned before.

6 Good afternoon, Mr. Nugent. Are you still the  
7 foreman?

8 MR. NUGENT: Yes, sir.

9 THE COURT: Has the jury arrived at a verdict?

10 MR. NUGENT: We have.

11 THE COURT: Would you hand all the forms to the bailiff  
12 please.

13 All the verdicts appear to be properly signed and  
14 dated by the foreman.

15 The clerk will kindly read the verdicts.

16 THE CLERK: "Superior Court of California, County of San  
17 Diego. The People of the State of California,  
18 plaintiff, versus Kevin Cooper, defendant.

19 "Verdict: II-A. Case No. OCR 9319.

20 "We, the jury in the above-entitled action,  
21 find the defendant, Kevin Cooper, guilty of the  
22 crime of Murder in the First Degree, as charged in  
23 the Information as to Count II.

24 "Dated: February 19, 1985.

25 "Signed: Frank Nugent, Foreman."

26 Same title, same cause.

27 "We, the jury in the above-entitled action, find  
28 the defendant, Kevin Cooper, guilty of the crime

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1 of Murder in the First Degree, as charged in the  
2 Information as to Count III.

3 "Dated: February 19, 1985.

4 "Signed: Frank Nugent, Foreman."

5 THE COURT: What is the verdict form on that one?

6 THE CLERK: I'm sorry. Verdict Form III-A.

7 THE COURT: Thank you. Read the form, too, please.

8 THE CLERK: Same title, same cause. Verdict: IV-A.

9 "We, the jury in the above-entitled action, find  
10 the defendant, Kevin Cooper, Guilty of the crime  
11 of Murder in the First Degree, as charged in the  
12 Information as to Count IV.

13 "Dated: February 19, 1985.

14 "Signed: Frank Nugent, Foreman."

15

16 Verdict 5-A: Same title, same cause.

17 "We, the jury in the above-entitled action,  
18 find the defendant, Kevin Cooper, Guilty of the  
19 crime of Murder in the First Degree, as charged in  
20 Information as to Count V.

21 "Dated: February 19, 1985.

22 "Signed: Frank Nugent, Foreman."

23

24 Same title, same cause. Verdict: "Special  
25 Allegation - True.

26 "We, the jury in the above-entitled action, find  
27 the allegation that the defendant has in this  
28 proceeding been convicted of more than one offense

1 of murder in the first degree to be true.

2 "Dated: February 19, 1985.

3 "Signed: Frank Nugent, Foreman."

4

5 Same title, same cause: Verdict VI-A.

6 "We, the jury in the above-entitled action, find  
7 the defendant, Kevin Cooper, Guilty of the crime  
8 of Attempt to Commit the Crime of Murder in the  
9 First Degree as charged in the Information as to  
10 Count IV.

11 "Dated: February 19, 1985.

12 "Signed: Frank Nugent, Foreman."

13

14 Same title, same cause. Verdict: "Great Bodily  
15 Injury Allegation as to Count VI - True.

16 "We, the jury in the above-entitled action, find  
17 the allegation that in the commission of the above  
18 offense, the said defendant, Kevin Cooper, with  
19 the intent to inflict such injury -- such bodily  
20 injury, inflicted great bodily injury on a person  
21 other than an accomplice, to wit, Joshua Ryen, to  
22 be true as to Count VI.

23 "Dated: February 19, 1985.

24 "Signed: Frank Nugent, Foreman."

25

26 Ladies and Gentlemen of the Jury, were these and

27 are these your verdicts?

28 THE JURY: (All responded in the affirmative.)

1 THE COURT: All the other verdict forms appeared to be  
2 unsigned and undated.

3 I'd like to poll the jurors and have the clerk call  
4 your names individually. It appears from the reading and from  
5 the verdicts that you found the defendant guilty of all four  
6 counts of murder, found the special allegation that he has in  
7 this proceeding been convicted of more than one count of murder  
8 to be true, that you found him guilty of one count of attempted  
9 murder, and the great bodily injury allegation in connection  
10 with that count likewise to be true.

11                   If you so voted in your final vote for each and  
12 every one of the verdicts mentioned as read by the clerk, when  
13 your name is called, would you answer yes or affirmatively. If  
14 you differ in any aspect from any one of those verdicts when  
15 your name is called, would you answer negatively please in some  
16 manner.

17 Kindly poll the jurors.

18 THE CLERK: Rita Lister?

19 MS. LISTER: Yes.

20 THE CLERK: Catherine Lopez?

21 MS. LOPEZ: Affirmative.

**22 THE CLERK: Frank Stesienko?**

23 MR. STESIENKO: Affirmative.

**24 THE CLERK: Janet Favero?**

25 MS. FAVERO: Affirmative.

**26 THE CLERK: Jetalyn Doxey?**

27 MS. DOXEY: Affirmative.

28 THE CLERK: Neville Sawyer?

1 MR. SAWYER: Affirmative.  
2 THE CLERK: Shirley LaPage?  
3 MS. LaPAGE: Affirmative.  
4 THE CLERK: Frank Nugent?  
5 MR. NUGENT: Affirmative.  
6 THE CLERK: Marilyn Bradley?  
7 MS. BRADLEY: Affirmative.  
8 THE CLERK: Franklin Manthei?  
9 MR. MANTHEI: Affirmative.  
10 THE CLERK: William Woods?  
11 MR. WOODS: Affirmative.  
12 THE CLERK: Donna Merchant?  
13 MS. MERCHANT: Affirmative.  
14 THE COURT: Counsel, it appears that the verdict was  
15 unanimous.  
16 Would you desire any further polling?  
17 MR. NEGUS: No.  
18 THE COURT: The clerk will kindly record the verdicts and  
19 each of them as read.  
20 Gentlemen, would you waive the rereading of the  
21 verdicts as recorded?  
22 MR. NEGUS: Yes.  
23 MR. KOTTMEIER: Yes.  
24 THE COURT: Thank you.  
25 Ladies and gentlemen, we have some discussion to do  
26 as far as logistics and timing of the second phase that I  
27 indicated to you. I need to do that with counsel in chambers.  
28 I would appreciate it if you would kindly go back

1 to the deliberation room for a few minutes till the dust settles  
2 and we have had a chance to draw our breath and discuss this  
3 matter, then I will bring you back in open court and we will  
4 give you further instructions.

5 Following that, the next time you go back to that  
6 deliberation room, hopefully, you will have your alternates with  
7 you once again.

8 Would you step back with the bailiff please.

9 If you would bring Mr. Cooper and counsel. The  
10 Court will be in recess into chambers for just a moment.

11

12 (Chambers conference reported.)

13 MR. NEGUS: Your Honor, could Mr. Cooper have his  
14 handcuffs removed? He has never done anything to deserve  
15 being --

16 THE COURT: He has got the leg brace on. He has never  
17 been handcuffed before. Why are we changing the procedure now?

18 THE BAILIFF: It came down from the sergeant to myself.  
19 I was just following procedure. I can take them off whenever  
20 the Court wishes.

21 THE COURT: Is the sergeant going to be all upset if I  
22 tell you to take them off?

23 THE BAILIFF: Whatever the Court wishes.

24 THE COURT: Mr. Cooper, you are in full control, are you,  
25 sir?

26 THE DEFENDANT: Yes, sir.

27 THE COURT: Okay. Take them off, please.

28 Mr. Forbush, would you stand between the reporter

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1 and Mr. Cooper please.

2 Thank you. Just have a seat if you would, sir.

3 All right. Now, we do have a second phase. I've  
4 started another case but I can abort it yet, we haven't started  
5 with receipt of evidence.

6 MR. KOCHIS: I've made plane reservations and hotel  
7 reservations for tomorrow to fly approximately five witnesses in  
8 tomorrow and to start the penalty phase on Thursday.

9 MR. NEGUS: My request was going to be either -- it's  
10 difficult -- that we start it tomorrow, with witnesses tomorrow,  
11 or go over to Monday.

12 MR. KOCHIS: The problem I have with that is the plane  
13 doesn't arrive until tomorrow afternoon, so I can't start it  
14 tomorrow and Monday. Two of the witnesses have a tentative  
15 conflict with Monday. They are available Tuesday, but not  
16 Monday. I'm confident I can put them all on in one day. If we  
17 started Thursday morning, I would anticipate opening statement  
18 and the presentation of the People's case to be done on Thursday  
19 by 4:00, have the witnesses back on the plane on Friday.

20 MR. NEGUS: As long as we don't work Friday, that's okay  
21 with me.

22 MR. KOCHIS: The only problem I would have with that is  
23 if there was any spillover from my witnesses. I wouldn't want  
24 to keep them here from Pittsburgh Friday, Saturday and Sunday.  
25 I'm willing to go as late as we have to Thursday, 6:00, 7:00,  
26 8:00 o'clock to finish with them.

27 THE COURT: Mr. Negus, I assume you have a good reason  
28 for that; is that right?

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1 MR. NEGUS: Yes.

2 THE COURT: I'm not going to press you for it.

3 MR. NEGUS: As you know, I have taken on other  
4 administrative duties as this case comes on and I am reasonably  
5 well committed for Friday afternoon because my people in my  
6 office have been understaffed by three attorneys for a long  
7 period of time and they have just run out of -- we have run out  
8 of people.

9 THE COURT: Friday is a big day in Ontario.

10 MR. NEGUS: Friday is a big day in Ontario, and I have  
11 taken on some other cases I need to be there for.

12 THE COURT: I probably need to touch base there myself.

13 MR. KOCHIS: And I've made personal contact with three of  
14 the witnesses; the other two I've left messages with at their  
15 office. I am confident they will be here Thursday. I would  
16 have to step outside to make phone calls to guarantee that.

17 MR. NEGUS: Maybe we could do that. I would like to call  
18 Mr. Cooper's mother so she hear's about the verdict from myself  
19 rather from the press.

20 THE COURT: Okay. You want another few minutes recess  
21 before we resume then?

22 MR. NEGUS: Could I use your phone? They be --

23 THE COURT: So that's the plan then. We will adjourn now  
24 and take up with opening statements and the presentation of your  
25 evidence on Thursday. Hopefully you'll finish that day.

26 Mr. Negus, you have some witnesses, do you not?

27 MR. NEGUS: Yes, I have. My witnesses will take less  
28 than an hour and a half all told and we can have them all here.

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1 THE COURT: I'd like your jury instructions then on  
2 Thursday and we can have a preliminary discussion about them on  
3 Thursday.

4 MR. KOCHIS: I believe you have some of them.

5 THE COURT: Any others, any others that you may have.

6 Mr. Negus, the same to you. And I will honor those  
7 requests then and we will start on Thursday. I will get rid of  
8 this other case after I finish selecting a jury on it and we  
9 shall go in that fashion. Make your phone call.

10 (Chambers conference concluded.)

11

12 (The following proceedings were held in  
13 open court in the presence of the jury:)

14 THE COURT: Ladies and Gentlemen, as we told you at the  
15 beginning of the jury selection process, this case could  
16 possibly have two phases. By your verdicts you have decided  
17 that there shall be a second or penalty phase.

18 I've discussed it with counsel, the matter of  
19 logistics, the duration expected, and that sort of thing. And  
20 what we're going to do now, ladies and gentlemen, is excuse you  
21 until Thursday, today being Tuesday, not tomorrow, but Thursday  
22 morning at the hour of 9:30 when we would ask you to return. We  
23 will not work on Friday, however, because of other matters. So,  
24 we will work Thursday and Monday and perhaps send the matter to  
25 you for the second phase on Monday or Tuesday of next week.

26 It's not going to be a long and protracted matter  
27 as far as we know at this particular time. I will later give  
28 you additional jury instructions that will assist you in making

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1 your determination at the second phase of it. One of the  
2 instructions that I will give you is that you may, in that  
3 phase, the penalty phase, consider the evidence that was  
4 received in this phase and thus you may have need yet for your  
5 notebooks. And I mention this now because I see a couple of you  
6 have your notepads with you. I would frankly suggest that you  
7 leave them with the bailiff. He would keep them private and  
8 secure for you and redistribute them at the next time you go  
9 back into deliberation or the next session of trial, in fact,  
10 Thursday, rather than take them home, but that's up to you. But  
11 you may well have need for them again.

12 Now, ladies and gentlemen, as you can see, there  
13 are a lot of people that are interested in this case and there's  
14 some media coverage. Do your best again not to watch the news  
15 on television, do not read about the case yet in the newspapers.  
16 If you can possibly avoid it, avoid those matters. When it's  
17 all over somebody is going to furnish you probably with all the  
18 clippings that you've missed so you will be able to catch up on  
19 the news. And I've also indicated to the media when the last  
20 verdict is received, why, perhaps then we will let them take  
21 your picture so you can go look at yourself on television, but  
22 that's not to be considered at this time.

23 So, try to avoid all those things. Do not yet talk  
24 anymore about this case. Don't let anybody discuss this case  
25 with you. Keep -- divorce yourself free from outside influence  
26 until we conclude the second phase.

27 Other than that, I know you must be tired and I  
28 want to thank you for your services so far. The next time we

00217900

1 come back into session the clerk will have called all the  
2 alternates.

3 I know Mrs. Aguinaga was present, I doubt if there  
4 was any others. But they will hopefully all be sitting up in  
5 their seats on Thursday.

6 Thank you, ladies and gentlemen. Will you go with  
7 the bailiff out here.

8 Counsel, Mr. Cooper, we will see you Thursday  
9 morning. Thank you.

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11 (Adjournment.)

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0021799

1 SAN DIEGO, CALIFORNIA. THURSDAY, FEBRUARY 21, 1985 9:20 A.M..

2 --oo0oo--

3  
4 (Chambers conference reported.)

5 THE COURT: The defendant is present, in chambers, with  
6 counsel. Good morning.

7 MR. KOCHIS: We have three major issues to deal with this  
8 morning.

9 First will involve whether we have properly given  
10 Mr. Negus notice pursuant to Penal Code Section 190.3 of our  
11 intention to introduce evidence that Kevin Cooper was lawfully  
12 confined at Mayview, and that he escaped from that institution  
13 on October the 8th of 1982.

14 The second issue will involve the jury, and,

15 The third issue is rather simple. It involves the  
16 request of the first three prosecution witnesses that the  
17 extended media coverage not pertain to them, the young girl that  
18 was raped in Pennsylvania, the owner of the home that was  
19 burglarized, and Dr. Meyers, should she get on the stand and  
20 testify.

21 They would also ask permission to leave the Court  
22 so that they not be mobbed outside. So, I would like to bring  
23 them in and out of the courtroom through the back door.

24 MR. NEGUS: The last one is the easiest. I have no  
25 objection to any of that.

26 THE COURT: The possibility that Joshua will testify in  
27 this phase. Is that what you said? Whose the third one.

28 MR. KOCHIS: Dr. Meyers is one, Robert Heath, who is a

0218000

1 resident of Allegheny County is the second witness. Lori  
2 Strahl, S-t-r-a-h-l, is the woman that was kidnaped, abducted,  
3 assaulted and raped by Mr. Cooper.

4 THE COURT: Let's -- as far as the rape victim, she's no  
5 problem. As far as the two people, what's sensitive about it?

6 MR. KOCHIS: Dr. Meyers is a director of the facility in  
7 Mayview. She's currently being sued, as is the institution, for  
8 negligence, and they don't want -- she does not want her picture  
9 on the news. She does not want the extended coverage to pertain  
10 to her, nor does her attorney wish that the extended coverage  
11 pertain to her.

12 THE COURT: Robert Heath.

13 MR. KOCHIS: Robert Heath is a resident of Allegheny  
14 County, it's his home that Cooper entered and burglarized and  
15 the home from which Lori Strahl was abducted, has some  
16 connection with the Mayview Hospital, and he does not wish his  
17 picture placed in the television or the extended media coverage  
18 to apply to him.

19 THE COURT: You didn't talk them into this, did you, Mr.  
20 Kochis?

21 MR. KOCHIS: They came out with it, they have very strong  
22 feelings.

23 MR. NEGUS: I can assure you from having talked to Dr.  
24 Meyers and having contact with the attorneys representing Mrs.  
25 Strahl, that it came from them.

26 THE COURT: Okay. We will honor it. No pictures. Next.

27 MR. KOCHIS: It is our intention to mention in our  
28 opening statement and to introduce evidence through the

021801

1 testimony of a single witness, that on the 8th of October of  
2 1982. Mr. Cooper was confined at the Mayview State Hospital.  
3 The hospital is located approximately one mile from the  
4 residence of Robert Heath, the residence from which Lori Strahl  
5 was abducted; that he left the institution without permission.

6 THE COURT: I have your notice under 190.3 before me.  
7 What number is that, do you know?

8 MR. KOCHIS: It is -- the only reference to it would be  
9 to the --

10 MR. NEGUS: No. 6.

11 MR. KOCHIS: 6. Lori Strahl. And it is not specifically  
12 referred to in that document.

13 However, we have given Mr. Negus notice, both  
14 orally and in writing, of our intention to introduce that type  
15 of evidence at the trial, on the -- I believe the 24th of July  
16 of 1984, Mr. Kottmeier filed a six page document with the Court,  
17 Points and Authorities in Argument in Support of Admitting  
18 Evidence of Other Crimes, and on Page 2 of that document, he  
19 specifically mentions the Mayview escape incident as it ties  
20 into it, and it was our intention in these points and  
21 authorities to offer evidence of the offense at the guilt phase,  
22 but, in our discussion on that issue on July the 25th of 1984,  
23 and July the 26th of 1984, we made reference to our intention to  
24 introduce that at the penalty phase, with Mr. Kottmeier on the  
25 26th of July of 1984, speaking, on Page 5644:

26 "Your Honor, this issue has been prepared. Mr.  
27 Forbush has been back to Pennsylvania. This is  
28 not an area that the defense is offering or trying

02218002

1 to in effect have set aside so they don't have to  
2 prepare. It is obvious because if we should reach  
3 a penalty phase this particular incident is going  
4 to be highly relevant under the state of the law  
5 at this time."

6 MR. NEGUS: I believe we were talking, however, at the  
7 time, about the the Pennsylvania rape. Maybe I'm wrong.

8 MR. KOCHIS: We were referring to the -- on Page 5636:

9 "THE COURT: I believe we're ready to go on to Item  
10 6 on Mr. Negus tentative list of motions, which  
11 is the motion regarding evidence, admitting  
12 evidence of other bad acts, Pennsylvania rape and  
13 escape charges."

14 And, your Honor, I do not have at the moment the  
15 pages which deal with the Court's ruling on our motion pursuant  
16 to 190.3, exactly what we discussed because Mr. Negus phoned me  
17 this morning at twenty to 9:00 and told me for the first time  
18 that he was concerned about this type of evidence.

19 I have discussed my witness list of the penalty  
20 phase with him in the past, and they have included Dr. Meyers,

21 MR. NEGUS: That was --

22 THE COURT: Excuse me. Not -- there is no dispute of  
23 what you had adequate notice of Lori Strahl and the rape.

24 MR. NEGUS: Agreed.

25 THE COURT: It is the scope he wants to go into before  
26 that, to the escape from the mental institution.

27 MR. NEGUS: Yes. I was looking over the statements that  
28 he filed. I have it, it is a four page document. I have --

021803

1     apparently you have it as well, and I was just trying to find  
2     the exact wording of the notice that he was -- he purported to  
3     give me and I went through and it didn't have it.

4             Therefore, that is, I did that last night and  
5     that's why I wondered about it, and it occurred to me also that  
6     the reason why they probably omitted it from this particular  
7     list is because this particular list is tied very closely to the  
8     statutory aggravating and mitigating factors which are found in  
9     Penal Code Section 190.3 and the escape, as near as I can make  
10    it out, doesn't fall into any of these.

11            THE COURT: I wondered about that.

12            Activity involving force or violence or threats to  
13    use force and violence. The newspaper accounts, as I recall, of  
14    the escape from Pennsylvania, was he walked out.

15            MR. KOCHIS: Let me address that question with two  
16    concerns:

17            First, his escape is not complete until he gets  
18    away from the institution. He gets a mile from the institution,  
19    breaks into a home, tries to hotwire a car, he's unable to do  
20    that, and he abducts the first person that appears at the car,  
21    forces them into their car.

22            THE COURT: Who is that?

23            MR. KOCHIS: Lori Strahl. And leaves with her and drives  
24    back to the Pittsburgh area where he lives. He's still in the  
25    process at 8:15, 45 minutes away from the institution, a mile  
26    away from the institution, of completing his escape.

27            THE COURT: Counsel, you contend that he hasn't yet  
28    escaped a mile away from it?

021804

1 MR. KOCHIS: Yes. He's in the process of completing his  
2 escape.

3 The second area is, your Honor, is evidence.

4 THE COURT: You know, he could have headed for California  
5 and in Kansas gotten involved in some criminal act and you say  
6 he's still in the process of escaping?

7 MR. KOCHIS: No, I wouldn't.

8 THE COURT: It is a matter of degree.

9 MR. KOCHIS: That is true.

10 THE COURT: In this case I'm more inclined to construe  
11 strictly, counsel.

12 MR. KOCHIS: The other issue, your Honor, is the burglary  
13 that we're going to go into today is not a prior conviction. It  
14 is not really an act of violence, but it is admissible because  
15 it is evidence of the identity of the man that abducted and  
16 raped Lori Strahl.

17 MR. NEGUS: We're willing to stipulate to the identity of  
18 Mr. Cooper as that person.

19 I have told Mr. Kochis that I am willing to  
20 stipulate to the defendant, to the fingerprints, to the  
21 serological evidence. There is no dispute as to the identity of  
22 the perpetrator. I do not intend to ask all the questions about  
23 the rape, unless something totally out of left field comes in  
24 with some witnesses, we do not the dispute it was Mr. Cooper as  
25 the person who perpetrated the attack on Mrs. Strahl.

26 MR. KOCHIS: My purpose for introducing Mayview is to put  
27 him in the area. show motive, to show plan, to show the reason  
28 for which he did these acts.

021805



1 MR. NEGUS: That's not in issue. We admit the act, we're  
2 willing to stipulate to them.

3 MR. KOCHIS: If, at the end -- let me offer the Court  
4 this suggestion then.

5 If, at the end of the presentation of my witnesses,  
6 I believe Mr. Negus is going to stipulate to chain on the  
7 clothing and the sex kit, chain on the finger and known fingers.

8 MR. NEGUS: Uh-huh.

9 MR. KOCHIS: If he's willing to stipulate that the man  
10 that attacked Lori Strahl was his client, I will stay away from  
11 that.

12 MR. NEGUS: Fine. So stipulated.

13 THE COURT: Counsel, I'm inclined to sustain the  
14 objection as far as going into the escape from Mayview for the  
15 reason enunciated.

16 MR. KOCHIS: Then I am going to need about five minutes  
17 to reorganize my opening statement because it tied the  
18 institution with Mr. Cooper with the community, with the house,  
19 with the woman, and I would be concerned that I would stick to  
20 that format if I am not given time to readjust it.

21 THE COURT: Okay.

22 MR. KOCHIS: I need time to explain.

23 THE COURT: We have now handled two of the three matters  
24 and the other one I can't recall.

25 MR. KOCHIS: The jury.

26 THE COURT: What about the jury?

27 MR. NEGUS: I received a phone call last night from an  
28 attorney, who I promised I would not reveal the identity of at

00218006

1 the present time. This attorney is an attorney who is known to  
2 me and I believe is known to everybody.

3 THE COURT: Reliable informant.

4 MR. NEGUS: Reliable confidential informant.

5 The attorney told me that a person, whose identity  
6 she would not completely reveal to me, was at the commissary at  
7 March Air Force base on last weekend, that is the weekend before  
8 the verdict in this case; a person known to the attorney's  
9 informant as a male juror, and that is all the information that  
10 I was able to obtain in this particular case, was at the  
11 commissary engaged in a conversation about the Cooper case.

12 In that particular conversation I was able to get  
13 from the attorney the following elements that were recalled  
14 having been said.

15 First off, the juror had a family member who saved  
16 all of the press clippings from the Riverside Press Enterprise.

17 THE COURT: Nothing wrong with that. I suggested it.

18 MR. NEGUS: Just hear me out. That I am not sure whether  
19 it was all the press clippings from the Riverside Press  
20 Enterprise from the very beginning or he means all the press  
21 clippings during the trial or during the -- from the get-go.  
22 But at least that's the way it was phrased to me.

23 I am a subscriber to the Riverside Press Enterprise  
24 and the Riverside Press Enterprise has carried daily stories on  
25 the progress of the case. Most of them have come from the  
26 Associated Press and have been the same stories with different  
27 headlines that appeared in the Sunday Daily Report, which you  
28 are familiar with. A few have been stories that were written by

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1 Ronnie Smith, a correspondent from the Riverside Press  
2 Enterprise, and one of those stories which appeared the first  
3 weekend --

4 THE COURT: Excuse me, just a moment, please.

5 Where are our jurors now?

6 THE BAILIFF: In the front hallway.

7 THE COURT: We talked last week about bringing the people  
8 from Pennsylvania I said into chambers. I found out just before  
9 we have commenced this session that they're in the jury room  
10 where the jury normally is. I consider that the jury is more  
11 important than those witnesses.

12 Let's get the jurors away from the hallway in some  
13 manner and find them another jury room. Remove those people  
14 some place else. Get them away from the environment around the  
15 media outside, please.

16 MR. NEGUS: Last Saturday, the Saturday after the jury  
17 first went out, not last weekend, there appeared in the  
18 Riverside Press Enterprise, an article which was titled  
19 something -- an article entitled something, "Cooper expects to  
20 be found guilty", or something like that. It contained a quote  
21 from Mr. Cooper which was that he expected to be found guilty by  
22 the jury "... because this is America."

23 It further went on to say in the article, right  
24 after that, that Cooper has never denied his innocence, the  
25 statement.

26 THE COURT: Cooper has what?

27 MR. NEGUS: Wait. Cooper has never, something. Cooper  
28 never said he was innocent. The statements in the article were

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1 attributed to the bailiff, Mr. Ricks. There was a picture of  
2 Mr. Ricks in the article. I have that article back in Ontario,  
3 I don't have them with me here. I can bring it in.

4 Okay. Enough. Back to the conversation. The  
5 juror further indicated that the juror had read the articles in  
6 the Riverside Press Enterprise, which had been saved for them by  
7 the family; that the juror was quite angry at the press  
8 clippings, and the juror said something to this effect. "I  
9 don't care what you people read in the papers, it was different  
10 in court. We're going to go hang the guy."

11 THE COURT: Mr. Kochis.

12 MR. KOCHIS: I got the phone call at twenty to 9:00. I  
13 have never heard --

14 THE COURT: Phone call from who?

15 MR. NEGUS: From me.

16 MR. KOCHIS: Mr. Negus. It's the first I have heard of  
17 this. But I believe Mr. Negus' suggestion is to bring the male  
18 jurors into chambers one at a time and ask any of them if they  
19 were at March Air Force base over the weekend.

20 My problem is, it is quadruple hearsay from sources  
21 that I have no idea as to their reliability. Throughout the  
22 course of this trial I have heard virtually every rumor  
23 imaginable, to the jury has found him not guilty, so I can't  
24 place any credence in the information whatsoever.

25 THE COURT: Is that what you are asking for?

26 MR. NEGUS: Yes. I mean, I have no other way at the  
27 present time.

28 THE COURT: There was a time for reconsideration for

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1 modification, for hearing, for a motion for new trial, it is  
2 automatic in this case. You can make your motion in the usual  
3 manner supported by the usual affidavits, declarations,  
4 clippings and so forth.

5 MR. NEGUS: It would also seem to be grounds for a  
6 mistrial as to the penalty phase.

7 THE COURT: Oh boy.

8 MR. NEGUS: If proven. Mrs. Kochis, I have no way of  
9 knowing if the -- whether it is true or not. I cannot -- I am  
10 hoping -- I have asked the attorney to try and make available to  
11 me that person, or make available their identity or whatever,  
12 but --

13 THE COURT: Where did the conversation allegedly occur  
14 at?

15 MR. NEGUS: The commissary at March Air Force Base.

16 THE COURT: Where are our jurors now?

17 THE BAILIFF: Ernie was trying to find them a room. As  
18 far as they know, they are not in the hallway.

19 THE COURT: How come you couldn't use the District  
20 Attorney's office in this vicinity.

21 MR. KOCHIS: It is ten minutes away. It would be a ten  
22 minute delay between each witness.

23 THE BAILIFF: Would you like me to find out their  
24 location for sure?

25 THE COURT: Let's take the jurors someplace else.  
26 There's got to be another --

27 MR. KOCHIS: I can get the witnesses out of the jury  
28 room.

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1 THE COURT: Let's get these witnesses out of there and  
2 put them in some place else. Let's do it now right away and  
3 let's put the jurors back in familiar surroundings, get them  
4 back here as quickly as possible.

5 How about, once we get the jurors back in the jury  
6 room, without exposing any of this.

7 THE BAILIFF: Your Honor, the jurors are put away in the  
8 jury room, the witnesses are in this jury room over here.

9 THE COURT: Leave them in there for a minute.

10 How about using the machine in the jury room and  
11 letting me inquire from the jurors if there is anyone of them  
12 that has been shopping at the commissary at March Air Force Base  
13 in the last two weeks.

14 MR. NEGUS: Fine.

15 THE COURT: Inquire from that person privately.

16 MR. KOCHIS: Seems the relevant time was the last  
17 weekend.

18 THE COURT: Seems what?

19 MR. KOCHIS: It was last weekend the comment was  
20 allegedly made.

21 THE COURT: Let's make it -- we can ask them questions  
22 once we get in there.

23 Mr. Kottmeier, all right?

24 MR. KOTTMEIER: Certainly.

25 THE COURT: Mr. Cooper, is that satisfactory?

26 MR. COOPER: Yes.

27 THE COURT: That is, that you will not go in with us, but  
28 rather we will, the two attorneys will be standing by while I

1 and the court reporter inquire.

2 Is that satisfactory with you?

3 MR. COOPER: Yes.

4 THE COURT: Before we break, Mr. Cooper, has been  
5 approached on three different occasions by three different  
6 people from the Marshall's office to restrain you more securely,  
7 in some manner, with either the waist chain on both hands and  
8 arms or with one hand and arm, leaving you free to write with  
9 one hand only in various ways.

10 I have been resistive all the way through and it is  
11 my desire not to do it. All I am doing right now is telling you  
12 to be a perfect gentleman, don't give us the slightest cause for  
13 any further concern.

14 MR. NEGUS: I think he has, your Honor, been a perfect  
15 gentleman.

16 THE COURT: Okay. I am just saying that, because at the  
17 slightest, as I have told the marshal standing right here, the  
18 slightest indication that you are going to cause a demonstration  
19 or any showing of resistance or attempt to escape or anything of  
20 that nature, we will indeed secure you to a fair-thee-well. I  
21 just want to mention that to you so to let you know to keep the  
22 cool. Okay? I won't restrain you anymore than the leg brace  
23 you had throughout.

24 Would the reporter come with counsel.

25 Do you know if we have got all twelve jurors?

26 THE BAILIFF: Right over there.

27 THE COURT: You want to lock Mr. Cooper up before you go?

28 MR. KOCHIS: Excuse me, your Honor. Do we have 16?

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1 THE CLERK: We have the alternates here, but I don't know  
2 where.

3 THE COURT: I think we're concerned only with the jurors,  
4 are we not?

5 MR. KOCHIS: I agree with that. My question is when we  
6 start the evidence there's going to be 16 people.

7 THE COURT: Ernie, how many jurors do we have?

8 THE BAILIFF: We have got all 16.

9 THE COURT: You have got 16 in the room now?

10 THE BAILIFF: Yes.

11 THE COURT: That's fine.

12 (Chambers conference concluded.)

13

14

15 (The following proceedings were held in the  
16 deliberation room in the presence of the jury:)

17 THE COURT: May I have your attention. Good morning.  
18 And we will wait till somebody gets out of the restroom.

19 (Brief pause.)

20 THE COURT: Ladies and gentlemen, I'm in the jury -- a  
21 jury room. We've moved you temporarily to a different one.

22 We have the alternates with us again. Happy to see  
23 you all.

24 I have a question before we commence proceedings  
25 this morning. Is there any one of you or more than one of you  
26 that has shopped at the March Air Force Base commissary in the  
27 last two weeks? Would you kindly raise your hand if you have,  
28 any one of you, ladies and gentlemen. This is important.



1 (No response.)

2 THE COURT: I am receiving no affirmative response at  
3 all. I take it none of you have.

4 Have any have you been on the premises at March Air  
5 Force Base in the last two weeks?

6 (No response.)

7 THE COURT: Then excuse me for asking, just -- That's all  
8 I have at the moment.

9 Do any of you have the privilege of shopping there  
10 even though you may not have done so lately?

11 Mr. Stesienko.

12 JUROR BRADLEY: Are you saying in any commissary, the  
13 privilege of shopping in any commissary?

14 THE COURT: No, March Air Force Base.

15 Mr. Stesienko?

16 JUROR STESIENKO: No, I haven't been up there for 15  
17 years.

18 THE COURT: You have a privilege, could you if you want  
19 to.

20 JUROR BRADLEY: I could.

21 THE COURT: Mrs. Bradley, you have a card?

22 JUROR BRADLEY: Yes, privileges.

23 THE COURT: You would be able to go to the post exchange  
24 or something like that?

25 JUROR BRADLEY: I don't even know where it is.

26 THE COURT: Mrs. Pavero, have you?

27 JUROR FAVERO: No.

28 THE COURT: Anybody else? I appreciate it. Would you

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1 stand by, be patient with us, please. Remember that admonition.  
2 Don't talk about the case still. And you can welcome your  
3 compadres back. Don't talk about it at the moment, please.  
4

5 (Chambers conference reported.)

6 THE COURT: Mr. Cooper is back. Mr. Cooper, I inquired  
7 of all 16 and they all assured me that nobody has shopped at  
8 March Air Force Base in the last two weeks.

9 Counsel, thus are rumors sometimes clarified and  
10 put to rest.

11 MR. NEGUS: I have nothing further then on the issue  
12 unless and until I can obtain the name of the person who  
13 allegedly heard the conversation.

14 THE COURT: Of course.

15 I have a couple of things, and this is -- can be  
16 lumped in with one other.

17 Yesterday I personally took two calls here in  
18 chambers from a Mr. Stern from the Sun Telegram, from Mr. Ron  
19 Smith from the Riverside Press Enterprises, both of whom were  
20 just trying to clarify some rumors with respect to what occurred  
21 last Wednesday on which the Court had imposed a gag order. And  
22 I clarified the the rumor not at all, told them that I perhaps  
23 would lift that gag today in view of the jury's return, but that  
24 I wanted to run it by counsel first.

25 Any reason why the reporter shouldn't make that  
26 transcript available as well as this one here?

27 MR. KOCHIS: I would request that it not be lifted until  
28 the jury reaches a decision in the penalty phase.

02-18-15

1 MR. NEGUS: It would seem to be a smart move.

2 MR. KOCHIS: That's going to be another week.

3 THE COURT: Are you going into in any manner Mr. Cooper's  
4 mental, past mental record in the penalty phase?

5 MR. NEGUS: No.

6 MR. KOCHIS: Not unless you let me, and you've already  
7 ruled that I can't even bring out the fact that he's a maybe, so  
8 the answer is no.

9 THE COURT: Mr. Negus?

10 MR. NEGUS: No.

11 THE COURT: Okay. We will maintain it then. They are  
12 going to have those two gentlemen perhaps inquire. I'm  
13 addressing the clerk now. Tell them that until the next verdict  
14 is reached the Court has discussed it with counsel and will  
15 maintain the order and then the transcript will be revealed to  
16 them. The order will be automatically lifted when the next  
17 verdict is received. I won't have to expressly say so, it will  
18 be lifted when the next verdict is received.

19 MR. NEGUS: I think more properly it's an order sealing  
20 the transcript and the records. I thought we were under a  
21 voluntary -- none of us are going to talk about it.

22 THE COURT: Well, I'm not letting them have the  
23 transcript nor has the reporter, but that will be lifted as  
24 swell I'm not going to keep the transcript sealed.

25 MR. NEGUS: I understand that but, never mind.

26 THE COURT: Okay. The gag is lifted. None us of us are  
27 under any restraints not to talk about it. The reporter is  
28 authorized to release the transcript.

1 MR. NEGUS: Wait.

2 THE COURT: Upon the next verdict being received.

3 Secondly, have the two of you talked about your  
4 procedure of this phase?

5 MR. NEGUS: No.

6 THE COURT: How do you -- the law is not all that clear  
7 and if the two of you have agreed upon the procedure or you can  
8 quickly do so, why --

9 MR. KOCHIS: I think the procedure I would suggest is I'm  
10 going to make an opening statement this morning.

11 MR. NEGUS: So am I.

12 MR. KOCHIS: Mr. Negus is going to make one after I  
13 conclude.

14 I'm going to start with the presentation of  
15 evidence and put on approximately six or seven witnesses. I  
16 will then offer certain exhibits into evidence. They will be  
17 photographs of the home and a car. And Mr. -- there's going to  
18 be a stipulation on chain and identity. We will rest.

19 On Monday it's my understanding Mr. Negus is going  
20 to present the testimony of approximately five to six witnesses  
21 that are basically Mr. Cooper's relatives and former girl  
22 friend. He's going to rest. I do not anticipate at this time  
23 any rebuttal. We are then going to argue the case.

24 MR. NEGUS: And would I would assume that the arguments  
25 would be in the form prosecution, defense, prosecution, defense  
26 or --

27 MR. KOCHIS: Or prosecution, defense.

28 THE COURT: Either one of those last two alternatives is

021817

1 all right with me. Is the procedure as out outlined up to the  
2 point of argument satisfactory with you, Mr. Negus?

3 MR. NEGUS: That's my understanding of how it's done,  
4 yes.

5 THE COURT: Okay. That's all right.

6 As far as argument is concerned I much prefer to  
7 have you the two of you agree rather than to have you get into  
8 the briefs. Do you want to go that way? Do you -- the defense  
9 gets the last word, so the prosecution, defense, do you want to  
10 stop there? Do you want to go prosecution, defense again?

11 MR. NEGUS: It's up to them. It's normally they who want  
12 the extra things. If they don't want it, I will agree to do it  
13 just once.

14 THE COURT: You can continue thinking about that.

15 MR. KOTTMEIER: Normally that's a decision, your Honor,  
16 that's made after you've heard the defense response; in other  
17 words, if there is something that needs responding to, maybe we  
18 will give one, if not then --

19 THE COURT: We will make that decision on Monday then as  
20 far as argument is concerned, that's the procedure that we will  
21 have.

22 Now who are your first two witnesses?

23 MR. KOCHIS: I have Robert Heath as my first witness.

24 THE COURT: Is that H-e-a-t-h?

25 MR. KOCHIS: Yes, I believe so. He will be followed by  
26 Lori. L-o-r-i. S-t-r-a-h-l, Strahl. They are the two witnesses  
27 that do not want the extended media coverage.

28 I need to speak with them to tell them that there's

1 been a change, there will be no mention of Mayview in any form  
2 and for them not to refer to it in any fashion.

3 THE COURT: Okay.

4 MR. KOCHIS: To the institution.

5 MR. KOCHIS: And then I need to mark some photographs  
6 with your clerk.

7 THE COURT: Do what you must do. Let the bailiff know.  
8 Let's get started as soon as we possibly can.

9 MR. NEGUS: After we get started, we have the  
10 instructions here, they have not been sorted out by the two of  
11 them. so we have them we can give you.

12 THE COURT: I have some as well. We can distribute to  
13 each other perhaps around the noon period at some point if you  
14 like.

15 MR. NEGUS: I wouldn't think the prosecution's case will  
16 take all day.

17 THE COURT: I think I would like to get the jurors back  
18 in their familiar surroundings where they have coffee, but we  
19 will do that.

20 THE BAILIFF: After the first round, your Honor.

21 THE COURT: Perhaps by the time we have the 11:00 o'clock  
22 recess. Okay. Just switch the people around if you would.

23 (Recess taken.)

24

25 (The following proceedings were held in  
26 open court in the presence of the jury:)

27 THE COURT: Ladies and gentlemen, good morning. For the  
28 record we have all the jurors and the four alternates, all three

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1 attorneys and Mr. Cooper present.

2 A couple of matters before we commence. To the  
3 media, when the question of whether or not photographic coverage  
4 would be permitted last came up it was when Mr. Cooper was  
5 getting ready to testify. At that time I informed the media  
6 that at the beginning of this case I had indicated to both  
7 counsel that I would honor the request of any witness scheduled  
8 to testify who did not wish their picture taken, that included  
9 the boy Josh, that included a couple of other witnesses  
10 heretofore.

