

PRINCIPAL AUTHORITIES FOR CONSTITUTIONAL CHALLENGES

Risk of Arbitrariness Cases (“no-narrowing”)

Furman v. Georgia, 408 U.S. 238 (1972): death sentence rate of 15-20% means penalty “wantonly” and “freakishly” imposed (Stewart); death penalty exacted with “great infrequency,” so that serves no purpose and is a “pointless and needless extinction of life” (White)

Zant v. Stephens, 462 U.S. 862 (1983): “aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder”

Lowenfield v. Phelps, 484 U.S. 231 (1988): “[A] capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty” [Holding: “double-counting” of aggravators okay if narrowing takes place at guilt phase]

Penry v. Lynaugh, 492 U.S. 302 (1989): “As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is particularly appropriate ... [juries] will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.”

Loving v. United States, 517 U.S. 748 (1996): Terms of military capital punishment scheme which allow imposition of death penalty for premeditated and felony murder do not sufficiently narrow the death-eligible class in a way consistent with *Furman*, and, thus, the Eighth Amendment requires “additional aggravating factors establishing a higher culpability” to support imposition of capital punishment.

Proportionality Cases

Coker v. Georgia, 433 U.S. 584 (1977): death penalty for rape of an adult woman is disproportionate in light of the fact that only one state imposes it and death sentence rate in such cases only 9.5%. (Court also considers the “climate of international opinion”)

Enmund v. Florida, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987): death penalty is disproportionate for felony-murderer unless he/she was a “major participant” in the felony and acted with “reckless indifference to human life” (*Hopkins v. Reeves*, 524 U.S. 88 (1998): *Tison* rule applied to actual killer)

Atkins v. Virginia, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005): death penalty disproportionate for mentally retarded and juvenile defendants because of “national consensus” against the death penalty for such defendants (30 states and the federal government) and, since “the culpability of the average murderer is insufficient to justify the most extreme sanction,” lesser culpability of such defendants bars death

penalty. (Court also considers international norms and professional opinion)

Kennedy v. Louisiana, ___ U.S. ___, 128 S.Ct. 2641 (2008): death penalty disproportionate for child sexual abuse because only six states allow and only two defendants sentenced to death since 1964 and because of the need to “confine” and “restrain” use of death penalty “to a narrow category of the most serious crimes (Court twice distinguishes between *intentional* murder and child rape)

Empirical Evidence on the California Death Penalty

California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California* (2008) (<http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>)

G. Pierce & M. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 Santa Clara L. Rev. 1 (2005)

S. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 Fla. L. Rev. 719 (2007)

S. Shatz & N. Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* 72 N.Y.U. L. Rev. 1283 (1997)

**APPELLANT’S BRIEFING ON THE PROPORTIONALITY CHALLENGE
IN *PEOPLE v. PAUL SODOA WATKINS*, No. S026634 (Cal. S.Ct.)**

Appellant’s Opening Brief (2004):

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

Watkins was subject to the death penalty under the robbery-murder special circumstance. It was the sole fact that made him death-eligible. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. Watkins moved to strike the robbery-murder special circumstance on the ground that imposing the death penalty for a killing done without a deliberate purpose to kill is a disproportionately severe sentence that constitutes cruel and unusual punishment. (CT 617-618.) The prosecution opposed the motion (CT 624-626), and the trial court denied his motion. (CT 630; RT 607.) As shown below, Watkins’s motion was well-founded. The lack of any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder before a death sentence may be imposed violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.

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

Watkins was found to be death-eligible solely because he was convicted of committing an attempted robbery and killing during his flight from the robbery attempt. (See §§ 189, 190.2, subd. (a)(17)(i).) While normally the prosecution, to obtain a murder conviction, must prove that the defendant had the subjective mental state of malice (either express or implied), in the case of a killing committed during an attempted robbery, or, indeed, during any attempted felony

listed in section 189, the prosecution can convict a defendant of first degree felony murder without proof of any mens rea with regard to the murder.