11 The first two witnesses to be called by the  
12 District Attorney, a Mr. Heath and a Mrs. Strahl have made that  
13 request. We will have opening statements first, and then when  
14 he calls the first witness and, please, you may have your  
15 cameras here but unmanned and turned away from the witness until  
16 they conclude their testimony. You are not excluded, you may  
17 cover it, of course, but I think that the reasons to some extent  
18 will become obvious.

19 All right. With that we now start with the other  
20 phase of the trial, ladies and gentlemen, and each side may if  
21 they wish make an opening statement, once again outlining to you  
22 what they expect the additional evidence to be.

23 Mr. Kochis, I understand you're going to go first.

24 MR. KOCHIS: That's correct.

25 THE COURT: Proceed.

26 MR. KOCHIS: Good morning, ladies and gentlemen.

27 In October of 1982, Upper St. Clair was a  
28 middle-sized bedroom community located in Allegheny County in

002-100200

1 the state of Pennsylvania.

2 It was a community in which Lori Strahl, a young  
3 woman was raised, went to high school, made her friends and  
4 lifted. Among the friends she would make at the time in high  
5 school would be Janine Miller.

6 Janine would live in an adjacent community with her  
7 mother and her stepfather, Robert Heath. They would live at a  
8 home located at approximately 1200 Boyce Road. The Heaths were  
9 lucky. They would have the same type of luck that Kathy Bilbia  
10 would have. Because on October 8th of 1982, sometime after 8:00  
11 p.m. in the evening when Kevin Cooper would break into their  
12 house and burglarize their house they would not be at home.

13 Kevin Cooper would arrive at the Heath residence  
14 and he would case the residence. He would first check the  
15 windows of the Heath home. In doing so he would leave behind  
16 his touch signature, his fingerprint, his right thumb print, on  
17 the glass to a window that led inside the Heath home into their  
18 dining room.

19 After he checked the windows he would return to a  
20 door that was used by the family as the front door, but actually  
21 led into the kitchen. He would smash the glass to the window,  
22 enter the home and enter the basement. In the basement he would  
23 find tools, search for tools and he would take a screwdriver.

24 Kevin Cooper would take the screwdriver outside of  
25 the Heath home to the driveway where Janine kept her van. He  
26 would pry through the wing window of the van, the driver's side.  
27 He would enter the car, and with a screwdriver he would attempt  
28 to hot wire the van. He would pry at the ignition. Unable to

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1 hot wire the car, unable to find the keys and start the, car he  
2 would return to the Heath home, go back inside, go upstairs  
3 where he eventually would steal a camera and a piece of jewelry.

4 Lori Strahl, in addition to maintaining her  
5 friendship with Janine Miller, chose on that Friday night to  
6 visit Janine at her parents' house. Lori arrived at the Heath  
7 residence sometime between 8:00 and 8:15 p.m.. Unknown to her  
8 Kevin Cooper was inside the house in the process of completing  
9 the burglary.

10 She arrived at the home, parked her car, got out,  
11 noticed Janine's van, walked up to the door that led into the  
12 kitchen, noticed that the lights were on upstairs, noticed that  
13 the screen door was closed but that the door itself was open.  
14 As she approached the Heath home she saw in the kitchen their  
15 two small dogs, and as she walked up the dogs started to bark.

16 Thinking nothing was wrong she knocked on the, door  
17 and Kevin Cooper answered. He had Robert Heath's camera with  
18 him at the time. Lori asked if Janine was home. Kevin Cooper  
19 said, "Yes, she's upstairs." Then with one motion he pushed  
20 open the screen door, smashed her on the side of the head with  
21 an object, grabbed her hair by the back of her head and forced  
22 her head down so that she couldn't look at his face. He would  
23 then force her, drag her, back to her car which was in the  
24 driveway. She screamed, she pleaded with him but to no avail.

25 At the car he would force her inside through the  
26 driver's door to the passenger's seat, again holding her head by  
27 the back by the hair, forcing it down so she couldn't look at  
28 his face. He would take her keys and then he would abduct her,

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1 he would kidnap her. He would drive her to a remote area past  
2 Pittsburgh.

3 It was a drive which to Lori which seemed to last  
4 forever. It would last in the area of 45 minutes. During that  
5 time he would keep her head down so she would never have the  
6 chance to look up and look at him in the face. They would  
7 arrive at a wooded area past Pittsburgh. He would stop the car,  
8 back it up into the trees and leave it running.

9 At that point he ordered Lori to take off her  
10 clothes. She refused to do so. Kevin Cooper at that point told  
11 her that if she didn't do exactly as she was told she would be  
12 killed. She took off her blue jeans, left her underwear on.  
13 Kevin Cooper ordered that she take her underwear off. She again  
14 refused. She again was told that if she didn't do exactly what  
15 she was told she would be killed. Frightened, she took off her  
16 underwear, and Kevin Cooper dragged her outside of the car by  
17 her hair.

18 She kicked him in the groin. He responded by  
19 smashing the side of her head with a screwdriver. He then took  
20 her and he forced her to the ground. She pleaded with him. She  
21 begged him not to do it. In spite of her pleas, in spite of the  
22 struggle, he forced her down on to the ground, face down, and in  
23 a remote area past Pittsburgh, with the screwdriver stuck at the  
24 back of her neck, Kevin Cooper raped her.

25 When he was finished he got up, he got into her  
26 car, he left her there nude from the waist down and then drove  
27 off.

28 He would leave behind his semen, semen which would

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1 be typed to match his profile with Lori Strahl. He would leave  
2 behind his palm prints on the gear shift on the floor inside  
3 Lori Strahl's car. He would leave behind his right thumbprints  
4 on the glass at the Heath home. He would take with him the car,  
5 the screwdriver, the camera. And he would also take with him  
6 the peace and security which once belonged to Lori Strahl in  
7 Upper St. Clair.

8 Thank you.

9 THE COURT: Mr. Negus, would you care to make an opening?

10 MR. NEGUS: This part of the case, you're going to be  
11 asked to make a decision based upon the law and certain evidence  
12 as to what is the appropriate punishment to be imposed on Kevin  
13 Cooper. The law asks you to do something a little bit different  
14 in this particular phase than you did in the first phase, not so  
15 much to determine facts,, because none of the facts which the  
16 prosecution has put -- pointed out to you in their opening  
17 statement will be disputed, but to weigh various factors which  
18 the law calls aggravating and mitigating factors.

19 The only thing that aggravating and mitigating  
20 factors are are factors which point towards the imposition of  
21 the death penalty. The others are those which the law says are  
22 to be weighed towards never letting Mr. Cooper out of prison  
23 again, keeping him in prison for the rest of his life.

24 The most -- most of the evidence that I will be  
25 relying on in my presentation to you has already been given from  
26 the witness stand. It was basically given from people who hate  
27 Kevin Cooper, those -- that evidence basically has to do with  
28 the nature, again, same issue, the nature of the evidence

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1     against Kevin Cooper.

2                   In the sentencing it is customary for a defendant  
3     to admit his crimes, beg forgiveness, throw himself on the mercy  
4     of the person who is going to sentence him. Kevin Cooper cannot  
5     do that. He won't do that. He told you before that he didn't  
6     commit the crime. He maintains his innocence. He has always  
7     maintained his innocence.

8                   All I will be able to present to you by way of  
9     evidence about the crime is the fact that the law allows that  
10    you consider that whether the crime has been proved beyond all  
11    possible doubt rather than beyond a reasonable doubt, which you  
12    have already found, which can create an awkward situation since  
13    you have obviously already rejected the argument that I made to  
14    you on those issues two weeks ago, but that is the major point  
15    that we will be bringing out in the penalty phase.

16                  In addition to presenting testimony of those people  
17    that hated Kevin Cooper, we're going to introduce a little  
18    testimony, not much, five witnesses, on Monday, the people that  
19    love Kevin Cooper: His adopted mother, his adopted father, his  
20    adopted sister, and two Godparents that helped to raise him.  
21    They will tell you basically just about their feelings towards  
22    Kevin Cooper.

23                  Kevin is a boy who was adopted by his parents at a  
24    very early age. They gave him their own name. He doesn't even  
25    know his own true name. And they will tell you a little bit  
26    about their love for him. And you're allowed to consider that  
27    type of thing. Not so much evidence, but feelings, you're  
28    allowed to consider that to a certain extent in making your

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1 sentencing decision. That's what we will be presenting to you.

2 Thank you.

3 MR. KOCHIS: Robert Heath.

4 THE COURT: All right call that witness.

5 You are going to have to leave your cameras to one  
6 side now. Thank you so much.

7 THE CLERK: Raise your right hand.

8

9 ROBERT G. HEATH,

10 called as a witness on behalf of the People, having been duly  
11 sworn, testified as follows:

12 THE CLERK: Thank you. Would you please be seated.  
13 Would you state your full name for the record and spell your  
14 last name.

15 THE WITNESS: Robert G. Heath, H-e-a-t-h.

16 THE CLERK: Thank you.

17

18 DIRECT EXAMINATION

19 BY MR. KOCHIS:

20 Q. Mr. Heath, what state do you presently live in?

21 A. Pennsylvania.

22 Q. Were you living in Pennsylvania on October the 8th  
23 of 1982?

24 A. Yes.

25 Q. Which county?

26 A. Allegheny.

27 Q. And what was your residence address at that time?

28 A. 1200 Boyce Road.

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- 1 Q. Is that located within any particular township or  
2 borough?
- 3 A. Upper St. Clair.
- 4 Q. Who did you live with at that time?
- 5 A. My wife, my daughter and my granddaughter.
- 6 Q. What was your daughter's name?
- 7 A. Janine Miller.
- 8 Q. Is she actually a stepdaughter?
- 9 A. Yes.
- 10 Q. Directing your attention to an exhibit which we  
11 have marked for identification as Exhibit 796, appears to be a  
12 nine by twelve inch clear photographed.
- 13 Is there any building in that picture that you  
14 recognize?
- 15 A. The white home at the top of the hill is mine.
- 16 Q. The building that's framed by the trees?
- 17 A. Yes.
- 18 Q. And is that the home that you lived in on October  
19 the 8th on Boyce Road?
- 20 A. Yes.
- 21 Q. What time did you leave your house on that  
22 particular day?
- 23 A. Around 6:30 in the evening.
- 24 Q. Was your wife home when you left?
- 25 A. She was at work.
- 26 Q. Was your stepdaughter at home?
- 27 A. Yes, she was still home when I left.
- 28 Q. Did she have a car at that time?

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1 A. She had a van, '77 Dodge van.  
2 Q. Where was it parked when you left the home?  
3 A. In the driveway.  
4 Q. Was that van left locked or unlocked?  
5 A. Locked.  
6 Q. Did you return to your home on that Friday?  
7 A. Around 9:00 in the evening.  
8 Q. Was it dark outside when you returned?  
9 A. Yes.  
10 Q. Was your daughter's -- your stepdaughter's van in  
11 the driveway when you got home?  
12 A. Yes.  
13 Q. Which door to the house did you approach?  
14 A. It's the kitchen door on the side of the house.  
15 Q. Directing your attention to a photograph which we  
16 have marked for identification as Exhibit 795, it's another  
17 color photograph, nine by twelve inches.  
18 Do you recognize the home depicted in that  
19 photograph?  
20 A. Yes, it's my residence.  
21 Q. Does it show the door that you walked up to when  
22 you got home?  
23 A. Yes.  
24 Q. And perhaps so you don't have to get up, the door  
25 that I'm pointing to, is that the door that you're referring to?  
26 A. Yes.  
27 Q. And for the record, I'm going to place an "X" on  
28 that particular door.

- 1 Is that door essentially half wood and half glass?
- 2 A. Essentially, yes.
- 3 Q. When you left at 6:30, was the glass to that door
- 4 intact?
- 5 A. Yes.
- 6 Q. When you got home were the lights on or off at the
- 7 house?
- 8 A. On.
- 9 Q. When you walked up to the door was the door open or
- 10 closed?
- 11 A. Closed.
- 12 Q. Did you notice anything about the door that
- 13 attracted your attention at that time?
- 14 A. The glass was broken.
- 15 Q. Did you enter your house at that time?
- 16 A. Yes.
- 17 Q. Where did you first go?
- 18 A. I went in to the kitchen and called to see if my
- 19 daughter was home. I thought perhaps she had broken it.
- 20 Q. Was anybody in the house at that time?
- 21 A. No.
- 22 Q. Do you have a basement in your house?
- 23 A. Yes.
- 24 Q. Do you keep any tools in your basement?
- 25 A. Yes.
- 26 Q. Among those tools do you keep -- are there
- 27 screwdrivers?
- 28 A. Yes.

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1 Q. Did you go into your basement at some point after  
2 you returned home on that evening?

3 A. Yes.

4 Q. Did you see any signs that someone had been in your  
5 basement?

6 A. Yes.

7 Q. What did you see?

8 A. Some of the tool boxes were open, things were moved  
9 around from where I had had them.

10 Q. Directing your attention to a smaller photograph  
11 which has been marked for identification as Exhibit 789,  
12 directing your attention to an item which appears in the  
13 photograph which appears to be a screwdriver, have you had a  
14 chance to look at that photograph prior to testifying today?

15 A. Yes.

16 Q. Back in October of 1982 did you have any  
17 screwdrivers of the type depicted in that photograph in your  
18 basement?

19 A. Yes, many.

20 Q. Did you at some point call the police that night?

21 A. About five minutes after I entered the house.

22 Q. Did you also check your daughter's van outside in  
23 the driveway?

24 A. Yes, but I don't know if that was before or after I  
25 called the police.

26 Q. You checked it however sometime that evening?

27 A. Yes.

28 Q. What did you discover when you checked the van?

1           A.     We checked it and the right wing window was busted  
2     on the passenger side. The sliding door on the side was  
3     unlocked. And the ignition, face of the ignition was all  
4     twisted and torn from someone prying at it.

5           Q.     Was the window broken when you left the home and  
6     passed the van at 6:30 that evening?

7           A.     No, it was not.

8           Q.     Was the ignition damaged at that time?

9           A.     No.

10          Q.     And you saw tool or pry marks on the ignition  
11     itself?

12          A.     Yes.

13          Q.     Did you likewise sometime that evening search your  
14     house to determine if anything was missing?

15          A.     Yes.

16          Q.     Did you determine that items were missing sometime  
17     that evening?

18          A.     Yes.

19          Q.     What type of items were missing?

20          A.     My camera, my telephoto lens, we couldn't find,  
21     which we found later. Some jewelry my wife couldn't account  
22     for.

23          Q.     When you arrived home did you go to the upstairs of  
24     your home?

25          A.     Yes.

26          Q.     Was there any money that was left in the upstairs?

27          A.     Yes.

28          Q.     Where was the money when you saw it?

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1 A. It was laying on the bed. It was change, coin.  
2 Q. Was that money at that location when you left your  
3 house earlier that evening?  
4 A. No.  
5 Q. Did you essentially call the police and report that  
6 your home had been burglarized?  
7 A. Yes.  
8 Q. Did they send an officer out to your home sometime  
9 that evening?  
10 A. Yes.  
11 Q. Were you present when an officer lifted a  
12 fingerprint from one of the windows to your house?  
13 A. Yes.  
14 Q. Directing your attention back to Exhibit 795.  
15 As you face the photograph, the left side of the  
16 house, are there one or two windows at that location?  
17 A. Two.  
18 Q. The window closest to the door which had the glass  
19 which was broken, what type of room does that lead into?  
20 A. The kitchen.  
21 Q. And the window which is obscured by the snow drift,  
22 where does that window lead to?  
23 A. Dining room.  
24 Q. Directing your attention to Exhibit 794.  
25 Do you recognize what that is a picture of?  
26 A. Of the kitchen and dining room windows.  
27 Q. And the side of your house?  
28 A. Uh-huh.

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- 1 Q. You have to answer yes or no for the reporter.  
2 Would that be a yes or no?  
3 A. Yes.  
4 Q. Do you see in the photograph either of the windows  
5 from which the police lifted the fingerprint?  
6 A. Yes.  
7 Q. And perhaps with the red grease pen, could you draw  
8 an arrow that would point to the window that the police took the  
9 fingerprint from.  
10 A. (Witness complied.)  
11 Q. You were present when that happened?  
12 A. Yes.  
13 Q. And was that after, sometime after midnight as the  
14 8th actually turned into the 9th of October?  
15 A. Yes.  
16 Q. Directing your attention, Mr. Heath, to Exhibit  
17 793, another photograph.  
18 Is that also a picture, another photograph of your  
19 house, which shows the door which was broken and the first  
20 window as you walked around the house?  
21 A. Yes.  
22 Q. Did you ever give Kevin Cooper permission to enter  
23 your home on that day?  
24 A. No.  
25 Q. Did you ever give Kevin Cooper permission to enter  
26 your home on any day?  
27 A. No.  
28 Q. Did you ever give anyone permission to take the

1 camera and the jewelry?  
2 MR. NEGUS: Object, 352.  
3 THE COURT: Overruled.  
4 THE WITNESS: That means you can answer.  
5 THE WITNESS: No.  
6 BY MR. KOCHIS:  
7 Q. Did you have any dogs at that time?  
8 A. Yes.  
9 Q. How many?  
10 A. Two.  
11 Q. And do you recall what type of dogs they were.  
12 A. I had a spitz, and it was like a cross between a  
13 poodle and terrier something like that.  
14 Q. Were they inside the house when you left the house  
15 at 6:30?  
16 A. Yes.  
17 Q. Were they inside the house when you returned  
18 sometime after 9:00 o'clock?  
19 A. Yes.  
20 Q. Do you know a person named Lori Strahl?  
21 A. Yes.  
22 Q. Is she a friend of your stepdaughter Janine's?  
23 A. Yes.  
24 Q. Did they go to high school together?  
25 A. Yes.  
26 MR. KOCHIS: Thank you. I have no further questions.  
27 MR. NEGUS: No questions.  
28 THE COURT: Thank you, Mr. Heath. You may step down.

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1                   You want him to go back or remain in the courtroom?

2           MR. KOCHIS: I think he desires to leave the courtroom.

3           THE COURT: Thank you, sir.

4                   Your next witness is --

5           MR. KOCHIS: Lori Strahl, your Honor.

6           THE COURT: Lori Strahl.

7                   We will try and stop around 11:00 o'clock for a  
8 recess.

9           MR. KOCHIS: If it could be acceptable to the court, I  
10 propose to finish with her direct in 25 minutes, which would be  
11 maybe go an extra five minutes.

12

13                   LORI ANN STRAHL,

14 called as a witness on behalf of the People, having been duly  
15 sworn, testified as follows:

16           THE CLERK: Thank you. Would you be seated.

17                   Would you state your full name for the record and  
18 spell your last name.

19           THE WITNESS: My name is Lori Ann Strahl. S-t-r-a-h-l.  
20 L-o-r-i.

21           THE CLERK: Ann is spell with two "n's"

22           THE WITNESS: Yes.

23

24                   DIRECT EXAMINATION

25 BY MR. KOCHIS:

26           Q. Miss Strahl, back in October of 1982, on the 8th  
27 day of that month, what state did you live in?

28           A. Um, Pennsylvania.

021835

1 Q. Which County?  
2 A. Upper St. Clair.  
3 Q. Is that a township located in Allegheny County?  
4 A. Yes, it is.  
5 Q. Did you live with your parents at that time?  
6 A. Yes, I am.  
7 Q. And your younger sister?  
8 A. Yes.  
9 Q. Did you attend high school in Upper St. Clair?  
10 A. Yes.  
11 Q. In high school did you meet Janine Miller?  
12 A. Yes.  
13 Q. And during high school did she live with her mother  
14 and her stepfather, the Heaths?  
15 A. Yes.  
16 Q. Did they live at a home somewhere out on Boyce  
17 Road?  
18 A. Yes.  
19 Q. Now, on October the 8th, Friday, did you decide to  
20 go to the Heath residence to see your high school friend,  
21 Janine?  
22 A. Yes, I did.  
23 Q. Do you know about what time you made the decision?  
24 A. Um, I arrived at the house approximately 8:00  
25 o'clock.  
26 Q. How far from your house is the Heath house?  
27 A. Um, driving distance, five minutes.  
28 Q. Did Janine have a car at that time?

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1 A. She had a van.  
2 Q. Was the van there when you got there?  
3 A. Yes.  
4 Q. Where was it?  
5 A. It was parked in the driveway.  
6 Q. Were there any lights on at the Heath home when you  
7 got there?  
8 A. Yes. The upstairs and the downstairs.  
9 Q. Did you park your car?  
10 A. Yes, I did.  
11 Q. Did you turn the engine off?  
12 A. Yes.  
13 Q. Did you get out of the car?  
14 A. Yes.  
15 Q. Did you go up to the Heath home?  
16 A. Yes.  
17 Q. Miss Strahl, directing your attention to a series  
18 of pictures, for example, Exhibit 795.  
19 Do you recognize what that is a picture of?  
20 A. Um, it is the Heath residence.  
21 Q. Is there more than one door to that home?  
22 A. Um, I'm not sure.  
23 Q. Do you see in that particular photograph the door  
24 that you walked up to on that particular Friday?  
25 A. Yes.  
26 Q. Does it have an "X" on the door?  
27 A. Yes, it does.  
28 Q. When you got up to the door, was the screen door



- 1 open or closed?
- 2 A. The screen door was closed.
- 3 Q. How about the door behind the screen door that had
- 4 the glass window. Was that open?
- 5 A. That was open.
- 6 Q. When you looked inside, did you see any animals or
- 7 people?
- 8 A. Two dogs came to the door when I arrived at the
- 9 door.
- 10 Q. Did they do anything when you got there?
- 11 A. Just barked.
- 12 Q. Were those the Heath dogs?
- 13 A. Yes.
- 14 Q. What did you do after you got to the front porch?
- 15 A. I knocked and waited a few minutes.
- 16 Q. Did someone come to the door?
- 17 A. Yes.
- 18 Q. Was it a member of the Heath family?
- 19 A. No, it wasn't.
- 20 Q. Was it Janine?
- 21 A. No.
- 22 Q. Had you seen that person before?
- 23 A. No.
- 24 Q. Was it a man or a woman?
- 25 A. A man.
- 26 Q. Do you remember what race the man was?
- 27 A. Negro.
- 28 Q. Did you say something to him when he got to the

1 door?

2 A. I asked him if Janine was home.

3 Q. What did he say?

4 A. Yes. She's upstairs.

5 Q. What's the next thing that you remember happening?

6 A. Um, he had opened the door, I took a step and he

7 struck me on the side of the face.

8 Q. Do you know what he hit you with?

9 A. Um, I believe it was a camera.

10 Q. What did he do after he hit you?

11 A. Grabbed the back of my hair and forced me over to

12 my vehicle.

13 Q. Did he say anything to you from the time he first

14 grabbed your hair to the time he forced you to the car?

15 A. Not that I can recall.

16 Q. What happened when you got to the car?

17 A. Um, he forced me in through the driver's side with

18 my head down.

19 Q. Which seat did you end up in?

20 A. In the passenger's.

21 Q. And which side did he end up?

22 A. In the driver's.

23 Q. Where were your keys at that time?

24 A. They were in my purse.

25 Q. What happened to your car keys?

26 A. He had asked me for them, I reached down and got

27 them out of my purse and gave them to him.

28 Q. Did he then start the car up?

1 A. Yes, he did.  
2 Q. What type of transmission do you have?  
3 A. Um, automatic.  
4 Q. Where is the stick shift for the car located?  
5 A. Um, to the right, upper driver's side.  
6 Q. Is it on the column or is it on the floor itself?  
7 A. On the floor.  
8 Q. Directing your attention to a series of small  
9 photographs that's been marked for identification as Exhibit  
10 797, and 799.  
11 Do you recognize the car in those two pictures?  
12 A. Yes, that's my car.  
13 Q. Exhibit 800. Does that appear to be a photograph  
14 of the inside of the car that you were kidnaped in?  
15 A. Yes.  
16 Q. And directing your attention to Exhibit 792.  
17 Is that a photograph of the automatic gearshift  
18 lever that appears on the floorboard of your car?  
19 A. Yes.  
20 Q. When you got inside the car, did the man say  
21 anything to you while you were still at the Heath home?  
22 A. He replied he didn't want to do this to me, and all  
23 he needed was a ride to Pittsburgh.  
24 Q. Did he in fact ask you for directions to  
25 Pittsburgh?  
26 A. Yes, he did.  
27 Q. Did he then take the car out of the driveway?  
28 A. Yes.

021840

1 Q. Then I take it it was without your permission.  
2 A. Correct.  
3 Q. Did he take you to a particular location?  
4 A. Out to Frick Park.  
5 Q. Frick Park?  
6 A. From where is Frick park located?  
7 A. In Pittsburgh.  
8 Q. During the drive, could you tell if you passed at  
9 any point the City of Pittsburgh?  
10 A. Yes. I could see out of the corner of my eye the  
11 buildings from downtown Pittsburgh.  
12 Q. How did he keep you positioned in the car during  
13 the ride?  
14 A. My face forward, facing forward, with my head  
15 sideways on his lap.  
16 Q. Between the time that you left the Heath home, and  
17 the time you got to Frick Park, did he threaten you?  
18 A. Yes, he did.  
19 Q. What did he tell you?  
20 A. Um, he said, "I will kill you."  
21 Q. Was he touching you during the ride between the  
22 Heath home and Frick park?  
23 A. Yes, he did. His one hand moved on the side of my  
24 chest down to the side of my rear.  
25 Q. To shift the car, would he at times put his hand on  
26 the automatic gearshift lever on the floorboard of the car?  
27 A. Yes.  
28 Q. When you got to Frick park, what did he do with the

1 car initially?

2 A. Um, he had stopped it and left the engine running.

3 Q. Did you, during the ride, ask him to stop hurting

4 you?

5 A. Yes, I did.

6 Q. Do you recall what he told you at that point?

7 A. He just told me to shut up.

8 Q. Do you remember him telling you that he knew about

9 girls like you, you would probably go straight to the police?

10 A. Yes.

11 MR. NEGUS: Objection as leading.

12 THE COURT: Sustained.

13 BY MR. KOCHIS:

14 Q. After you asked him to stop hurting you, do you

15 recall some of the things that he said to you?

16 A. No.

17 Q. Did he ever make any reference to you going to the

18 police?

19 A. Yes, he did.

20 Q. What did he say in that regard?

21 A. He had just said that "Girls like you do go to the

22 police if I left you off."

23 Q. When he got to Frick Park, did he park your car in

24 a particular location?

25 A. Yes. Um, very secluded.

26 Q. Did he leave the engine running?

27 A. Yes, he did.

28 Q. When he stopped the car, did he order you to do

021842

1 anything?

2 A. Yes. He forced me to take off my pants and my  
3 underpants.

4 Q. At first when he told you to take off your pants,  
5 what type of pants were you wearing?

6 A. Um, I believe they were jeans.

7 Q. What did you tell him when he first told you to  
8 take your pants off?

9 A. I told him I wouldn't.

10 Q. Did he tell you what would happen to you if you  
11 didn't take your clothes off?

12 A. Yes. He he said -- he threatened again to kill me.

13 Q. Did you take your pants off at that time?

14 A. Yes.

15 Q. Is that because you were afraid of him?

16 A. Yes.

17 Q. Did you leave your underwear on at that time?

18 A. No.

19 Q. Did he give you any orders after your clothes were  
20 off?

21 A. Um, he did force me out of the car.

22 Q. How did he do that?

23 A. He pulled the back of my hair and told me to come  
24 on. Then once we were standing outside of the car, I had kneed  
25 him in the crotch, and he again then hit me in the face.

26 Q. Do you remember where in the face he struck you?

27 A. On the side.

28 Q. Do you know with what?

021843

1 A. Possibly a screwdriver.  
2 Q. Did you beg him not to do anything to you?  
3 A. Yes.  
4 Q. Do you remember what words you used?  
5 A. Um, just "Please, don't do this."  
6 Q. What was his response?  
7 A. I don't recall.  
8 Q. What did he do next after he struck you in the side  
9 of the head?  
10 A. Again, he grabbed me by the back of the hair and  
11 forced me on to the ground, face down.  
12 Q. Were you at that point nude from the waist down?  
13 A. Yes.  
14 Q. Did you have your clothes on then from the waist  
15 up?  
16 A. Pardon me.  
17 Q. Were your clothes on from the waist up, do you  
18 recall? Were you completely --  
19 A. Yes, they were up.  
20 Q. Do you know what happened to the screwdriver after  
21 you were forced face down onto the ground?  
22 A. He had it towards the back of my neck.  
23 Q. Could you feel any part of the screwdriver?  
24 A. Yes, the tip.  
25 Q. And where was it laying? Was it at the back of  
26 your neck?  
27 A. Yes.  
28 Q. Were you screaming or doing anything at that time?

00221844

- 1 A. Um, very upset, and crying.
- 2 Q. Once he got you down on the ground, and had the
- 3 screwdriver at the back of your neck, what did he do next?
- 4 A. He took down his pants, and he got on top of me,
- 5 and entered me from behind into the vagina.
- 6 Q. So he placed his penis inside your vagina?
- 7 A. Yes.
- 8 Q. Is that without your consent?
- 9 A. Yes.
- 10 Q. Did you do that because you were afraid of him?
- 11 A. Yes.
- 12 Q. Did there come a time when the rape stopped?
- 13 A. Yes.
- 14 Q. Did he -- do you know whether or not he ejaculated
- 15 during the rape?
- 16 A. I don't know.
- 17 Q. After the rape stopped, what did he do?
- 18 A. He had gotten up, told me to keep my face towards
- 19 the ground, pulled up his pants and jumped into the driver's
- 20 seat.
- 21 Q. Did he make any statement to you before he left you
- 22 on the ground?
- 23 A. "I should kill you."
- 24 Q. Did he take your car from the area?
- 25 A. Yes.
- 26 Q. Did you attempt to find your clothes?
- 27 A. Yes, I did.
- 28 Q. Did you eventually find your blue jeans and your

021045



- 1     panties?
- 2           A.     Um, just my jeans.
- 3           Q.     Where did you find them?
- 4           A.     As I walked up through the entrance of the park up
- 5     the hill, I found them laying on the side of the road.
- 6           Q.     And did you put them on at that point?
- 7           A.     Yes.
- 8           Q.     And where did you go next?
- 9           A.     Um, I ran to the nearest house.
- 10          Q.     And did someone answer the door?
- 11          A.     Yes. A woman and man.
- 12          Q.     Did they call the police?
- 13          A.     Yes, they did.
- 14          Q.     Were you taken to a hospital that evening.
- 15          A.     Yes. Shadyside.
- 16          Q.     Were certain samples taken from you at the
- 17     hospital?
- 18          A.     Yes.
- 19          Q.     For example, did they -- did a doctor or nurse take
- 20     a vaginal swab from you?
- 21          A.     Yes.
- 22          Q.     Did they take your blue jeans?
- 23          A.     Yes.
- 24          Q.     Did you ever get a good look at the face of the man
- 25     that kidnaped you and raped you and stole your car?
- 26          A.     No, I did not.
- 27          Q.     Was your car eventually recovered?
- 28          A.     Yes, it was.

1 Q. How much later was it that you next saw your car?

2 A. I don't know.

3 MR. KOCHIS: Thank you. I have no further questions.

4 MR. NEGUS: No questions.

5 THE COURT: We thank you very much. Would you go with  
6 the bailiff, please.

7 MR. KOCHIS: Your Honor, if we're going to take a recess,  
8 could we take a short recess. The next two witnesses are going  
9 to be short and they're from Pennsylvania, they're experts. I  
10 can get them on the 1:00 o'clock plane if I finish this with  
11 them by noon.

12 MR. NEGUS: That is fine with me.

13 MR. KOCHIS: So if we come back by five or ten after  
14 11:00, I am confident I can be done with them as well.

15 THE COURT: All right. We do not have session tomorrow,  
16 there will be Friday, Saturday and Sunday, and rather than keep  
17 them over the weekend, we're going to make every effort to  
18 conclude today.

19 Bailiff hold it down to 15 minutes, no more than  
20 that. We will be in recess 10 to 15 minutes.

21 (Recess)

22

23 THE COURT: Next witness.

24 MR. KOCHIS: Walter Lorenz.

25

26 WALTER LORENZ,

27 called as a witness on behalf of the People, having been duly  
28 sworn, testified as follows:

021847

1 THE CLERK: Thank you. Would you be seated. Would you  
2 state your full name for the record and spell your last name.

3 THE WITNESS: My name is Walter Lorenz. That's  
4 L-o-r-e-n-z.

5 THE CLERK: Thank you.  
6

7 DIRECT EXAMINATION

8 BY MR. KOCHIS:

9 Q. Mr. Lorenz who do you work for?

10 A. I'm employed as a criminalist for the Allegheny  
11 County Department of Laboratories, the Forensic Science Section.

12 Q. How long have you been employed by Allegheny County  
13 as a --

14 A. For approximately four years.

15 Q. Do you have any specialty within the crime lab?

16 A. Yes.

17 Q. Is that serology?

18 A. Yes.

19 Q. Do you have any educational background in the area  
20 of serology?

21 A. Yes.

22 Q. What does that consist of?

23 A. I ever a Bachelors of Science Degree in Biological  
24 Sciences from the University of Pittsburgh. And I completed  
25 graduate training in the area of Forensic Chemistry in the  
26 graduate program of Forensic Chemistry also at the University of  
27 Pittsburgh.

28 Q. In your graduate training did you receive any

021848

1 training in the area of conducting electrophoretic tests on body  
2 fluids to determine their various enzyme and serum protein  
3 types?

4 A. Yes.

5 Q. Have you in the past as a criminalist in a  
6 laboratory in a controlled setting analyzed samples of whole  
7 blood to determine whether or not the person was, for example, a  
8 secretor?

9 A. Yes.

10 Q. Can you even estimate the number of times you've  
11 done that?

12 A. Over a thousand.

13 Q. Have you likewise analyzed samples of whole blood  
14 using electrophoretic techniques to determine the various enzyme  
15 and certain proteins types of the donor of the sample of whole  
16 blood?

17 A. Yes.

18 Q. Would that likewise be in excess of a thousand  
19 times?

20 A. Yes.

21 Q. Have you also in your duties as a criminalist  
22 analyzed strains in criminal cases to determine the genetic  
23 profile, for example, of a person who may have deposited a semen  
24 stain?

25 A. Yes.

26 Q. Have you qualified in the past as an expert in a  
27 court of law in Pennsylvania in the area of serology?

28 A. Yes.

00221849

1 Q. How many times?  
2 A. At least 20.  
3 Q. Did you do some work on a case in your laboratory  
4 in Pennsylvania which bore the laboratory case number 23965?  
5 A. Yes.  
6 Q. And did that include analyzing a sample of the  
7 whole blood of Lori Strahl?  
8 A. Yes.  
9 Q. Do you recall when your analysis of Lori Strahl's  
10 blood was completed?  
11 A. Pardon me. When?  
12 Q. Yes. When you tested her blood, for example, to  
13 determine whether or not she was a secretor, the date?  
14 A. It was sometime before November 3rd.  
15 Q. Of which year?  
16 A. 1982. It was -- to be exact it was October 26th.  
17 1982.  
18 Q. Were you able to determine through scientific tests  
19 whether or not Lori Strahl was a secretor?  
20 A. Yes.  
21 Q. Is she a secretor?  
22 A. No.  
23 Q. Did you conduct then certain electrophoretic tests  
24 to determine, for example, what her PGM enzyme type was?  
25 A. Yes.  
26 Q. And what is her PGM enzyme type?  
27 A. She was a PGM type 1.  
28 Q. Did you do any PGM subtyping?

0021850

1 A. Yes.

2 Q. What PGM subtype is Lori Strahl?

3 A. PGM subtype 1+.

4 Q. And did you conduct an electrophoretic test to

5 determine what her peptidase A type was?

6 A. Yes.

7 A. It was a peptidase A type 1.

8 Q. Did you also analyze in the laboratory in a

9 controlled setting a vaginal swab which was taken from Lori

10 Strahl after she was raped?

11 A. Yes.

12 Q. What did you discover when you looked at the

13 vaginal swab?

14 A. The vaginal swab was microscopically examined for

15 the presence of spermatozoa and spermatozoa were found.

16 Blood groupings studies were performed on the

17 vaginal swab and no blood group substances were found.

18 Enzyme studies were also performed on the vaginal

19 swab, however, I could not find any PGM or peptidase A

20 activities.

21 Q. The presence of spermatozoa on a vaginal swab, is

22 that consistent with someone who has had intercourse?

23 A. Yes.

24 Q. And had someone ejaculate on them?

25 A. Yes.

26 Q. Now, the absence of the blood group substances, is

27 that consistent, for example, with coming from a victim such as

28 Lori who was a nonsecretor?

021051

1 A. Yes.

2 Q. And the absence of those blood group substances, is  
3 that also consistent with the stain, the semen stain, being  
4 deposited by an assailant who himself is a nonsecretor?

5 A. Yes.

6 Q. Did you likewise test some stains which were --  
7 which you removed from Lori's blue jeans which were seized by  
8 the police?

9 A. Yes.

10 Q. And would that have been in your laboratory in  
11 Pennsylvania as well?

12 A. Yes.

13 Q. Did you find, first of all, any blood group  
14 substances on the stain on the blue jeans?

15 A. The item that I examined was a pair of blue  
16 corduroy pants, and faint white crusty stains were found on the  
17 inside crotch area of the pants.

18 The stains were microscopically examined and  
19 spermatozoa were found.

20 Q. Okay. Then my question would be: Did you find any  
21 antigens, evidence of antigens or antibodies?

22 A. Blood grouping studies were performed on the  
23 seminal stains and no blood group substances were found.

24 Q. Again, serologically would that stain then be  
25 consistent with being deposited by an assailant who was not a  
26 secretor?

27 A. Yes.

28 Q. Did you conduct certain electrophoretic tests on

1 the enzyme types of the semen stain on Lori's pants?

2 A. Yes.

3 Q. What was the PGM type of that stain?

4 A. The PGM type was PGM type 1.

5 Q. The PGM subtype was what?

6 A. 1+.

7 Q. What was the peptidase A enzyme type of that stain?

8 A. The peptidase A type was two 2-1.

9 Q. Mr. Lorenz, directing your attention to an exhibit  
10 which has previously been identified as Exhibit 589, and let me  
11 ask you a hypothetical question.

12 Assuming hypothetically that there's been previous  
13 testimony by two other serologists that Kevin Cooper is a  
14 nonsecretor, that his PGM type is a 1, that his PGM subtype is a  
15 1+, and that his peptidase A type is a 2-1; is the semen stain  
16 which you typed on Lori's pants consistent with coming from  
17 Kevin Cooper?

18 A. Yes.

19 MR. KOCHIS: I have no further questions.

20 MR. NEGUS: No questions.

21 THE COURT: Thank you very much.

22 MR. KOCHIS: Mr. Peters.

23 THE COURT: Is he in the courtroom?

24 MR. KOCHIS: Yes, he is, your Honor.

25 THE CLERK: Raise your right hand.

26

27 EDWARD S. PETERS.

28 called as a witness on behalf of the People, having been duly

02-10557



1 sworn, testified as follows:

2 THE CLERK: Thank you. Would you be seated. Would you  
3 state your full name for the record and spell your last name.

4 THE WITNESS: Edward S. Peters, P-e-t-e-r-s.

5 THE CLERK: Thank you.

6

7

DIRECT EXAMINATION

8 BY MR. KOCHIS:

9 Q. Mr. Peters, who do you work for?

10 A. I work for the Pennsylvania State Police.

11 Q. How long have you worked for the Pennsylvania State  
12 Police?

13 A. I have been employed there for the past 15 years.

14 Q. Do you have any formal education or training in the  
15 area of fingerprint identification?

16 A. Yes, I do.

17 Q. Would you tell the jury what that consists of?

18 A. I'm a member of the International Association for  
19 Identifiers. I have attended classes in advanced latent  
20 fingerprint techniques, fingerprint classification,  
21 photographing and handling of evidence, and basic police  
22 photography.

23 Q. Have you done fingerprint comparisons in the past  
24 for the State Police in Pennsylvania?

25 A. Yes, I have.

26 Q. Could you estimate the number of times?

27 A. Over -- well over five thousand times at least.

28 Q. Have you likewise testified as an expert in a court

0221054

1 of law in Pennsylvania on the issues of fingerprint  
2 identification and comparison?

3 A. Yes, I have.

4 Q. On October the 9th of 1982, did you proceed to a  
5 residence located at 1200 Boyce Road in Allegheny County?

6 A. Yes, I did.

7 Q. Was that the residence that at that time was  
8 occupied by a Robert Heath?

9 A. That's correct.

10 Q. Did you process that home for latent fingerprints?

11 A. Yes, I did.

12 Q. And although the jury has heard it once before,  
13 could you tell them briefly what the difference is between a  
14 latent fingerprint and an inked fingerprint?

15 A. A latent fingerprint is an impression of the -- of  
16 the patterns of the balls of the fingers which is placed on any  
17 object in any area by chance and it's an unknown type of print,  
18 by that I mean we don't know who it belongs to.

19 Q. And what is an inked print?

20 A. And your inked print is normally what you find on  
21 your fingerprint cards in which the individual's prints have  
22 been rolled on the ink and placed on a card and it's a known  
23 print.

24 Q. On the 9th of October of 1982, did you lift any  
25 latent fingerprints from the Heath house?

26 A. Yes, I did.

27 Q. How many?

28 A. From the Heath house I lifted one partial from a

002-10555

1 window area of the residence.

2 Q. Was the window inside -- was the area where you  
3 lifted the print from inside or outside of the home?

4 A. It was on the outside of the window of the home.

5 Q. And what type of room did that window lead into?

6 A. It led into the living room area of the  
7 residence -- or the -- yes, the dining -- correct, dining room  
8 area of the residence.

9 Q. Directing your attention to Exhibit 795, does this  
10 appear to be a picture of the Heath home from which you lifted  
11 the print?

12 A. Yes.

13 Q. And did you lift it from one of the windows that  
14 appear, on as you face the photograph, the left side of the  
15 house?

16 A. Yes, I did.

17 Q. After you lifted that print did you compare that  
18 fingerprint to the known fingerprints of Kevin Cooper?

19 A. Yes, I did.

20 Q. When did that take place?

21 A. I compared that on the 12th of October, 1982.

22 Q. Directing your attention to an exhibit which has  
23 been marked for identification as Exhibit 801, is this the  
24 comparison card of the thumbprint or the palmprint?

25 A. That's a comparison of the thumbprint which was  
26 found on the window of the residence.

27 Q. This particular exhibit, 801, is the portion of the  
28 exhibit that has the words "inked fingerprint" at the bottom of

1 it, is that a photographic enlargement of an actual known  
2 fingerprint of Kevin Cooper's right thumb that was rolled?

3 A. Yes, it is. It was taken off a fingerprint card.

4 Q. And is the left side of the card which has the  
5 labeling "latent print," is that a photographic enlargement of  
6 the print that you took off the window of Robert Heath's home?

7 A. Yes, it is.

8 Q. Did you examine the two prints to look for points  
9 of similarity?

10 A. Yes, I did.

11 Q. What did you discover?

12 A. I found that the -- the latent fingerprint that I  
13 found on the window matched the right thumb of Kevin Cooper.

14 Q. Based on your examination then do you have an  
15 opinion as an expert as to whether or not the thumbprint that  
16 was left outside on the Heaths' window was left by Kevin Cooper?

17 A. Yes. It was definitely left by Kevin Cooper.

18 Q. Did you also process in conjunction with your case  
19 a car which was recovered in the State of Pennsylvania?

20 A. Yes, I did.

21 Q. And do you recall what the license number of that  
22 particular car was?

23 A. Yes. It's a '77 Ford Pinto with a P.A.  
24 registration, Pennsylvania Registration CUH556.

25 Q. When did you process that?

26 A. I processed that vehicle on the 13th of October,  
27 1982.

28 Q. Directing your attention to a series of small

1 photographs which have been marked for identification as  
2 Exhibits 797, 798, 799, and 800, do you recognize the vehicle  
3 depicted in those photographs?

4 A. Yes. That's the vehicle that I processed.

5 Q. In fact, are those all pictures that you actually  
6 took of the car that you processed?

7 A. Yes. These are my photographs at the time I  
8 processed the vehicle.

9 Q. Did you lift off the inside of the car on the  
10 automatic gear shift lever a latent palmprint?

11 A. Yes, I did.

12 Q. That was on the same day?

13 A. That was on the same day.

14 Q. Directing your attention to an exhibit which has  
15 been marked for identification as Exhibit 790, does that appear  
16 to be an enlargement of a picture that was taken of the  
17 automatic gear shift lever in that Pinto where you found the  
18 latent palmprint?

19 A. That's correct.

20 Q. Did you compare that palmprint against the known  
21 palmprint of Kevin Cooper?

22 A. Yes, I did.

23 Q. Directing your attention to Exhibit 802, which  
24 appears to be another fingerprint comparison card, do you  
25 recognize this exhibit?

26 A. Yes, I do.

27 Q. Is it an exhibit that was prepared at your  
28 direction?

021858

1 A. Yes.

2 Q. And again does the right portion of the exhibit  
3 where it says "inked fingerprint", does that contain a  
4 photographic enlargement of the known palmprint of Kevin Cooper?

5 A. Yes, it is.

6 Q. Do you know which hand?

7 A. It's the right hand.

8 Q. And the left portion of the exhibit, the latent  
9 fingerprint, is that a photographic enlargement of the latent  
10 print which you yourself took out of the inside of Lori Strahl's  
11 car?

12 A. Yes, it is.

13 Q. Did you examine the two prints to determine whether  
14 or not there were any points of similarity?

15 A. Yes, I did.

16 Q. And did you find points of similarity?

17 A. I found several points of similarity.

18 Q. And have you noted those numerically on the  
19 exhibit?

20 A. Yes.

21 Q. Did you also note numerically the points or  
22 similarity on the exhibit which deals with the right thumbprint?

23 A. Yes, I did.

24 Q. Based on your examination of the palmprint taken  
25 from Lori's car and your examination of Kevin Cooper's right  
26 palmprint, do you have an opinion as an expert as to whether or  
27 not the palmprint on Lori's gear shift was left by Kevin Cooper?

28 A. Yes. That latent lifted from the interior of that

002-10559

1 car is Kevin Cooper's right palmprint area.

2 Q. Thank you.

3 I have no further questions.

4 MR. NEGUS: Nor do I.

5 THE COURT: Thank you very much, sir. You may step down.

6 MR. KOCHIS: Ann Punter.

7 MR. NEGUS: Object to this to be cumulative about a fact  
8 not in dispute. I think she's going to repeat this officer's  
9 testimony.

10 THE COURT: For what purpose?

11 MR. KOCHIS: Perhaps in light of the stipulation he is  
12 correct, so if I can go through the stipulations I will see. I  
13 may not call her.

14 THE COURT: I previously advised you of the nature of the  
15 stipulations, so the matters stated within a stipulation agreed  
16 upon by the defendant and his counsel and the District Attorney  
17 may be conclusively considered proved.

18 Yes, sir.

19 MR. KOCHIS: The first stipulation would be that the sex  
20 kit, the vaginal swab and the sample of Lori Strahl's blood as  
21 well as the blue corduroy pants which were examined by Walter  
22 Lorenz were, in fact, gathered from Lori Strahl by the police  
23 and delivered to the crime lab in Allegheny County.

24 MR. NEGUS: So stipulated.

25 THE COURT: We mentioned that back in chambers with the  
26 defendant.

27 MR. NEGUS: I have talked it over with Mr. Cooper. He  
28 agrees.

021860

1 THE COURT: Is it satisfactory to enter into these  
2 stipulations, Mr. Cooper?

3 THE DEFENDANT: Yes.

4 THE COURT: Go ahead. Accepted.

5 MR. KOCHIS: The second stipulation would be that Lori  
6 Strahl's 1977 light blue Pinto was recovered by the police at  
7 9:15 p.m. on October the 12th, 1982, parked in the 3500 block of  
8 Terrace Street near Pittsburgh, Pennsylvania.

9 MR. NEGUS: So stipulated.

10 THE COURT: Accepted.

11 MR. KOCHIS: The third stipulation would be that the  
12 inked or rolled impressions which appear on the exhibits which  
13 Officer Peters has testified to are the known right thumbprint  
14 and right palmprint of Kevin Cooper.

15 MR. NEGUS: So stipulated.

16 THE COURT: Accepted.

17 MR. KOCHIS: And the fourth stipulation would be that  
18 Kevin Cooper was the man who abducted Lori Strahl on October 8th  
19 of 1982 from the Heath residence, kidnapped her, and later raped  
20 her in Frick Park.

21 MR. NEGUS: So stipulated.

22 THE COURT: Stipulation accepted.

23 MR. KOCHIS: There was one other minor portion of the  
24 earlier stipulation about the car, the Pennsylvania license  
25 number, Pinto CUR556, the car was actually found in Pittsburgh,  
26 Pennsylvania, and the location was the 3500 block of Terrace  
27 Street near the intersection of Lathrop in Pittsburgh,  
28 Pennsylvania.

021861



1 MR. NEGUS: So stipulated.

2 THE COURT: Accepted.

3 MR. KOCHIS: The people have no further evidence to offer  
4 at this time in the form of either testimony or stipulation. We  
5 will rest as soon as we have moved the exhibits into evidence.

6 MR. NEGUS: I have no objection to the exhibits.

7 THE COURT: All right. The exhibits will be received.

8 MR. KOCHIS: And that would be all the exhibits which  
9 have been marked for identification during the penalty phase  
10 here today. I don't have all the numbers handy.

11 MR. NEGUS: My understanding that consists of a series of  
12 photographs of the car and the Heath residence and the inked  
13 and -- and the fingerprints, and I have no objection to any of  
14 those items coming in.

15 THE COURT: Everything that you mentioned before the jury  
16 here this morning, I assume. Is there something else that  
17 you've marked that they haven't seen?

18 MR. KOCHIS: No, there is not, your Honor.

19 THE COURT: All right then. All of those will be  
20 received into evidence without objection.

21 (Exhibits No. 790, 792,  
22 793, 794, 795, 796,  
23 797, 798, 799, 800, 801  
24 and 802 were received  
25 in evidence.)

26 MR. KOCHIS: At this point we have no further evidence to  
27 offer at the penalty phase.

28 THE COURT: All right. And you will be ready to proceed

02-18-88

1 Monday.

2 MR. NEGUS: My witnesses are flying in. They will be  
3 here Monday morning.

4 THE COURT: I rushed you through that recess, didn't give  
5 you a chance to get a cup of coffee, something like that, so we  
6 could get these witnesses on the plane, ladies and gentlemen. I  
7 didn't know it would be this brief, however, so we're going  
8 to -- counsel I'd like to see you in chambers with the defendant  
9 and we can preliminarily discuss instructions.

10 And I remind all of you once again of the  
11 admonition which is precisely the same at this phase as it was  
12 before. Don't discuss the case amongst yourselves. Don't  
13 permit others to discuss it with you. Don't form or express an  
14 opinion on the penalty matter until we finally submit it to you

15 I thank the alternates once again for coming back  
16 and joining us.

17 And the rest of you ladies and gentlemen do your  
18 best to avoid reading about it watching it on television.  
19 Certainly don't discuss it with anybody.

20 Thank you for coming in again. We will see you  
21 Monday morning at the hour of 9:30.

22 Thank you. We will be in recess.

23

24 (Chambers conference reported.)

25 THE COURT: On the record. The defendant and all three  
26 counsel are in chambers.

27 Mr. Negus gave me a number of instructions this  
28 morning through the clerk and I have marked that Delta in the

021097

1 lower right-hand corner of each and everyone of them. All the  
2 rest of the instructions have been offered by the District  
3 Attorney, previously, or at this time, and there's quite a bunch  
4 of them he's got here.

5 MR. KOCHIS: Your Honor, they're all very tentative.

6 What my concern was is I talked to Mr. Negus  
7 informally about that issue as to how to instruct the jury on  
8 direct and circumstantial evidence, should we simply do a  
9 catch-all instruction that they may consider the instruction  
10 being previously given, that they deem applicable.

11 He was somewhat concerned about that, and I simply  
12 pulled a new set of instructions, because they have heard  
13 evidence of other crimes and there's going to have to, I assume,  
14 be instructions on -- I'm not sure that there has to be.

15 MR. NEGUS: I don't think there has to be.

16 THE COURT: Counsel, I will give you additional  
17 instructions that I have just tentatively prepared, not knowing  
18 what was coming. You can keep those separate. I don't think we  
19 ought to make a final determination on instructions at this  
20 time, but, I would like to work on them between now and our next  
21 session; look at what each of you have offered.

22 But my feeling is that all of the prior  
23 instructions, where applicable, will apply and jurors can be so  
24 instructed, with the the exception of penalty, and we have a  
25 separate one on that.

26 MR. KOCHIS: When you are on that issue, CALJIC 1.00,  
27 they specifically, I believe, can be told not to consider that  
28 because that says you put aside sympathy, feelings of sympathy

1 and you don't in the penalty phase for the defendant, I guess.

2 MR. NEGUS: I have an instruction on that.

3 THE COURT: When you get a chance to look at the  
4 instructions that I prepared, and that Mr. Negus has prepared, I  
5 think that you can synthesize or come up with an adequate  
6 instruction.

7 I think the easy and the clearest way to instruct  
8 the jurors is to -- if we tell them anything at all about  
9 instructions, then, I believe we should, we should say to  
10 include, consider all the previous ones except as hereinafter  
11 provided, something along that line, and we will -- the only one  
12 that I can think of to exclude out is sympathy. We spell that  
13 out for them.

14 MR. NEGUS: I am uncomfortable with that because I think  
15 it is better to reinstruct them and tell them to consider the  
16 previous instructions. That is the easiest way in which to do  
17 it.

18 THE COURT: Then I have to tell them how to evaluate  
19 testimony and all of the other factors once again.

20 MR. NEGUS: Takes twenty minutes. Avoid reversal.

21 MR. KOCHIS: You do so so succinctly, so clearly, so  
22 concisely.

23 THE COURT: Why are you starting to stroke me now when  
24 you have been so obstinate before.

25 Well, I will take a look and we can --

26 MR. NEGUS: I think we can whittle down the packet Mr.  
27 Kochis has considerably. There was a whole bunch of stuff in  
28 there --

1 THE COURT: I'd rather talk about some of the factors  
2 that Mr. Negus mentioned in his instruction that he has  
3 provided, to give you some food for thought between now and the  
4 next session.

5 I think just in general terms that it is good to  
6 itemize the factors in aggravation that have been brought out at  
7 this trial, but I think you are probably incomplete. I am  
8 looking at the first instruction that you have.

9 MR. NEGUS: I don't recall any others.

10 THE COURT: Circumstances of the crime for which he's  
11 been convicted in the first phase, then you only include the  
12 rape of Lori Strahl.

13 MR. NEGUS: Right. That's the only fact in aggravation  
14 they gave me notice of, being a rape, kidnapping or assault.

15 THE COURT: The matters surrounding that. You have got  
16 burglary.

17 MR. NEGUS: But they didn't give me notice of burglary,  
18 that's not -- you can't use burglary, it is not a crime of  
19 violence. It has got to be a violent crime, right?

20 THE COURT: Act. You are talking about criminal  
21 activity.

22 MR. NEGUS: There you go.

23 THE COURT: Criminal activity.

24 MR. NEGUS: There is no aggravating -- nothing about  
25 criminal activity in the instruction,

26 THE COURT: There certainly is.

27 MR. NEGUS: Criminal activity in general. It has got to  
28 be --

1 THE COURT: Presence or absence of criminal activity by  
2 the defendant which involves use or attempted use of force or  
3 violence will be express or implied. You will see that I added  
4 onto mine the provision, the same has been proved to you beyond  
5 a reasonable doubt.

6 We would also have to instruct on 8.84.1, -.2,  
7 which spells out the reasonable doubt matter on that.

8 MR. NEGUS: Well, that's a different instruction, doesn't  
9 involve force or violence or what have you and theft. It  
10 doesn't -- I mean, the things that involve force and violence  
11 are the abduction, assault and rape of Lori Strahl.

12 THE COURT: If I accepted that then I would have to have  
13 the escape from Mayview from which he walked away; that there's  
14 force and violence when he breaks the window to the house for  
15 entrance. That is an act of a criminal activity involving  
16 violence.

17 MR. NEGUS: You do it on that basis, you've got  
18 reversible error.

19 THE COURT: I don't believe so. Don't throw that at me  
20 that there's reversible error.

21 MR. NEGUS: I think that they have strictly construed  
22 these things in force and violence against a person, not against  
23 an object. You couldn't bring in malicious mischief.

24 THE COURT: If you wish to withdraw and not consider  
25 that, Mr. Kochis, I am not insisting on anything, and I can take  
26 a look at that further. But it would seem to me that that would  
27 be a direct tie between the type of conduct in this case and the  
28 breaking of the house in the other case.

0021867

1 MR. KOCHIS: If I could think about that with Mr.  
2 Kottmeier. We have an answer to that.

3 THE COURT: Yes. That is all I want to do at this time.  
4 I presume we can talk -- we can go into that a little later.  
5 Some other things I question about. At one time I  
6 am confident that I saw a case that talked about lingering  
7 doubt.

8 MR. NEGUS: People versus Fields.

9 THE COURT: Fields?

10 MR. NEGUS: People versus Fields. There's one of my  
11 instructions that has a piece of paper stapled to the back of it  
12 that gives you the exact cite in Fields.

13 THE COURT: I am well familiar with the case.  
14 Undoubtedly that is where I read it. In my research again  
15 yesterday, I couldn't find it. So, that is the lingering doubt.  
16 I will check on that and put it in mine because I knew I had  
17 read it as well.

18 I also put sympathy or pity, or just put sympathy.  
19 That is all right. I fail to see how No. 3, the effect of a  
20 death verdict on Mr. Cooper's family is in any way a factor in  
21 mitigation.

22 MR. NEGUS: Anything at all with the jury could be used  
23 in mitigation, is a factor in mitigation. Lockett versus Ohio.

24 THE COURT: Well, I am familiar with that general phrase  
25 and statement. But in general, there's a number of cases cited  
26 that say evidence at the penalty phase should focus on the  
27 offender and the offense; is that correct? That's also in your  
28 Attorney General booklet, Page 20. Those cases there cited are

1 Woodson, Harris, Pouley.

2 MR. NEGUS: The Attorney General hasn't been very good on  
3 predicting what the law is on death penalty.

4 THE COURT: He cited a case. I have no objection to it  
5 being in there if you want to put it in.

6 MR. KOCHIS: At this point I certainly don't think it is  
7 appropriate. I would like to talk to the Attorney General  
8 before I finalize that. But I am not confident, there's a case  
9 that says, on point, about what effect it may have on Mr.  
10 Cooper's family is something for the jury.

11 THE COURT: The language from the cases are very, very  
12 broad as far as the defendant goes. They can put in darn near  
13 anything, including hearsay. But I have never seen any  
14 reference to it as an effect on his family. They talk about  
15 matters that affect the defendant and matters that affect the  
16 offense,

17 MR. KOCHIS: Your Honor, on that instruction, he's left  
18 out some of the aggravating factors you can consider because the  
19 code specifically mentioned prior felony conviction being --

20 MR. NEGUS: It wasn't noticed. I mean --

21 THE COURT: Counsel, the general position is they can  
22 consider all the evidence received in the first trial that was  
23 proved up in the first phase.

24 MR. NEGUS: But it wasn't noticed, an aggravated  
25 circumstance. If you have got --

26 THE COURT: Has he got you again, counsel? You threw in  
27 the kitchen sink on that 190.3 notice.

28 MR. KOCHIS: Well --

0021069



1 MR. NEGUS: He withdrew everything except the rape.

2 MR. KOCHIS: No. The problem was they were allowed to  
3 consider when we gave notice. Remember the posture we were in  
4 when we gave notice? At that point we were not giving notice on  
5 the escape because he was charged with the escape. He had not  
6 admitted the escape, he had not pled guilty to the escape, so,  
7 it was a charge we were going to have to prove at the trial. He  
8 was convicted of the escape at the trial and then it would be  
9 the same as the murders. We obviously didn't have to, it is in  
10 the Information, it is in writing.

11 MR. NEGUS: Slow down. We're arguing about different  
12 things. I was not arguing about the escape, I was arguing about  
13 the L.A. burglaries.

14 THE COURT: The L.A. burglaries?

15 MR. NEGUS: They were admitted only to impeach Mr.  
16 Cooper.

17 THE COURT: You never put any documentary evidence on on  
18 that.

19 MR. NEGUS: I asked.

20 THE COURT: He admitted it.

21 MR. KOTTMEIER: We have notice of the particular  
22 burglaries in item 22, that offense occurred prior to March 21,  
23 1983.

24 MR. NEGUS: But it was only introduced to impeach him.

25 THE COURT: Well, in what way? Did he withdraw No. 22?

26 MR. NEGUS: I thought so. I thought they withdrew  
27 everything except the rape. I will concede on those, the escape  
28 and the CIM escape. That's --

021870

1 MR. KOCHIS: I don't recall withdrawing on the  
2 burglaries. What we did with the L.A. burglaries, we had an  
3 evidentiary hearing, we argued that his commitments in  
4 Pennsylvania did not result in a felony conviction. At this  
5 point we were drop the Pennsylvania burglaries, the Pennsylvania  
6 other escapes, but it was my understanding for the L.A.  
7 burglaries we wanted that in.

8 MR. NEGUS: Let's look at that and see what was said,  
9 and --

10 THE COURT: Check that out, because it may be  
11 determinative they gave you notice, but they may have withdrawn  
12 it. I don't know how you can take it out of evidence, however.

13 MR. NEGUS: That doesn't make it aggravating factors.

14 THE COURT: Yes, it does.

15 MR. NEGUS: No. You have to specify. There is certain  
16 rules for what the aggravating factors are and --

17 THE COURT: Let's talk about it on Monday.

18 MR. KOCHIS: Would the clerk have the records that would  
19 indicate the day that we ruled on that? Because we have 65  
20 volumes of transcripts of rulings and in the supreme court --

21 THE CLERK: Is that the day that --

22 MR. NEGUS: It was done in Ontario, and it was done -- it  
23 was done those two weeks in July, I think. Don't you think?

24 THE COURT: I have records. But if you are going to be  
25 in Ontario tomorrow, you might get Mrs. McKinney to find it.

26 MR. KOCHIS: I am not going to be in Ontario tomorrow,  
27 but I can look through the transcripts I have here.

28 THE COURT: Where do you get the idea that beyond a

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1 reasonable doubt, Mr. Negus, is involved in weighing aggravation  
2 and mitigation?

3 MR. NEGUS: Let's see.

4 THE COURT: You offered an instruction to that effect.  
5 If you are not convinced beyond a reasonable doubt that the  
6 aggravating circumstances outweigh the mitigating circumstances  
7 you must return a verdict of life imprisonment without the  
8 possibility of parole.

9 MR. NEGUS: That is a separate instruction, right.

10 THE COURT: Yes, it is.

11 MR. NEGUS: Okay. That's where -- what I think should be  
12 the law. If you will give me a second, I will tell you the  
13 cases upon which it is based. Actually, I forgot to have this  
14 typed over. I have a written --

15 THE COURT: It would be helpful if you could have give me  
16 some sort of a citation.

17 MR. NEGUS: I can see if I have -- I thought I had it  
18 typed, but I haven't. I Xeroxed -- I can make available to  
19 counsel a copy of the Xerox as soon as I get a chance, so I  
20 could hand the judge my Xerox argument on that. Will you look  
21 at it?

22 MR. KOCHIS: If I could get a copy of that.

23 The case is analogous to the constitutional  
24 protection that pertains to people on a finding of guilt, that  
25 the elements of the crime haven't been proved beyond a  
26 reasonable doubt.

27 THE COURT: As soon as we break perhaps the clerk can get  
28 us copies of that. I would like to take a copy with me.

00221872

1 MR. NEGUS: It happens to be part of my clerk's  
2 transcript.

3 THE COURT: All right, let's move on. The instructions  
4 aren't numbered, but the one that starts off, "The mitigating  
5 circumstances which I have read for your consideration are given  
6 to you as examples as some of the factors you may take into  
7 account."

8 Then you say, "Anyone of them may be sufficient,  
9 standing alone, to support a decision that death is not the  
10 appropriate punishment in this case."

11 That seems to be directly contrary to the statute  
12 which talks about weighing them and if one outweighs the other.

13 MR. NEGUS: No. But anyone -- you don't count the number  
14 of mitigating circumstances on one hand versus the aggravating  
15 on the other hand. Any mitigating circumstance --

16 THE COURT: Is that the same true of aggravating  
17 circumstance? That one aggravating circumstance alone may  
18 outweigh all the other --

19 MR. NEGUS: I certainly have had death verdicts returned  
20 on that argument, as a matter of fact, but --

21 MR. KOCHIS: The answer is yes. If you give this type of  
22 instruction you have to give an instruction the other way. It  
23 seems to invite error. And the way the legislature or courts  
24 have drafted instructions about aggravating outweighing  
25 mitigating seems the appropriate instruction. Mr. Negus can  
26 make an argument, but it is not necessary to give this  
27 instruction.

28 MR. NEGUS: I think there's always a tendency.

00221873

1 THE COURT: There are a lot of gray areas in these. How  
2 do they weigh it? We don't really tell them precisely how.

3 And then you have drafted another one that says,  
4 "The death penalty should not be imposed if you find that  
5 although the evidence suffices to sustain the verdict it does  
6 not foreclose all doubt as to Mr. Cooper's guilt."

7 MR. NEGUS: That is a pretty close quote from People  
8 versus Fields.

9 THE COURT: I'm willing to give the other one that talks  
10 about lingering doubt, but I am not inclined at the moment to  
11 give this.

12 MR. NEGUS: I am asking you to read Fields, that's what  
13 it says.

14 THE COURT: There are a lot of things in the cases that I  
15 don't instruct the jurors on.

16 MR. NEGUS: Well, I know. But this is sort of --

17 THE COURT: I will read it, I assure you.

18 And then I will call your attention, Mr. Kochis, to  
19 the instruction that starts off, "It is now your duty to  
20 determine which of the two penalties, death or life, shall be  
21 imposed." And then he puts in there, "... if the aggravating  
22 outweighs the mitigating you may impose a sentence of death.

23 "If the mitigating outweighs the aggravating you  
24 must impose a sentence of confinement in the state prison."

25 Of course, the code section, there was one case  
26 which questions whether or not the mandatory nature of the code  
27 section 190 builds in reversible error and the supreme court  
28 hasn't specifically passed on that.

1 MR. NEGUS: That's true. And anticipating how likely the  
2 supreme court responds to the courts, at least one County in the  
3 state have adopted essentially that instruction, other courts  
4 have not adopted it. Someplaces I think they give it,  
5 sometimes, depending on the case.

6 THE COURT: I may word it a little bit differently, to  
7 take away some of the strength of the mandatory nature of it.

8 Your Attorney General booklet says there may be a  
9 problem with CALJIC No. 8.84.2, which advises the jury it shall  
10 impose the death penalty if at times the aggravating factors  
11 outweighs mitigating factors. That's Easley. People versus  
12 Easley, 34 Cal. 3d 858.

13 I just call your attention to it at this time.

14 MR. NEGUS: What's the likelihood of being able to  
15 finalize the instructions sometime before we commence on Monday  
16 morning?

17 THE COURT: I can get here at any time you desire. I  
18 will be here at 7:00, for that matter.

19 MR. NEGUS: Shouldn't take -- if we go over and have this  
20 all organized, it shouldn't take more than 45 minutes or an  
21 hour.

22 THE COURT: It certainly has got to be done before  
23 argument.

24 MR. NEGUS: I know.

25 THE COURT: Your witnesses are going to take maybe an  
26 hour?

27 MR. NEGUS: Yeah.

28 THE COURT: Maybe an hour. We might excuse the jurors

00-22-1875

1 the rest of the morning and then start argument in the  
2 afternoon. I'm perfectly willing to come in as early as counsel  
3 may want to. It may require us to get Mr. Cooper here.

4 MR. NEGUS: Mr. Cooper can be here at 8:30, I believe.

5 THE COURT: I am perfectly willing to give 8:30. In  
6 fact, I'm always here by then.

7 MR. KOCHIS: Yes.

8 THE COURT: Let's be here at 8:30, have Mr. Cooper here  
9 as well, at that time on Monday.

10 Well, I have gone basically through these to  
11 provoke your consideration, and you have got some more which I  
12 am simply not inclined to go through at this time.

13 MR. NEGUS: Could I just bring to your attention one  
14 issue which I think is objectionable, and that is, to define for  
15 the jurors a bunch of different crimes under California law that  
16 have to do with Lori Strahl. The real thing is whether it is  
17 either a crime involving force or violence.

18 THE COURT: There was cases that say if you are going to  
19 tell them that they may consider these crimes you have to define  
20 it in order for them to find them beyond a reasonable doubt.

21 MR. NEGUS: Well, they find -- I think they can find the  
22 facts true beyond a reasonable doubt by stipulation in this  
23 case.

24 So, I don't really see that that is a particular  
25 issue, which I know is a Robertson issue. That sort of thing is  
26 really critical in this particular case. We have sort of  
27 stipulated it away.

28 THE COURT: I got burned on it one time. I got

021876

1 reversible on a case that only collaterally involved a crime of  
2 rape. I said everybody knows what rape is, we don't have to  
3 define, we didn't define it, and I got reversed.

4 MR. NEGUS: I remember that case, and -- I remember the  
5 case, and I know that Mr. Shiftlet at the time was of the  
6 opinion that you committed error that was a different sort of  
7 thing because what that was was an assault with the attempt to  
8 commit rape or something like that. Your position was everybody  
9 knows what rape is.

10 In that case there was an issue as to whether or  
11 not there was a rape involved. In this case there's no real  
12 issue as to rape, kidnapping or anything else. The only  
13 aggravating part of it is the offense. I just don't see the  
14 need to go through all the instructions on that.

15 THE COURT: You know, they can all be defined in a much  
16 more brief fashion than we normally do. It can all be put in  
17 very concise instructions just to touch all the bases. It might  
18 make it more palatable for you.

19 MR. NEGUS: I don't see the need to have a separate  
20 definition of crimes when what we're really talking about is  
21 force and violence. If the facts which underline the  
22 allegations of force and violence are proved beyond a reasonable  
23 doubt, which they certainly seem to be under the state of the  
24 evidence at the present time, then, you know, why risk  
25 misleading the jurors by getting them off --

26 THE COURT: I'm willing to go that way if the prosecution  
27 is. If we get all the necessary waivers.

28 MR. KOCHIS: Here's our problem. The fact that there's

0221877



1     aggravation, are specifically going to refer to evidence of  
2     crimes of rape, kidnapping, assault with a deadly weapon crime.

3             The Attorney General just expressed their concern to me,  
4     if that type of evidence is going to be admitted a jury is going  
5     to be instructed that they can consider evidence of those  
6     crimes, but they have to be told the crime has been proven  
7     beyond a reasonable doubt, then you better seriously consider  
8     instructing on what the elements of the crime are, or there is  
9     going to be an issue, how could the jury have based their  
10    decision one way or the other without sua sponte instructions.

11            THE COURT: Well, this is it in a nutshell.

12            MR. KOCHIS: What I say --

13            THE COURT: That's a long form explanation of what I  
14    said.

15            MR. NEGUS: Let me think about it for awhile. We can  
16    hash it over again Monday.

17                    One further thought though is that are those crimes  
18    as defined in the California law or under Pennsylvania law, and  
19    I think that's one of the problems that you get into.

20            THE COURT: That's true.

21            MR. NEGUS: Probably. Whichever is better for defendant,  
22    if it matters.

23            THE COURT: Well, you see, you are talking there not of a  
24    crime for which he's been committed, but criminal activity which  
25    doesn't necessarily include all the elements, I suspect.

26            MR. KOCHIS: No. The statute.

27            THE COURT: They have to be convinced beyond a reasonable  
28    doubt that he did the force and violence involved in criminal

1 activity, but whether or not he is actually guilty of the crime  
2 I don't think is important.

3 Think about it over the weekend, and the clerk can  
4 make a copy of this Information here for me and let me take  
5 that.

6 I understand you are not going to be in the Ontario  
7 area at any time before you can have the benefit of any  
8 redrafts.

9 MR. KOCHIS: That's correct.

10 THE COURT: So be it. We will see you hear at 8:30 on  
11 Monday then. I prepared an instruction attached to those that I  
12 gave to you just in case the jurors come in on the governor's  
13 power to modify. You can take a look at it. Just try and  
14 anticipate. Hopefully it will never come up.

15 MR. NEGUS: Probably that's not going to. I am not going  
16 to be happy with that, if I understand it.

17 THE COURT: I regret that I am unable to make you more  
18 happy, Mr. Negus.

19 MR. NEGUS: Well, judge all right.

20 MR. KOCHIS: Is there anything we need to clarify or  
21 organize prior to Monday? Because on Monday Mr. Negus is going  
22 to put a series of witnesses on and we will probably have no  
23 rebuttal and we can finalize instructions and we will argue.

24 MR. NEGUS: That is my understanding, unless lightening  
25 strikes over weekend, I get a brainstorm, which I will try to  
26 communicate to somebody.

27 THE COURT: Should be brief.

28 All right. We will be in adjournment until Monday

002-1079

1 at 8:30 in chambers.

2 (Chambers conference concluded.)

3 (Adjournment.)

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021880

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO  
DEPARTMENT NO. 30 HON. RICHARD C. GARNER, JUDGE

THE PEOPLE OF THE STATE  
OF CALIFORNIA,

Plaintiff,

vs.

KEVIN COOPER,

Defendant.

NO. OCR-9319

REPORTERS' TRANSCRIPT  
February 25, 1985

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COMPUTERIZED TRANSCRIPT

0021001

1       1       SAN DIEGO, CALIFORNIA, MONDAY, FEBRUARY 25, 1985, 8:35 A.M.

2                       --ooOoo--

3               THE COURT: Good morning. All counsel, Mr. Cooper are  
4 present in chambers.

5               Mr. Negus, you indicated through the bailiff  
6 apparently that you desire to have your witnesses held in the  
7 back here to avoid the media?

8               MR. NEGUS: Yes.

9               THE COURT: And no extended coverage to any of your  
10 witnesses?

11              MR. NEGUS: That's correct.

12              THE COURT: Well, I'll honor that. The sergeant in  
13 charge of the bailiffs requested that I permit a search of them  
14 this morning, and that sounds reasonable to me offhand. Do you  
15 wish to be heard on that? We're letting them back into security  
16 quarters.

17              MR. NEGUS     Yes, as long as it's not -- Well, when you  
18 see them, you will see -- Okay. Yes that's okay.

19              THE COURT: Okay. So you can tell the sergeant that he  
20 may search their purses or whatever he's going to do with them.

21              MR. NEGUS: I have to call -- I will let them know that  
22 that's the case. If anybody has any objections to it then I  
23 will have them come in the other way.

24              THE COURT: The bailiff is going to put them in the large  
25 jury room down lower where we have been keeping Mr. Kochis'  
26 witnesses later. We first put them up here. That's No. 1 on  
27 the agenda.

28                       Secondly, may I offer you tea or anything?

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1 MR. NEGUS: No.

2 MR. KOCHIS: No, thank you.

3 THE COURT: Thirdly, let's get back to instructions,  
4 unless you have something else anything before we get do those.

5 MR. KOCHIS: No.

6 THE COURT: As far as the general scheme of instructions,  
7 I went over them again over the weekend, read everything I could  
8 get my hands on, including the latest syllabus from the  
9 conference of judges in California.

10 It appears that we have one trial with two phases.  
11 We're still in the same trial. The jury instructions previously  
12 given in my opinion should apply except as modified or otherwise  
13 instructed.

14 I do not think it either required nor practical nor  
15 needed to give instructions on everything ab initio in this  
16 phase of the trial, so I have structured my tentatively approved  
17 instructions in that fashion.

18 MR. KOCHIS: Your Honor, before we leave that there's one  
19 area, one issue that creates. The instruction that you gave  
20 during the guilt phase, which was proper, the first instruction,  
21 1.00, has been held to be error to be given in the penalty  
22 phase.

23 THE COURT: That's not amongst the ones I'm going to  
24 give.

25 MR. KOCHIS: I misunderstood you then. You're not going  
26 to simply refer the jury back and tell them --

27 THE COURT: Yes.

28 MR. KOCHIS: The other issue that is now pending on

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1 appeal is some defense attorneys, some appellate counsel have  
2 made the argument that by referring the jury back en masse to  
3 the general instructions you are in effect inviting them to  
4 reconsider 1.00, which has to do with not considering --

5 MR. NEGUS: I think that's a good argument.

6 THE COURT: Okay. Examine, however, what there is about  
7 1.00 that's been found to be objectionable. There's only one  
8 aspect of it: Penalty.

9 MR. KOCHIS: Right, which appears several times.

10 THE COURT: Not penalty.

11 MR. KOCHIS: "Sympathy, passion, prejudice".

12 THE COURT: And I'm covering that in the proposed  
13 instructions to be given in two places and in no uncertain  
14 words. So I just think that it's cured. And let's go on  
15 through them in that fashion, and unless you have something  
16 more, as we get through if I see any complications we can go  
17 back.

18 You have not furnished me, either of you, however,  
19 with a complete set of instructions that would be -- that would  
20 make it if I have to instruct them from the beginning. It's  
21 just a lot of instructions. All on how to treat a witness, all  
22 on the burden of proof, circumstantial evidence, the whole bit  
23 would have to come in once again.

24 MR. KOCHIS: I thought I had furnished those with --

25 THE COURT: No. Everything is not there. It's simply  
26 not there from the beginning. We'd have to -- There's a lot of  
27 them we'd have to put in that are not here.

28 In any event, anything further on that point, on

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1 MR. NEGUS: Just a second. I had this one.

2 Take it back.

3 THE COURT: I have modified to where I'm going to have  
4 these retyped, but it will read as follows:

5 "The defendant in this case has been found guilty  
6 of four counts of murder in the first degree and  
7 one count of attempted murder."

8 And then it goes on",

2 9 "The charges that the murders were committed under  
10 a special circumstance has been found especially  
11 to be true."

12 That would be the first instruction that I would  
13 give.

14 The next instruction is the one that was referred  
15 to a minute ago, and it would read as follows, proposed:

16 "To the extent they are applicable to the witnesses  
17 and issues of the penalty phase of this trial, you  
18 shall apply all relevant instructions heretofore  
19 given to you at the conclusion of the guilt phase  
20 of the scheme except as hereinafter provided."

21 MR. KOCHIS: If we're going to give that, I think we need  
22 to amend it to indicate that they are to specifically disregard.

23 THE COURT: That what?

24 MR. KOCHIS: They should specifically disregard CALJIC  
25 1.00.

26 MR. NEGUS: I find that tremendously confusing. I don't  
27 see how --

28 THE COURT: May I see the instructions..

1 THE CLERK: They are right here.

2 MR. NEGUS: It just doesn't tell them anything.

3 THE COURT: Well, there's a lot of things in CALJIC 1.00,  
4 for instance, that I think are still applicable.

5 MR. KOCHIS: I agree with that, your Honor.

6 THE COURT: You must not be biased against the defendant  
7 because he has been arrested for this offense, because he has  
8 been charged with the crime, because he has been brought to  
9 trial. I want to give that.

10 MR. KOCHIS: Right.

11 THE COURT: The only thing in that instruction is  
12 sympathy and pity, and I'm covering that. And I think this is  
13 the way to go, gentlemen, as far as I can tell.

14 MR. NEGUS: Let me just -- let me just point out that  
15 this particular particular instruction says that to the extent  
16 they were applicable to the witnesses and whatever, doesn't tell  
17 them what that extent is, and then it just says, "you shall  
18 apply all relevant instructions;" doesn't say what relevant  
19 instructions are except "as hereinafter provided," and I think  
20 that it's confusing.

21 THE COURT: Thank you. Overruled at the moment.

22 The next instruction that I have is 8.84.1 to which  
23 you did give me a proposed instruction, Mr. Negus.

24 MR. NEGUS: Yes, sir.

25 THE COURT: Which had, I think, one good factor in it in  
26 any event.

27 Mr. Kochis, did you find any problem with the 8.84  
28 that he proposed?

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1 MR. KOCHIS: Yes, I do.

2 THE COURT: All right. Then let's -- let's --  
3 anticipating that I believe you voiced that before. I have  
4 modified it. I think that the good part that you have in there,  
5 and it's excellent, is defining aggravating and mitigating  
6 circumstances, and I have incorporated that into my proposed  
7 instruction.