[F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(*People v. Dillon, supra*, 34 Cal.3d at p. 477.) This rule is reflected in the standard jury instruction for felony murder:

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

(CALJIC No. 8.21, italics added.)

Except in one rarely-occurring situation,¹ under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is the actual killer in a robbery felony murder, the defendant also is death-eligible under the robbery-murder special circumstance.² (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-

¹ See *People v. Green* (1980) 27 Cal.3d 1, 61-62 (robbery-murder special circumstance does not apply if the robbery was only *incidental* to the murder).

² As a result of the erroneous decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 154, which was reversed in *People v. Anderson, supra*, 43 Cal.3d 1104, this Court has required proof of the defendant's intent to kill as an element of the felony-murder special circumstance with regard to felony-murders committed during the period December 12, 1983 to October 13, 1987. This Court has held that *Carlos* has no application to

632 [the reach of the felony-murder special circumstances is as broad as the reach of felony murder and both apply to a killing “committed in the perpetration of an enumerated felony if the killing and the felony ‘are parts of one continuous transaction.’”].³ The key case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, where the Court held that under section 190.2, “intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved.” (*Id.* at p. 1147.) The *Anderson* majority did not disagree with Justice Broussard’s summary of the holding: “Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing.” (*Id.* at p. 1152 (dis. opn. of Broussard, J.))

Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the killing. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, this Court rejected the defendant’s argument that, to prove a felony-murder special circumstance, the prosecution was required to prove malice. In *People v. Earp* (1999) 20 Cal.4th 826, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with “reckless disregard” and could not be applied to one who killed accidentally. This Court held that the defendant’s argument was foreclosed by *Anderson*. (*Id.* at p. 905, fn.15.) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant’s argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human

prosecutions for murders occurring either before or after the *Carlos* window period. (*People v. Johnson* (1993) 6 Cal.4th 1, 44-45.)

³ In fact, the robbery-murder special circumstance is even broader than the robbery felony-murder rule because it covers a species of implied malice murders, so-called “provocative act” murders. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1080-1081.)

life.⁴

In this case, Watkins testified that he did not intend to kill Shield but shot him accidentally when his gun went off as he was closing the door to the truck. (RT 1492-1497, 1575-1582.) In urging the jury to convict Watkins of first degree murder under the felony murder rule, the prosecutor argued:

The only elements of first degree murder is [*sic*] that the individual or individuals specifically intended to rob and they were engaged in a commission or the attempt to commit a robbery and that killing occurred. There is no other state of mind that needs to be shown. And that killing can either be intentional, unintentional or accidental.

(RT 1658.) Addressing the robbery-murder special circumstance, the prosecutor emphasized that the act of killing Shield, by itself, proved the special circumstance:

If it is the actual trigger finger, the actual guy who did the killing, if you find he was the person who did the killing during an attempted robbery, then there is nothing else you have to decide. The special circumstance is true.

So as to that individual if you, all of the evidence that we have heard is consistent with Mr. Watkins having pulled the trigger. If you find that Mr. Watkins was the person who pulled the trigger and that when he did that he was engaged in an attempted robbery, then you not only find him guilty of first degree felony murder, but you also find this special circumstance to be true.

(RT 1663-1664.) The jury was instructed pursuant to the standard felony-murder instruction CALJIC No. 8.21 set forth above. (CT 713; RT 1791.)

B. The Robbery-Murder Special Circumstance Violates The

⁴ Alternatively, this Court found that there was sufficient evidence that the defendant did act with reckless indifference to justify the death penalty. (*People v. Smithey, supra*, 20 Cal.4th at pp. 1016-1017.)

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

In a series of cases beginning with *Gregg v. Georgia, supra*, 428 U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia* (1977) 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty for getaway driver to a robbery felony-murder]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded defendant].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia, supra*, 428 U.S. at p. 183.)