8 Mr. Negus, do you want us to put into this case  
9 where there is a possible mitigating or aggravating circumstance  
10 the age of the defendant?

11 MR. NEGUS: No. I object to the age coming in on either  
12 side.

13 MR. KOCHIS: I think it's a factor that the legislature  
14 indicates the jury can consider. There's proof of his age in  
15 evidence, and I think they should consider it.

16 THE COURT: How old was he at the time of the crime?

17 MR. NEGUS: 25.

18 MR. KOCHIS: Yes.

19 MR. NEGUS: And if -- there's no guidelines whatsoever as  
20 to how that is going to -- which way that cuts, and I think it's  
21 you're getting into constitutionally vague -- the vague type  
22 things as to whether that is an aggravating or mitigating or  
23 what. It just doesn't guide the jury in any way. All it can do  
24 is confuse them.

25 THE COURT: Counsel, in view of his objections to it, in  
26 the fact that I frankly prefer -- it's an irrelevant factor,  
27 doesn't weigh one way or the other in this case, I would just as  
28 soon leave it out. It doesn't mitigate or aggravate.

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1 MR. KOCHIS: It depends. You haven't heard my argument  
2 on how it would mitigate. I think it's a fact you could argue  
3 one way or the other. On the one hand he is 25. He's an adult.  
4 He's not a teenager. He's not a junior high school student. He  
5 is someone past voting age, past drafting. He is someone that  
6 at that age society recognizes is a mature adult. And he is  
7 also, at that age, someone who is going to be around for an  
8 awfully long period of time.

9 MR. NEGUS: That seems to invite a consideration of  
10 attack of the cost to the taxpayers of housing Mr. Cooper if  
11 they should give life without parole, and that, according at  
12 least to some federal decisions, is a totally improper  
13 consideration to take into place. If that's going to be the  
14 argument it brings in even more problems.

15 THE COURT: You better be careful, indeed, how you argue.

16 All right, if it's at least arguable, in spite of  
17 how I feel about that factor, I better leave it in for the jury.

18 MR. NEGUS: Well, it should be under both then, but I  
19 object to it.

20 THE COURT: I beg your pardon, Mr. Negus?

21 MR. NEGUS: I object to it under either, but if it is  
22 under -- if it's in it should be as both an aggravating and a  
23 mimitigating circumstance.

24 THE COURT: Well, I think I get into trouble when I start  
25 telling them that would exemplify which are the aggravating are  
26 the mitigating. We can do that later on.

27 I have taken the format of 8.84 out of CALJIC and  
28 I've modified as indicated.

1 MR. NEGUS: The problem is, if you don't tell them which  
2 is aggravating and mitigating and they are left to speculate --

3 THE COURT: You are going to tell them that, you,  
4 generally you attorneys.

5 MR. NEGUS: That doesn't do any good. That's not  
6 instructing the jury. That's -- what attorneys say they don't  
7 pay any attention to anyway. They have to be instructed. They  
8 have been told what the law is. Attorneys don't guide their  
9 discretion, the law is supposed to.

10 MR. KOCHIS: Your Honor, the problem I have with the  
11 Court's modified instruction is that the Court has left out a  
12 number of factors which the legislature --

13 THE COURT: Such as what?

14 MR. KOCHIS: Defendant's participation in the offense,  
15 whether it was relatively minor or whether he played a major  
16 role; whether he was acting under the substantial dominion of  
17 other persons or by himself.

18 THE COURT: How can you can consider them applicable to  
19 the facts of this case? There was no evidence there was any  
20 other person there.

21 MR. KOCHIS: Which makes them circumstances in  
22 aggravation. He is responsible start to finish for everything.

23 THE COURT: Counsel, you can't bootstrap that way. You  
24 can't say this guy was by himself and there was nobody else  
25 there over which he could exercise dominion, therefore, this  
26 increases the culpability in some manner. You simply can't do  
27 that.

28 MR. KOCHIS: Here's the argument I'd like to make. We

1 are dealing with a group of people who are going to be engaged,  
2 in effect, in sentencing. They are not sophisticated. They are  
3 not used to the factors that should be considered, taken into  
4 consideration when they decide what type of penalty to impose.

5 The legislature has specifically set down a long  
6 list of factors that should be considered, their presence or  
7 their absence. The code specifically says that you will  
8 consider the presence or the absence of the following, and it's  
9 a guideline to give laymen what to look at. They are not to  
10 look at the color of the sky, the color of the defendant's skin,  
11 his clothes. There's a long list of factors that they are to  
12 take into consideration, the presence of those factors, the  
13 absence of those factors.

14 MR. NEGUS: But the thing is the prosecution is trying to  
15 use the absence of certain factors in mitigation as a factor in  
16 aggravation, and I don't believe that is a correct statement of  
17 the law.

18 MR. KOCHIS: Well, for example, if Mr. Cooper had not  
19 been convicted of any felony, I'm sure Mr. Negus would be asking  
20 the jury to be instructed that he has an absence of any prior  
21 felony conviction. He would be arguing that the absence of a  
22 mitigating -- of an aggravating factor is mitigating, and he  
23 would be entitled to that. I believe it's 190.3.

24 THE COURT: Yeah, I've got it now.

25 Well, it is phrased in that kind of language, the  
26 positive as well as the negative.

27 MR. NEGUS: The problem is --

28 THE COURT: Whether or not the offense was committed

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1 while he was under the influence, whether or not the victim was  
2 a participant, whether or not it was committed under  
3 circumstances of moral justification, whether or not he acted  
4 under extreme duress or under the substantial domination of  
5 another person.

6 MR. NEGUS: The problem is that you're getting into a  
7 situation if you -- if you construe the statute that way, you're  
8 getting into a situation where you're stacking the deck in favor  
9 of the death penalty. And the statute specifically says, and  
10 the law specifically says, that the law has no preference  
11 between one and the t'other.

12 First of all, you are encouraging the jury to count  
13 the number of aggravating factors and factors which don't apply  
14 to this particular case are taken to be aggravating factors.

15 THE COURT: Do they apply, Mr. Negus, as long as I stand  
16 corrected and it does speak in the negative as well as the  
17 positive?

18 MR. NEGUS: No, they don't, because they are plainly only  
19 circumstances in mitigation, that is, it is not -- how can it be  
20 circumstances in aggravation that the defendant acted alone?  
21 That doesn't make it -- that doesn't -- that has no rational  
22 bearing upon the seriousness of the -- of the crime.

23 THE COURT: Mr. Kochis, did you prepare 190.4 for me?  
24 No.

25 8.84.1, did you prepare one of those for me?

26 MR. KOCHIS: I have a copy of it so you should have the  
27 original of it.

28 THE COURT: Well, I do then.

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1 THE COURT: I'm sorry, I don't seem to find it.

2 MR. KOCHIS: It should have been in the original section  
3 that I gave the Court with the guilt phase instructions.

4 THE COURT: Okay.

5 MR. NEGUS: For whatever it's worth, I can't find my copy  
6 either.

7 THE COURT: Here it is. You've basically thrown in  
8 everything in the statute including, you know, mental disease,  
9 defect or effects of intoxication.

10 MR. NEGUS: It's certainly not an aggravating factor that  
11 is the absence of --

12 MR. KOCHIS: That one I don't have strong feelings about.

13 THE COURT: Well, let's go through them. Which ones do  
14 you -- let me tick them off here, then let's examine them.

15 First is circumstances of the crimes of which he is  
16 convicted.

17 Then we have the other criminal activity; the  
18 presence of or absence of any prior felony convictions.

19 I've got that in there, too. That's all right.

20 MR. NEGUS: Let me just point out one other particular  
21 point is that they are required to give notice of any statutory  
22 evidence in aggravation, and no notice has been given as to any  
23 of those particular factors.

24 MR. KOCHIS: Which factors?

25 MR. NEGUS: The ones -- acted alone, all those ones you  
26 have been talking about.

27 MR. KOCHIS: I believe if you will read my notice I did  
28 put the catchall provisions that dealt with evidence as they



1 pertain to the crimes in the Information as they relate to Penal  
2 Code Section 190.3, and then I put Subsections (g), I put the  
3 Subsections --

4 MR. NEGUS: Have you got that?

5 MR. KOCHIS: Yes.

6 MR. KOCHIS: Subsections (g), (j), (i), (d) --

7 THE COURT: Where are you at? Which number have you  
8 noticed?

9 MR. KOCHIS: I'm on, your Honor, 25, 26, 27.

10 THE COURT: Was not committed while he was under the  
11 influence of extreme mental or emotional disturbance.

12 MR. KOCHIS: I'm talking about my notice, I'm sorry.

13 MR. NEGUS: But you struck those --

14 MR. KOCHIS: 26.

15 THE COURT: Evidence of the age of Kevin Cooper.

16 MR. KOCHIS: No.

17 MR. NEGUS: Let's see.

18 MR. KOCHIS: And I also included 190.3(a) and (e) in No.

19 1.

20 THE COURT: Well, is this the full extent of your  
21 instruction, one page?

22 MR. KOCHIS: No. This is not mine, that's not the one.

23 I thought that was the one you proposed.

24 MR. NEGUS: Yes.

25 THE COURT: Could be. Here's yours.

26 MR. KOCHIS: Yes. You found it, the one you've marked  
27 up.

28 THE COURT: All right. (d), whether or not the offense

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1 was committed while the defendant was under the influence of  
2 extreme mental or emotional disturbance.

3 MR. NEGUS: There's no evidence on that one way or the  
4 other. It's just improper to give. There is no evidence on  
5 that.

6 MR. KOCHIS: I'm not going to argue that strongly for  
7 that particular one.

8 THE COURT: Shall I take it out?

9 MR. KOCHIS: I have no objection to the Court taking that  
10 one out.

11 THE COURT: Whether or not the victim was a participate  
12 in the homicidal conduct or purely the act.

13 MR. NEGUS: That's one.

14 THE COURT: Take it out, Mr. Kochis?

15 MR. KOCHIS: That's one we typically argue, that they  
16 were undeserving victims, they in in no way taunted, baited or  
17 induced the defendant to commit the act.

18 MR. NEGUS: If you read it that way, then the statute is  
19 being stacked in favor of death.

20 THE COURT: Of course they've done that by their  
21 legislative act. They have set forth a number of factors. If  
22 this is, as they apply to the facts of this case, it mitigates  
23 against the defendant, how can we fault it.

24 MR. NEGUS: The thing is that somehow the legislature in  
25 order to make the statute constitutional has to single out those  
26 murders which are especially heinous.

27 The particular factors that Mr. Kochis wants to  
28 have are factors which apply to all murders, and they -- so any

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2 ( 1 murder, according to that particular argument, would become  
2 aggravating. That is unconstitutional.

3 THE COURT: When you talk about the the gravamen of the  
4 case where you could talk about the footsteps in the night and  
5 the victims asleep in their bed, attacked in their bed, you  
6 know, that comes under the general one. Why don't I take it  
7 out?

8 MR. KOCHIS: Because, your Honor, what Mr. Negus is  
9 trying to get the Court to agree to is in the general scheme of  
10 things the statute is not stacked one way or the other.

11 Under the facts of this particular case with this  
12 particular murder and series of victims, if you follow the law  
13 the aggravating factors are going to outweigh the mitigating  
14 factors, but that doesn't mean the Court should delete various  
15 aggravating factors.

16 There are murder cases the Court has sat on where  
17 the victims know the defendant, where there may have been an  
18 argument, there may have been a quarrel, there may have been  
19 some taunting. That would be a mitigating factor. This is not  
20 the case.

21 That's what makes this case a very aggravated  
22 murder, which makes it a case the death penalty is appropriate.  
23 That's why the legislature included that, whether or not for  
24 that particular element, to give the jury some guidance, these  
25 are lay persons.

26 THE COURT: All right. We will give it.

27 (f) Whether or not the offense was committed in  
28 the circumstance that the defendant reasonably believed to be a

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1 moral justification or extenuation.

2 Do you want it given, Mr. Kochis's?

3 MR. KOCHIS: The argument would be the same for the  
4 factor above.

5 THE COURT: Do you want it given?

6 MR. KOCHIS: Yes.

7 MR. NEGUS: Same objection.

8 THE COURT: Well, since it's in there, whether or not I  
9 try to give both sides the full opportunity in accordance with  
10 the law, and that's the law. He can argue for whatever it may  
11 be worth.

12 MR. KOCHIS: (g) Whether or not the defendant acted  
13 under extreme duress or substantial domination of another  
14 person.

15 MR. KOCHIS: That one I have no strong feeling about.  
16 I'm not going to ask for that.

17 THE COURT: Take it out.

18 MR. KOCHIS: Unless Mr. Negus wants it.

19 MR. NEGUS: Obviously I don't.

20 THE COURT: All right. Take take it out.

21 (h) Whether or not at the time of the offense the  
22 capacity of the defendant to appreciate the criminality of his  
23 conduct or to conform his conduct to the requirement of law were  
24 impaired as a result of mental disease or defect or evidence of  
25 intoxication.

26 MR. NEGUS: Again, there is no evidence.

27 MR. KOCHIS: I'm not asking for that one.

28 THE COURT: Out.

1 (i) The age of the defendant at the time of the  
2 crime. Do you want that in?

3 MR. KOCHIS: I think that's a factor they should consider  
4 on both sides.

5 MR. NEGUS: I object.

6 THE COURT: I will give it.

7 (j) Whether or not the defendant was an accomplice  
8 to the offense and his participation in the commission of  
9 offense was relatively minor.

10 Mr. Kochis?

11 MR. KOCHIS: No.

12 MR. NEGUS: Well, as long as you're leaving all that  
13 other junk in, at least there's some evidence along that line.

14 MR. KOCHIS: Then leave it in. Let's leave that one in.

15 MR. NEGUS: I take it -- Well, I will think about it.

16 THE COURT: You are not objecting to that, Mr. Negus?

17 MR. NEGUS: I'm thinking about whether I'm objecting.

18 Yes, I am. Take it out.

19 THE COURT: Want me to take it out?

20 MR. KOCHIS: Yes.

21 THE COURT: Well, you called the shot there. All right.

22 I think to be fair in format, at least if we're  
23 going to itemize in such fashion, we should pick up with Mr.  
24 Negus' instruction now in that regard.

25 MR. NEGUS: Would you mind if we start taking -- one  
26 other reason for my objections to these particular factors in  
27 aggravation being put in there, what you're doing is also  
28 encouraging double, triple, quadruple counting. As the Court

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1 pointed out, what those factors that Mr. Kochis argued be  
2 included do is really go back and emphasize the circumstances  
3 and the nature and gravity of the crime, and they are just  
4 repetition.

5 The only rational way that they could have any  
6 affect in guiding a jury is to -- is to focus them on things  
7 which may be out of the -- out of the ordinary from an ordinary  
8 murder which usually would result in a manslaughter verdict but  
9 somehow might -- might require that there be mitigation.

10 The only way that I could see any of those things  
11 coming into a murder charge would be under a pre Carlos felony  
12 murder. If you have a first degree premeditated and deliberate  
13 murder, they are just not going to apply almost by definition.  
14 And so I think what they are doing is they are quadruple, even  
15 quintuple counting the nature and gravity of the offense, which  
16 is the only thing that is really at issue.

17 THE COURT: I can't conceive of a case where the facts  
18 wouldn't reveal whether or not a defendant, for instance, is a  
19 major participant or whether somebody was exerting dominion over  
20 him.

21 So many of these necessarily refer back to the  
22 facts that came out in the trial portion or the guilt phase of  
23 the trial, and yet they've done that.

24 You want me to say that the statute is  
25 unconstitutional in some way because it doubles up on factors in  
26 aggravation?

27 MR. NEGUS: There's also just a statutory construction  
28 argument that when these people, when Mr. Briggs and Mr.

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1 Nichols, whatever his name is, drafted this particular -- this  
2 particular statute, they were thinking that they would have a  
3 felony murder with no intent to kill. That's obviously the way  
4 it was -- was originally construed, and there is even stuff in  
5 the voter's pamphlet to indicate that.

6 So this particular sort of thing can be logically  
7 inferred to have some relevance as to some felony murders.  
8 However, when you're dealing with a first degree premeditated  
9 murder by definition, you're not going to have some of that  
10 stuff. And it seems to me just to be in the context of a first  
11 degree premeditated murder it is double counting, and the  
12 statute should be construed not to have results.

13 THE COURT: I don't find the argument persuasive enough  
14 to where I'm going to rewrite the statute, Mr. Negus.

15 The way I had this written, you may not wish it  
16 this way and I'm willing to break it down, but I had it all in  
17 one paragraph, most of the stuff that you want to talk about.

18 MR. NEGUS: I'd rather have it separately. We are going  
19 to have theirs with 25 different ones.

20 THE COURT: Let's go through it then, as you've got them  
21 here.

22 (j) then would be any lingering doubt.

23 MR. KOCHIS: Is the Court then going to use the same  
24 wording: "Whether or not you find the existence of any  
25 lingering doubt", because these are all factual issues the jury  
26 has to decide on. They may find there is no lingering doubt.  
27 They may find there is no sympathy for Mr. Cooper.

28 THE COURT: Whether or not you have any lingering doubt

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1 as to Mr. Cooper's guilt?

2 MR. KOCHIS: Yes.

3 THE COURT: Mr. Negus?

4 MR. NEGUS: I suppose if you are not going to tell them  
5 which one aggravates and which one mitigates, which I think is  
6 completely unguided discretion, but if you are not going to do  
7 that, I suppose you have to be consistent in your wording.

8 THE COURT: All right.

9 Whether or not you have any lingering doubt as to  
10 Mr. Cooper's guilt;

11 And (k) would be -- do you want just "sympathy and  
12 "pity" or "sympathy"?

13 MR. NEGUS: "Sympathy" will do.

14 THE COURT: I beg your pardon?

15 MR. NEGUS: "Sympathy" will do.

16 THE COURT: Whether or not you have any sympathy for Mr.  
17 Cooper.

18 Whether or not you have -- or whether or not you  
19 feel --

20 MR. NEGUS: It's probably "feel".

21 THE COURT: Whether or not you feel any sympathy for Mr.  
22 Cooper.

23 MR. NEGUS: That seems, however, -- I can see a problem  
24 with that with this particular format again is that that would  
25 suggest that if they don't feel sympathy for Mr. Cooper, that's  
26 an aggravating factor. And I think that that's another example  
27 of the absurdity of the statute -- I mean the absurdity of this  
28 particular way, because in fact lack of sympathy for Mr. Cooper

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1 is not an aggravating factor.

2 MR. KOCHIS: But --

3 THE COURT: That's true.

4 MR. KOCHIS: They are the fact finders. Simply because  
5 Mr. Negus is going to argue for sympathy or he may introduce a  
6 witness that themselves feel sympathetic for Mr. Cooper, that  
7 doesn't mean the jury has to find sympathy for Mr. Cooper. They  
8 can consider it if they so find it, and I think they should be  
9 instructed in that light.

10 MR. NEGUS: I'm not even sure that's the law. I am not  
11 sure that's a correct -- I think sympathy for Mr. Cooper is just  
12 a mitigating factor per se.

13 MR. KOCHIS: No. If you read the language, I believe of  
14 the Easley case, it talks about the type of factual basis that  
15 the Court felt the defendant established in Easley which would  
16 justify the jury having a feeling of sympathy for him, and  
17 therefore, being instructed on it. And it indicated that there  
18 may be some requirement at least if you read between the lines  
19 of the defendant to make some factual showing at the penalty  
20 phase that would entitle him to the instruction, because Easley  
21 specifically talks about the fact that the jury is not to put  
22 aside their reason and to base their decision on things that  
23 aren't established in the record.

24 THE COURT: You would prefer to have it, Mr. Negus, any  
25 sympathy you may feel for Mr. Cooper?

26 MR. NEGUS: As opposed to what?

27 THE COURT: Any other option.

28 MR. NEGUS: Yes.

1 THE COURT: Mr. Kochis.

2 MR. KOCHIS: Yes, your Honor.

3 THE COURT: With reference to --

4 MR. KOCHIS: And I have an objection to "the family".

5 THE COURT: You do have an objection?

6 MR. KOCHIS: Yes, because I don't find any authority for  
7 it and I don't believe it relevant, the effect of the death  
8 verdict on Mr. Cooper's family.

9 MR. NEGUS: Well, certainly we've had ample argument,  
10 emotion, suggestions as to the effect of the death of the  
11 various victims on various people, and I think that is an  
12 unspoken circumstance in aggravation. Certainly the contrary is  
13 also entitled to something. And Lockett says anything which  
14 mitigates.

15 THE COURT: Well, I went back and I read the People vs.  
16 Jackson case 28 Cal.3d 264 at 316, and it says that the penalty  
17 phase should focus on factors surrounding the offenders and the  
18 offense. There are a number of other cases to the same effect  
19 cited in the A.G.'s death penalty treatise on Page 20. That  
20 doesn't seem to approach any one of them, and once I open it up  
21 to things family, then it's a question of degree how far it has  
22 to be open.

23 I can see in many cases -- over the years I've seen  
24 victims of crimes feel real strong emotion about what might  
25 happen to the defendant. And when the probation officer asks  
26 them what they would recommend, they want to wash their hands  
27 like Pontius Pilate. They feel really emotionally involved in  
28 the case.

02219077

1           So I can say in a hypothetical situation the victim  
2   in this case, though beat half to death in another case, doesn't  
3   want to see the defendant's incarceration on his shoulders, or  
4   something like that, therefore, that would be a factor for the  
5   jurors to consider. And I don't think in any way the  
6   legislature intending some third parties, for instance, to  
7   effect the way this is sentenced.

1           MR. NEGUS: Well, I would point out that I have certainly  
8   in normal sentencing things, these are unguided lay people, I  
9   have seen many, many, many judges over the years use as a  
10   circumstance for leniency the effect of the particular  
11   punishment on the defendant's family. It is something that  
12   trial judges always do, and I just think it is something that  
13   unguided jurors may miss if they don't do it. It is certainly  
14   something that weighs in the --

15           THE COURT: Oh, we do that generally when we are  
16   considering putting somebody on probation or in custody. If  
17   they're in custody, they can't then work, the family, the home  
18   gets foreclosed upon, the children go hungry, that sort of  
19   thing. Neither of that kind of assistance is going to be given  
20   in this case.

21           MR. NEGUS: But it doesn't -- the specific type thing I  
22   have seen it is where the effect is in a child molest case, the  
23   effect on the child of putting the -- or the other children in  
24   the family of putting the father into prison would be  
25   considered. That has got nothing to do with -- it is just  
26   purely an emotional thing that I think it is a proper factor in  
27   mitigation.  
28

00219004

1 THE COURT: I am not going to open it up, Mr. Negus,  
2 simply not persuasive. In view of the objection I will not give  
3 No. 3 in your proposed instruction.

4 MR. KOCHIS: No. 4, I have no objection to, provided it  
5 is modified to include the language that Easley now says should  
6 be included, and if the jury should be instructed that any  
7 circumstance which lessens -- the Court has modified the  
8 paragraph. I have seen the Court, you consider not only the  
9 offense but the offender.

10 THE COURT: No.

11 MR. KOCHIS: I saw it somewhere. In fact, we included it  
12 in our proposed instruction. We included the Easley language, I  
13 believe, in 8.84.2, one of those. You have to include it.

14 THE COURT: I think this was just a note in reference to  
15 the argument of factors surrounding the offender and the  
16 offense. I have not modified it.

17 MR. KOCHIS: No. Excuse me I'm looking at 8.84.1.

18 THE COURT: Well, I think I will use Mr. Negus'.

19 MR. KOCHIS: Your Honor, the only problem I have with  
20 that is we have a problem, the Supreme Court says you give that  
21 instruction, by the absence of the other language, it indicates  
22 the jury can only consider the factors pertaining to the offense  
23 and he also has the right to have the benefit of factors which  
24 pertain to him. Let me find it. Let's see.

25 MR. NEGUS: I have my original instruction in a separate  
26 file, which is not in final.

27 MR. KOCHIS: It is going to take me a moment.

28 MR. NEGUS: Can. I make a phone call? How much do you

00219055

2 THE COURT: I don't know, sir.

5 THE COURT: Yes. All right. I will modify the  
6 instruction as indicated,

11 MR. NEGUS: Okay.

17 I think that taken is somewhat from Mr. Negus'  
18 language. I back up on circumstance and factor a little bit and  
19 I will put that in.

20 MR. NEGUS: Where do we tell them which one is which?

21 THE COURT: In argument.

22 MR. NEGUS: That is not instructing the jury on the law.

23 THE COURT: I think it is.

24                    Okay, I will get you a copy of that. As soon as  
25                    the secretary gets here, we will have that typed up. That is  
26                    the most important one perhaps for you.

27                   The next instruction that I have --

28 MR. NEGUS: If we're going to -- now that we have changed

1 it around I would request that you put in some instruction that  
2 they are to consider aggravating and mitigating circumstances  
3 according to the weight of them and not by counting them.

4 THE COURT: Let's keep that in mind, weight not number.  
5 We may that cover later.

6 The next one I have is 8.84.11, evidence that has  
7 been introduced for purposes of showing that the defendant,  
8 Kevin Cooper, has been convicted of the crimes of burglary in  
9 two counts in the County of Los Angeles prior to the offense of  
10 murder in the first degree which he has been found guilty in  
11 this case.

12 And then it goes onto say, you have to find that by  
13 a reasonable doubt. Anything?

14 MR. NEGUS: Okay.

15 THE COURT: Well, it came out necessarily in the  
16 penalty -- guilt phase, therefore you have had plenty of notice  
17 on it.

18 MR. NEGUS: It only came out for impeachment. The  
19 defendant is not going to testify in the penalty phase.

20 MR. KOCHIS: It should also include escape, should it  
21 not?

22 THE COURT: Where was he convicted of escape?

23 MR. KOCHIS: He admitted it.

24 THE COURT: Where was he convicted of escape?

25 MR. KOCHIS: In the courtroom. He pled guilty.

26 MR. NEGUS: I am not sure that is in evidence. But he  
27 certainly did.

28 THE COURT: Certainly told them informally.

0021907

1 MR. NEGUS: That is not the same thing as saying it.

2 THE COURT: Back to escape.

3 MR. KOCHIS: He admitted it on the stand.

4 MR. NEGUS: Not that he was convicted, just that he did  
5 it.

6 MR. KOCHIS: I had thought he admitted it on  
7 cross-examination as to his prior felony convictions.

8 MR. NEGUS: I don't recall that.

9 THE COURT: Did he state --

10 MR. NEGUS: I don't think he was asked on  
11 cross-examination as to his prior felony convictions.

12 THE COURT: Did he state that he had pled guilty to  
13 escape?

14 MR. KOCHIS: That was my understanding but I could check  
15 the transcript to make sure.

16 THE COURT: There certainly is evidence that he escaped,  
17 and you can consider the matter, that is, that came out in the  
18 guilt phase in the penalty phase.

19 MR. NEGUS: That is not an aggravating circumstance  
20 unless it is a conviction.

21 THE COURT: There was so many things in the guilt phase  
22 that he can talk about in aggravation.

23 MR. NEGUS: But they're not aggravating circumstances.

24 THE COURT: Yes. When they talk about the circumstances  
25 of the evidence brought out in the --

26 MR. NEGUS: You are not entitled to bring out the  
27 circumstances of the evidence brought out in the first phase,  
28 you are entitled -- that is one of the problems I think with

021908

1 these open-ended instructions. You are not entitled to talk  
2 about the circumstances of the crime.

3 There was a lot of stuff that was brought out that  
4 had nothing to do with the crime. For example, the purse-snatch  
5 in San Diego, that is not an aggravating factor, ain't never  
6 been convicted of it, doesn't involve force and and violence,  
7 there was no notice. The escape, that is the same thing unless  
8 there's a prior felony conviction.

9 I would submit that it can't be a prior felony  
10 conviction anyway, it is just not a prior. It is not prior to  
11 the crime, so it is not really a prior.

12 THE COURT: I prefer leaving it out, Mr. Kochis. I don't  
13 think it adds anything for you, creates another area of possible  
14 reversal.

15 MR. NEGUS: Can you tell me, I don't remember -- excuse  
16 me.

17 MR. KOCHIS: Fine.

18 THE COURT: Mr. Negus.

19 MR. NEGUS: Could you tell me the language that you are  
20 using as far as the crimes of violence?

21 THE COURT: We haven't got to it.

22 MR. NEGUS: Wasn't that a circumstance in aggravation?

23 THE COURT: This is crimes of which he's been convicted.

24 MR. KOCHIS: He's talking about the laundry list in  
25 8.84.1, I believe.

26 THE COURT: She's going to be back with that, I will get  
27 it to you before argument.

28 MR. NEGUS: It seems like to me you are opening up there

021909



1 crimes which we were not given notice of, which they cannot  
2 possibly -- they can't consider, and that is why I felt that it  
3 was better to try and limit that to evidence of the crimes  
4 involving Lori Strahl.

5 MR. KOCHIS: Well, your Honor, it is -- the reason  
6 counsel is claiming he doesn't have evidence of it is it is  
7 evidence that came in during the course of the trial which came  
8 from his client's own mouth, during his testimony, which we  
9 could not have had notice of. He certainly was on notice of the  
10 things that his client testified to.

11 THE COURT: Here's the instruction on that point that  
12 comes up next. I think I will just use the burglary as far as  
13 crimes of conviction, and then I will have this typed up.

14 MR. KOCHIS: It should be assault with a deadly weapon, I  
15 believe.

16 THE COURT: Counsel, I don't think I will do that. The  
17 deadly weapon perhaps is a camera, is perhaps a screwdriver,  
18 then we'd have to define deadly weapon, and we will have to get  
19 into the vagueness of what is a deadly weapon, depending upon  
20 how it is used. We're not trying to convict him of a crime.

21 If you are mentioning incorporating that in a  
22 circumstance of aggravation, I define that, that is something  
23 they are going to consider. We're talking about the assault on  
24 Lori Strahl, simple assault is sufficient.

25 Show Mr. Negus, please.

26 MR. NEGUS: Driving a motor vehicle without the consent  
27 of the owner of the vehicle, that's not a crime of force or  
28 violence.

0021910

1 THE COURT: It was in this case.

2 MR. NEGUS: That is not the act of force or violence,  
3 neither was the burglary. Object to those.

4 THE COURT: All right. Overruled. That's something else  
5 I will give that as indicated.

6 The next one I have is 14.50, Burglary - Defined.

7 MR. KOCHIS: I believe you should have a modified -- I  
8 had my secretary type a modified --

9 THE COURT: Yeah. You did.

10 MR. KOCHIS: -- version, I think. I believe Mr. Negus  
11 gave that to you this morning, although it used the word  
12 "inhabited dwelling" as opposed to "any structure".

13 THE COURT: Then we get into first or second degree and  
14 inhabited and occupied. You get into language such -- that  
15 is -- why don't you just leave it as I have got it here.

16 MR. KOCHIS: Fine.

17 THE COURT: All of these I have indicated on 8.84.1.2  
18 relate to the alleged Lori Strahl incidents.

19 The next one I have is the No. 9.00 modified. I  
20 took out your one on A.D.W. and just modified that to read the  
21 assault.

22 MR. KOCHIS: I have no objection to that.

23 THE COURT: 9.19, kidnapping.

24 MR. KOCHIS: No objection.

25 THE COURT: All right. The next one is 14.36 as Mr.  
26 Kochis submitted it.

27 18051 of the vehicle code seems to be all right.

28 The next one I have doesn't have a citation on it,

021911

1 I may have torn off the second page, but it is with reference to  
2 rape. I have modified that extensively.

3 MR. KOCHIS: Your Honor, this morning you should have  
4 also gotten some instructions.

5 THE COURT: Let me go through mine, Mr. Kochis, the  
6 ones -- I will go back to yours.

7 MR. KOCHIS: They have to do with the crimes though.

8 THE COURT: The next one I have is certainly slanted away  
9 towards the defense, and it reads as follows:

10 "In all the aforementioned crimes the defendant has  
11 not been convicted and is presumed to be innocent  
12 until the contrary is proved, and in case of a  
13 reasonable doubt whether his guilt is  
14 satisfactorily shown, you must disregard them and  
15 not consider them as factors in aggravation  
16 in this case.

17 "This presumption places upon the state to proving  
18 them beyond a reasonable doubt."

19 "Reasonable doubt is again defined as follows:"

20 MR. NEGUS: I am not sure why we're telling them that, he  
21 hasn't been convicted of them.

22 THE COURT: Just to accent the reasonable doubt element  
23 of that. I can take that out if you prefer. But I took it out  
24 of one of the cases somewhere.

25 MR. KOCHIS: My office -- it's on my offices typewriter.  
26 I can't recall drafting that.

27 THE COURT: I am not sure.

28 MR. KOCHIS: Because it definitely is a defense oriented

00221912

1 instruction.

2 THE COURT: I think that is my typewriter in Ontario.

3 MR. KOCHIS: It seems appropriate. I know we have to  
4 instruct them in some fashion on it.

5 THE COURT: The one in Ontario, it would be right here if  
6 at all.

7 MR. NEGUS: Is that -- let me look at that again. Is  
8 that in fact the modification of 2.90?

9 THE COURT: Indeed. I butchered 2.90. I didn't modify  
10 the reasonable doubt portion of it, I made it apply not to  
11 guilty but into factors in aggravation.

12 MR. NEGUS: You are going to give the regular 2.90 to  
13 boot?

14 THE COURT: No, no need to be given; doesn't need to be  
15 given at all.

16 MR. NEGUS: I am not too sure about that.

17 THE COURT: The next would be is, I have one from Mr.  
18 Negus which reads:

19 "As jurors in deciding the appropriate penalty, you  
20 may consider pity, sympathy or mercy for the  
21 defendant. However, you must not be swayed by  
22 mere conjecture, prejudice or public opinion."

23 MR. KOCHIS: I don't recall getting a copy of that.

24 THE COURT: Again, any of them coming from Mr. Negus have  
25 a small "Delta" entered in the lower right-hand corner.

26 MR. KOCHIS: I have no objection, that is the state of  
27 the law. Then I have 2.60 and 2.61 with reference to the  
28 defendant's not testifying.

1 MR. NEGUS: That causes a problem. I think that's  
2 another reason why this recapitulation thing -- obviously you  
3 gave 2.62 before.

4 THE COURT: Which one was that?

5 MR. KOCHIS: He didn't satisfactorily explain away certain  
6 things that he could have.

7 MR. NEGUS: I think that you either -- the problem is you  
8 either reemphasize that instruction and emphasize the difference  
9 between his testifying in one stage and not testifying at the  
10 other, which is sort of an implied comment on it, or you confuse  
11 everybody.

12 THE COURT: My point of view --

13 MR. NEGUS: Another example.

14 THE COURT: -- is it disconfuses them.

15 MR. KOCHIS: Your Honor, I included those for the court.  
16 I wasn't sure what we should do on that area. It dawned on me  
17 if he's entitled to a reasonable doubt instruction on these  
18 offenses of violence then he's probably entitled to an  
19 instruction that he doesn't have to testify. That is the only  
20 reason I included it. I assumed Mr. Negus would be asking for  
21 it.

22 THE COURT: I modified that to make that 2.61 to apply to  
23 aggravating factors. No failure on the defendant's part. Or I  
24 think you have -- you want that there, Mr. Negus?

25 MR. NEGUS: I am not saying I don't want it. What I am  
26 saying is that you, by referring them back to the original  
27 instructions, you have got two contradictory instructions, I  
28 think.

002-1914

1 THE COURT: The next one I have is 17.31, all  
2 instructions not necessarily applicable.

3 MR. NEGUS: Can I find what he's saying about that?

4 Well, you told them on the one hand by referring  
5 them back to the original instructions that the failure of the  
6 defendant to explain something is something they can take into  
7 account. On the other hand, you are telling them just the  
8 opposite.

9 THE COURT: I think I have heard enough on that point.  
10 Overruled, Mr. Negus. I am going to give it in the abbreviated  
11 fashions. I am not going to give every instruction on  
12 credibility of witnesses. Let's keep the trial understandable  
13 to the jurors.

14 For that matter, obviously a bunch of the  
15 instructions will not apply any longer.

16 In this case, your verdict may be in one of the  
17 following forms, and I have changed them just slightly. I had  
18 these retyped.

19 Verdict form "A" says:

20 "We, the jury in the above-entitled  
21 cause, determine that the penalty shall be death."

22 Form "B":

23 "We, the jury in the above-entitled cause,  
24 determine that the penalty shall be confinement in  
25 the state prison for a term of life without the  
26 possibility of parole."

27 And, then, when I come to 8.84.2, the concluding  
28 instruction, I have added something that probably again helps

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1 the defense in some amount.

2 In the third paragraph of that instruction it  
3 reads:

4 "If you conclude that the aggravating circumstances  
5 outweigh the mitigating circumstances, you shall  
6 impose a sentence of death.

7 "If the mitigating outweigh the aggravating  
8 circumstances, it should be life."

9 Then I adding something to that.

10 "If the factors are evenly balanced so that neither  
11 outweighs the other, you should return life  
12 without the possibility of parole."

13 MR. KOCHIS: I don't feel comfortable with that. I  
14 prefer to have it the way CALJIC has it raised.

15 THE COURT: I think the problem is that the Supreme Court  
16 takes up that issue and that they find against you on it. I  
17 really think what is necessary if there is an omission in the  
18 law the jurors could find that, hey, these factors balance out.  
19 It is evenly balanced.

20 MR. KOCHIS: But if they find -- it is their duty under  
21 the law if they find that aggravating do not outweigh the  
22 mitigating, it is their duty to apply the life sentence.

23 THE COURT: Then you are not hurt a bit by that then.

24 MR. KOCHIS: I would prefer that we give it as it has  
25 been drafted and not amended.

26 THE COURT: Mr. Negus, do you have any objection to it?

27 MR. NEGUS: Well, I submitted my own version of that.

28 THE COURT: Let's go to yours now. Those are my

0022-19-15

1 intended. We're going to go get back to yours as well as the  
2 prosecution's additional instructions.

3 So, let me go to those. Let's go to Mr. Kochis'  
4 additional once given to me this morning.

5 MR. KOCHIS: Those have to do whether or not we should  
6 instruct the jury if there has been a requisite intent on the  
7 part of Mr. Cooper of the specific intent crime. For example,  
8 of a burglary. There is a general criminal intent for the rape  
9 the kidnapping and the car theft.

10 THE COURT: 14.50. I have already defined burglary.  
11 That's duplicative. 2.02 has already been given. It's already  
12 in the file, previously instructed.

13 MR. KOCHIS: Judge, but there was no instruction on 2.02  
14 as it pertained to burglary, because burglary was not a crime  
15 that was alleged in the guilt phase, so they have not been  
16 instructed on that.

17 THE COURT: Well, in my definition of burglary, I say,  
18 with a specific intent to commit theft and I define theft.

19 Further, in my prior instructions I define the  
20 specific intent. Now, you know, you consider it. I don't find  
21 anything else needed.

22 Mr. Negus.

23 MR. NEGUS: My position on all of that was that we should  
24 just tell them that they should find beyond a reasonable doubt  
25 as to criminal activity involving force and violence and that  
26 defining the crimes is misleading, especially if they are  
27 putting in the burglary and driving without permission of the  
28 owner and other such things.

021917



1 I really don't have much to say on that. I am  
2 objecting to the whole thing.

3 MR. KOCHIS: The other instruction would have been the  
4 same, I believe. I have got another instruction along that  
5 line, concurrence of act of criminal intent as to the general  
6 intent crimes. That is usually a sua sponte instruction that we  
7 give.

8 THE COURT: Well, the general intent crime of driving a  
9 motor vehicle without the consent is defined within that  
10 particular instruction.

11 MR. KOCHIS: Rape is a general intent crime. I believe  
12 assault is also a general intent crime. Kidnapping is a general  
13 intent crime.

14 THE COURT: Well, assault. The person making the attempt  
15 had a general criminal intent for an assault, means that he  
16 intended to commit an act, the probable consequences of --  
17 kidnapping as defined doesn't say anything about intent at all.

18 How did you cover that, Mr. Kochis?

19 Now, driving a motor vehicle without consent of an  
20 owner is a specific intent crime that has previously been  
21 defined. Rape.

22 MR. KOCHIS: I believe I covered it in 3.30, with the  
23 union and joint operation of act and criminal intent, where we  
24 covered the criminal intent of the kidnapping.

25 THE COURT: Okay. The crime of assault, kidnapping and  
26 rape are general criminal intent. That should be then given.

27 And 3.31 that you gave, burglary, requires specific  
28 intent may be surplusage. But I'll give it.

021918

1                   You got another one on 10.00, rape?

2                   MR. KOCHIS: I think that was just one that I struck the  
3 bracketed portions about threats to third persons.

4                   THE COURT: I'm sorry.

5                   MR. KOCHIS: I believe that was just the one that struck  
6 the bracketed portions --

7                   THE COURT: Well, do you want --

8                   MR. KOCHIS: -- of third persons.

9                   THE COURT: That is all right. I think that is probably  
10 all right, 10:00, and I can take out my butchered-up  
11 instruction.

12                  MR. KOCHIS: Yes. What I did was I had my secretary  
13 delete the inappropriate parts.

14                  THE COURT: Okay, then, I will leave that.

15                         The only other one that you gave this morning that  
16 I am not now putting in is 14.50, Burglary - Defined, which I  
17 can give. I have got another one in here that I use.

18                         2.02, specific intent is already there.

19                         9.00, Assault - Defined, I have already got in  
20 there.

21                         And 8.84.1.2, I think got that in there. Just a  
22 minute.

23                   MR. KOCHIS: My secretary simply typed in the  
24 numbers that I believe you wrote in with handwriting on the  
25 other one. We just typed them in. I don't know if they're --

26                   THE COURT: It doesn't have anything about the car in  
27 that one.

28                   MR. KOCHIS: You are correct.

00221919

1 THE COURT: I will use mine. That's a duplicate.

2 So much for those.

3 MR. NEGUS: Are you going to send these instructions in  
4 with them?

5 THE COURT: As far as sending them in is concerned, I am  
6 not going to send them in unless they request it. I think that  
7 is the way we did it with the original instructions, we never  
8 did send them in in the guilt phase.

9 MR. NEGUS: Yes, we did.

10 MR. KOCHIS: We instructed that they would be given a  
11 copy in writing.

12 MR. NEGUS: And they were.

13 MR. NEGUS: What you have done then is --

14 THE COURT: I will send in both sets.

15 MR. NEGUS: Then how are we going to handle -- how will  
16 they handle the first set because there's inappropriate stuff in  
17 the first set?

18 MR. KOCHIS: We would have to -- if we send the first set  
19 in we would have to go through it and pull from the first set  
20 the ones they should not be reconsidering.

21 We would have, for example, to pull 1.00.

22 THE COURT: No, you wouldn't.

23 MR. KOCHIS: 2.62.

24 THE COURT: I'm covering it, counsel. The only thing  
25 that doesn't apply is pity and sympathy and No. 1.00, I have  
26 covered that area as well.

27 MR. KOCHIS: But in the black and white instructions  
28 there are cases on appeal that say that they should not go in.

022920

1 THE COURT: The cases on appeal didn't have another  
2 instruction which says, now, in this phase you can consider  
3 penalty. Not a single one of those on appeal and that's the  
4 Easley case notwithstanding.

5 MR. NEGUS: I think that is another problem of why we  
6 should instruct them on the law separately.

7 THE COURT: Here is the one that the secretary just  
8 brought back.

9 We're going to have another recess when?

10 MR. NEGUS: Your "I" is not the way that Mr. Kochis has  
11 it reframed from the Easley decision.

12 MR. KOCHIS: That's correct.

13 THE COURT: I got it from your language, Mr. Negus.  
14 That's straight from your language.

15 MR. NEGUS: Mr. Kochis pointed out that Easley had  
16 modified the law since that instruction was originally thought  
17 about.

18 THE COURT: How did you do it, Mr. Kochis? I can't  
19 remember.

20 MR. KOCHIS: It would be on the second page of your  
21 8.84.1, 1984 revision, which I can hand you a copy of. It  
22 should include that additional information.

23 THE COURT: Oh, yes. Oh, yes. That is very good. Yes I  
24 have to talk about the defendant and his record as well as the  
25 circumstances. That is good.

26 Going to defendant's instructions, the first one I  
27 have says that:

28 "In order to impose a death sentence you must be

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25

1 he's weighing the factors in aggravation and mitigation. And  
2 the death penalty statute in California at this time doesn't say  
3 whether you weigh and determine which outweighs the other by a  
4 preponderance of the evidence or how. So he's adding another  
5 factor here.

6 MR. KOCHIS: That's completely changing the law.

7 THE COURT: What is the law?

8 MR. KOCHIS: Well, that is --

9 THE COURT: Where do you find it?

10 MR. KOCHIS: That is a standard we are not required to  
11 live up to. In fact, the procedure indicates to the contrary  
12 because Mr. Negus is going to have the right to speak to the  
13 jury last, whether it's one argument on each side or both  
14 arguments. And on every case in which there's a burden beyond a  
15 reasonable doubt, the party with the burden getsto speak last.  
16 We don't get to speak last.

17 THE COURT: There is a fine point beyond the ken of the  
18 jurors.

19 MR. NEGUS: But I get to speak last because of burden of  
20 proof, not the standard by which the burden is carried, and  
21 that's -- reasonable doubt is the standard by which the burden  
22 is carried, not the burden of proof.

23 MR. KOCHIS: There is -- there is no case which indicates  
24 we have to live up to that particular burden.

25 MR. KOCHIS: You are placing on us a burden that is  
26 stronger.

27 THE COURT: I think this citation that he put down here  
28 applies to the factor in aggravation having to prove them beyond

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1 a reasonable doubt.

2 MR. KOCHIS: They do. They don't apply to the burden of  
3 weighing them.

4 THE COURT: In case the jurors or the foreman comes in  
5 with a question by what standard or burden must we find that the  
6 aggravation outweighs the mitigation, what would we tell them?

7 MR. KOCHIS: We would have to cross that bridge at that  
8 time.

9 THE COURT: Tell them what?

10 MR. KOCHIS: We would have to handle that if we get that  
11 type of question -- I think the code --

12 THE COURT: So you're admitting by that statement that --

13 MR. KOCHIS: No, I'm not.

14 THE COURT: We are not defining how they measure that at  
15 all. We're not telling them by a preponderance of the evidence,  
16 we're not telling them beyond a reasonable doubt if I don't give  
17 that instruction.

18 MR. KOCHIS: It's a straight weighing or balancing. I  
19 mean the code has made it very specific, very clear, they weigh  
20 them. They must find them proven, each one, beyond a reasonable  
21 doubt, and that doesn't even apply in this case because some of  
22 them, there's no -- there's no contest to, and then they decide  
23 which ones outweigh the others.

24 THE COURT: Sounds to me like bootstrapping. I say by  
25 what standard, preponderance or reasonable doubt, and you say  
26 they weigh it, which is begging the question.

27 MR. KOCHIS: Well, the code doesn't say there has to be a  
28 specific standard.

02-1975

1 THE COURT: That's true, it doesn't. It's silent on the  
2 issue. Mr. Negus has attempted to fill the vacuum, and what do  
3 you offer me other than argument.

4 MR. KOCHIS: Then an instruction that they must be  
5 convinced beyond a reasonable doubt that the mitigating outweigh  
6 the aggravating before they can vote for life without the  
7 possibility of parole.

8 MR. NEGUS: That's not true either though.

9 THE COURT: That's a startling statement. I don't know  
10 that the law says that anywhere. It doesn't start off with the  
11 presumption that he should be put to death.

12 MR. KOCHIS: No, but it doesn't start off with the --  
13 What the statute has attempted to do is remain neutral and let  
14 the jurors decide. If you impose a reasonable doubt standard on  
15 weighing, then you're going to indicate to the jury there's a  
16 preference that the legislature has not indicated for life  
17 without the possibility of parole. That type of burden really  
18 is going to indicate to the jury there's a preference that he  
19 spends the rest of his life in jail and doesn't get the death  
20 penalty and there's this very high standard you have to meet  
21 when you balance before you can give him the death penalty, and  
22 that's not the case, that's not the law.

23 THE COURT: Let's go to another one for a minute and pass  
24 that. Let's go to another one that Mr. Negus submitted that  
25 says that:

26 "The mitigating circumstances which I have read for  
27 your consideration are given to you in examples of  
28 some of the factors that you may take into account

02-19-95



1 as reasons for deciding not to impose a death  
2 sentence upon Mr. Cooper. You should pay careful  
3 attention to each of those factors. Any one of  
4 them may be sufficient standing alone to support a  
5 decision that death is not the appropriate  
6 punishment in this case."

7 This is the one where you said initially, Mr.  
8 Negus, you want something to the effect that it's not the number  
9 but rather the weight. And if I do that that that means for  
10 every factor in mitigation and aggravation they have to assign  
11 some weight to it and any one factor can outweigh all the other  
12 factors basically.

13 So how do I reconcile your two requests? Obviously  
14 one factor in aggravation can outweigh all the factors -- other  
15 factors in aggravation and can be given more weight by the  
16 jurors and can outweigh various and several factors in  
17 mitigation, so I probably should tell them something to the  
18 effect that it is not the number of factors one way or another,  
19 but rather the weight that you may assign or give to the various  
20 factors. And if you find that the factors then outweigh, you  
21 should do this if; you don't find or if they are evenly balance,  
22 you should do that.

23 MR. NEGUS: There is a preference, although the statute  
24 might be neutral on life versus death, there is a preference in  
25 the law, and I've got six cases that I think stand for that --  
26 if you want to look at them I will pull them out -- for -- in  
27 favor of -- anything being mitigating as opposed to aggravating.  
28 Aggravation is limited to specific things which are statutorily

02-1-92-9

1 set out. The whole world is mitigation as far as statute is  
2 concerned. So there's a constitutional favoring of mitigation  
3 over aggravation.

4 If they find despite that constitutional favoring  
5 that the aggravating circumstances outweigh the mitigating,  
6 fine, but there is this constitutional, I think, preference or  
7 broadening of what a mitigating factor is as opposed to an  
8 aggravating.

9 MR. KOCHIS: Well, your Honor, we're going to  
10 specifically instruct them on that catchall provision that, yes,  
11 they are limited to the aggravating factors which are mentioned,  
12 but with mitigation we have the catchall provision which says  
13 they can consider anything not amounting to a legal excuse for  
14 the crime, and anything about the defendant's background. That  
15 8.84 I believe 2(d), that certainly seems to make this  
16 instruction redundant.

17 We're giving them the catchall instruction which  
18 Easley says -- Easley says is appropriate. He is getting that.  
19 He's not entitled to it twice. And portions of this particular  
20 instruction simply aren't the law. I remember where --

21 THE COURT: I have just written down to discuss with you  
22 a proposed instruction as follows:

23 "These various factors in aggravation and  
24 mitigation may be assigned different weights by  
25 you. Thus, it is not the number of factors,  
26 necessarily, but also the weight you assign to the  
27 various factors which should control. For  
28 instance, you could find that one specific factor

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1 in mitigation weighs so heavy in your  
2 consideration that it outweighs all the determined  
3 factors in aggravation."

4 MR. KOCHIS: Would we then get a sentence on the other  
5 side: "One factor in aggravation can outweigh all the  
6 circumstances of mitigation."?

7 THE COURT: I don't exclude that.

8 MR. KOCHIS: I would ask for it.

9 THE COURT: Let's see, we could make it:

10 "For instance, you could find that one specific  
11 factor on one side weighs so heavy in your  
12 consideration that it outweighs all of the  
13 determining factors on the other side."

14 MR. KOCHIS: That would be fine.

15 THE COURT: That would seem, Mr. Negus, to accomplish one  
16 of the things you attempted to do by drawing that instruction  
17 that I read a moment ago.

18 MR. NEGUS: One of the things.

19 THE COURT: Let's see --

20 MR. NEGUS: But not all.

21 THE COURT: Now you have in there:

22 "You should not limit your consideration of  
23 mitigating circumstances to these specific  
24 factors."

25 I've already covered that by the other thing,  
26 saying, that we had typed up this morning by the secretary,  
27 which has a general catchall phrase, and also the last sentence:

28 "You may also consider any other circumstances

022920

1 relating to the case and Mr. Cooper."

2 So I'm going to mark that one rejected, having in  
3 mind that I think it's given in any essential aspect by the one  
4 that I read a moment ago that I'll have typed. Rejected,  
5 covered with other destruction.

6 MR. NEGUS: That's not a consent that it be rejected  
7 but --

8 THE COURT: Beg your pardon.

9 MR. NEGUS: The covered by other instruction should not  
10 be construed by the Appellate Court as a consent by me that it  
11 be rejected.

12 THE COURT: Okay. Going back to your other one now about  
13 totality beyond a reasonable doubt, I don't think there's any  
14 law to support that, and I'm inclined not to give it. Anything  
15 further on that?

16 MR. NEGUS: Just the authorities that I submitted.

17 THE COURT: All right. That will be -- and I'm going to  
18 attach behind it your citation, and I will mark it rejected and  
19 the authority referred to starts off: "It is settled that the  
20 command of the Fifth and Fourteenth Amendment of the  
21 Constitution of the United States" and concludes on the second  
22 page with a citation of Hankerson vs. North Carolina, and that's  
23 marked rejected.

24 Another instruction I have from Mr. Negus says,  
25 reads:

26 "The death penalty should not be imposed if you  
27 find that although the evidence suffices to  
28 sustain the verdict it does not foreclose all

002-1-9229

1                   doubt as to Mr. Cooper's guilt."

2           MR. NEGUS: Should be a citation from the model Penal  
3 Code and People vs. Fields.

4           THE COURT: I put in it there when I put in any lingering  
5 doubts about legal excuse.

6           MR. NEGUS: I don't think that's the same thing as what  
7 they said in Fields, and --

8           THE COURT: Lingering doubt and foreclose all doubt.

9           MR. NEGUS: Right. But this -- according to Fields if  
10 there's not enough to foreclose all doubts the death penalty  
11 should not be imposed, according to the way you have it in the  
12 other one it's just a balancing process.

13          THE COURT: Objection, Mr. Kochis?

14          MR. KOCHIS: Yes.

15          THE COURT: Yes, I will mark it rejected.

16                Next one I have commences: "It is now your duty to  
17 determine which of the two penalties, death or life without  
18 possibility of parole," and in that instruction, it's  
19 substantially a full page, you say, "If you find the aggravating  
20 outweigh the mitigating you may impose a sentence of death. If  
21 you find the mitigating outweighs the aggravating you must  
22 impose" --

23          MR. NEGUS: That's essentially 84.2 modified to the  
24 particular point that you just pointed out.

25                As I indicated that's given -- that's being given  
26 in the Alameda County Superior Courts. Those judges believe  
27 that it is constitutionally required. I believe it's  
28 constitutionally required.

0021930

1           In addition, it would seem to be a denial of equal  
2 protection to Mr. Cooper who is being tried in San Diego despite  
3 his request to be tried in Alameda County. If he were -- if he  
4 were being tried in Alameda County he would get that  
5 instruction, to be denied it here.

6           THE COURT: How would he get in it Alameda?

7           MR. NEGUS: They are giving it as a standard instruction  
8 in Alameda County right now.

9           THE COURT: I don't know that to be the case.

10          MR. NEGUS: Well, I can represent to you that I think  
11 that it is, and I believe Judge Kayashima made some sort of --

12          THE COURT: Do you object to it, Mr. Kochis?

13          MR. KOCHIS: Yes, I do.

14          THE COURT: You know, rarely the history of the death  
15 penalty in general terms where first we gave the jurors complete  
16 discretion and that was found to be constitutionally infirm,  
17 then we give the jury a mandatory provision and that was found  
18 to be constitutionally infirm, and then we wound up making it  
19 mandatory, but with guidelines, specific guidelines, now you  
20 want me to go back to say once again you have complete  
21 discretion to ignore all the factors in aggravation and to find  
22 life.

23          MR. NEGUS: Not that they have complete discretion.

24          THE COURT: Well, when you say "may", when you say you  
25 "may" --

26          MR. NEGUS: No. It gives you a "must". There is guided  
27 discretion as far as when you can -- when they can impose death,  
28 but it's unlimited discretion as far as when they can impose

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1 life, and that's consistent with Lockett vs. Ohio and all the  
2 other cases which say that a juror can always impose life, they  
3 don't have to ever impose death. We tell them that. I believe  
4 that's the state of the law. In instructing them otherwise, as  
5 the Briggs initiative attempted to do is plainly  
6 unconstitutional.

7 THE COURT: Okay. Well, you've given me absolutely no  
8 case authority for it.

9 MR. NEGUS: Lockett vs. Ohio, just a second, I will give  
10 you lots of them, Gregg vs. Georgia, Washington vs. Watkins, 655  
11 Federal 2d 1346, Chenault, C-h-e-n-a-u-l-t, Stynch, S-t-y-n-c-h  
12 581 F.2d 3448, Spivey vs. Zant 661 --

13 THE COURT: What do those cases say?

14 MR. NEGUS: They all have to do with the point I was just  
15 making, that as to the unlimited discretion of the jury in  
16 finding mitigation and if they have unlimited discretion in  
17 finding mitigation, then they don't have to impose the death  
18 penalty. You're telling them they do have to impose the death  
19 penalty, and I --

20 THE COURT: Any of those cases arising out of California  
21 whether they are construing our present law?

22 MR. NEGUS: No. But you, as you well know, I believe  
23 there are no cases as of yet construing the 1978 statute one way  
24 or the t'other.

25 THE COURT: Did that convince you, Mr. Kochis?

26 MR. KOCHIS: No, because I believe if you give this  
27 instruction it allows the jury over a series of cases to be  
28 arbitrary and capricious and to impose the death penalty when

1 they feel like it on particular defendants they may not like for  
2 reasons outside the law.

3 THE COURT: Haven't we done that anyhow by telling them:  
4 "Hey, you can take one factor in mitigation and say it outweighs  
5 everything else."?

6 MR. KOCHIS: No, you haven't, you are still telling them  
7 they have to base their decision on the law and the evidence and  
8 their instruction is not indicating that.

9 THE COURT: Counsel, I'm going to reject it. It will be  
10 preserved.

11 The last one I have says, "I have previously read  
12 to you the list of aggravating circumstances which the law  
13 permits you to consider. If you find" --

14 MR. NEGUS: That's essentially the correlary of the one  
15 about mitigating circumstances which you rejected, but, you know  
16 it's not -- I suppose it's separate.

17 THE COURT: All right. This seems unnecessary to me.

18 Mr. Kochis.

19 MR. KOCHIS: I take it Mr. Negus drafted this instruction  
20 when he had set out an instruction we've had -- which had on one  
21 side the aggravating factors and on one side the mitigating  
22 factors. We know longer have that, so it appears this  
23 instruction is no longer appropriate.

24 MR. NEGUS: I think it's appropriate because you have to  
25 tell them whether what's aggravating and mitigating.

26 MR. KOCHIS: We would no longer have a list, so I think  
27 it doesn't apply.

28 THE COURT: I'll mark it rejected.

002-1-6777



1 MR. NEGUS: Do you also have -- if you have my list of  
2 aggravating versus mimitigating circumstances so we can have it  
3 it. I think you were writing all over that. If I could I just  
4 hand you -- which needs to be stapled together -- 8.84.1  
5 modified.

6 THE COURT: Let me use my copy. I do have that here  
7 somewhere.

8 MR. NEGUS: Okay, you can give me that back as modified.

9 THE COURT: The only -- mine has writing on it. But the  
10 only thing you have trouble reading is line 27 that I've marked  
11 out. But I can still decipher.

12 MR. NEGUS: No, I marked that out anyway. That was  
13 modified as far as submitting it is concerned.

14 THE COURT: I had crossed out the escape from Mayview  
15 State Hospital.

16 MR. NEGUS: Because we didn't proceed with that in the  
17 penalty phase.

18 THE COURT: So I will mark this rejected and put it with  
19 the others.

20 MR. KOCHIS: Before we forget, are you are going to  
21 modify one instruction to include the language about defendant's  
22 past and his record, the Easley language?

23 MR. NEGUS: Your version of 8.84.1.

24 MR. KOCHIS: I have that language here, if the Court  
25 wants to borrow my copy.

26 THE COURT: Just a moment, please.

27 MR. KOCHIS: Bracketed "K" portion.

28 THE COURT: I have that. I will have that modified. I

02-19-77

1 have it right on top.

2 Here are the defendant's rejected instructions.

3 Now, I have -- we will have another session on  
4 instructions at the conclusion of the case. Let's put on our  
5 evidence and probably have the jurors back this afternoon.

6 MR. NEGUS: As far as evidence, it shouldn't take more  
7 than an hour.

8 THE COURT: Whatever. We will have the jurors back this  
9 afternoon and it will give us another chance to go over the  
10 instructions because I have a lot of typing to do. Okay.

11 MR. NEGUS: The missing juror.

12 THE COURT: Oh, yes. Mrs. Loftis called.

13 THE CLERK: Mrs. Loftis called this morning and she's  
14 been hired at an elementary school and she had no other  
15 transportation to come in and she is requesting to be excused.

16 THE COURT: Any objection if I excuse her for cause?

17 MR. KOCHIS: I have no objection. She's an alternate.

18 MR. NEGUS: It is -- my position is, well, let me  
19 paraphrase. My position is that as one of the mitigating  
20 factors that can be used in a case such as this, is the jury  
21 deliberations on the guilt phase, it would be error to  
22 substitute any alternate. As long as we have that  
23 understanding, I have no objection. If not, that is not cause.

24 MR. KOCHIS: I am not at this point going to agree that  
25 we can't substitute,

26 THE COURT: Excuse me. What are you saying, that if one  
27 of these jurors were hit by a car and couldn't continue that  
28 we'd have to start the penalty phase all over?

002-1-5775

1 MR. NEGUS: Yes.

2 MR. KOCHIS: No. He's saying --

3 THE COURT: Absurd. Okay. If that is your only  
4 qualification to find cause to excuse.

5 Anything further, Mr. Kochis?

6 MR. KOCHIS: No.

7 THE COURT: I find good cause to excuse her. We will go  
8 with the other alternates in the box. If we have to draw an  
9 alternate juror, I want Mrs. Loftis name in the hat when you  
10 make the draw.

11 Anything further before we go in and put on your  
12 evidence?

13 MR. KOCHIS: Can we have a three minute recess?

14 THE COURT: Certainly. Thank you.

15 (Chambers conference concluded.)

16

17 (The following proceedings were held in  
18 open court in the presence of the jury:)

19 THE COURT: Good morning, ladies and gentlemen, counsel.

20 I'm sorry for the delay, I kept you waiting almost  
21 an hour. We have been working particularly with reference to  
22 jury instructions and it has just taken us this long.

23 To the media. The defense witnesses and everyone  
24 of them that is going to testify this morning have requested  
25 that they not have their picture taken during the proceedings  
26 this morning. So, you can turn your cameras off when they come  
27 in.

28 Three of them, Mr. Negus; is that correct?

1 MR. NEGUS: Five. That is all extended media coverage  
2 including -- including voices. The whole thing.

3 THE COURT: All right. So that is the restriction on  
4 that. Treat them as I have treated other witnesses. I am going  
5 to honor that request. Other than that, you are free to conduct  
6 yourselves consistent with our prior rules and regulations.

7 Was there anything else?

8 MR. KOCHIS: I believe you are going to tell the jury  
9 about Mrs. Loftis.

10 THE COURT: I knew there was something else.

11 Mrs. Loftis called in this morning and you may be  
12 happy to know that she now has a job with one of the school  
13 districts, I believe, and she's indicated that it would be very  
14 detrimental to her if she did come in and assist this morning.  
15 So, we have discussed it and I have excused her for cause. So  
16 that's why she is absent. You have an empty chair beside you.

17 Mr. Negus, call your first witness.

18 MR. NEGUS: Melvin Cooper.

19 THE COURT: What we're going to do, ladies and gentlemen,  
20 is put on evidence which is going to take us approximately an  
21 hour or something like that, then excuse you until the hour of  
22 1:30. I'm having certain instructions typed. I would like,  
23 with counsel, to have a chance to review those before we  
24 commence argument.

25 So, we perhaps break before noon for you this  
26 morning. Then after lunch we would argue and instruct and you  
27 will again retire to deliberate.

28 Sir, could you come right is and raise your hand.

1

2

MELVIN COOPER,

3

called as a witness on behalf of the Defendant, having been duly  
sworn, testified as follows:

4

5

THE CLERK: Thank you. Would you please be seated.

6

7

Would you state your full name for the record and  
spell your last name.

8

THE WITNESS: Melvin Cooper.

9

10

## DIRECT EXAMINATION

11

BY MR. NEGUS:

12

13

Q. Mr. Cooper, what is your relationship to Kevin,  
please?

14

A. I'm Kevin's father.

15

16

Q. When -- since Kevin has been in jail in California,  
has he kept in contact with you?

17

A. Yes, he has.

18

Q. How has he done that?

19

A. He writes and he calls.

20

21

Q. When Kevin was growing up, did you ever have an  
opportunity to observe Kevin with children?

22

23

24

25

A. Yes, I have. He's been very compassionate with  
children in the neighborhood. I guess all the children more or  
less looked up to him, and he sort of like just guided the  
youngsters around, you know.

26

27

Q. Has he done that since he's become an adult as  
well?

28

A. I would say yes.

002-19778

1 Q. Have you had an opportunity to observe Kevin with  
2 his nieces and nephews?

3 A. Yes, I have.

4 Q. How does he behave?

5 A. He has a nice rapport with all of the  
6 relationships. In fact, his niece DiDi wanted to come out here  
7 today.

8 Q. In Pittsburgh you have heard about this particular  
9 case from both Kevin and through the media; is that right?

10 A. Yes, I have. Through the newspapers and through  
11 the clippings that I have received from Kevin.

12 Q. Do you still love Kevin Cooper?

13 A. Definitely. And I really think that he didn't do  
14 this.

15 Q. Do you have anything you'd like to say to the jury  
16 on his behalf?

17 A. Well, I just hope that -- that through the power of  
18 the jury, that they would have some compassion in their heart.  
19 I would hope that maybe through all the grace of the almighty  
20 God that the truth will come out and we will find out that Kevin  
21 don't do this.

22 MR. NEGUS: Thank you. I have nothing further.

23 THE COURT: Cross examination.  
24

25 CROSS EXAMINATION

26 BY MR. KOTTMEIER:

27 Q. Mr. Cooper, the defendant in this case is not your  
28 natural son, is he?

0021-0776

1 A. No. But I have had him since he was about six  
2 months old.

3 Q. You adopted him and raised him with your wife?

4 A. Yes, I have.

5 MR. KOTTMEIER: I have nothing further.

6 THE COURT: Thank you, Mr. Cooper. You may leave or you  
7 may stay as you wish. You want him to --

8 MR. NEGUS: I think Mr. Cooper wants to go back. You  
9 want to go back to the jury room, Mr. Cooper?

10 THE COURT: You can stay in open court or you can go  
11 back, whatever you wish. We may have to set up a chair for him.

12 Do we have folding chairs handy, Mr. Ricks? If you  
13 will wait or stand there, it is not going to be too long, if we  
14 can't otherwise provide a chair.

15 MR. NEGUS: Calvin O'Neal.

16 THE COURT: To explain the delay, ladies and gentlemen,  
17 to just avoid the effects of the witnesses of the media,  
18 possible media crush or something like that, just have them wait  
19 inside.

20 Sir, could you face my clerk and raise your right  
21 hand and take the oath, please.

22

23 CALVIN O'NEAL

24 called as a witness on behalf of the Defendant, having been duly  
25 sworn, testified as follows:

26 THE CLERK: Would you state your full name for the record  
27 and spell your last name.

28 THE WITNESS: Calvin O'Neal. Capial O, apostrophe,

0022-1940

1 Capital N-e-a-l.

2

3

DIRECT EXAMINATION

4 BY MR. NEGUS:

5 Q. Mr. O'Neal, what city do you reside in?

6 A. Pittsburgh, Pennsylvania.

7 Q. Are you acquainted with Melvin and Esther Cooper.

8 A. Yes, I am. We're lifetime friends.

9 Q. At the time that Mr. and Mrs. Cooper adopted Kevin

10 Cooper, did you consult with them about that?

11 A. Talk over the adoption?

12 Q. Yes.

13 A. Yes.

14 Q. And after -- well, are you married to Gloria  
15 O'Neal.

16 A. Yes, I am.

17 Q. After Kevin was adopted by Mr. and Mrs. Cooper, did  
18 you assume some roll in Kevin Cooper's life?

19 A. Yes. As his Godfather.

20 Q. Can you describe some of the activities that you  
21 carried on with Kevin as his Godfather?

22 A. Yes. Um, we engaged in activities as I suppose  
23 Godparents or parents supposed to do. We visited, he visited  
24 with us, and as he came of size and age he has spent weekends  
25 and days with us. Why, they were times we spent the weekend and  
26 spent that Sunday at church, and sometime at my parents place,  
27 my parents house, and social functions, such as picnics and  
28 outings, our union picnic. We spent the days together; many of



1 those, good days together.

2 Q. Are your memories of Kevin -- what kind of memories  
3 do you have of your time with Kevin?

4 A. They -- the memories have been all good as a  
5 Godparent-Godchild relationship, why I can't remember all the  
6 things that we have did. But to me, my impression of being a  
7 father also, were ideal, typical Godparents-Godchild affairs.

8 Q. Has Kevin kept in touch with you while he's been in  
9 jail in California?

10 A. Yes, he definitely have. We have letters -- I save  
11 most of his letters, particularly the latter ones, and  
12 clippings, and we have talked quite often. We talked no later  
13 than Thursday of last week over the --

14 Q. The verdict in this particular case?

15 A. Yes. The verdict. And his sole-search. And we  
16 just had an enjoyable conversation under those circumstances.

17 Q. Mr. O'Neal, do you still love Kevin Cooper?

18 A. Yes, I do. Very much so. It it was quite a thing  
19 last Thursday. As I mentioned before, if there is any way of  
20 showing mercy, I certainly think that I feel he has the feeling,  
21 soul-searched and everything should be all right.

22 MR. NEGUS: Thank you. I have nothing further.

23 MR. KOTTMEIER: No questions, your Honor. Thank you, Mr.  
24 O'Neal.

25 THE COURT: Thank you, Mr. O'Neal. You can go back to  
26 that little waiting room or perhaps sit in here. I believe  
27 there was one chair open.

28 You can go right back out here.

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1 Whose next?

2 MR. NEGUS: Gloria O'Neal.

3

4 GLORIA MARIE O'NEAL,

5 called as a witness on behalf of the Defendant, having been duly  
6 sworn, testified as follows:

7 THE CLERK: Would you please be seated.

8 Would you please state your full name for the  
9 record.

10 THE WITNESS: Gloria Marie O'Neal.

11 THE CLERK: Thank you.

12

13 DIRECT EXAMINATION

14 BY MR. NEGUS:

15 Q. Mrs. O'Neal, do you live in Pittsburgh,  
16 Pennsylvania?

17 A. Yes, I do.

18 Q. And have you -- how long have you known Melvin and  
19 Esther Cooper?

20 A. Well, we have known each other for years, before we  
21 even got married.

22 Q. When Melvin and Esther Cooper adopted their son,  
23 Kevin, did you agree to become the Godmother to Kevin Cooper?

24 A. Yes, we did.

25 Q. What experiences have you had with Kevin, as his  
26 Godmother?

27 A. Well, we have had Kevin in our home many times. We  
28 have taken him on picnics.

002-1-0747

1 THE COURT: Excuse me, just a moment. You might get  
2 pretty close to that.

3 THE WITNESS: We have taken him on picnics, church with  
4 us. He spent many a times at our home.

5 BY MR. NEGUS:

6 Q. Do you have any particular memories that stand out  
7 about your times with Kevin?

8 A. Oh, yes. We have -- his mother would constantly  
9 bring him over every Halloween over to the house, and we would  
10 just look forward with him to Halloween, him all dressed up.

11 And we'd have like at home dinner. We have gone to  
12 his mother's, my husband's mother, and we have taken him to  
13 church with us.

14 Q. Have you kept in contact with Kevin while he's been  
15 in the San Diego County Jail?

16 A. Yes. Kevin has called us numerous times. We  
17 talked with him. We pray with him.

18 Q. Have you attempted to maintain the roll of  
19 Godparents?

20 A. Oh, definitely.

21 Q. Do you still love Kevin?

22 A. Oh, my, yes, we love Kevin. We love him so much.  
23 We just love him -- we just -- sad. We love him. We do love  
24 him so much. And he's been so good to us. We miss him around  
25 the house.

26 MR. NEGUS: Thank you.

27 MR. KOTTMEIER: No questions of Mrs. O'Neal. Thank you.

28 THE COURT: Thank you very much, Mrs. O'Neal. You may

002219444

1 leave or remain, as you wish?

2 THE WITNESS: Thank you.

3 MR. NEGUS: Sandra Thomas.

4

5 SANDRA COOPER THOMAS,

6 called as a witness on behalf of the Defendant, having been duly  
7 sworn, testified as follows:

8 THE CLERK: Thank you. Would you please be seated.

9 Would you state your full name for the record and  
10 spell your last name.

11 THE WITNESS: Sandra Cooper Thomas. T-h-o-m-a-s.

12

13 DIRECT EXAMINATION

14 BY MR. NEGUS:

15 Q. Mrs. Thomas, What's your relationship with Kevin  
16 Cooper?

17 A. He's my brother.

18 Q. Are you older than he is.

19 A. Yes.

20 Q. Do you have a daughter?

21 A. Yes.

22 Q. Was your daughters name?

23 A. Benet.

24 Q. Can you describe Kevin's relationship with Benet?

25 A. Oh, they get along famously. He loves her and she  
26 loves him.

27 Q. When -- do you recall the time in 1982 when Kevin  
28 was attending the Art Institute of Pittsburgh?

021945

1 A. Yes.

2 Q. At that point in time, did he paint any pictures  
3 for Benet?

4 A. Yes. He painted her a gorgeous clown?

5 Q. Does Kevin have talent as an artist?

6 A. Yes. Yes. He can draw. Anything that he sees, he  
7 can just glance at it and he can draw it.

8 Q. Does Kevin Cooper keep in touch with Benet?

9 A. Yes.

10 Q. Can you describe that?

11 A. He talks to her. Everytime he calls they talk on  
12 the phone, and for Valentine's Day she made him a card and sent  
13 him a letter, and she just loves him. That is her uncle Kevin.

14 Q. When Kevin was growing up with you in Pittsburgh,  
15 was he generous?

16 A. Oh, yes. He'd give you the shirt off his back.

17 Q. Can you describe how that happened?

18 A. No matter what it was, if you said I want it, he  
19 gave it to you. He didn't care. If it was his last, it was all  
20 right with him. If you wanted it that was all that was  
21 important.

22 Q. Have you kept in contact with Kevin while he's been  
23 in jail in California.

24 A. Yes. Oh, yes.

25 Q. Do you still love him?

26 A. Oh, yes. Very much. That is my baby boy.

27 MR. NEGUS: Thank you. I have nothing further.

28 THE COURT: Mr. Kottmeier.

1 MR. KOTTMEIER: No questions. Thank you, Mrs. Thomas.

2 THE COURT: You can leave or stay as you wish.

3 MR. NEGUS: Esther Cooper.

4

5 ESTHER COOPER,

6 called as a witness on behalf of the Defendant, having been duly  
7 sworn, testified as follows:

8 THE CLERK: Would you please be seated.

9 Would you state your full name for the record and  
10 spell your last name.

11 THE WITNESS: My name is Esther Cooper. C-o-o-p-e-r.

12 THE CLERK: Thank you.

13

14 DIRECT EXAMINATION

15 BY MR. NEGUS:

16 Q. Mrs. Cooper, are you Kevin Cooper's mother?

17 A. Yes, I am.

18 Q. And is he an adopted child?

19 A. Yes, he is.

20 Q. When you and Mr. Cooper adopted Kevin, did you give  
21 him your own family name?

22 A. Yes, we did.

23 Q. And did you choose a new name for him at that point  
24 in time?

25 A. Yes, I did.

26 Q. And have you raised him since infancy?

27 A. Yes, I have.

28 Q. Since Kevin has been in custody in California, have

02-19-47

1 you kept in communication with him?

2 A. Yes, I have.

3 Q. How often do you communicate with him?

4 A. Possibly three, maybe four times a week I talked to  
5 him by phone.

6 Q. When -- after Kevin was arrested, did you learn  
7 that you were a grandmother?

8 A. Yes, I did.

9 Q. And is -- does Kevin have a year and a half, I  
10 guess, little over a year and a half old son named Dietrich?

11 A. Yes, he does.

12 Q. Does Dietrich live in a eastern state other than  
13 Pennsylvania?

14 A. Yes.

15 Q. Do you keep in contact with Dietrich?

16 A. Yes. I talked with Dietrich yesterday and he said,  
17 "Hi, Grandma."

18 Q. Does Kevin talk to you about his son, too?

19 A. Everytime I talk with him he says, "Please, help  
20 take care of Dietrich, Mommy."

21 Q. When Kevin was growing up, how was he with other  
22 kids?

23 A. Kevin got along fine with kids. Kevin had no  
24 problem with them. Kevin was very outgoing, and had a crowd  
25 around the house all the time. He got along beautiful with the  
26 kids and always was bringing a stray animal from dogs to rabbits  
27 home.

28 Q. Since Kevin has been an adult, how has he been with

1 kids?

2 A. Great.

3 Q. During the time that you have been talking to Kevin  
4 on the phone, has he sent you newspaper clippings and other  
5 things about the case?

6 A. Yes. I kept well abreast of everything that was  
7 going on.

8 Q. Did you also keep in contact with me on --

9 A. Yes.

10 Q. -- more or less a monthly basis?

11 A. Right on.

12 Q. So you are aware of what has occurred in this  
13 particular case.

14 A. Yes, I am.

15 Q. You still love Kevin Cooper?

16 A. I love Kevin, yes. I love Kevin. I have always  
17 loved Kevin, I will always love Kevin.

18 Q. Is there anything that you would like to say to the  
19 jury on Kevin's behalf?

20 A. Just please have mercy on my child, that is all I  
21 am asking. Save my child's life, please.

22 MR. NEGUS: I have nothing further.

23 MR. KOTTMEIER: No further questions. Thank you, Mrs.  
24 Cooper.

25 THE COURT: Thank you, Mrs. Cooper. You may step down.

26 MR. NEGUS: I rest.

27 MR. KOTTMEIER: Your Honor, the People have no rebuttal  
28 to offer as far as this particular phase of the case and we're



1 ready to argue whenever it is the Court's pleasure.

2 THE COURT: Any further evidence, Mr. Negus?

3 MR. NEGUS: No.

4 THE COURT: I think it best that we come back at 1:30. I

5 would like counsel here.

6 MR. NEGUS: We can be here at 1:00 or earlier.

7 THE COURT: I would suggest quarter to, counsel.

8 MR. NEGUS: Fine.

9 THE COURT: All right. Counsel, Mr. Cooper, will be here

10 at quarter to 1:00, the jurors will be here at 1:30. That will

11 be fine.

12 Would you please remember the admonition given to

13 you in this phase during the lunch period, don't talk about the

14 case anymore, don't let anybody discuss it with you, don't

15 express or form an opinion on the penalty as yet until we

16 finally submit it to you, which will be after arguments and

17 further instructions.

18 Would you perhaps -- the bailiff is gone at the

19 moment. Just step out, ladies and gentlemen. We will go, let

20 you go out that way, if you would.

21 Would you hold off -- you want the jurors to go

22 back with you?

23 Okay, follow the bailiff, please, a more familiar

24 route.

25 We will be in adjournment until 1:30.

26 Counsel, just without amplifying on it, have you

27 got an agreement as to argument procedures?

28 MR. KOTTMEIER: As far as I know, your Honor, we're

1 reserving the right to respond if there is anything that we feel  
2 needs responding.

3 THE COURT: Just one a a piece -- two a piece.

4 MR. KOTTMEIER: One a piece, unless there is some need to  
5 respond. Is that satisfactory?

6 MR. NEGUS: That seems to be the law. That is fine with  
7 me.

8 THE COURT: Then the prosecution should go, the defense  
9 will close then in argument. Okay.

10 All right. 12:45 with, counsel.

11

12 (Noon recess taken.)

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02-16-55

1        SAN DIEGO. CALIFORNIA. MONDAY. FEBRUARY 25. 1985. 12:20 P.M.

2

3

(Chambers conference reported.)

4

THE COURT: Counsel, I've broken down the --

5

The defendant is present with all three counsel.

6

I've broken down the instructions I received back  
7 from the typist. I haven't proofread them all, I was in the  
8 process of doing that.

9

Do you want to go through them again in the order  
10 in which they will probably be given, or how would you like to  
11 handle it? Would you like more time to just simply read them  
12 yourself or what?