The Supreme Court has addressed the proportionality of the death penalty for unintended felony-murders in *Enmund v. Florida*, 458 U.S. 782, and in *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on the “getaway driver” to an armed robbery murder because he did not take life, attempt to take life, or intend to take life. (*Enmund, supra*, 458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of “intent to kill” was an Eighth Amendment prerequisite for imposition of the death penalty. Justice O’Connor, writing for the majority, held that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with “reckless indifference to human life” and as a “major participant” in the underlying felony. (*Tison, supra*, 481 U.S. at pp. 158.) Justice O’Connor explained the rationale of the holding as follows:

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

(*Id.* at pp. 157-158.) In choosing actual killers as examples of “reckless indifference” murderers whose culpability would satisfy the Eighth Amendment standard, Justice O’Connor eschewed any distinction between actual killers and accomplices. In fact, it was Justice Brennan’s dissent which argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices (*id.* at pp. 168-179 (dis. opn. of Brennan, J.)), but that argument was rejected by the majority.

That *Tison* established a minimum mens rea for actual killers as well as

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

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

(*Reeves, supra*, 524 U.S. at 99, citations and fns. omitted; italics added.)¹⁰³

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

¹⁰³ See also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc. opn. of Stevens, J.) (stating that an accidental homicide, like the one in *Furman*, may no longer support a death sentence.)

329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn.9.¹⁰⁴
The *Loving* court explained its thinking as follows:

As highlighted by Justice Scalia in the *Loving* oral argument, the phrase “actually killed” could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio*, 438 U.S. 586 (1978), expressing his view that “it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.” 438 U.S. at 624. Without speculating on the views of the current membership of the Supreme Court, we conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, “actually killed,” as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.

(*Loving, supra*, 220 F.3d at p. 443.)

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the

¹⁰⁴ See also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.

Court's two-part test for proportionality would dictate such a conclusion. In *Atkins v. Virginia*, the Court's most recent proportionality decision, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins, supra*, 536 U.S. at p. 312.) Of the 38 death penalty states, there are at most five states other than California – Florida, Georgia, Maryland, Mississippi and Nevada – where a defendant may be death-eligible for felony-murder *simpliciter*.¹⁰⁵ The position of Mississippi is not altogether clear because its supreme court recently stated:

[T]o the extent that the capital murder statute allows the execution of felony murderers, they must be found to have intended that the killing take place or that lethal force be employed before they can become eligible for the death penalty, pursuant to *Enmund v. Florida*, 458 U.S. 782, 796 (1982).

(*West v. State* (Miss. 1998) 725 So.2d 872, 895.) And, in Nevada, felony murder *simpliciter* as a basis for death eligibility apparently is being reconsidered in the courts. (See *Leslie v. Warden* (Nev. 2002) 59 P.3d 440, 449 (conc. opn. of Maupin, J.)) That at least 44 states (32 death penalty states and 12 non-death penalty states) and the federal government¹⁰⁶ reject felony murder *simpliciter* as a basis for death eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).

¹⁰⁵ In Shatz & Rivkind, *The California Death Penalty: Requiem for Furman?* 72 N.Y.U. Law. Rev. 1283, 1319, fn.201 (1997), the authors list seven states other than California as authorizing the death penalty for felony murder *simpliciter*, but Montana, by statute (see Mont. Code Ann., §§ 45-5-102(1)(b), 46-18-303), and North Carolina, by court decision (see *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665), now require a showing of some mens rea in addition to the felony murder in order to make a defendant death-eligible.

¹⁰⁶ See 18 U.S.C. § 3591(a)(2).

Although such legislative judgments constitute “the clearest and most reliable objective evidence of contemporary values” (*Atkins, supra*, 536 U.S. at p. 312), professional opinion as reflected in the Report of the Governor’s Commission on Capital Punishment (Illinois)¹⁰⁷ and international opinion¹⁰⁸ also weigh against finding felony murder *simpliciter* a sufficient basis for death-eligibility. The most comprehensive recent study of a state’s death penalty was conducted by the Governor’s Commission on Capital Punishment in Illinois, and its conclusions reflect the current professional opinion about the administration of the death penalty. Even though Illinois’s “course of a felony” eligibility factor is far narrower than California’s special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(b)(6)(b)), the Commission recommended eliminating this factor. (*Report of the Former Governor Ryan’s Commission on Capital Punishment*, April 15, 2002, at pp. 72-73, <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.pdf >.) The Commission stated, in words which certainly apply to the California statute:

Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this

¹⁰⁷ The Court has recognized that professional opinion should be considered in determining contemporary values. (*Atkins, supra*, 536 U.S. at p. 316, fn. 21.)