13

MR. NEGUS: I don't have --

14

MR. KOCHIS: I've glanced at them and they appear to me  
15 to all be correct and to include the modifications that were  
16 agreed upon this morning. I haven't had a chance to read each  
17 and every word.

18

THE COURT: Let's take a few minutes off the record for a  
19 minute here -- well, the record can keep running, but I want a  
20 chance to glance at them a little more if I could.

21

MR. NEGUS: Fine with me.

22

THE COURT: While you're contemplating and waiting for me  
23 to finish the instructions, let me toss out a point for you.

24

I originally thought -- and I mention it only in  
25 passing -- back during the guilt phase at some point that if the  
26 defendant were found guilty that I would immediately thereafter  
27 transfer the matter back to San Bernadino County, use the  
28 offices of our probation department for a presentence

002-1-05572

1 investigation and report and proceed there, you know, once the  
2 guilt -- the jury part was concluded.

3 As time drew closer and after we received the  
4 guilty verdict, in my research I couldn't find authority for it.

5 MR. NEGUS: There is none.

6 THE COURT: No. I checked with the judicial counsel as  
7 well. They say there probably should be because you can  
8 reconsider a venue change before in fact the matter is actually  
9 physically transferred. But I was researching it with reference  
10 to possible hung jury even, and there's simply no provision for  
11 getting it back, prohibition.

12 Logic tells me you could, but in any event I'm not  
13 inclined to do so unless the parties wish to stipulate and agree  
14 in some way.

15 MR. NEGUS: The parties don't. We don't.

16 MR. KOCHIS: I would agree. I would agree.

17 MR. NEGUS: We don't.

18 THE COURT: I could probably, just for your  
19 consideration, anticipating perhaps why you wouldn't want to  
20 agree to it, Mr. Negus, I could probably get a --

21 MR. NEGUS: There's --

22 THE COURT: Let me just explain.

23 -- a commitment from the presiding judge of this  
24 court that if the matter has to be tried again that it will  
25 be -- that they will accept it back down here.

26 MR. NEGUS: There's multiple reasons, one of them,  
27 including amongst obvious reasons about retrial, what happens to  
28 it after appeal, is that sort of thing, but the more immediate

002-1-05577

1 one is I don't want Mr. Cooper back in the San Bernadino County  
2 jail.

3 THE COURT: I understand that. I thought maybe some way  
4 you might see some outweighing benefit.

5 MR. NEGUS: I'm not really all that happy about driving  
6 down here all the time, but that's my feeling. I think it's  
7 legally definitely not in Mr. Cooper's interest to do that.

8 THE COURT: I haven't mentioned that to the presiding  
9 judge of this court. I fear doing so, but I'm afraid I'm going  
10 to have to.

11 MR. KOTTMEIER: Your Honor, after we've finished with the  
12 pronouncement of judgment, does Mr. Cooper still stay in the San  
13 Diego jail or does he go back to?

14 MR. NEGUS: He goes correctly to San Quentin from the San  
15 Bernadino County jail. They have ten days -- assuming either he  
16 is committed from here to the Reception Center Central, CIM,  
17 from San Diego he goes up on the regular bus, or if he has a  
18 death penalty he is transported within ten days directly to San  
19 Quentin by the local Sheriff's Department.

20 THE COURT: Excuse me. If the verdict were life without  
21 possibility.

22 MR. NEGUS: Then he could be to CIM.

23 THE COURT: Strike that. Regardless of the type of  
24 verdict this jury returns in the penalty phase, I've got to  
25 refer it out for a presentence investigation report. I'm going  
26 to set it over for 28 days.

27 MR. NEGUS: We are going to request that it go over to  
28 May the 8th.

02-195574

1 THE COURT: All right. But in any event, we have a  
2 motion, automatic motion for reconsideration, I believe, new  
3 trial, and that will probably be handled at the same time, so  
4 there's no transferring him within ten days of the time the  
5 verdict is received.

6 MR. NEGUS: No. I'm talking about from the time that the  
7 sentence is pronounced.

8 THE COURT: Okay. That's fine.

9 And if he then receives life I would probably order  
10 him to another Reception Guidance Center, but first I'd check  
11 with the Department of Corrections other than Chino.

12 If he receives the death sentence, then, indeed, my  
13 order of commitment is going to read directed to the warden of  
14 San Quentin, and I will probably have various forms of those  
15 prepared one way or the t'other by the time we get around to it  
16 trying to anticipate the various options.

17 Okay. I will cross that one off my list.

18 MR. KOTTMEIER: One other -- the minor question is in  
19 responses to your probation report that you would need, would  
20 that be done by San Diego?

21 THE COURT: It has to be. I've already talked to the  
22 Chief Probation Officer here --

23 Mr. Steppe; is that right?

24 THE CLERK: Cecil Steppe.

25 THE COURT: And he was very nice about it. I was very  
26 apologetic about foisting it off on him, but they are now  
27 prepared. He has probably already selected an officer to do the  
28 work.

021955

2 1 MR. NEGUS: Just along that line, whatever the verdict  
2 turns out to be I would request that you direct the probation  
3 department not to interview Mr. Cooper. They don't need to do  
4 that and I don't want to have --

5 THE COURT: I'm sure that you and Mr. Cooper can handle  
6 that. I'm not going to get involved in telling them how to do  
7 their work.

8 MR. NEGUS: I just don't want them going out there  
9 talking to him. I want it understood they are not to go out and  
10 talk to Mr. Cooper.

11 THE COURT: Make that clear to them. I don't think I  
12 should get involved in that.

13 THE COURT: All right. I've gone through the  
14 instructions and it seems that I received an excellent  
15 secretary. I don't find any errors at all in them.

16 I changed the word "circumstance" singular to  
17 plural on the last instruction, 8.84.2, but that's probably my  
18 fault.

19 MR. NEGUS: Where was that?

20 THE COURT: In the very last one, the concluding  
21 instruction on the third paragraph:

22 "If you conclude that the aggravating circumstances  
23 outweigh the mitigating circumstances,"

24 That should likewise be plural.

25 I would like, and I suspect that you would like,  
26 the next 30 minutes for thinking about argument.

27 Who is going to make it for the People?

28 Mr. Kottmeier.

02-1-6559

1 Anything else with reference to instruction?

2 Mr. Kottmeier will go first then Mr. Negus, then  
3 that will be it then.

4 MR. KOTTMEIER: Unless there's something that we feel  
5 cries out for a response; and then if we respond, Mr. Negus  
6 would get a chance to respond to that.

7 THE COURT: Yes, of course.

8 MR. NEGUS: That seems to be the lawful -- I mean he  
9 doesn't have --

10 THE COURT: You've said that several times. I simply  
11 don't find the law clear one way or another with reference to  
12 argument.

13 MR. NEGUS: There's a case that says that the order of  
14 argument is prosecution first, defense in rebuttal, prosecution,  
15 third defense, prosecution.

16 MR. KOTTMEIER: Bandhauer --

17 MR. NEGUS: 60 Cal --

18 THE COURT: Banhauer, I thought it suggested that. It's  
19 not written in the statute anywhere. My books here, my  
20 benchbooks advise that that's probably the way to do it, but I  
21 just didn't find it all that clear.

22 MR. KOTTMEIER: There are two cases after Bandhauer, one  
23 of them is Nye, that validate that particular approach and put  
24 it in more final form.

25 THE COURT: I just anticipate perhaps when Mr. Negus  
26 finishes you want to get up and say something else and Mr. Negus  
27 objecting to it.

28 MR. NEGUS: No. My understanding is that 1, 2, 3, 4 is

021957



1 the way it goes. If he skips 3, then obviously I have to skip  
2 4.

3 THE COURT: Okay. Apparently you are prepared for it.

4 You don't anticipate making an objection to him  
5 exceeding the scope of your argument or something?

6 MR. NEGUS: Well, I may object to him exceeding the scope  
7 of my argument because he is more or less limited to responding  
8 to me, and I'm limited to responding to him on 3 and 4, but that  
9 doesn't -- I mean that's the order of speaker.

10 THE COURT: Fair enough. Anything further?

11 THE CLERK: Your Honor, I have a question regarding the  
12 exhibits. Do you want all of the exhibits to go in?

13 THE COURT: Good point. Have you got them all on a cart  
14 that you could simply wheel in there?

15 THE CLERK: Well, they can't all fit on one cart, but we  
16 can get them in there fairly fast if need be.

17 THE COURT: I suggest that you take them in.

18 THE CLERK: Right now?

19 THE COURT: Anything on that?

20 MR. KOCHIS: No.

21 MR. NEGUS: No.

22 THE COURT: Just take them in in as compact and area as  
23 you can. And I will hand you the verdict forms, and then when  
24 we get a verdict we will go through the same procedure: The  
25 bailiff will give it to me, I will look at them and give it to  
26 you to read, assuming that we get a verdict.

27 I don't know if you people have anticipated, just  
28 to make you feel real good, but it is possible that we could be

1 going another couple month on this case. In case this jury did  
2 not arrive at a verdict the law says it shall be tried again  
3 using a different jury selected for that purpose. We could then  
4 go back into selecting another jury and put go on a penalty  
5 phase once again.

6 MR. NEGUS: We don't -- yeah -- I'm not prepared to do  
7 that until next year.

8 THE COURT: It's in the books.

9 MR. KOCHIS: We are aware of that. It would entail  
10 retrying the case though because to prove the circumstances of  
11 the offense and to let Mr. Negus argue about lingering doubt, we  
12 would retry the case. Even though we would not have to  
13 reconvict him we would probably retry the case start to finish.  
14 It would be five to six months. It wouldn't be a couple months.  
15 It would be Witherspoon, plus five to six months.

16 MR. NEGUS: We have talked it over. We have agreed it  
17 would be the same rerun of what we have already had.

18 THE COURT: I'm not following you.

19 MR. NEGUS: Well, different trial strategy, but they  
20 would put on all the witnesses that they put on. I would put on  
21 all the witnesses that I put on, and you wouldn't see much  
22 difference in what you've already seen.

23 THE COURT: Even if we just tried the penalty phase?

24 MR. NEGUS: Yes, sir, because as they said, they have to  
25 prove the circumstances of the crime; I've got to prove  
26 lingering doubt. And that's all we did in the first part.

27 THE COURT: It's worse than even. I thought -- Hopefully  
28 it shall never come to pass. Thank you.

0022195567

1 Take Mr. Cooper back into the cell until they get  
2 ready to start with the jury.

3 (Chambers conference concluded.)

4 (Recess)

5  
6 THE COURT: Counsel, good afternoon. The jurors and  
7 three alternates are still with us, Mr. Cooper and all counsel.

8 Mr. Kottmeier, you may commence argument.

9 MR. KOTTMEIER: Yes. Thank you, your Honor.

10 Good afternoon, ladies and gentlemen. The problems  
11 that Kevin Cooper faces are problems of his own creation. Mr.  
12 Cooper is not a product of a bad background. You saw this  
13 morning his loving parents, his Godparents, and I would submit  
14 to you, ladies and gentlemen of the jury, that they are as much  
15 victims of Mr. Cooper's actions as are the survivors in this  
16 particular case, and the relatives whose lives were touched by  
17 Mr. Cooper's deadly actions.

18 You have had the opportunity to discuss this case  
19 among yourselves, to reach a decision as far as the guilt or  
20 innocence of Mr. Cooper, and at this particular time I leave the  
21 reasons for your decisions within your mind, and will suggest to  
22 you that the next few minutes that I talk with you will be  
23 relative to the next task that you will face, which is, weighing  
24 the appropriate penalty in this case.

25 In weighing a penalty, his Honor, Judge Garner,  
26 will instruct you as to the procedures that you should use, and  
27 basically he will give you certain guidelines for your  
28 consideration. Well, what it really comes down to is a

021960

1 balancing. There are certain aspects of the law that the law  
2 suggests to you are guidelines for deciding whether or not a  
3 verdict of life or death is appropriate.

4 There are three particular aspects of the evidence  
5 that you have heard in the recent past that I would like to  
6 direct your attention to. They are not all of the aspects of  
7 aggravation or mitigation, but there are three that I would like  
8 to have you consider particularly. They are Mr. Cooper's  
9 background as far as violence is concerned, they relate also to  
10 his past felony convictions and to the circumstances of the  
11 particular crime that brought this whole trial about the killing  
12 of the Ryen family and Christopher Hughes and the murderous  
13 attack on Josh Ryen.

14 October, 1982, particularly October 8, gave you  
15 some insight into Kevin Cooper's thoughts about crime and his  
16 feelings and values as far as a human being.

17 Recall back, for example, that Mr. Cooper was in  
18 1982 committing a burglary, and during that burglary the first  
19 person that happened on the scene while it was being committed  
20 was Lori Strahl. How did he handle Lori Strahl? How did he  
21 treat her as a human being? She asked the casual question,  
22 "is Janine here?"

23 Mr. Cooper, responding in a calculated way to throw  
24 her off guard said, "Yes, Janine is upstairs.", then starts to  
25 hold the door open for her, and as she is coming towards the  
26 door, he hits her with a camera, he grabs her by the hair and  
27 ushers her away from this house to her car, thus against the  
28 journey of terror for Lori Strahl.

0021991

1           That the violence that was done to Lori Strahl was  
2 reflected by some of the words that Kevin Cooper used with her,  
3 such as "I will kill you."

4           I submit to you, ladies and gentlemen, that that is  
5 significant. It wasn't a statement, "If you cooperate with me,  
6 if you do what I say, and if you follow my directions, I won't  
7 hurt you", it is much stronger than that. It is a statement, "I  
8 will kill you."

9           In addition to this, he kidnaped her, he raped her,  
10 and then when he had finished, as he left her, following the  
11 completion of the rape, naked from the waist down in the park,  
12 and started to walk to her car, what was it that he said to her?  
13 "I should kill you." She had submitted in every way possible,  
14 she had been the victim, and yet Mr. Cooper says, as he starts  
15 to leave the scene, "I should kill you."

16           What's the reason for a statement like this? Why  
17 would someone say that to a victim after they had been through  
18 what Lori Strahl has been through? There is only one reasonable  
19 answer and that reasonable answer is, you are a witness that can  
20 identify me in future proceedings, and I can't afford that, and  
21 I am not killing to risk that, my freedom, my opportunity to  
22 stay on the streets is more important than your life. So, "I  
23 should kill you." Your life has no more value to me than that.

24           Ladies and gentlemen, I would submit to you future  
25 victims would pay the price of Lori Strahl's survival in going  
26 to law enforcement to report the crimes that Kevin Cooper had  
27 done to her.

28           In the case of Lori Strahl there are a couple of

02219922

1 other factors that are of note that I mentioned for your thought  
2 processes, and that is, for example, note in this particular  
3 1982 attack that the defendant uses a screwdriver. It is a  
4 screwdriver that is found in the basement of the Heaths  
5 residence and is carried with him, along with the camera, and  
6 the screwdriver is used to strike Lori Strahl in the face and  
7 also held at back of her neck to assure compliance with the  
8 defendant's demands upon her person.

9 It is the same type of action, the same use of  
10 available weapons that we then see later on in 1983 in the  
11 commission of the Ryen attack. What was the motive in Lori  
12 Strahl's attack? What was the reason? Relatively simple.  
13 Transportation. When she arrived, notice that it was not a  
14 continuation of the burglary.

15 What was it that the defendant was after during the  
16 commission of the burglary? He had used the screwdriver to try  
17 and get Janine's van started, he had worked on the ignition, the  
18 wires had been pulled. When Lori Strahl arrived was the  
19 defendant's ticket to Pittsburgh, and it was her car that he was  
20 interested in.

21 And there can be no question, I submit to you, that  
22 if there had been no more than one individual they too would  
23 have been victims, as Lori Strahl was taken taken away so that  
24 the defendant would have the ability to move from Upper St.  
25 Clair to Pittsburgh.

26 A second factor in aggravation that weighs in favor  
27 of a death penalty in this particular case is the burglary  
28 convictions. The defendant, as you heard during the earlier

1 portion of the case, was convicted of two burglaries out of Los  
2 Angeles. Those particular burglaries, prior felony convictions,  
3 are factors that weigh in favor of the death penalty in this  
4 particular case.

5 But probably the strongest evidence, the evidence  
6 that I submit to you, ladies and gentlemen of the jury, that in  
7 and of itself literally warrants the death penalty in this  
8 particular case is the brutality with which this defendant  
9 attacked the Ryen family, the Hughes little boy, and left them  
10 all dead, except for one survivor. It is a crime of an extreme  
11 brutality.

12 It is a crime, to come to try and describe it, to  
13 mention it is almost indescribable. It is one that I'm sure all  
14 of you, ladies and gentlemen of the jury, have paid a price for  
15 having sat here and listened to it because your lives will never  
16 be the same after having seen the evidence that has been  
17 presented, having to view the pictures, and you can well imagine  
18 the tale of terror that rests in Josh Ryen's mind and all of the  
19 people that were close to the Ryens and Christopher Hughes, the  
20 loss of this particular case, of Doug Ryen, Peg Ryen, Chris  
21 Hughes, and the attack on Josh Ryen. Each and everyone are  
22 factors that warrant the death penalty for Kevin Cooper.

23 Similar to 1982, what was the item that the  
24 defendant needed more than anything else? A way out of the  
25 Chino Hills. Looking at these particular factors, one of the  
26 things that certainly strikes your eye is the fact that the top  
27 three victims are children.

28 As I had mentioned at one point in the past, to

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1 attack children requires a special coldness, a complete  
2 abandonment of those human values all of us hold dear, that  
3 causes us to respect the rights of other individuals. Notice  
4 that in this particular case, not only is it a brutal crime, but  
5 it is almost the realization of a nightmare, the tale of terror.

6 Everyone who goes to bed at night feels safe and  
7 secure in your own bed. I can remember, as I am sure many of  
8 you can, as a little boy when you got scared, if you just  
9 covered up enough with the blankets you were safe.

10 I would not be safe anymore than these victims were  
11 if the crime of opportunity that this defendant committed was  
12 one that puts you in similar positions as these individuals.

13 But more important, more important than probably  
14 all of these factors, is that you, ladies and gentlemen of the  
15 jury, have had the unique opportunity to see this defendant  
16 testify. I submit to you that you have literally been able to  
17 watch him change throughout the progress of this particular  
18 trial, and that is a factor that you can put just as much in the  
19 column against the defendant in favor of the death penalty as  
20 any other aspect of the evidence of the law that you have heard  
21 or that you are about to hear.

22 There is a particular strong feeling that a case  
23 like this obviously invokes in any individual. Anyone that  
24 shared with Lori Strahl her sense of loss as she testified as a  
25 witness in this case. You saw what kind of a girl she was, what  
26 kind of a defenseless teenager she was, probably was during the  
27 attack. You can look at the pictures of the victims as they  
28 were in life and see a similarity in regard to the victims, the

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1 Ryens, Christopher Hughes and Lori Strahl.

2 But the most important aspect of all these  
3 particular items is probably the weighing factor that you have  
4 to do, and that weighing factor is to consider what these  
5 particular death oriented items of evidence have to balance them  
6 off as far as life without possibility of parole.

7 All of you ladies and gentlemen have made a  
8 sacrifice of not only time and energy and thoughts with your  
9 participation in this trial. The community is indebted to each  
10 and everyone of you for all of the things that you have given to  
11 achieve justice.

12 I submit to you, ladies and gentlemen of the jury,  
13 that after you have heard the defense argument, and after you  
14 have heard all of the law that his Honor, Judge Garner, will  
15 read to you, when you go into the jury room and you balance the  
16 scales of justice, you will find that the only appropriate  
17 verdict in this case is death.

18 THE COURT: Thank you, counsel.

19 Mr. Negus, please.

20 MR. NEGUS: I am here this afternoon to ask you not to  
21 execute my friend, Kevin Cooper. You have already decided by  
22 your decision, last Tuesday, that Kevin Cooper will die in  
23 prison in California. But I am asking you not to vote to  
24 execute him. The reasons that I am asking you that basically  
25 boil down to the same thing that I have been arguing to you  
26 since we started selecting each and everyone of you to be the  
27 jurors that made the decision in this particular case.

28 Obviously, from the facts that were here, I failed

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1 to produce sufficient evidence to convince you that there was a  
2 reasonable doubt in this particular case. That under the law  
3 and the evidence that you should vote not guilty.

4 As I think I told practically each and everyone of  
5 you when I -- when we were talking about your sitting on this  
6 particular case, nothing that we were going to present to you  
7 was going to be in any way attempted to undermine the horror of  
8 this particular crime.

9 Therefore, at least in my particular statements to  
10 you, which the law allows to be a little bit more personal than  
11 a normal legal argument, I am not going to make a plea that you  
12 exercise mercy on behalf of Kevin Cooper, but I am going to ask  
13 you, as I said, not to execute him.

14 The reasons that I am going to ask you not to  
15 execute him, is that a sentence of life without possibility of  
16 parole, which is the only alternative that exists to death, can  
17 be given for other than reasons of mercy.

18 In this particular case it can be given, as the  
19 judge will instruct you, because of the existence of what he  
20 will define as a lingering doubt. I will suggest to you that a  
21 lingering doubt is that space of conviction of the evidence that  
22 exists between proof beyond a reasonable doubt, which is all  
23 that the law requires for a conviction, and proof beyond all  
24 possible doubt.

25 The reason not to execute Kevin Cooper is that  
26 although each of you has decided in your own mind that the  
27 evidence justifies convicting him, I don't believe you'll be  
28 able to say that you know beyond all possible doubt that Kevin

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1 Cooper is the person that committed the crime.

2 The judge will -- will instruct you that you don't  
3 decide this balancing process by counting the number of factors  
4 on one side or the t'other. That just one factor, just a  
5 lingering doubt and not being able to say that I am sure beyond  
6 all possible doubt, is sufficient in itself to justify keeping  
7 Mr. Cooper in prison for the rest of his life.

8 I guess the question I have for each of you is,  
9 despite my failure to present evidence which convinced you to  
10 vote not guilty, can each of you say that you are sure that Josh  
11 Ryen was mistaken in the emergency room when he answered the  
12 initial questions of the people who were treating him about the  
13 number and race of his attackers. Obviously in coming to the  
14 verdict that you did, you have decided that the conclusion that  
15 he was mistaken is the more reasonable interpretation to make  
16 under the evidence.

17 But can you really say that you are sure that he's  
18 mistaken? Can you really say that when we know that Josh, who  
19 understandably wants to think happy thoughts, wants to forget,  
20 we know that the means were not taken which could have allowed  
21 us to evaluate how Josh changed from his statement that there  
22 were three White males that perpetrated the crime to the various  
23 statements of not knowing or uncertainty that exists in Josh's  
24 mind today.

25 How can you be sure, beyond all possible doubt,  
26 that there was one person and one person alone that committed  
27 the crime? When Dan Gregonis and Craig Ogino themselves  
28 obviously felt in asking for more time at the crime scene to

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1 gather that kind of evidence, that the evidence was improperly  
2 gathered by Mr. Stockwell and Ms. Schechter and other people  
3 from the Sheriff's Department the night of the 4th.

4 The reason that the law allows this particular  
5 mitigating factor in a sentencing process, which normally  
6 focuses upon the nature of the crime and the nature of the  
7 defendant, is for those same human values that Mr. Kottmeier  
8 stressed in his argument.

9 We do not wish, in this society, to execute people  
10 unless we're absolutely sure they're guilty. That is not a  
11 reason for voting for life without the possibility of parole,  
12 which is in any way a sign of leniency to Mr. Cooper, it is a  
13 reason for voting for life without possibility of parole, which  
14 preserves the values, those human values which are important to  
15 those of us who have known Mr. Cooper.

16 In this particular case, thinking back to the  
17 opening statements of the prosecutor, it was like a television  
18 script. There was a horrible crime, they found the bad guy,  
19 they caught the bad guy, and the bad guy should be convicted and  
20 punished. Unfortunately, the particular evidence in this  
21 particular case is not capable of giving us that degree of  
22 certainty which we have been led to expect from our television  
23 script.

24 There is always, in our country, that feeling that  
25 a really bad crime, the man has to be punished with the ultimate  
26 penalty. If you were to vote for death that would be, I am  
27 sure, a very popular thing to do.

28 You have been told by the judge that at the end of

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1 the case, after your verdict, you may even see your pictures on  
2 television, if you wish, all be popular heros. But the brave  
3 thing to do in this particular case, is to recognize that  
4 although you may have done your duty as jurors and decided the  
5 case on the basis of the evidence presented to you, that that  
6 evidence still has substantial gaps in it, still does not allow  
7 that degree of positiveness which a civilized society would  
8 require in order to execute you. The brave thing to do is to  
9 tell your fellow citizens that, yes, we convicted Mr. Cooper,  
10 but we gave him life, not because of mercy or leniency, but  
11 because we weren't that sure that we could execute him.

12 Mr. Kottmeier referred you to Kevin's demeanor in  
13 the courtroom, and I'd like to -- this is my last feeling that I  
14 am allowed to make as an individual that has been talking to you  
15 for these last six months, point out another piece of behavior  
16 that occurred in this particular case which tells me in my  
17 particular profession something about my friend Kevin Cooper.

18 When your verdict was announced last Tuesday, Kevin  
19 turned to both Ron and myself and shook our hands to thank us  
20 for fighting for him. I have been a public defender for almost  
21 eleven years now. I may have volunteered for this particular  
22 case, but most of the clients I get I don't pick one or t'other.  
23 And the kind of response that Kevin Cooper has shown to me over  
24 this last year and a half that I have been sitting next to him  
25 day after day in court, is the response of one friend to  
26 another. It is not the kind of response of somebody who is  
27 outside that tale of civilized society, as Mr. Kottmeier has  
28 suggested.

1 Kevin has always maintained his innocence.

2 THE COURT: Counsel, that's not a part of the evidence in  
3 this phase. His reactions, rapport to you are not a matter of  
4 evidence.

5 MR. NEGUS: I think they're still a matter of fair  
6 comment, your Honor.

7 THE COURT: Counsel, please stick to the matter of  
8 evidence.

9 MR. NEGUS: He's always maintained his evidence --  
10 maintained his innocence to you. I would suggest to you that  
11 the state of the evidence is such that you cannot be sure that  
12 he's not innocent, and for that reason I ask you not to kill my  
13 friend, Kevin Cooper.

14 THE COURT: Anything further? Thank you.

15 MR. KOTTMEIER: No, your Honor. We submit the matter on  
16 the Court's instructions.

17 THE COURT: Before I give you the jury instructions some  
18 of you may wish to depart before you listen to all of these.

19

20 If you could close the door, bailiff, please.

21 Thank you.

22 Ladies and Gentlemen of the Jury, the defendant in  
23 this case has been found guilty of four counts of Murder of the  
24 First Degree and one count of Attempted Murder. The charge that  
25 the murders were committed under a special circumstance have  
26 been especially found to be true.

27 It is the law of this state that the penalty for a  
28 defendant found guilty of Murder of the First Degree should be

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1 death or confinement in the state prison for life without the  
2 possibility of parole in any case in which the special  
3 circumstance charged in this case has been specially found to be  
4 true.

5 Under the law of this state you must now determine  
6 which of said penalties shall be imposed upon the defendant.

7 To the extent that they are applicable to the  
8 witnesses and to the issues of the penalty <sup>phase</sup> face of this trial,  
9 you are you are instructed that you shall apply all relevant  
10 instructions heretofore given to you at the conclusion of the  
11 guilt phase of the trial except as hereinafter provide.

12 In determining which penalty is to be imposed on  
13 the defendant, you shall consider all of the evidence which has  
14 been received during any part of the trial of this case. You  
15 shall consider, take into account and be guided by the following  
16 factors in aggravation and mitigation, if applicable:

17 An aggravation factor is a circumstance which, if  
18 true, weighs in favor of the death penalty.

19 A mitigation factor is a circumstance which, if  
20 true, weighs in favor of the penalty of life imprisonment  
21 without the possibility of parole.

22 Factors you may consider are:

23 One -- Excuse me.

24 (a) The circumstances of the crimes of which the  
25 defendant was convicted in the present proceeding and the  
26 existence of the special circumstance found to be true:

27 (b) The presence or absence of criminal activity  
28 by the defendant which involved the use or attempted use of

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1 force or violence or the express or implied threat to use force  
2 or violence provided the same has been proved to you beyond a  
3 reasonable doubt.

4 (c) The presence or absence of any prior felony  
5 conviction.

6 (d) Whether or not the victim was a participant in  
7 the defendants homicidal conduct or consented to the homicidal  
8 act.

9 (e) Whether or not the offense was committed under  
10 circumstances which the defendant reasonably believed to be a  
11 moral justification or extenuation for his conduct.

12 (f) The age of the defendant at the time of the  
13 crime.

14 (g) Whether or not you have any lingering doubt as  
15 to Mr. Cooper's guilt.

16 (h) Any sympathy you may feel for Mr. Cooper.

17 (i) Any other circumstances which extenuates the  
18 gravity of the crime even though it is not a legal excuse for  
19 the crime and any other aspect of the defendant's character or  
20 record that the defendant offers as a basis for a sentence less  
21 than death.

22 As jurors, in deciding the appropriate penalty you  
23 may consider pity, sympathy, or mercy for the defendant.

24 However, you must not be swayed by mere conjecture, passion,  
25 prejudice or public feeling.

26 These various factors in aggravation and mitigation  
27 may be assigned different weights by you. Thus, it is not the  
28 number of factors, necessarily, but also the weight you assign

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1 to them which should control. For instance, you could find that  
2 one specific factor on one side weighs so heavily in your  
3 consideration that it outweighs all of the determined factors on  
4 the other side.

5 Evidence has been introduced for the purpose of  
6 showing that the defendant Kevin Cooper has been convicted of  
7 the crimes of burglary in two counts in the County of Los  
8 Angeles prior to the offense of Murder in the First Degree of  
9 which he has been found guilty in this case.

10 Before you may consider any such crimes as an  
11 aggravating circumstance in this case, you must first be  
12 satisfied beyond a reasonable doubt that the defendant Kevin  
13 Cooper was in fact convicted of such prior crimes.

14 Evidence has been introduced for the purpose of  
15 showing that the defendant Kevin Cooper has committed the  
16 following criminal acts: Burglary, assault, kidnapping, driving  
17 a motor vehicle without the consent of the owner, and rape, all  
18 related to the alleged Lori Strahl incident, and all of which  
19 allegedly involved the express or implied use of force or  
20 violence or the threat of force or violence. Before you may  
21 consider any of such criminal acts as an aggravating  
22 circumstance in this case, you must first be satisfied beyond a  
23 reasonable doubt that the defendant Kevin Cooper did in fact  
24 commit such criminal acts. You may not consider any evidence of  
25 any other criminal activity as an aggravating circumstance.

26 Every person who enters any structure of the type  
27 shown by the evidence in this case with the the specific intent  
28 to steal, take and carry away the personal property of another

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1 of any value, and with the further specific intent to deprive  
2 the owner permanently of such property, is guilty of the crime  
3 of burglary.

4 It is immaterial whether the intent with which the  
5 entry was made was thereafter carried out.

6 In order to prove the commission of the crime of  
7 burglary each of the following elements must be proved:

8 1. That a person entered a structure of the type  
9 shown by the evidence in this case.

10 2. That at the time of the entry, such person had  
11 the specific intent to steal and take away someone else's  
12 property, and intended to deprive the owner permanently of such  
13 property.

14 3. That at the time of the entry, such person had  
15 the specific intent to commit the crime of theft. Theft is the  
16 taking and carrying away of the personal property of another  
17 with the specific intent to deprive the owner permanently of his  
18 property.

19 In the crime of Burglary there must exist a union  
20 or joint operation of act or conduct and a certain specific  
21 intent in the mind of the perpetrator and unless such specific  
22 intent exists the crime to which it relates is not committed.

23 The crime of Burglary requires the specific intent  
24 to steal.

25 An assault is an unlawful attempt coupled with the  
26 present ability, and the general and criminal intent, to apply  
27 physical force on the person of another.

28 In order to prove the commission of the crime of

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1 assault, each of the following elements must be proved:

2 1. That an attempt was made to apply physical  
3 force upon the person of another.

4 2. That such an attempt was unlawful, and

5 3. That at the time of such attempt the person who  
6 made the attempt had the present ability to apply such physical  
7 force, and

8 4. That the person making the attempt had a  
9 general criminal intent, which, for assault, means that he  
10 intended to commit an act, the direct natural and probable  
11 consequences of which, if successfully completed, would be the  
12 application of physical force upon the person of another.

13 To constitute an assault, it is not necessary that  
14 any actual injury be inflicted. However, if an injury is  
15 inflicted it may be considered in connection with other evidence  
16 in determining whether an assault was committed.

17 Every person who unlawfully compels any other  
18 person, against his will and without his consent and because of  
19 a reasonable apprehension of harm, to move for a substantial  
20 distance, that is, a distance more than slight or trivial, is  
21 guilty of the crime of kidnapping.

22 In order to prove the commission of the crime of  
23 kidnapping, each of the following elements must be proved:

24 1. That a person was unlawfully compelled by  
25 another person to move because of a reasonable apprehension of  
26 harm.

27 2. That the movement of such other person was  
28 against his will or without his consent, and

1           3. That the movement of such other person was for  
2 a substantial distance, that is, a distance more than slight or  
3 trivial.

4           Every person who takes or drives a vehicle not his  
5 own, without the consent of the owner, and with specific intent  
6 to deprive the owner either permanently or temporarily of his  
7 title to, or possession of, the vehicle, whether with or without  
8 the intent to steal the same, is guilty of the crime of  
9 violation of Section 10851 of the Vehicle Code.

10           In order to prove the commission of such crime each  
11 of the following elements must be proved?

12           1. That a person took or drove a vehicle belonging  
13 to another person.

14           2. That the other person had not consented to such  
15 taking or driving of his vehicle, and

16           3. That when such person took or drove the vehicle  
17 he had the specific intent to deprive the owner either  
18 permanently or temporarily of his title to or possession of the  
19 vehicle.

20           The crime of rape is an act of sexual intercourse  
21 with a person who is not the spouse of the perpetrator  
22 accomplished against the will of such person by means of force.

23           The crime of rape is also an act of sexual  
24 intercourse with a person who is not the spouse of the  
25 perpetrator accomplished against such person's will by means of  
26 fear or of immediate and unlawful bodily injury to such person.

27           In order to prove the commission of the crime of  
28 rape, each of the following elements must be proved:

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1                   1. That the defendant engaged in an act of  
2 intercourse with a person.

3                   2. That such other persons was not the spouse of  
4 the perpetrator.

5                   3. That the act of intercourse was against the  
6 will of such other person, and

7                   4. That the act was accomplished by means of  
8 force, or that such act was accomplished by means of fear of  
9 immediate and unlawful bodily injury to such person.

10                   In the crimes of Assault, Kidnapping, and Rape,  
11 there must exist a union or joint operation of act or conduct  
12 and general criminal intent. To constitute general criminal  
13 intent it is not necessary that there should exist an intent to  
14 violate the law. When a person does intentionally -- Strike  
15 that. When a person intentionally does that which the law  
16 declares to be a crime, he is acting with general criminal  
17 intent even though he may not know that his act or conduct is  
18 unlawful.

19                   In all of the aforementioned crimes the defendant  
20 has not been convicted and is presumed to be innocent until the  
21 contrary is proved, and in case of a reasonable doubt whether  
22 his guilt is satisfactorily shown, you must disregard them and  
23 not consider them as factors in aggravation in this case. This  
24 presumption places upon the state the burden of proving them  
25 beyond a reasonable doubt.

26                   Reasonable doubt is again designed are defined as  
27 follows: It is not a mere possible doubt; because everything  
28 relating to human affairs and depending on moral evidence is

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3 ( 1 open to some possible or imaginary doubt. It is that state of  
2 the case which, after the entire comparison and consideration of  
3 all the evidence, leaves the minds of the jurors in that  
4 condition that they cannot say they feel an abiding conviction,  
5 to a moral certainty, of the truth of the charge.

6 It is a constitutional right of a defendant in a  
7 criminal trial that he may not be compelled to testify. You  
8 must not draw any inference from the the fact that he does not  
9 testify. Further, you must neither discuss this matter nor  
10 permit it to enter into your deliberations in any way.

11 In deciding whether or not to testify, the  
12 defendant may chose to rely on the state of the evidence and  
13 upon the failure, if any, of the People to prove beyond a  
14 reasonable doubt every aggravating factor against him, and no  
15 lack of testimony on the defendant's part will supply a failure  
16 of proof by the People so as to support a finding against him on  
17 any such aggravating factor.

18 You have been instructed as to all the rules of law  
19 that may be necessary for to you reach a verdict. Whether some  
20 of the instructions will apply will depend upon your  
21 determination of the facts. You will disregard any instruction  
22 which applies to a state of facts which you determine does not  
23 exist. You must not conclude that the fact in that an  
24 instruction has been given that the court is expressing any  
25 opinion as to the facts.

26 We will give you two verdict forms, and I will read  
27 them to you:

28 Penalty Verdict A says:

0022-1-97-9

1           We, the jury in the above entitled cause, determine  
2           that the penalty shall be death, with a dateline and a place for  
3           the foreman or foreperson to sign.

4           Penalty Verdict B says:

5           We, the jury in the above-entitled cause, determine  
6           that the penalty shall be confinement in the state prison for a  
7           term of life without the possibility of parole, with a date and  
8           signature line.

9           Ladies and Gentlemen, it is now your duty to  
10          determine which of the two penalties, death or confinement in  
11          the state prison for life without the possibility of parole,  
12          shall be imposed upon the defendant.

13          After having heard all of the evidence, and after  
14          having heard and considered the arguments of counsel, you shall  
15          consider, take into account and be guided by the applicable  
16          factors of aggravating and mitigating circumstances upon which  
17          you have been instructed.

18          If you conclude that the aggravating circumstances  
19          outweigh the mitigating circumstances, you shall impose a  
20          sentence of death. However, if you determine that the  
21          mitigating circumstances outweigh the aggravating circumstances,  
22          or if you determine that they are evenly balanced so that  
23          neither set of circumstances outweigh the other, you shall  
24          impose a sentence of confinement in state prison for life  
25          without the possibility of parole.

26          You shall now retire and select one of your number  
27          to act as foreperson, who will preside over your deliberations.  
28          In order to make a determination as to the penalty, all twelve

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1 jurors must agree.

2 Any verdict that you reach must be dated and signed  
3 by your foreperson on a form that will be provided and then you  
4 shall return with it to this courtroom.

5 Perhaps you should reswear the bailiff.

6 (The bailiff was sworn.)

7 THE COURT: If the alternates would again remain, please,  
8 and the rest of you follow the bailiff.

9 Are you going to take them back now?

10 THE BAILIFF: Yes.

11 (The jury retired to deliberate.)

12 THE COURT: I think those instructions can be stapled  
13 together.

14 Mr. Sawyer, would you mind taking the other two  
15 notepads just in case somebody inadvertently left them? Are  
16 there any more there? Thank you.

17 Counsel, would you stipulate and agree again that  
18 the alternates may be on telephone standby without keeping them  
19 under the custody of another bailiff?

20 MR. NEGUS: Yes.

21 MR. KOTTMEIER: Yes, your Honor.

22 THE COURT: So the same provisions apply.

23 May I say to you that never in my dreams did I  
24 imagine that we would have a trial of this duration without a  
25 single juror having something happen to them. It's just  
26 extremely rare. And it's a compliment to their diligent effort,  
27 I guess, and to yours as well.

28 Mrs. Loftis even this morning could have come in if



1 we had requested her to do so, but it would have made it a  
2 little difficult for her on a job that she had just begun.

3 So basically I had all of you staying with me  
4 throughout for which I'm eternally grateful.

5 Mrs. Aguinaga, you have been staying in the  
6 courthouse. You may continue to do so if you wish.

7 All of you be on telephone standby since something  
8 could still happen.

9 Since you might be used, would you continue to  
10 remember the admonition at all times. Once we get a verdict, if  
11 we get one without the necessity of using you, Mrs. Bennett will  
12 telephone you and tell you how it came out.

13 Any questions by any of the three of you?

14 Thank you all once again for coming in.

15 Counsel, anything before we take a recess?

16 All right, we will be in recess.

17 (Recess)

18

19

20 (Chambers conference reported.)

21 THE COURT: This is something that could have been done a  
22 number of other times. But I never know how long they are going  
23 to be deliberating. It didn't register at the time you  
24 mentioned it, what you meant that we would waive time for  
25 sentencing and set it over until May something or other.

26 MR. NEGUS: 8th.

27 THE COURT: I might have some serious reservations of  
28 doing that, particularly if the verdict were a death sentence.