¹⁰⁸ The Court has regularly looked to the views of the world community to assist in determining contemporary values. (See *Atkins*, 536 U.S. at p. 316 n.21; *Enmund*, 458 U.S. at pp. 796-797, fn. 22; *Coker v. Georgia, supra*, 433 U.S. at p. 596.)

recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.

A second reason for excluding the “course of a felony” eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal.

(*Id.* at p. 72.)

With regard to international opinion, the Court observed in *Enmund*: “[T]he climate of international opinion concerning the acceptability of a particular punishment” is an additional consideration which is “not irrelevant.” *Coker v. Georgia*, 433 U.S. 584, 596, n. 10, 97 S.Ct. 2861, 2868, n. 10, 53 L.Ed.2d 982 (1977). It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.

(*Enmund, supra*, 458 U.S. at p. 796, fn. 22.) International opinion has become even clearer since *Enmund*. Article 6 (2) of the International Covenant on Civil and Political Rights (“ICCPR”), to which the United States is a party, provides that the death penalty may only be imposed for the “most serious crimes.” (ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be “read restrictively” because death is a “quite exceptional measure.” (Human Rights Committee, General Comment 6(16), ¶ 7; see also American Convention on Human Rights, art. 4(2), Nov. 22, 1969,

OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996) ["In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes"].) In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*)¹⁰⁹ The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (*Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. CCPR/C/79/Add.85, November 19, 1997, ¶ 13.)

The imposition of the death penalty on a person who has killed negligently or accidentally is not only contrary to evolving standards of decency, but it fails to serve either of the penological purposes – retribution and deterrence of capital crimes by prospective offenders – identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty . . . measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund, supra*, 458 U.S. at pp. 798-799, quoting *Coker, supra*, 433 U.S. at p. 592). With respect to retribution, the Supreme Court has made clear that retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said:

¹⁰⁹ The Safeguards are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. While the safeguards are not binding treaty obligations, they provide strong evidence of an international consensus on this point. "[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight." (*Restatement (Third) of the Foreign Relations Law of the United States*, § 103 cmt. c.)

"It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund, supra*, 458 U.S. at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Court further explained:

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

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

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

[I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia, supra*, 428 U.S., at 186, 96 S.Ct., at 2931 (fn. omitted).

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

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

Finally, California law making a defendant death-eligible for felony murder *simpliciter* violates international law. Article 6(2) of the ICCPR restricts the death penalty to only the “most serious crimes,” and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional crimes. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2; see Argument XIV, section C, *supra*, which is incorporated by reference here.) In light of the international law principles discussed previously, Watkins’s death sentence, predicated on his act of shooting Raymond Shield without any proof that the murder was intentional, violates both the ICCPR and customary international law and, therefore, must be reversed.

Appellant’s Supplementary Opening Brief (2009):

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

In both his opening brief and his reply brief, Watkins challenges his death sentence as unconstitutionally rendering him death-eligible based on the commission of a felony murder *simpliciter*. (Appellant’s Opening Brief [hereafter “AOB”], Argument XV, at pp. 211-225; Appellant’s Reply Brief [hereafter “ARB”], Argument VIII, at pp. 55-60.) As he demonstrates in those briefs, the lack of any requirement that the prosecution prove that he, although an actual killer, had a culpable state of mind with regard to the killing violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty. More specifically, Watkins argues that *Tison v. Arizona* (1987) 481 U.S. 137 established a minimum *mens rea* of acting with reckless indifference to human life for actual felony murderers as well as their accomplices. (AOB at pp. 216-219.) The United States Supreme Court’s recent decision in *Kennedy v. Louisiana* (2008) ___ U.S. ___, 128 S.Ct. 2641, not only underscores that California’s outlier practice of imposing the death penalty for felony murder *simpliciter* is disproportionate under the Eighth and Fourteenth Amendments, but also calls into question whether *Tison* itself remains good law and instead strongly suggests that the death penalty is unconstitutional for any unintentional murder.

In *Kennedy*, the high court held that the Eighth and Fourteenth Amendments prohibit the death penalty for the rape of a child because the penalty is disproportionate to the crime. (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at pp.

2646, 2651.) *Although Kennedy* addressed the ultimate penalty for a person who raped, but did not kill, a child, and this case involves a person who did kill, the Court’s proportionality analysis applies with equal force here.

In *Kennedy*, the high court applied its two-part “evolving standards of decency” test to determine whether death is disproportionate to the crime of child rape. The Court first considered whether there is a national consensus about the challenged penalty by looking at penal statutes and the record of executions (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at pp. 2650, 2651-2658), and then brought its own judgment to bear on the question of the constitutionality of the penalty, *i.e.* whether either of the social purposes of the death penalty – retribution or deterrence – justifies capital punishment for the crime (*id.* at pp. 2650, 2658-2664). However, the Court prefaced its traditional analysis with a discussion of the cruel and unusual punishments clause. This introduction is not a *pro forma* recitation of the law. Rather, the Court delineated essential principles that animate its proportionality jurisprudence.

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

by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” (*Id.* at p. 2650.)

To guard against this danger, the high court admonished that capital punishment must “be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2650., quoting *Roper v. Simmons* (2005) 543 U.S. 551, 568, internal quotation marks omitted). The Court forthrightly acknowledged that the more crimes that are subject to capital punishment, the greater the risk that the penalty will be arbitrarily imposed. (*Id.* at pp. 2658-2661.) Thus, under the Eighth Amendment, “the Court insists upon confining the instances in which the punishment can be imposed.” (*Id.* at pp. 2650; see *id.* at p. 2659 [repeating the point].) The Court’s message is unmistakable: the use of capital punishment must be restricted. This mandate informs the Court’s ensuing Eighth Amendment analysis.

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

As *Watkins* demonstrates, the evidence of a national consensus against executing actual felony murderers when there has been no proof of a culpable mental state with regard to the killing is just as stark as that presented in *Kennedy*. At most six states, including California, permit the death penalty for such felony murders, and 44 states and the federal government do not. (AOB at pp. 219-220 [reporting five states other than California]; ARB at pp. 56-57 [reporting only five states including California because Nevada no longer imposes death for felony murder simpliciter]; see also [Shatz](#), *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 Fla.L.Rev. 719, 761 [adding Idaho to the list of states that along with California, Florida, Georgia, Maryland, and Mississippi authorize death for felony murder simpliciter].) Under the analysis used in *Kennedy* and the high court's other recent proportionality cases, [Atkins v. Virginia](#) (2002) 536 U.S. 304 and [Roper v. Simmons](#) (2005) 543 U.S. 551, the death penalty for felony murder simpliciter is inconsistent with our society's national standards of decency and justice.

The high court's decision on the second part of the "evolving standards of decency" test further supports *Watkins*'s claim. In determining that, in its own independent judgment, the death penalty is excessive for the crime of child rape, the Court drew a clear distinction between "intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." ([Kennedy v. Louisiana](#), *supra*, 128 S.Ct. at p. 2660.) The Court repeated this distinction between "intentional murder" and child rape in comparing the number of reported incidents of each crime. (*Ibid.*) These references cannot be considered inadvertent or incidental. They build upon the Court's understanding in [Hopkins v. Reeves](#) (1998) 524 U.S. 88, 99, that there must be a finding that an actual killer had a culpable mental state with respect to