02-1987

1 The County of San Bernardino, San Diego, is not going to want to  
2 keep him here any longer than absolutely necessary.

3 MR. NEGUS: We have done that dozens of -- I mean, I have  
4 only done it once. I have never heard anybody object to it, I  
5 mean, because the reason for it is that it takes --

6 THE COURT: Maybe, sergeant, I misread the County.

7 What do you think? Do you think we'd draw any heat  
8 if we would set over the sentence for a couple of --

9 MR. NEGUS: Couple of months.

10 THE COURT: Yes. It if went over to May -- what did you  
11 say, May 8? Is there good reason for that?

12 MR. KOCHIS: I may be even out of the country the end of  
13 March, beginning of April, and unavailable. It is not strictly  
14 a matter of sentencing, I believe there's going to be a motion  
15 for new trial and motion to reconsider.

16 MR. NEGUS: I need time to write them, the motions for  
17 new trial, which are of considerable length of time going back  
18 over the transcripts. I am going to be out of the country at  
19 the end of April, and before Mr. Kochis leaves. I couldn't have  
20 it done. That is when we will all be back.

21 THE BAILIFF: Your Honor, in cases, in my past experience  
22 of this type, whatever you order is what they will do.

23 However, Mr. Cooper is considered a security risk  
24 for the Sheriff's Department and you are correct in assuming  
25 they want him to leave the County Jail as soon as possible.

26 THE COURT: I assume that he's in segregation even now.

27 THE BAILIFF: Yes.

28 MR. NEGUS: He's been a security risk since August 1st,

1 1983, as far as jails are concerned. I don't think that's a  
2 reason to --

3 THE BAILIFF: May I make one suggestion. Perhaps if it  
4 is held over for two months, perhaps you might --

5 THE COURT: That's almost two and a half months. You  
6 see, you have got March, April and then May.

7 MR. NEGUS: I concede it is a little over two months.  
8 But, that doesn't seem -- I mean, the last capital case that I  
9 had was sentenced March 8th to May 20th, about the same time.  
10 Your experience, I am thinking, has been similar.

11 MR. KOCHIS: My experience has been they're never  
12 sentenced within 28 days, because usually the prosecution gets  
13 served late with the motion for new trial and we have to ask for  
14 an additional two weeks to respond. It takes the defense  
15 attorneys more than four weeks to draft his motion.

16 THE COURT: I can see how you can use the time even  
17 without any time off, which we all sorely need. Normally in  
18 that type of situation we would house them at the prison. But I  
19 don't think that is feasible in this case.

20 MR. NEGUS: The last case I had he was housed in San  
21 Bernardino County Jail. I can't imagine that the San Diego  
22 County Jail --

23 MR. KOCHIS: He's not housed in prison until he's  
24 convicted, until sentence is imposed. Until judgment is  
25 pronounced he stays in the County Jail.

26 THE COURT: He's a state prisoner, Mr. Kochis. We often  
27 times house them in state prison.

28 MR. NEGUS: We often times don't, too.

1 THE COURT: I don't want to put him in CIM.

2 MR. NEGUS: Mr. Cooper has been locked up securely in  
3 this jail since last September and the Sheriff hasn't had any  
4 problems with him. I just don't see that -- I don't know why  
5 the Marshal has problems with him, but we will have to --

6 THE BAILIFF: We don't have any problems, he just asked  
7 my opinion about that.

8 THE COURT: You don't have any problems.

9 MR. NEGUS: I don't think the Sheriff's Department --

10 THE BAILIFF: I would suggest is that we perhaps have a  
11 little note to the Sheriff's Department explaining why he's  
12 going to be staying in the jail with the circumstances. I think  
13 that that would give them some idea how they are going to house  
14 him, where they're going to keep him, et cetera.

15 THE COURT: Well, I take it the two of you have discussed  
16 it to where you have talked about the first date available.

17 MR. NEGUS: We both agreed May 8th looked like a good  
18 date. It is on a Wednesday morning, both of us are going to  
19 have administrative responsibilities when we get back, plus the  
20 vacation.

21 THE COURT: If there is not a sentence of death --

22 MR. NEGUS: It doesn't make any difference. Motions for  
23 new trial has to be written either way. It is not automatic.  
24 Well, I'd write it.

25 THE COURT: I don't think it is automatic if there is  
26 life.

27 MR. NEGUS: It is not, but I would do it, from my point  
28 of view.

0219005

1 THE COURT: That date is mutually agreeable, May 8?

2 MR. KOCHIS: Yes, it is.

3 MR. NEGUS: It is a agreeable with Mr. Cooper, I believe.

4 Mr. Cooper you understand from what we talked,  
5 whichever sentence you get you have a right to be sentenced  
6 within 28 days of the time the verdict comes back, and do you  
7 likewise agree to have it set over until May the 28th?

8 MR. COOPER: Yes.

9 THE COURT: Do you join in the waiver?

10 MR. NEGUS: I do.

11 THE COURT: I think I better go down and talk to the  
12 presiding judge. I will have to set up arrangements to have a  
13 place, that may not always be in this particular courtroom.

14 MR. NEGUS: I don't think it matters which court we do  
15 it.

16 MR. KOCHIS: As long as it is in San Diego County, I  
17 guess not.

18 THE COURT: Okay. Anything else that you want to talk  
19 about before we break and wait?

20 MR. NEGUS: Mr. Kochis and I both intend to be in San  
21 Diego until tomorrow afternoon. When the jury goes home  
22 tomorrow, should they be out that long, could we both have  
23 permission to -- if they are going to be out longer than  
24 tomorrow afternoon -- to go back to Ontario and wait?

25 THE COURT: Okay. Make sure you stand by the phone, too.

26 MR. NEGUS: We wouldn't be --

27 THE COURT: And get here within two and a half hours.

28 All right, I thank you.

021986

1 MR. NEGUS: Thank you.

2 (Chambers conference concluded.)

3 (Adjournment.)

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2000-1-10

1 f SAN DIEGO, CALIFORNIA, WEDNESDAY, FEBRUARY 27, 1985, 1:00 P.M.

2  
3 --ooOoo--

4 (The following proceedings were reported over the  
5 telephone between the Court and counsel.)

6 THE COURT: On the record, this is Judge Garner in  
7 chambers.

8 Is the clerk Dodie Bennett here?

9 THE CLERK: Yes, I'm here.

10 THE COURT: She is on another phone.

11 And the reporter, Donna Beard, are you there?

12 THE REPORTER: Yes, your Honor.

13 THE COURT: Thank you.

14 Counsel, identify yourself and your client.

15 MR. NEGUS: David Negus, Public Defender, on behalf of  
16 Mr. Cooper.

17 I spoke to Mr. Cooper on the phone at approximately  
18 11:20 this morning, explained to him what was to transpire and  
19 he has waived his presence for this proceeding.

20 THE COURT: Do you join in the waiver?

21 MR. NEGUS: I do.

22 THE COURT: Mr. Kochis, are you there?

23 MR. KOCHIS: Yes, I am, and I represent the People, of  
24 course.

25 THE COURT: Thank you, counsel.

26 The message from the jury foreman, Frank Nugent,  
27 reads as follows:

28 "A question, informative in nature, has been raised

1           pertaining to the sentencing procedure if the  
2           jury cannot unanimously agree on a penalty  
3           verdict."

4           I gave you through the clerk a tentative suggestion  
5           earlier. I amplified on that just a bit. Let me read you my  
6           suggestion, and then I'll receive any suggestions, objections,  
7           whatever from each of you.

8           The answer that I would be giving them would be to  
9           step to the jury room with the court reporter and everything on  
10          the record and advise as follows, quote:

11          "You previously inquired as to procedure if the  
12          jury cannot unanimously agree on a penalty  
13          verdict. As I previously instructed, it is the  
14          duty of each of you to consider the evidence for  
15          the purpose of arriving at a verdict if you can do  
16          so in accordance with that evidence and the  
17          instructions given to you. You are not to be  
18          concerned with procedures. Thank you."

19          Reaction, please.

20          MR. KOCHIS: Your Honor, my reaction is first, I have no  
21          objection to the Court's proposed instruction to the jury.

22          Second, I would prefer we take the bull by the  
23          horns and tell the jury that if they do not reach a unanimous  
24          decision the law provides that another jury must be selected, --

25          THE COURT: We are getting dangerously close to Allen,  
26          counsel.

27          MR. KOCHIS: -- that the penalty phase must be retried.

28          THE COURT: I think that's coercive in nature and I think



1 that that would be considered verboten under the Allen decision.

2 MR. NEGUS: I agree. People versus Gainer, 19 Cal.3d at  
3 851, is pretty clear on that I believe.

4 THE COURT: I'm afraid not, Mr. Kochis. You know, I  
5 don't know what the consequences will be. I've received notes  
6 from jurors before indicating a certain inclination and have had  
7 them come in with a verdict thereafter. I can still hold one  
8 way or another in this case, but I don't want to jeopardize the  
9 possibility by giving them an instruction that I think would be  
10 clearly erroneous in our present law.

11 Mr. Negus, with reference to my suggestion.

12 MR. NEGUS: The problem I have with it is that I believe  
13 that the first part about reaching a verdict if you can might  
14 itself be coercive by the circumstances of the note. I would  
15 prefer that you tell them that if they cannot reach a verdict to  
16 inform the Judge, otherwise they are not to be concerned with  
17 procedure.

18 THE COURT: All right. Taking my language directly from  
19 17.40 CALJIC previously given in the guilt phase, at least the  
20 most part of it, and it basically all comes from 17.40 which is  
21 an approved instruction, so I'm giving them really nothing new.  
22 There is something but this is not coercive in nature.

23 MR. KOCHIS: Your Honor, the other suggestion I might  
24 have if the Court and counsel is agreeable is to tell the jury  
25 that any verdict they agree on unanimously is subject to review  
26 by the trial court.

27 MR. NEGUS: I object.

28 THE COURT: That is not the law.

1 MR. NEGUS: I -- Dave Negus speaking.

2 I object. That takes away the personal  
3 responsibility that they must feel for making the decision. And  
4 I believe that -- I don' have the case in front of me, but  
5 anything which diminishes the jurors personal responsibility is  
6 likewise reversible error.

7 THE COURT: Counsel, you each have objections to my  
8 suggestion, but to my way of thinking you are not assisting me  
9 in coming up with a better more responsive answer so I will  
10 overrule you both. I propose to answer them then as I have  
11 indicated.

12 Do you want to be here or may I do it on the record  
13 as indicated?

14 MR. NEGUS: Doing it on the record with the reporter  
15 present in the jury room is fine with me.

16 MR. KOCHIS: As it is with the People.

17 THE COURT: Now I think you ought to get back. I hate to  
18 have you run back, but we might will have a mistrial this  
19 afternoon.

20 MR. KOCHIS: Your Honor, it's a two-hour drive from here  
21 for both of us. Neither of us have apartments that we can stay  
22 at there any more, be nice if we could stay here.

23 The other thought I have, your Honor, is in a  
24 case -- this is John Kochis -- in which the jury has heard  
25 testimony for five to six months in which a retrial of the  
26 penalty phase would entail another five to six month trial, I  
27 would not urge the Court to today consider granting a mistrial  
28 regardless of what the response is of the jury.

1 THE COURT: All right. Supposing, Mr. Negus --

2 MR. KOCHIS: They had a long time to listen to the law  
3 and the evidence and they should take some some time to  
4 deliberate amongst themselves, either to reach a decision or to  
5 make sure they are unable to reach a unanimous decision.

6 THE COURT: Suppose they tell me today that they are  
7 enable to arrive at a verdict.

8 MR. NEGUS: I think then you have no other choice but to  
9 grant a mistrial.

10 THE COURT: Well, I do have another choice. I could at  
11 that point tell them that considering the duration of the trial  
12 and the subject matter I want them to deliberate further before  
13 I find out one way or the other.

14 MR. NEGUS: Dave Negus again. I believe on a penalty  
15 trial of a death penalty case that especially as there is some  
16 doubt in my mind whether or not the former provision of the 1977  
17 statute which was purportedly repealed by Briggs is maybe  
18 constitutionally mandated, that such a procedure would again be  
19 reversable error and coercing a verdict.

20 THE COURT: No. I'm not telling them what way to go in  
21 any way.

22 MR. NEGUS: Doesn't matter. Gainer makes it clear. It  
23 doesn't matter, that the error is not in suggesting which way to  
24 go, the error is in coercing a verdict whichever way it goes.

25 THE COURT: Just a second, please.

26 If I -- got we are anticipating perhaps. We  
27 shouldn't do that. But if I got such an inquiry indicating, I  
28 would then telephone you, certainly, I wouldn't do anything

02-1992

1 without doing that and giving us a chance to discuss it.

2 At this time I think I would be inclined to advise  
3 them in this order: Considering the duration of the trial and  
4 the length of deliberations, I request you retire for the day  
5 and continue your deliberation tomorrow.

6 Counsel, we can discuss that again later if it  
7 comes up. With reference to -- Well, if that be the case, then  
8 I don't think that I'm going to need to have you return back  
9 here. So stand by your phones and be prepared to discuss the  
10 matter further, and we will keep you advised.

11 Then what would we do if we got a verdict today? I  
12 will have to have them come back tomorrow if you are not coming  
13 down today.

14 MR. NEGUS: We can be down there in two hours, a little  
15 over two hours. And if they have a verdict I'm sure they would  
16 be willing to wait till 4:30 or 5:00 for us to get there.

17 THE COURT: Okay. Would it be all right if we got a  
18 verdict if we -- if I advised them that we can either take it  
19 two hours and 15 minutes from then or return tomorrow morning at  
20 9:30 to take the verdict? What's your pleasure?

21 MR. NEGUS: That's fine.

22 MR. KOCHIS: Fine with me as well. I'm also willing to  
23 drive down any time today if we got a verdict.

24 THE COURT: Either one is all right depending upon the  
25 jurors' feelings?

26 MR. NEGUS: Yes.

27 THE COURT: All right. Then I guess that's all we can do  
28 at this time. Stand by your phone and I will go in with the

1 court reporter and indicate as I indicated.

2 MR. KOCHIS: Thank you.

3 THE COURT: Thank you, gentlemen.

4 (Telephone conference concluded.)

5

6 (The following proceedings were held in the  
7 presence of the jury:)

8 THE COURT: Good afternoon. For the record I'm in the  
9 jury deliberation room with all of the jurors.

10 You previously inquired, Mr. Nugent as to  
11 procedure, if the jury cannot unanimously agree on a penalty  
12 verdict.

13 As I previously instructed it is the duty of each  
14 of you to consider the evidence for the purpose of arriving at a  
15 verdict if you can do so in accordance with that evidence and  
16 the instructions given to you. You are not to be concerned with  
17 procedures.

18 Thank you.

19 (Adjournment.)

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1 SAN DIEGO, CALIFORNIA, THURSDAY, FEBRAURY 28, 1985 11:20 A.M..

2 --oo0oo--

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4 (The following proceedings were recorded over  
5 the telephone between the court and counsel.)

6 THE COURT: Judge Garner.

7 MR. KOCHIS: This is John Kochis. I have with me Dave  
8 Negus, in chambers, behind Department 2.

9 What we would like to do, with the Court's  
10 permission, is to continue to work in our office and remain on  
11 telephonic standby with the understanding that we would drive to  
12 San Diego at any time, day or night, if there was a verdict or  
13 question which had to be handled by our presence in San Diego.

14 THE COURT: I have tried to permit that, but I'm  
15 concerned that this may be the last day.

16 MR. KOCHIS: There has been no communication, correct?

17 THE COURT: That is true. That is true, there hasn't.  
18 But it has now been -- it will have been by the end of this  
19 day -- two full days, basically, since we recieved the note  
20 about a possible hung jury. So, I still suspect that sometime  
21 this afternoon something is going to happen.

22 For example, either we're going to get a verdict or  
23 there is going to be a mistrial.

24 MR. KOCHIS: I would urge the Court not to be thinking  
25 along the latter lines. The case lasted for six months, the  
26 jury has only been out for two days.

27 THE COURT: The day's been short. They don't have to  
28 reconsider all the circumstances in the guilt phase.

1 MR. KOCHIS: Based on the law they must reconsider the  
2 circumstances of the offense, and part of Mr. Negus argument  
3 basically requires them to reconsider the evidence in light of  
4 the different standard he's suggested to them.

5 THE COURT: Counsel, if they come in this afternoon, and  
6 they're not able to reach a verdict. I suspect that's going to  
7 be the end of the case.

8 I would suggest that you, Mr. Kochis, if you don't  
9 want to come up here, get yourself a counterpart from the San  
10 Diego office, District Attorney's office, to sit in on the  
11 taking of the verdict in some manner. Perhaps it is the same  
12 for you, Mr. Negus. We have got to do something.

13 I don't want them to have to come back again  
14 tomorrow.

15 MR. KOCHIS: We will come down tonight, whenever we get  
16 any --

17 THE COURT: Suppose they come in at 3:30 today?

18 MR. NEGUS: We can be here by two hours and five minutes  
19 after we get some indication, and we both don't feel that there  
20 is any evidence necessarily of either a verdict or a hang-up.  
21 They took a long time to come up with their first verdict and  
22 the indications were that they were talking most of the time, at  
23 least how we read it. We feel that is quite possible they could  
24 be --

25 THE COURT: I'm -- well, I'm in no hurry to abort the  
26 matter, but I'm just concerned that I don't want to keep them  
27 waiting around forever once they reach a decision.

28 MR. NEGUS: The problem is, we have -- neither of us no

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1 longer have any place to go.

2 THE COURT: Well, that's simply not a problem.

3 MR. NEGUS: It's a four hour round trip drive, and if  
4 there is no indication from the jurors that there is any reason  
5 to come down there, it seems to be a fairly large waste of  
6 resources.

7 THE COURT: Okay. I will wait.

8 Are you going to come together if you come?

9 MR. NEGUS: No.

10 THE COURT: I will go along with it. You may have to  
11 come down late at night then.

12 MR. KOCHIS: That's fine.

13 THE COURT: Because if they do come in late today, and  
14 this is going to be the last day, then I'd be inclined to work  
15 them late rather than have them come back tomorrow.

16 MR. NEGUS: Fine.

17 MR. KOCHIS: I'm willing to come down any time between --  
18 there is no limit. I will come down at 9:00, 10:00, 11:00,  
19 there is no limit. I will make myself available by the  
20 telephone the remainder of the day, in the evening.

21 THE COURT: Okay, so be it. I will keep the watch here  
22 at the Court.

23 MR. KOCHIS: Then what I will do, your Honor, I will  
24 check with the court at Noon, at 1:30, and at 4:00 to see if  
25 there is any communication or need for us to come to San Diego.

26 THE COURT: Rest assured we will call you, I don't think  
27 you have to bother. As long as you are standing by there, we  
28 will call you as soon as anything happens for sure.

021997



1 MR. KOCHIS: My question is, your Honor, and I think Mr.  
2 Negus has, is if 4:00 comes and they have no verdict, no  
3 question, I assume they will simply go home for the day and  
4 return tomorrow to deliberate.

5 THE COURT: The same procedure as we had before. The  
6 bailiff is letting them go and just recall the admonition to  
7 you.

8 Okay. That's it.

9 (Telephone conference concluded.)

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02-1990

1 SAN DIEGO, CALIFORNIA, FRIDAY, MARCH 1, 1985 11:25 A.M..

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3  
4 (The following proceedings were recorded over  
5 the telephone between court and counsel.)

6 THE COURT: Judge Garner here.

7 Who else is on the line?

8 MR. KOCHIS: John Kochis, your Honor, and David Negus is  
9 seated right beside me.

10 MR. NEGUS: Hi, judge.

11 THE COURT: Okay. Somehow, in shuffling things together,  
12 I have set aside the note from the Foreman, Frank Nugent. It  
13 reads basically as follows: Your Honor, with regret it seems --  
14 I believe seems is underlined -- that we are unable to arrive at  
15 a verdict, and the message and the signature date. I have got  
16 it here somewhere.

17 So, I think you better come, No. 1, back to court.  
18 And I drafted a little message I would like to give the jurors  
19 at this time that I would like to read over for you as follows.

20 "In response to your note about your possible  
21 inability to agree on penalty, it will take us  
22 until 2:00 p.m. to get everybody together. We  
23 must therefore call you into open court at that  
24 time. Please inform the bailiff whether you  
25 desire to continue deliberating or to adjourn  
26 until 2:00 p.m."

27 That may not give you enough time. It is 11:00 --

28 MR. KOCHIS: We can be there by 2:00, we think.

1                   Your Honor, does the Court have any idea how  
2 they're split numerically?

3           THE COURT: Not the slightest at this time. When I  
4 bring them into court, without telling us, I will make the usual  
5 inquiry.

6           MR. NEGUS: I would like to be heard before you do,  
7 either now or down there.

8           THE COURT: Okay. Now.

9           MR. NEGUS: I would object to that particular thing in a  
10 death penalty case particularly because once they tell us that  
11 they can't reach a verdict, then I don't think it matters what  
12 the numerical split is, and any inquiries at this point in time  
13 could be, could be taken as coercing the minority members, if  
14 there are minorities, into a verdict.

15           THE COURT: Well, first, what I am going to do before I  
16 do that, would be to inquire of each and everyone of them  
17 individually if they believe that given more time to deliberate  
18 that there is a reasonable likelihood that they will arrive at a  
19 verdict. If any one of them tells me, yes, I am going to decide  
20 to send them back for more deliberation.

21           All right, I will take up your objection with  
22 reference to polling under advisement. Anything further?

23           MR. KOCHIS: No. We will attempt to be there at 2:00  
24 o'clock.

25           THE COURT: Would it be satisfactory, counsel, to both of  
26 you, if I would just have my reporter and have everything on the  
27 record, if I stepped to the deliberation room and so advised  
28 them as I read to you.

*Kochis*  
1 MR. ~~NEGUS~~: That would be acceptable to the People. And  
2 I would -- we would just stay on the line until you did that and  
3 advised us what the response was.

4 MR. NEGUS: Yes. That's a good idea. Can I get back on  
5 and you can advise us what they said when --

6 THE COURT: I won't permit any response.

7 MR. NEGUS: -- tell you whether they want to keep  
8 deliberating or not?

9 THE COURT: You may stay on the line, but I thought that  
10 rather than get me in a dialogue, at that point I will step out  
11 and they can advise the bailiff.

12 MR. NEGUS: I feel better if you at least get the  
13 response from the foreman.

14 THE COURT: You want me to do it right there?

15 MR. NEGUS: Yes, sir.

16 THE COURT: You may have to caucus.

17 MR. KOCHIS: I agree with that, your Honor.

18 MR. NEGUS: Yes, I want you to find out.

19 THE COURT: All right. If you would hold the line,  
20 please.

21

22 (The following proceedings were held.

23 in the presence of the jury.)

24 THE COURT: For the record, I am in the jury deliberation  
25 room. The reporter and the clerk are with me, the attorneys are  
26 on the telephone.

27 Mr. Nugent, in response to your note about your  
28 possible inability to agree on penalty, it will take up until

1 2:00 o'clock to get everybody together. We must therefore call  
2 you back into open court at that time.

3 I would like to have you inform me either now or  
4 after you caucus for a minute, so to speak, whether or not you  
5 desire to continue deliberating or if you'd like to adjourn  
6 until 2:00 p.m..

7 Would you like to discuss it with your fellow  
8 jurors?

9 MR. NUGENT: Yes.

10 THE COURT: We will step out until you do so, to await  
11 your information. Thank you.

12

13 (Continuing proceedings between the court  
14 and counsel on the telephone.)

15 THE COURT: Gentlemen.

16 MR. NEGUS: Yes.

17 THE COURT: Is the reporter there? All right. I did so,  
18 and I told Mr. Nugent we would like for you to advise us  
19 either now or after you caucus with your fellows jurors whether  
20 or not you want to continue deliberating, if you'd like to  
21 adjourn until 2:00 p.m. There was some uncertainty and I  
22 indicated on its face, and I indicated if you like I will step  
23 out and let you do it privately. They indicated they would like  
24 to do so. I have stepped out. You are going to have to hang on  
25 a minute. I don't know how long this will take.

26 MR. NEGUS: Okay.

27 THE COURT: Hang on for a reasonable time anyhow. Thank  
28 you. I am setting down the phone.

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(The following proceedings were held

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in the presence of the jury.)

4

THE COURT: Back to the deliberation room, the reporter  
and the clerk once again.

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I suggested that the bailiff receive your message,  
but apparently it was more complicated than a brief one. So,  
you might tell me what your desire is.

9

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MR. NUGENT: Your Honor, we desire to deliberate, even if  
it takes through the lunch hour.

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12

THE COURT: I will have everybody here at 2:00 p.m.,  
standing by for whatever time you so desire.

13

14

Thank you. All right, thank you very much.

15

(Further telephonic proceedings.)

16

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19

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21

THE COURT: Counsel, I would suggest that the bailiff  
again standby and let them break with an admonition to go to  
lunch when they desire, and I would suggest you get on your  
bicycles and get here, and then I think that we owe a duty to  
the media to tell them that we're having everybody standby from  
2:00 p.m. on, based upon possible action with the jury.

22

Anything else?

23

MR. NEGUS: No.

24

25

26

27

28

MR. KOCHIS: Your Honor, I would like the Court to  
consider that when we bring the jury into open court to request  
individually of them about their desire to continue to  
deliberate, that we might want to do so without the media  
present. I would not want the presence of the media to

1 influence the individual answers one way or the other.

2 MR. NEGUS: I think that is a good idea.

3 THE COURT: You guys are more closed-mouth than I am. I  
4 am resistive to that at this stage. So, I don't think so.

5 I think at this time if they indicate that they're  
6 still hung at that point, then I think that the media has a  
7 right to be there. Now, if they're still working and they're  
8 not going to come into open court, and if I only get the message  
9 around about 2:00 o'clock that they're still unable to arrive at  
10 a verdict, and that they know they're deadlocked or something,  
11 then I am going to bring them back into open court right now.  
12 But right now it is not necessary. But please come.

13 MR. KOCHIS: We will be there at 2:00 o'clock.

14 (Telephone conference concluded.)

15

16 (Chambers conference reported.)

17 THE COURT: We're in chambers now with Mr. Cooper  
18 present, Mr. Negus and Mr. Kochis.

19 Gentleman, I walked in just a few minutes before  
20 you did, and I have now been handed a note by the clerk reading  
21 "Your Honor, we have reached a unanimous penalty verdict." By  
22 the foreman.

23 The jurors have been there throughout the lunch  
24 period, it is now ten after 2:00. I am ready to bring them into  
25 the courtroom without further adieu unless you have something.

26 MR. KOCHIS: I do. Mr. Kottmeier left San Bernardino by  
27 helicopter an hour ago. He should be landing at this time.

28 THE COURT: Counsel, I can't wait for him. The jurors in

1 there are hungry. I simply can't do it. Anything further?

2 MR. KOCHIS: I would ask that you wait five minutes for  
3 him to arrive.

4 THE COURT: Five minutes to an annoying stomach at this  
5 time, I am simply not going to do it. He knew it was at 2:00  
6 o'clock. I'm simply not going to do it. I'm not going to keep  
7 them locked up in there any longer.

8 We will have things to discuss one way or the  
9 other, so I tell you what, I will, after I excuse the jurors,  
10 then --

11 MR. KOCHIS: Your Honor, I would ask, for the record,  
12 regardless of what their decision is, but based on the length of  
13 the trial, some of the novel evidence that was introduced,  
14 without questioning their decision one way or the other, if they  
15 would like to remain and talk to either counsel in the jury  
16 room --

17 MR. NEGUS: Or Mr. Forbush. I don't want to talk them.

18 MR. KOCHIS: Then I would withdraw any further request I  
19 was going to make. I wouldn't feel comfortable talking to them  
20 unless Mr. Negus was here.

21 MR. NEGUS: If you want to go in, I am willing to talk to  
22 both of them. But I would like to have Mr. Forbush here.

23 THE COURT: Anything further?

24 MR. KOCHIS: I just was going to say, if they want to  
25 talk to us, to remain. If Mr. Negus isn't going to be there I  
26 will withdraw that request.

27 THE COURT: Bring the jurors in.

28 THE BAILIFF: You want the defendant in --



1 THE COURT: Have him in there first before you bring the  
2 jurors in.

3 (Chambers conference concluded.)  
4

5 (The following proceedings were held in  
6 open court in the presence of the jury:)

7 THE COURT: All right. The court will come to order.

8 For the record, the defendant is present, Mr. Negus  
9 and Mr. Kochis, Mr. Kottmeier is on his way, but under the  
10 circumstances I have declined to wait for him at the moment.

11 Mr. Nugent, has the jury arrived at a verdict?

12 MR. NUGENT: It has, your Honor.

13 THE COURT: Before you hand it to the bailiff, let me ask  
14 you to have a seat, please; let me run through a couple of other  
15 things before I receive the verdict.

16 Throughout your period of deliberations, you have  
17 been kind of setting your own hours as far as when you go to  
18 lunch and take breaks, things of that nature. That's been fine.  
19 Normally you take a lunch period, today you did not, and you  
20 worked through your lunch period. This was, I assume, at your  
21 choice. I didn't prevent you from doing that, did I, in any  
22 way?

23 MR. NUGENT: No, sir.

24 THE COURT: What I want to do, ladies and gentlemen, I  
25 don't know what your verdict is, but I want to make certain  
26 under those kinds of circumstances, where I know you are tired  
27 and you are hungry, I want to find out if any of you feel that  
28 you have been coerced or forced or compelled in any manner,

1 under the circumstances? You know, when you haven't had your  
2 lunch, I know I get hungry when the time comes.

3 Do any of you feel that that has caused any undo  
4 pressure or coercion to where you would like more time? If you  
5 would like to go back and further deliberate or to take a recess  
6 and have your lunch and then come back and make one final  
7 consideration before you decide one way or the other, that can  
8 be arranged.

9 Do anyone of you have such feelings that you would  
10 like that kind of recess? Each of you speak for yourself.

11 Is there anyone of you that would like a recess to  
12 eat and fall back and regroup before I receive your verdict?

13 Ladies and gentlemen, is there anyone amongst you  
14 that feels any coercion because of the circumstances, the time  
15 of deliberations, in any manner, to where you would like further  
16 time to reflect and consider?

17 All right. Everybody is indicating negative.

18 Sir, would you hand the forms to the bailiff,  
19 please.

20 One of the forms appears to be signed and the other  
21 to be unsigned.

22 The clerk will kindly read the verdict.

23 THE CLERK: Superior Court of California, County of San  
24 Diego. The People of the State of California, plaintiff, versus  
25 Kevin Cooper, defendant.

26 Case No. OCR 9319. The Penalty Verdict A.

27 "We, the jury in the above-entitled cause,  
28 determine that the penalty shall be death."

1 Dated "March 1st, 1985."

2 Signed: "Frank Nugent, Foreperson."

3 THE CLERK: Ladies and gentlemen of the jury, was this  
4 and is this your verdict?

5 THE JURY: (in unison) Yes.

6 THE COURT: Once again, ladies and gentlemen, we're going  
7 to poll the jurors.

8 The Court is in session. Would you kindly not  
9 interrupt for a minute, please.

10 Sir, on your feet, do you want to move out? Do so  
11 and we'll wait for you.

12 We're going to poll you once again, ladies and  
13 gentlemen, to see if you disagree with that verdict or it  
14 appears unanimously that you have determined the penalty to be  
15 the death penalty. If you agree with it, fine; if you disagree  
16 in any way, then indicate negatively or no in some manner.

17 Would you call their names, please.

18 THE CLERK: Ladies and gentlemen of the jury, please  
19 answer yes or no --

20 THE COURT: I have instructed them. Just call their  
21 names.

22 THE CLERK: Rita Lister?

23 MS. LISTER: Yes.

24 THE CLERK: Catherine Lopez?

25 MS. LOPEZ: Yes, ma'am.

26 THE CLERK: Frank Stesienko?

27 MR. STESIENKO: Yes.

28 THE CLERK: Janet Pavero?

1 MS. FAVERO: Yes.  
2 THE CLERK: Jetalyn Doxey?  
3 MS. DOXEY: Yes.  
4 THE CLERK: Neville Sawyer?  
5 MR. SAWYER: Yes.  
6 THE CLERK: Shirley LaPage?  
7 MS. LaPAGE: Yes.  
8 THE CLERK: Frank Nugent?  
9 MR. NUGENT: Yes.  
10 THE CLERK: Marilyn Bradley?  
11 MS. BRADLEY: Yes.  
12 THE CLERK: Franklin Manthei?  
13 MR. MANTHEI: Yes.  
14 THE CLERK: William Woods?  
15 MR. WOODS: Yes.  
16 THE CLERK: Donna Merchant?  
17 MS. MERCHANT: Yes.  
18 THE COURT: It appears to be unanimous. The clerk will  
19 kindly record the verdict as read.  
20 Gentlemen, would you waive the rereading of the  
21 verdict as recorded?  
22 MR. NEGUS: Yes.  
23 MR. KOCHIS: Yes.  
24 THE COURT: Any reason why I should not discharge the  
25 jury?  
26 MR. KOCHIS: No.  
27 MR. NEGUS: No.  
28 THE COURT: A number of you, I understand, received some

1 hassling at your employment because of the duration of the  
2 trial. For that I am exceedingly sorry. I did indicate to the  
3 jury commissioner, who was approached by I believe one or more  
4 of you, that I would be happy to write a letter for you to use  
5 at your work because you have been the most diligent jury I have  
6 had in years and I will be happy to put that in writing if that  
7 will help you.

8 I appreciate if before you leave the courthouse if  
9 you'd notify the bailiff or the clerk if you want such a letter,  
10 and then I will personally address it with reference to you for  
11 your use at your employment.

12 To the rest of you, I am going to likewise try to  
13 express in written form some of my feelings about this. Those  
14 of you that don't have to rush off absolutely immediately, I  
15 would like the bailiff to take you back there and perhaps --  
16 then perhaps I can shake your hands individually and thank you.

17 I want to tell you one word of caution here, that  
18 the admonition that I have given you so many times, hundreds  
19 perhaps during the course of the trial, will no longer apply.  
20 You are free to talk to whomever you wish. You don't have to,  
21 however. Very possibly attorneys may wish to talk with you,  
22 their investigators, the people from the media, and that's all  
23 right. Often times it happens. You don't have to do so, it is  
24 up to you whether you do or do not. So, be mindful.

25 I would urge you if you do talk that you report  
26 accurately the set of circumstances because there may well yet  
27 be motions and things such as that in the future.

28 Those of you who had a disagreement, I am not

1 looking at any notes or anything, I am just thinking about  
2 disagreements with your fellow jurors in the jury room, please  
3 don't take it personally; don't put that person or persons down  
4 in any manner. Let it go. We're in a very democratic country,  
5 thank goodness reasonable minds can differ. That is why we get  
6 constantly split decisions of five to four decisions from our  
7 highest justices in the land in the supreme court. So, it can  
8 happen to you, and it does indeed.

9 You have gone and been through an agonizing  
10 difficult time; it's been a hard time.

11 I wish to tell you thank you so very much on behalf  
12 of the people of San Diego and the people of San Bernardino and  
13 the State of California, and I, on behalf of everybody here.

14 So, ladies and gentlemen, the jury is discharged.  
15 We're going to take up just a few more things. Those of you  
16 that can wait around I will look for you back there. You are  
17 excused. Thank you.

18 (The jury retires from the courtroom.)  
19

20 THE COURT: Counsel, once before when we discussed  
21 another date, whichever way the verdict came back, you have  
22 talked about your various commitments, and I believe one or more  
23 of you had plans to be out of the country.

24 MR. NEGUS: Your Honor, we have cut it short. We have  
25 been informed by the clerk and we have selected May 15, if  
26 that's agreeable with you.

27 THE COURT: All right. The law requires as I indicated,  
28 that he be sentenced within 28 days. That I was normally

1 inclined to do. At first I was resistive, but by way of  
2 explanation to the people in the audience, they're is an  
3 automatic motion for new trial, automatic motion for  
4 modification of this kind of a sentence under the circumstances  
5 to where I will then have to consider whether or not to reduce  
6 it from death to life without the possibility of parole.

7 Counsel may well file points and authorities. I am  
8 not attempting to speak for them, but that is usual and  
9 ordinary, and this requires some research. I know all of you  
10 are exhausted, counsel; you have all three worked very hard and  
11 diligently throughout, it has been the most difficult I have  
12 been involved.

13 Counsel have indicated to me that they have  
14 plans -- Mr. Kottmeier, I'm sorry, sir, but the jurors didn't  
15 have any lunch and I just couldn't hold them any longer. I know  
16 you wanted to to be here.

17 MR. KOTTMEIER: No problem, your Honor.

18 THE COURT: They worked right through the lunch period.  
19 They haven't eaten yet. But, counsel need to have time to fall  
20 back and regroup, then they'd have to have time for points and  
21 authorities, responses thereto, and time for me, and then to  
22 study the next steps.

23 So, the 15th of May, if that is agreeable with both  
24 of you. And the defendant previously waived time to May 8th  
25 which is our first date.

26 MR. NEGUS: Mr. Cooper, you understand that you have a  
27 right to be sentenced within 28 days of today's date? And do  
28 you agree with to me to have the matter set for May 15 for all

1 the motions for sentencing?

2 MR. COOPER: Yes.

3 THE COURT: I can't see the 15th on the sentence.

4 MR. NEGUS: I believe it is on a Wednesday.

5 MR. KOCHIS: Would that be at 9:30, your Honor? That  
6 would give us time to drive down from San Bernardino that day.  
7 I think 10:00 o'clock might be a better time for it.

8 THE COURT: I have no idea what department I am going to  
9 be in. I have imposed on the powers that be. But it will be in  
10 one of the departments.

11 Counsel, you will be notified, and certainly Mr.  
12 Cooper, you will be brought to that department, and the clerk  
13 can be our clearing house for members of the media to find out  
14 where you can find out perhaps before the day's over and later  
15 on this week.

16 Anything further? Next week I would like to see  
17 counsel back in chambers. The matter will be referred out to  
18 the probation department of the County of San Diego for  
19 investigation and presentence report. We will set the time for  
20 the hearing, for a hearing on the automatic motion for  
21 reconsideration and for new trial for the 15th of May at the  
22 hour of 10:00 o'clock in the morning in some department to be  
23 determined by the presiding department of this court.

24 MR. NEGUS: Your Honor, could the minute order referral  
25 to the probation department reflect my request that they not  
26 interview Mr. Cooper.

27 THE COURT: All right. To the probation officer -- in  
28 your memo with reference to the probation department, a note



1 that the defense has requested that Mr. Cooper not be  
2 interviewed.

3 I want to say something for the media and perhaps  
4 through them to the people in San Bernardino County. It was my  
5 intent immediately upon such a life or death to immediately  
6 refer it back to San Bernardino County. Once the object of the  
7 change of venue had been fulfilled, that is, an impartial jury  
8 from another county, I saw no particular reason for having  
9 continued the expense and inconvenience of coming to San Diego.  
10 I can't do that. I researched it and I couldn't find any  
11 mechanics of getting it back to San Bernardino County. I  
12 checked with the judicial counsel they struggled with it for a  
13 day and they told me I'd have to be innovative and be creative  
14 and test the matter on appeal in some way. It is not worth it.  
15 It is a San Diego case unless and until some other order is  
16 made, and I can't get it back to San Bernardino. That is the  
17 reason we must it hold it here.

18 Mrs. Aguinga, I didn't recognize you. You have  
19 been here throughout this hearing. All the alternate jurors  
20 will be immediately notified as well. You are welcome to go  
21 back with your fellow jurors as well and we will talk to you  
22 there. Any questions?

23 Counsel, anything further? I am not sure we need  
24 to have anything further. I would like one thing, I don't know  
25 if you can do this, I can see us -- well, no, perhaps not.  
26 Strike that.

27 Anything further, Mr. Negus?

28 MR. NEGUS: No.

1 THE COURT: Mr. Kochis and Mr. Kottmeier.

2 MR. KOCHIS: No.

3 MR. KOTTMEIER: No, your Honor.

4 THE COURT: The court will be in recess on this matter.

5 The Court accepts the waiver of time.

6 Do you join in the waiver, Mr. Negus?

7 MR. NEGUS: I do.

8 THE COURT: All right. Accepted. May 15, 10:00 o'clock.

9 Thank you very much.

10 --oo0oo--

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12 (Adjournment.)