the killing before the death penalty may be imposed for felony murder (see AOB at pp. 217-218), and the Court's decision in [Tison v. v. Arizona](#), *supra*, 481 U.S. at pp. 157-158, *in which the Court drew no distinction between the mental state required to impose death on actual killers and accomplices for a felony murder (see AOB at pp. 216-217). They also are consonant with the understanding of individual justices about the limits of the death penalty for murder. (See AOB at pp. 218, fn. 103, citing [Graham v. Collins](#) (1993) 506 U.S. 461, 501 [conc. opn. of Stevens, J., stating that an accidental homicide, like the one in *Furman v. Georgia* (1972) 408 U.S. 238, may no longer support a death sentence]; see also [Lockett v. Ohio](#) (1978) 438 U.S. 586 621) [conc. & dis. opn. of White, J., stating that "the infliction of death upon those who had no intent to bring about the death of the victim is . . . grossly out of proportion to the severity of the crime"].) Just as the death penalty is excessive for child rape, it is excessive for felony murder simpliciter.*

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

Under the traditional Eighth Amendment analysis used in *Kennedy*, there is now a national consensus that the death penalty may not be applied to

unintentional robbery felony murderers. As discussed above, at most six states, including California, make a defendant death-eligible for felony murder *simpliciter*. Only seven other jurisdictions – Arkansas, Delaware, Illinois, Kentucky, Louisiana, Tennessee, and the United States military – authorize the death penalty for a robbery felony murderer who acts with a mental state less than intent to kill. (See [Shatz, supra](#), at pp. 761-762.)¹¹⁰ Thus, only 13 jurisdictions of a total 52 jurisdictions (the 50 states, the United States military, and the United States government) impose the death penalty without requiring proof of an intent to kill.¹¹¹ Of the remaining 39 jurisdictions, 14 jurisdictions do not use capital punishment at all.¹¹² The remaining 25 death penalty jurisdictions (1) do not make robbery murder or attempted robbery murder – Watkins’s crime – a capital crime,¹¹³ do not make felony murder a death-eligibility circumstance,¹¹⁴ or do not permit the prosecution to use the robbery to prove both the murder and death

¹¹⁰ See [Shatz, supra](#), at p. 770, fn. 248, citing [Ark. Code Ann. § 5-10-101\(a\)\(1\) \(2006\)](#); [Del. Code Ann. tit. 11, § 4209\(e\) \(2007\)](#); [720 Ill. Comp. Stat. Ann. 5/9-1\(6\)\(b\) \(West 2007\)](#); [Ky. Rev. Stat. Ann. §§ 532.025, 507.020 \(West 20067\)](#); [La. Rev. Stat. Ann. § 14:30\(A\)\(1\) \(20067\)](#); [Tenn. Code Ann. §§ 39-13-202, 39-13-204\(i\)\(7\) \(2007\)](#); [Manual for Courts-Martial, United States, R.C.M. 1004\(c\) \(2005\)](#).

¹¹¹ The District of Columbia, which does not have the death penalty, is excluded from this list.

¹¹² As of March 1, 2009, these states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, West Virginia, Vermont, and Wisconsin. <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

¹¹³ See, [Shatz, supra](#), at p. 770, fn. 249 citing [Mo. Rev. Stat. § 565.020 \(2007\)](#) as an example.

¹¹⁴ See [Shatz, supra](#), at p. 770, fn. 250, citing [Ariz. Rev. Stat. Ann. § 13-703\(F\) \(2006\)](#); [S.D. Codified Laws § 23A-27A-1 \(2006\)](#) as examples.

eligibility,¹¹⁵ or (2) require proof of an intent to kill.¹¹⁶ In this way, at least 39 jurisdictions (38 states and the federal government) – three-quarters of all jurisdictions – do not follow California’s practice of subjecting to execution a defendant who unintentionally kills during a robbery or attempted robbery. This showing reflects a substantially stronger “national consensus against the death penalty” than the high court found in striking down the death penalty as disproportionate for mentally retarded murderers in [Atkins v. Virginia](#) (2002) 536 U.S. 304, 314-316 (30 states and the federal government) and for juvenile murderers in [Roper v. Simmons](#) (2005) 543 U.S. 551, 664 (30 states and the federal government). In short, the national consensus, as evidenced by state and federal legislation, establishes that the death penalty for an unintentional murder is a cruel and unusual punishment under the Eighth and Fourteenth Amendments.

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

¹¹⁵ See Shatz, *supra*, at p. 770, fn. 251, citing [McConnell v. State](#) (Nev. 2004) 102 P.3d 606, 620-24; [State v. Gregory](#) (N.C. 1995) 459 S.E.2d 638, 665 as examples..

¹¹⁶ See Shatz, *supra*, at p. 770, fn. 252, citing [Ohio Rev. Code Ann. § 2903.01\(D\) \(West 2007\)](#); [Tex. Penal Code Ann. § 19.03\(a\)\(2\) \(Vernon 2007\)](#) as examples.

restrain the reach of the ultimate penalty.

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

Fisher v. United States (1946) 328 U.S. 463, 484 (dis. opn of Frankfurter, J.).)

In *Enmund*, the high court went further. It found the death penalty for felony murder had no deterrent value with regard to the underlying felony. The Court posited that the deterrent value of the death penalty might be different if the likelihood of a killing in the course of a robbery were substantial. [Enmund v. Florida, supra](#), 458 U.S. at p. 799. *But the empirical data refuted this hypothesis. Both historical data and then-recent data from 1980 “showed that only about one-half of one percent of robberies resulted in homicide.”* ([Enmund v. Florida, supra](#), 458 U.S. at pp. 799-800 & fn. 23 & 24.) *As a result, the high court concluded “there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself.”* ([Enmund v. Florida, supra](#), 458 U.S. at p. 799.)¹¹⁷

Moreover, as a general matter, the validity of the deterrence rationale is

¹¹⁷ In *Tison*, the Court glossed over the deterrence justification and minimized *Enmund*'s discussion of the deterrence data, including its conclusion that the death penalty did not deter robberies or robbery murders. (See [Tison v. Arizona, supra](#), 481 U.S. at p. 148 ; *see also id.* at p. 173, fn. 11 (dis. opn. of Brennan, J.)

questionable. As Justice Stevens has observed, “[d]espite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.” (*Baze v. Rees* (2008) ___ U.S. ___, 128 S.Ct. 1520, 1547 (conc. opn. of Stevens, J.); see also [Shatz, supra](#), at p. 767 & fn. 275 [noting the scholarly debate and empirical data on the deterrence question].) Even assuming that capital punishment may deter some murders, its deterrent value is lost when, as Justice White noted in *Furman*, the penalty is seldomly imposed. (*Furman v. Georgia, supra*, 408 U.S. at p. 312.) As an empirical matter, in California the death penalty is rare for robbery felony murder. Only five percent of death-eligible robbery felony murderers (who had no more aggravating special circumstances) are sentenced to death. ([Shatz, supra](#), at p. 745.)¹¹⁸ Consequently, the deterrence rationale cannot justify executing a robbery felony murderer like *Watkins*.

¹¹⁸ This very infrequent use of the death penalty for robbery felony murder death penalty raises both risk of arbitrariness and proportionality concerns and suggests that the imposition of the death penalty even for an intentional robbery felony murder is barred by the Eighth Amendment. (See, [Shatz, supra](#), at pp. 745-768.)

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

Certainly, an unintentional murder is a very serious crime calling for a very serious penalty. But there is neither logic nor justice in punishing a person who, like Watkins, kills unintentionally during an attempted robbery when his gun accidentally goes off with the same penalty as a person who kills intentionally. A person who kills unintentionally does not exhibit the kind of "extreme culpability"

that makes him among “the most deserving of execution.” (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2650.) Rather, unintentional felony murderers like Watkins can be adequately “repaid for the hurt he caused” by a lesser punishment. (*Ibid.*) Retribution “does not justify the harshness of the death penalty here.” (*Id.* at p. 2662.)

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