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05-02-70

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO

DEPARTMENT NO. 7

HON. RICHARD C. GARNER, JUDGE

|                         |   |              |
|-------------------------|---|--------------|
| THE PEOPLE OF THE STATE | ) |              |
| OF CALIFORNIA,          | ) |              |
|                         | ) |              |
| Plaintiff,              | ) |              |
|                         | ) |              |
| vs.                     | ) | NO. OCR-9319 |
|                         | ) |              |
| KEVIN COOPER,           | ) |              |
|                         | ) |              |
| Defendant.              | ) |              |

REPORTERS' TRANSCRIPT  
May 15, 1985

APPEARANCES:

For the People:

DENNIS KOTTMEIER  
District Attorney  
WITH: JOHN P. KOCHIS  
Deputy District Attorney  
1540 Mountain Avenue  
Ontario, California 91762

For the Defendant:

DAVID L. MCKENNA  
Public Defender  
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ROBERT L. ROACH, CSR #1727  
Official Reporter

COMPUTERIZED TRANSCRIPT

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1 SAN DIEGO, CALIFORNIA, WEDNESDAY, MAY 15, 1985 10:00 A.M.,

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4 (Chambers conference reported.)

5 THE COURT: All right, we're once again collected. We're  
6 in chambers apparently at the request of Mr. Kochis. The  
7 defendant, Mr. Cooper is here, Mr. Negus, Mr. Rottmeier, Mr.  
8 Kochis, for the prosecution, and the usual crowd of onlookers  
9 and spectators, Detective Arthur and Mr. Forbush.

10 Yes, counsel.

11 MR. KOCHIS: Your Honor, my request to be in chambers is  
12 this morning to place both the Court and Mr. Negus on notice  
13 that the victims are in the courtroom and I believe they intend  
14 to request permission to make a statement.

15 THE COURT: I was going to invite it.

16 MR. KOCHIS: I just wanted to alert the Court.

17 MR. NEGUS: I would like to object informally for the  
18 record.

19 THE COURT: Counsel, I think the law affords them the  
20 privilege, even before Proposition 8 was passed, and in that  
21 regard it was my practice, so long as I feel it remained orderly  
22 and were brief and concise, and it didn't completely bog down  
23 the administration of justice, I permitted it. So, apart from  
24 the statute that we now have, I would permit it.

25 MR. KOCHIS: The only thing I wanted to discuss with the  
26 Court is I believe it would be an inappropriate time for them to  
27 make the statement. I believe that would be after the Court and  
28 counsel have resolved the issue on the defendant's Motion for

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1 New Trial, and after the Court has resolved the Williams and  
2 Penal Code section 190.4(e) issue, the review of the jury's  
3 verdict as to the imposition of the death sentence; after those  
4 issues are resolved.

5 THE COURT: You are talking about the automatic motion  
6 for modification?

7 MR. KOCHIS: Yes, your Honor. Because I feel that under  
8 the law the Court probably is going to be bound to review the  
9 jury's death verdict in light of the evidence that was presented  
10 at the two trials, the guilt trial and the penalty trial, and  
11 the Court should not be influenced directly or indirectly or by  
12 statements that may have been by a parent of the victims.

13 THE COURT: I appreciate your reminder. I think that  
14 probably you are correct. I had seen that issue before.

15 For instance, I have read the probation report here  
16 and there are matters therein that I simply will not consider  
17 with reference to the motions, and yet are quite appropriate for  
18 me to consider if I ever get to the point of sentencing. So, it  
19 is kind of a special use type of situation where we can use such  
20 things as probation report matters. And victims statements, for  
21 one thing, will come after the other. So that is probably  
22 correct. Do you wish to be heard on that?

23 MR. NEGUS: Well, other than my objection to the victims  
24 speaking, which I think is improper. This is the sort of thing  
25 just based on evidence at the penalty phase and not on either  
26 probation reports or the victims statements.

27 THE COURT: I understood from reading -- excuse me, I  
28 didn't mean to cut you off.

1 MR. NEGUS: The only reason that I didn't object to the  
2 preparation of a probation report at all was that it has been my  
3 understanding that San Quentin will not classify a prisoner if  
4 they were coming on the death sentence without one. Other than  
5 that I think it is a waste of time. I don't think it is  
6 something that the Court should consider in passing sentence.

7 THE COURT: All right. Well, I can assure you I am fully  
8 aware of the matters that I am to consider for these respective  
9 issues.

10 You may have something to give to the Court from  
11 reading the papers a month or so back, Mr. Negus. I understood  
12 that certain people were going to present a petition to you to  
13 give to the Court and that, if so, that sort of thing would  
14 likewise be received appropriately, I believe, if at all at that  
15 time.

16 MR. NEGUS: As of the moment I am not sure whether the  
17 person that has passed, circulated the petition intends to give  
18 to me to give to the Court today or seek some other forum. That  
19 was unresolved as of yesterday when I talked to him.

20 THE COURT: Well, I will follow your suggestion Mr.  
21 Kochis. Anything else?

22 MR. KOCHIS: The third matter is yesterday I served Mr.  
23 Negus with a notice, which I have filed the original with your  
24 clerk this morning, of our intention to release two pieces of  
25 potential evidence, neither of which were introduced at the  
26 trial. One is a .22 caliber revolver handgun which was taken  
27 from the Ryen home by Sheriff's deputies, and the other was the  
28 Buick station wagon about which there was testimony, photographs

1 and exhibits, but not the item itself.

2 I have discussed it with Mr. Negus, that if he had  
3 any expression of objection to the release of those items. He  
4 apparently --

5 MR. NEGUS: I have no position on the issue of allowing  
6 evidence out of the court, which I would hate to see anything  
7 happen to.

8 THE COURT: Those particular items you are taking no  
9 position on?

10 MR. NEGUS: Right.

11 THE COURT: The gun, were either of those ever marked for  
12 identification?

13 MR. KOCHIS: No, your Honor.

14 THE COURT: I am not sure that technically the Court  
15 should get involved with it it then.

16 MR. KOCHIS: I believe you are correct. My purpose was  
17 just to place on the record the fact that we have given Mr.  
18 Negus notice in writing; we have given him notice, oral here  
19 today, and he's not expressed an objection to the car itself or  
20 the handgun.

21 THE COURT: For what it is worth, I have no objection and  
22 I don't find anything wrong with it.

23 MR. KOCHIS: That was all I had to discuss.

24 THE COURT: All right. Then let's go outside and  
25 proceed.

26 MR. NEGUS: Could I have a few minutes in the holding  
27 cell with Mr. Cooper before we begin?

28 THE COURT: I will step out of chambers. It is okay with

1 me. I think you must be aware that they're particularly  
2 conscious of security at the moment, and I would like to afford  
3 your request, but consistent with whatever they say. I will be  
4 happy to accommodate however we can.

5 Sergeant?

6 THE BAILIFF: Your Honor, he can stay in here and talk to  
7 his client right here, I have no objection. But we don't have  
8 facilities here, holding facilities for people to visit at the  
9 moment.

10 THE COURT: All right. That being the case I will step  
11 out.

12 (Chambers conference concluded.)

13

14 THE COURT: Ladies and gentlemen, good morning.

15 This is the time and place set for hearing on the  
16 Motion for New Trial, or, alternatively, for a Modification of  
17 the Judgment of Death Penalty set by the jury.

18 And there is a lot of you here. You may wonder,  
19 first, why we went to chambers. This was at the request of  
20 counsel. The defendant was present, they were just brief things  
21 mentioned at the time and place for the family to be heard, if  
22 they wish to be heard, will be after I consider and rule on  
23 certain motions.

24 The law is very specific about the types of matters  
25 that may be considered for certain things and I have to wait  
26 until the appropriate time. I will, at some point, invite them  
27 to be heard, as well as you, Mr. Cooper, if you so desire.

28 Also, there were a couple of items of evidence that



1 counsel wished not -- matters that had been presented to the  
2 Court, but that had been collected by the Sheriff's Department  
3 that he wish returned, such as the station wagon, and likewise  
4 Mr. Negus wished to speak to Mr. Cooper and we permitted him  
5 sometime to do that. So, that was what we were doing.

6 Counsel, more formally the defendant here, in the  
7 matter of People versus Kevin Cooper, makes a motion  
8 alternatively for a new trial or for a Modification of Judgment  
9 without granting a new trial pursuant to Penal Code Section  
10 1181, Subdivisions (5), (6) and (7), and Penal Code Section  
11 1385.

12 I have carefully reviewed each and every one of the  
13 points and authorities made by you, as well as the responsive  
14 points and authorities made by opposing counsel, and I will hear  
15 you further. Particularly, I think the proper way to do it  
16 would be to consider first your Motion for New Trial, and then  
17 if we get that far, to go to the question of penalty.

18 MR. NEGUS: I have no -- nothing really to add to what I  
19 put in my written points and authorities, Judge. I'm willing to  
20 submit it on that.

21 THE COURT: Mr. Kottmeier or Mr. Kochis?

22 MR. KOCHIS: I would likewise submit it.

23 THE COURT: Well, counsel, I want you to know that I have  
24 had it now for roughly a week, together with all the materials,  
25 and I have been working on it consistently for quite a period of  
26 time, examining each of the points and authorities that has been  
27 made by you. I respectfully deny your motion. Each of the  
28 points was fully heard during the course of the previous

1 proceedings and I believe the record will support each of the  
2 rulings, findings and verdicts made. And in making the ruling I  
3 have again reviewed, weighed and considered the evidence  
4 relating to the various points that you have made.

5 There was, as an aside there was a request  
6 apparently by one of the members of the media this morning to  
7 examine the probation report. While you may not know what I am  
8 talking when I talk about these points and authorities, as far  
9 as I know they will be public documents that will be examined by  
10 any member of the media following the proceedings today, as well  
11 as the probation report, and likewise can be examined. There is  
12 nothing being covered, hidden or kept from you. But in due  
13 course. So, you can look at it and examine it to understand  
14 what I am talking about. But the Motion for a New Trial is  
15 simply denied.

16 Now, with reference to your express motion together  
17 with the defendant's automatic motion for a modification of the  
18 jury's penalty verdict.

19 Counsel, you wish to be heard?

20 MR. NEGUS: No.

21 THE COURT: Counsel?

22 MR. KOCHIS: Your Honor, we submitted written points and  
23 authorities in approximately 20 pages which outline in detail  
24 our position on the motion to reduce his sentence.

25 Our position simply is if any defendant was ever  
26 passed through the criminal justice system in the State of  
27 California deserves the death sentence, that person is Kevin  
28 Cooper.

3  
1 When you look at the evidence that was introduced  
2 in both trials, the guilt phase and the penalty phase, you apply  
3 that evidence to the facts, when you look at the circumstances  
4 of this case in which Mr. Cooper, in a very brutal and callous  
5 fashion, slaughtered an entire family, we feel that the only  
6 appropriate punishment, based on his past -- based on the  
7 conduct of which he was convicted in this case is the death  
8 penalty. We feel that jury's verdict was appropriate, and we  
9 urge the Court not to reduce the verdict.

10 THE COURT: Anything further, counsel?

11 MR. NEGUS: Just one thing. I don't know where you wish  
12 this. Mr. Cooper -- you spoke of Mr. Cooper making a statement.

13 THE COURT: He can be heard at this time if you wish.

14 MR. NEGUS: It is not quite that way. Basically Mr.  
15 Cooper wanted to make a statement to the Court before sentence  
16 was passed. On my advice I believe he is not going to do that  
17 because I have advised him not to. However, I can tell you what  
18 he wished to -- would have said.

19 THE COURT: I am not sure I will consider it the same way  
20 coming from you.

21 MR. NEGUS: Whatever, we will take our risk.

22 THE COURT: I don't distrust you in any way, but it is  
23 still basically secondhand, Mr. Negus.

24 MR. NEGUS: Okay, I will not say it if you don't want me  
25 to.

26 THE COURT: I express no desire one way or another. You  
27 run your own case.

28 MR. NEGUS: Then I would just like to indicate that what

1 Mr. Cooper wanted to say was to maintain that he did not do the  
2 crime; he continues to maintain that he did not do the crime and  
3 that is the only real statement that he has to make as far as  
4 sentence goes.

5 THE COURT: All right. The law -- those of you observing  
6 may think that the matter is fairly clear-cut, but it is not all  
7 that easy.

8 In making my ruling at this time on the defendant's  
9 motion for modification of the jury's penalty verdict, pursuant  
10 to Penal Code Section 11817, and Penal Code Section 190.4, the  
11 law first requires that I shall review the evidence, consider  
12 and take into account and be guided by the aggravating and  
13 mitigating circumstances referred to in Penal Code Section  
14 190.3, and that I shall make an independent determination as to  
15 whether the weight of the evidence supports the jury's verdicts  
16 and findings. I have carefully done so.

17 In this case the Court specifically agrees that the  
18 jury's findings and verdicts are supported by the weight of the  
19 evidence. Penal Code section 190.4 directs the judge to state  
20 on the record the reasons for his findings, and the reasons for  
21 his rulings on this application for modification of the jury's  
22 verdict, and then direct the Clerk of the Court to enter those  
23 reasons in her minutes.

24 In other words, the statute requires that the Court  
25 give its personal assessment as to the evidence of guilt, the  
26 truth of the special circumstance and the selections of the  
27 proper penalty based only upon the evidence as to mitigation and  
28 aggravation brought out at the trial, as well as the

1 circumstances of the offense.

2 The Court has examined and reviewed all of the  
3 evidence that was presented to the jury, the trier of the fact,  
4 and in making this determination, the Court has also examined  
5 all of the exhibits admitted into evidence and studied the daily  
6 transcripts on both phases.

7 The law, from all of the evidence admitted at the  
8 guilt phase, the Court is satisfied beyond a reasonable doubt,  
9 all reasonable doubt that the defendant, Kevin Cooper, is the  
10 one who entered the Ryen home and committed the various murders,  
11 and that he is thus guilty beyond a reasonable doubt, of Counts  
12 Two through Six.

13 I must say that a large portion of the trial was an  
14 attack upon law enforcement's handling of the evidence and their  
15 credibility and the weight to be given their evidence and  
16 testimony. Period. While the investigative techniques of the  
17 collection and preservation of evidence techniques could have  
18 certainly been better, in my humble opinion I find still much  
19 value and assistance in the evidence that they did present in  
20 terms of credibility.

21 I find the official witnesses were credible and  
22 believable in analyzing all the points very capably brought out  
23 by the defense, and I compliment you, Mr. Negus, publically; I  
24 thought you did an admirable job in that regard and pointed all  
25 of that out, and that the inadequacies, those inadequacies were  
26 explained in good faith terms by the enormity of the tasks of  
27 the officers; the unprecedented complications and complexities  
28 of the scene; the resources that they had, and; the exigencies

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1 involved in failing to collect and preserve certain evidence  
2 does not detract from the extremely large quantity of good and  
3 valid evidence that was presented.

4 Now, some of the more particular points persuading  
5 me of the defendant's guilt are the following: The proof  
6 showed, apart from his own statements at trial, that he was in  
7 the hideout home next door, in effect to the Ryen home, for  
8 several days. He admitted that; indeed he could not deny it.  
9 He was next door at least until 8:30 p.m. the night of the  
10 murder, a fairly short period of time before the crimes  
11 occurred.

12 I am convinced that the hatchet in evidence was one  
13 of the murder weapons and that it came from the hideout house  
14 where the defendant spent a lot of time.

15 I am convinced that the defendant stole the Ryens  
16 car; I thought that that was adequately proved by the evidence  
17 found therein, particularly the tobacco, the same tobacco that  
18 was also found at the home was the same that comes from the  
19 state prison.

20 I'm also, with reference to logic, I am convinced  
21 that the defendant would not have changed his plans, if the  
22 situation be as he suggested. He suggested that he had ties in  
23 Los Angeles, he had girl friends, he had people there that he  
24 knew, that his plan, when he escaped, was to go back to Los  
25 Angeles, but that his plans changed.

26 To me, and I am sure to all the people incarcerated  
27 in state prison, a simple escape, without force and violence, as  
28 his was, is a relatively minor matter. No big deal. Generally

1 it means a walk-away type of escape. About sixteen additional  
2 months in state prison if you are caught and convicted; two  
3 years at the maximum, normally. I am certain that anybody in  
4 the state prison knows that very commonly known fact.

5 I believe that the reason that the defendant  
6 changed those plans, he went to the extreme lengths that he did  
7 was to avoid detection of a much more serious consequence,  
8 namely, his guilt and conviction for these terrible murders. He  
9 left the country, spent a lot of time, too, in an effort to  
10 avoid detection.

11 Now, if he was in the hideout house until after  
12 8:30, if the murders occurred around 1:30, it just simply  
13 strains my imagination to believe that anybody else could have  
14 done it, because what those people would have to have done, the  
15 defendant would have had to have left the premises at the  
16 hideout house, instantly, as he says, and then some other person  
17 would have had to have gone into the hideout house, obtained the  
18 weapon, gone in to the Ryen home, person or persons, committed  
19 the crime and then gone back out to the hideout house, cleaned  
20 up and left, all within a matter of very few hours.

21 Now, Kathy Bilbia had left the premisis at the  
22 hideout house clean and in good shape when she left a few days  
23 before. The circumstances there, the blood in the house and in  
24 the shower indicate that somebody from the murder went back into  
25 the hideout house. A stranger or strangers to the scene, coming  
26 after 8:30 p.m. at night I suggest would not have felt so secure  
27 that they would go back and calmly take showers and cleanup  
28 before making their escape after committing such heinous crimes.

1 But to the defendant, however, who had used that as  
2 a secure harbor and haven for several days and made his home  
3 there, knew that it was not occupied by that time, and that it  
4 would be a safe place, that he was in no particular rush, logic  
5 tells me that there is no question but what he was the one that  
6 did it.

7 The defendant's blood, an extremely rare type, was  
8 found in the Ryen home, Exhibit A-41; that much todo was made at  
9 the trial.

10 Further, there was absolutely no credible evidence  
11 concerning anybody else at this scene or with the victims  
12 property. I have no doubt about the defendant's guilt or the  
13 truth of the special circumstances found true by the jury.

14 In weighing and evaluating the evidence at the  
15 penalty phase, and considering the evidence of aggravation and  
16 mitigation, as I must do under Penal Code Section 190.3, I  
17 believe the jury selected the only appropriate verdict. And  
18 there I must consider all the circumstances of the crimes as  
19 well as circumstances in aggravation and mitigation as set forth  
20 in the law.

21 Reasonable minds can differ, and what motivated the  
22 jury, I don't know. But in looking at the crimes themselves, to  
23 me it is clear, and I believe that Joshua heard only his mother  
24 and Christopher Hughes that night before he was struck down. He  
25 never heard the assailant, and never indicated to the  
26 psychiatrist, he never indicated it in his recorded statement or  
27 any of his statements when he saw a lone form in the house, it  
28 was not screaming or verbalizing at all.



1 That evidence, plus the fact that children were  
 2 apparently not frightened away from the master bedroom by a  
 3 stranger's voice, indicate to me that Mr. Cooper went about his  
 4 terrible business in a silent, cool, calculated and deadly  
 5 manner. ★

6 In my nineteen plus years on the bench, other years  
 7 involved in the law and trying cases as an attorney, somewhat  
 8 cases and murder cases as well, I can understand rage and  
 9 hostility, but this defendant's conduct was otherwise. There  
 10 was no provocation here, there was no necessity, no heat of  
 11 passion or anything to even explain with any humanity these  
 12 attacks in the middle of the night. The circumstances of the  
 13 crimes alone and the nature of the wounds are so aggravating  
 14 that I believe the death penalty is mandated. ★

15 But there are other factors in aggravation as well.  
 16 I believe beyond a reasonable doubt that the defendant has  
 17 previously engaged in violent acts with force and violence,  
 18 particularly with reference to Lori Strahl and the incident in  
 19 October of 1982 in Pennsylvania. He assaulted, abducted and  
 20 raped her, and expressly threatened to kill her. I considered  
 21 this a strong factor in aggravation under Penal Code Section  
 22 190.3(b).

23 He had two prior felony convictions out of Los  
 24 Angeles County for Burglary. That is a factor in aggravation  
 25 under 190.3(c). *only 1 prior violent incident be shown as typical*

26 The evidence presented at the trial established  
 27 that the victims did not in any way participate in the  
 28 defendant's conduct. Certainly there was no consent under

1 1290.4(e). The Court considered that as an aggravating fact. ✓

2 The evidence presented at the trial indicated that  
3 these offenses were not committed under circumstances which  
4 would allow the defendant or any defendant to reasonably  
5 believe, or moral justification, or extenuation for his conduct.  
6 Pursuant to 190.3(f), that is an aggravating factor. ★

7 The defendant's age is almost irrelevant to ★  
8 penalty. He was 25 years old at the time of the offense. But,  
9 if anything, it is more aggravating than it is mitigating. He  
10 certainly was not a minor, teenager, nor a person without  
11 sufficient maturity to understand the wrongfulness of the acts  
12 to appreciate the consequences of it.

13 You know, in trying to determine whether or not  
14 there were any factors in mitigation, I really can't find any. ★  
15 The members and the friends of the defendant's family who  
16 testified did not, in the Court's opinion, present any evidence  
17 which the Court would find to be a moral justification or  
18 extenuation for his conduct. So, I can sympathize with them as  
19 well. It simply does not mitigate this offense.

20 I do not excuse my -- the Court finds that the  
21 defendant did not commit the murders while acting under extreme  
22 duress, and in fact under any duress at all.

23 I specifically find that the victims did not  
24 participate in his homicidal conduct, nor did they consent to  
25 the homicidal conduct.

26 The Court is satisfied that there were no  
27 circumstances with which the defendant could reasonably believe  
28 to be a moral justification or extenuation for his conduct.

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1           The Court is satisfied that the defendant, Kevin  
2   Cooper, did not act under any duress nor was he under the  
3   domination of any person. On the contrary, it is clear that he  
4   acted alone.

5           Accordingly, considering all of the evidence the  
6   Court's personal assessment is that the death penalty is  
7   appropriate here, and that the Automatic Motion for Modification  
8   of the Jury's Verdict of Death, as to the defendant, Kevin  
9   Cooper, should be and is hereby denied.

10          I would say at this time for the Court to do  
11   anything other than to deny this motion, regardless of my  
12   personal feelings concerning the death penalty and the  
13   sacredness of human life, I believe would be an arbitrary and a  
14   capricious act and against the Court's sworn duty to uphold the  
15   law of the State of California.

16          I hereby direct that a transcript be made of my  
17   reasons for denying the Automatic Motion for Modification of the  
18   Jury's Verdict as to Death and that these reasons be entered in  
19   the Clerk's minutes.

20          Mr. Negus, with all due respect, sir, your motions  
21   and each of them are denied.

22          Counsel, will you waive arraignment for judgment?

23          MR. NEGUS: Yes.

24          THE COURT: Is there any other legal reason why judgment  
25   shouldn't be pronounced?

26          MR. NEGUS: No; other than those which have already been  
27   articulated.

28          THE COURT: I think at this time, Mr. Kochis, that before

1 we get down to the sentencing, that first I should hear from  
2 counsel with regards to that, and then I would go to the other  
3 parties to speak if they wish. Any objection?

4 MR. KOCHIS: No.

5 THE COURT: Mr. Negus, in that regard, with reference to  
6 sentencing now, not for the other rulings I have heretofore  
7 made, with reference to sentencing, I have received, read and  
8 considered a 17 Page report, dated May 15, 1985, kindly prepared  
9 by the probation officer in the County of San Diego.

10 Do you care to be heard, sir?

11 MR. NEGUS: Um, I am sure at this point in time it is  
12 nitpicking, but with respect to the sentences for which there is  
13 a determinate sentence provided by the penal code, I believe  
14 that the calculation of credit for time served is erroneous.

15 The probation officer has indicated that there  
16 should be no credit for time served because Mr. Cooper was  
17 serving a sentence in state prison for burglary at the time that  
18 he escaped. The problem with that particular logic is that  
19 under the law the way the determinate sentence will be  
20 restructured, that is, Count Six will become the principle term,  
21 the Los Angeles burglaries will become subordinate terms. The  
22 term would be one-third the middle term and then the escape can  
23 run consecutive to that full term. Mr. Cooper, therefore,  
24 should be given a credit for time served on Count Six.

25 THE COURT: Mr. Kochis.

26 MR. KOCHIS: I am not sure about that and it would seem  
27 to me that that would make Count Six retroactive, because that  
28 crime did not occur until June of '83, and he had already been

1 in state prison for sometime by that time.

2 MR. NEGUS: I am talking about he should get credit for  
3 time served from July 30, 1983, until the present on Count Six  
4 because whatever time he had in prison, up from January 3rd to  
5 June 2nd, 1983, would be credited towards the subordinate term  
6 on the burglaries. But, there is considerably more time there  
7 than there is in the subordinate term and the burglaries which  
8 accrue. As I say, I don't think it is --

9 THE COURT: Counsel, I have no objection frankly to doing  
10 that. While he was in custody, and should have been in custody  
11 on that burglary commitment, he's likewise been in custody  
12 throughout this period of time on these offenses. And is that  
13 the date that he was arrested, July 30, 1983?

14 MR. NEGUS: Yes.

15 THE COURT: All right. Give him credit from that day.

16 MR. NEGUS: I believe that the probation officer did  
17 calculate that out to be 979 days including the conduct credits.  
18 I see that on Page 16. He just didn't think that it should be  
19 applied.

20 THE COURT: Just a minute. In effect he would be given  
21 653 days actual custody time and 326 days conduct credits since  
22 his incarceration, for the total of 979 days.

23 Unless there is something further, I will give him  
24 credit for that. As you say, it would be nitpicking under the  
25 circumstances.

26 MR. NEGUS: I just didn't want to have it come back.

27 THE COURT: I appreciate it. Thank you.

28 Anything further, Mr. Negus?

1           MR. NEGUS: I have not yet seen a copy of the actual  
2 sentence which the Court would pronounce when we get to  
3 pronouncing the sentence as to sentence of death. The one that  
4 normally is pronounced indicates that the Sheriff of this County  
5 is directed to take Mr. Cooper directly to San Quentin. I just  
6 want to make sure that that is what the order says.

7           At previous times the Court has expressed an  
8 opinion that Mr. Cooper should not be returned in any way to the  
9 California Institution for Men. Mr. Cooper agrees with that. I  
10 believe the standard procedure is to transport him directly to  
11 San Quentin. I just want to make sure that that is what the  
12 order says.

13          THE COURT: I am confident if he ever went back to CIM  
14 that he would not be held in Minimum Security and that he would  
15 not be getting loose security.

16           I was contacted by a reporter yesterday. He asked  
17 me if there was a chance he could go back to CIM, and I  
18 indicated that's a possibility if I modified the death sentence,  
19 that then it would not be appropriate to send him to San  
20 Quentin, but rather to the Reception and Guidance Center at the  
21 California Institution for Men in Chino, but that I wouldn't  
22 speculate further. It appears to be moot. Anything further?

23          MR. NEGUS: As long as the order indicates he goes to San  
24 Quentin, nothing further.

25          THE COURT: It will. Counsel?

26          MR. KOCHIS: I have no further comments to make other  
27 than the ones I made in opposition to the defense motion to  
28 reduce his sentence.

1 THE COURT: All right. Anybody from the -- representing  
2 any of the victims? I would be happy to hear you. Mrs. Hughes?

3 MRS. HUGHES: Do you want me to do it here or up here?

4 THE COURT: I would hear -- you can do it from out there  
5 providing you can keep your voice up where people can hear. You  
6 can step up to the bar.

7 MRS. HUGHES: In June of 1983, our son, Chris, was eleven  
8 and a half years old, and he wasn't just a statistic in some  
9 murder case, he was just a little boy, who was a good student,  
10 he had lots of friends, he was on a swim team, he had a room  
11 full of trophies, his friends liked him, he liked sports. Where  
12 he went to school there is a tree that stands there now that  
13 says, "To our friend Christopher Hughes."

14 The last thing that I did with him was I took him  
15 to see the last "Star Wars" picture, and I can still remember I  
16 spent more time watching the looks on his face than watching the  
17 picture. All this changed when a mistake sent Mr. Kevin Cooper  
18 to Chino Institution for Men, where he could simply walk out of  
19 a prison.

20 We were never told that Kevin Cooper escaped from  
21 CIM or our son would have been home with us that night; he would  
22 have not been out with the Ryens, and instead Kevin Cooper went  
23 to the Ryen home and murdered four innocent people.

24 It is impossible, I think, for anybody to imagine  
25 the kind of horror that had to go on in that house at the time  
26 our little boy was put in a situation that he could have only  
27 known terror, and we know he had to have some idea of what was  
28 going on. Josh heard him screaming, he knew there was something

1 wrong.

2 My husband is always going to remember what he saw  
3 in that house that morning, and I will always be remembering  
4 that I let my boy go up to spend the night that night. I will  
5 always think of what went on there. The Ryens and Chris were  
6 killed in a manner that is not even as human as we use to kill  
7 animals.

8 For the last almost two years our family has been  
9 through sheer hell, through going through this court system. We  
10 have had to argue for the right to even be in the court at  
11 times. I have sat through three days of autopsy pictures  
12 looking at pictures of my son, that of Doug and Peg and Jessa  
13 (sic). I have heard public defenders say that -- ask how my  
14 son's body was removed. Each time I was in the courtroom and  
15 the subject came up, it seemed always to be Chris.

16 I have heard an expert say that he would have left  
17 my son's body up there for two days while they processed the  
18 crime scene. We really feel bitter about all this. A system  
19 that our parents brought us up to respect has failed us all the  
20 way through, and has put us through something that is probably  
21 going to continue the rest of our lives while the whole penal  
22 system goes on.

23 Kevin Cooper robbed Christopher of his right to  
24 life. He deserved to live longer than eleven and a half years.  
25 We don't understand why he died. I asked our priest and he said  
26 that Chris was so good that God wanted him to be with him. But  
27 he didn't deserve to die like that.

28 This probably isn't the along the line, but Chris



1 had a cat. We named it Garfield. He loved Garfield. Right  
2 after Chris was killed, Garfield hated everybody. He only liked  
3 Christopher, and after that all the sudden he showed up at the  
4 house one night and wanted in, wanted everybody to pet him. It  
5 gave us the chills. We didn't understand why it was happening.  
6 The next morning the cat was dead out on the street, been hit by  
7 a car. It was as if Chris was telling us, "I'm okay mom and  
8 dad, and don't worry about me."

9 Kevin Cooper has a history of escaping when he's  
10 put away. I am not saying that we want revenge, I don't know  
11 that that is any good. I don't know if the death penalty is a  
12 deterrent or not. But all I know is that if Kevin Cooper is put  
13 to death some other little boy is going to get to live longer  
14 than eleven and a half years.

15 THE COURT: Thank you very much for your remarks.  
16 Anybody else? Mrs. Howell? State your name for the record.

17 MRS. HOWELL: I am Mary Howell, I am the mother of Peggy  
18 Ryen and Jessica -- grandmother of Jessica Ryen, grandmother of  
19 Joshua Ryen and mother-in-law of Doug Ryen.

20 What happened on June the 4th or 5th of 1983 my  
21 grandson and I, we have, we feel anger, a lot of anger, and  
22 everyone who knew my family, there was a lot of anger also.

23 I would like to have a lot of questions answered,  
24 why? Why does Kevin Cooper purposely go up the hill and kill  
25 the family in the fashion? There was a lot of questions that I  
26 will always want to know. And with people like Rose Bird and  
27 several others sitting on the bench in the Supreme Court, and my  
28 understanding is that there are approximately 183 cases to be

1 heard, and each case takes about three months. So at that rate  
2 it would be the year 2010 before the case got to Kevin Cooper.

3 Therefore, I feel that if he was put life in prison  
4 without parole, and specifically with no special protection and  
5 no special privileges, that I would like to see him be one of  
6 the prisoners and let the prisoners take care of him. Thank  
7 you.

8 THE COURT: Thank you. You know, even Proposition 8  
9 permitted victims to be heard since sentencing proceedings, but  
10 even before that it was my habit to permit, if anybody wished to  
11 be heard as long as it doesn't bog down the court procedure, and  
12 if anybody wishes to be heard on behalf of Mr. Cooper or  
13 otherwise, even though they are not a victim or relative, I  
14 don't mind it. As long as it doesn't take too long. Anything?

15 MR. BRADFORD: I would like to say something.

16 THE COURT: Sure. State your name, sir, if you would.

17 MR. BRADFORD: I am Reverend Bradford and I want to say  
18 something on behalf of Kevin Cooper, the defense. I feel like  
19 that he is innocent. I believe that there is other people who  
20 have committed this crime. I believe that the investigation  
21 wasn't handled properly, and I feel like that if it would have  
22 been handled properly I believe that the people who perpetrated  
23 this crime would be -- it would have been brought out who  
24 actually committed the crime.

25 I feel like that he happened to be in the wrong  
26 place at the wrong time. This evidence, that so-called evidence  
27 that connected him with the crime, I don't see where it  
28 connected him with the crime, and I feel like that justice

1 haven't been served, with all due respect for the family, and I  
2 certainly do feel sorry for them, but I don't believe that Kevin  
3 Cooper is the murderer.

4 I don't see how one person could go in a home and  
5 kill all these people single-handed with all these different  
6 weapons. It is not even possible.

7 So, I feel like an injustice is being done to him,  
8 and who have did the crime I feel like they should be the one,  
9 they should receive the penalty worthy of the crime. But I  
10 don't feel that he did it.

11 That's all I have to say about it.

12 THE COURT: Thank you, very much. Anybody else?

13 If I am not mistaken, your name is mentioned, sir,  
14 in the newspaper article that said there was going to be a  
15 petition that was going to be presented to the Court.

16 And if I might be permitted just a word of personal  
17 response to that. I don't know whether it accurately reflected  
18 the statement of the lady that was being interviewed, but it  
19 said that she just wanted to see that Kevin Cooper got a fair  
20 trial, wanted me to give a new trial. And to some extent I took  
21 umbrage at that. Those of us who have dedicated our lives to  
22 the administration of justice in an effort to see a fair trial,  
23 you might imagine we would resent that sort of a statement.

24 I believe he got a fair trial. He certainly had a  
25 day in court. He was represented by a very capable attorney  
26 that fought full-time for over a year on this case before it  
27 ever came to trial. He had a full-time investigator, a man that  
28 was extremely skilled and went all the way through the ranks in

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1 the Sheriff's department investigating this very type of case.  
2 He had the best serology expert that money could buy. I could  
3 not, myself, personally have afforded the defense Kevin Cooper  
4 got in this case. Very few in our society could unless we have  
5 the type of system that we do have, which is a good and  
6 excellent and fair system, forwarding people excellent,  
7 excellent representation. All right.

8 Since the jury found that the special allegation  
9 pursuant to the Penal Code Section 190.2(a)(3) to be true, and  
10 decided on the death penalty, Counts One and Six would appear to  
11 be moot, and appear to be nitpicking, as you indicate, Mr.  
12 Negus. However, the terms for said crimes need to be set,  
13 nevertheless.

14 Initially -- and this likewise seems to be  
15 nitpicking -- but the defendant is statutorily prohibited from a  
16 grant of probation by Penal Code section 190.2 and Penal Code  
17 section 1203.075, and subdivision (2) and (3) of Penal Code  
18 section 1203(e).

19 The principal term for the determinate sentence  
20 offense, as you indicated, Mr. Negus, shall, and the Court  
21 decides it shall be Count Six attempted murder which carries  
22 penalty ranges of 5, 7 or 9 years.

23 The circumstances in aggravation listed on Page 13  
24 of the probation report are especially found. The attack on  
25 Joshua Ryen was in a manner showing a high degree of cruelty and  
26 viciousness, using a hatchet and knife on the head and throat;  
27 the victim was particularly vulnerable, he was in his home alone  
28 in the middle of the night, the previous arming and entry

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1 indicated premeditation, the defendant's prior convictions as a  
2 juvenile and adult are numerous and certainly increasing in  
3 seriousness and the Court also finds the other circumstances  
4 there listed likewise to be true.

5 I find a complete dearth of any circumstance in  
6 mitigation. The upper term of 9 years is therefore selected,  
7 plus the additional 3 years for the Penal Code Section 12022.7  
8 allegation of great bodily injury on Joshua. Count One occurred  
9 at a different time and place and in an unrelated manner, so it  
10 should run consecutive to Count Six, and 8 months should be  
11 added, being one-third of the mid-term of 2 years, pursuant to  
12 Penal Code section 1170.1(a).

13 The total fixed term is therefore 12 years 8  
14 months. The Court determines that the sentences for both the  
15 escape and the attempted murder was with great bodily injury.

16 Counsel, I think that he's basically served the  
17 time from the Los Angeles commitment. I am going to order that  
18 to run concurrent with the 4 years he previously received from  
19 the County of Los Angeles for the two counts of burglary. Said  
20 sentence totalling 12 years and 8 months shall be stayed,  
21 however, pending execution of judgment as to Counts Two, Three,  
22 Four and Five.

23 As to each of said four counts of murder, it is  
24 hereby ordered, adjudged and decreed that the defendant, Kevin  
25 Cooper, should be put to death by the administration of lethal  
26 gas within the walls of the State Prison at San Quentin, all in  
27 accordance with Penal Code Section 3604.

28 In the event the judgment of death is later

1 modified or reduced to life imprisonment with or without the  
2 possibility of parole by the Governor or the Supreme Court, it  
3 is the order that said life terms run consecutive to the  
4 determinate terms of Counts One and Six, and that the life terms  
5 shall all run consecutive to each other as authorized by Penal  
6 Code Section 669.

7 The Court has considered the criteria in California  
8 Rules of Court No. 425, and finds the acts on each of the  
9 victims was a prolonged separate act of violence, divisible in  
10 time and predominantly independent of each other and the  
11 circumstances were so heinous and aggravated as to justify and  
12 require permanent separation from society in the event the death  
13 sentence is not executed.

14 The Court also specifically finds the following  
15 circumstances in aggravation. The defendant was armed with and  
16 used an axe and a knife on each victim, the acts disclosed a  
17 very high degree of cruelty and viciousness; the victims were  
18 particularly vulnerable; the crimes demonstrated considerable  
19 sophistication and premeditation; the defendant has engaged in a  
20 pattern of violent conduct indicating he is a serious danger to  
21 society; and the defendant has suffered numerous prior  
22 convictions which have increased in seriousness and some of  
23 which have resulted in prior prison terms. The performance on  
24 parole and probation has been poor.

25 The defendant will be given credit for the time  
26 that I previously mentioned or days previously served.

27 The defendant, Kevin Cooper, is hereby remanded to  
28 the care, custody and control of the Sheriff of San Diego County

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1 to be by him delivered to the Warden of the State Prison at San  
2 Quentin, California, for execution of this sentence, to be held  
3 by said warden pending the final determination of defendant's  
4 appeal in this matter, which is automatic. Said defendant is to  
5 be held by the Warden during said period of time until further  
6 order of this Court.

7 Therefore, this is to command the Sheriff of San  
8 Diego County to take Mr. Cooper to the State Prison of San  
9 Quentin and deliver him to the Warden.

10 Anything further?

11 MR. KOCHIS: No.

12 MR. NEGUS: No.

13 THE COURT: Mr. Cooper, I thank you at least for your  
14 forbearance during the trial of any outbursts and restraint  
15 from any untoward action.

16 And, ladies and gentlemen, I see many of you have  
17 been here throughout the course of trial and I appreciate your  
18 constraint also. There has been highly emotional matters, I am  
19 sure at times it has not been easy. I thank you very much,  
20 ladies and gentlemen. Court will be adjourned.

21 --oo0oo--

22

23 (Adjournment.)

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3 1 STATE OF CALIFORNIA )

2 ) ss:

3 COUNTY OF SAN DIEGO )

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6

THE PEOPLE OF THE STATE OF CALIFORNIA vs. KEVIN

7

COOPER, Case No. CR 72787

8

9

10 We, ROBERT L. ROACH, CSR, Certificate No. 1727, and  
11 DONNA D. BEARD, CSR, Certificate No. 1874, Official Reporters of  
12 the Superior Court of the State of California, in and for the  
13 County of San Diego, hereby certify that we reported in  
14 shorthand as daily copy the proceedings in the above-entitled  
15 cause consisting of pages numbered 1 through and including 8163,  
16 and that the foregoing transcript is a full, true and correct  
daily copy transcript of the proceedings in this case.

17

Dated at San Diego, California, this \_\_\_\_ day of

18

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ROBERT L. ROACH, CSR #1727

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Official Reporter

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DONNA D. BEARD, CSR #1874

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Official Reporter

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